

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY K. MOORE, IN HIS OFFICIAL )  
CAPACITY AS SPEAKER OF THE )  
NORTH CAROLINA HOUSE OF )  
REPRESENTATIVES, ET AL., )  
                                    ) Petitioners, )  
                                    ) v. ) No. 21-1271  
REBECCA HARPER, ET AL., )  
                                    ) Respondents. )  
- - - - -

Pages: 1 through 192  
Place: Washington, D.C.  
Date: December 7, 2022

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10                           Respondents.        )  
11   - - - - -

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13                           Washington, D.C.  
14                           Wednesday, December 7, 2022

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16                           The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 10:04 a.m.

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1 APPEARANCES:  
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3 DAVID H. THOMPSON, ESQUIRE, Washington, D.C.; on  
4 behalf of the Petitioners.  
5 NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf  
6 of the Private Respondents.  
7 DONALD B. VERRILLI, JR., ESQUIRE, Washington, D.C.; on  
8 behalf of the State Respondents.  
9 GEN. ELIZABETH B. PRELOGAR, Solicitor General,  
10 Department of Justice, Washington, D.C.; for the  
11 United States, as amicus curiae, supporting the  
12 Respondents.  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-1271, Moore versus Harper.

Mr. Thompson.

ORAL ARGUMENT OF DAVID H. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Mr. Chief Justice, and may it please the Court:

The Elections Clause requires state legislatures specifically to perform the federal function of prescribing regulations for federal elections. States lack the authority to restrict the legislatures' substantive discretion when performing this federal function.

As Alexander Hamilton wrote in Federalist 78, the scope of legislative authority is governed by the commission under which it is exercised. Here, that commission is contained in the United States Constitution, and it is federal law alone that places substantive restrictions on states' legislatures performing the tasks assigned them by the federal

1 Constitution. The most prominent discussion of  
2 the Elections Clause in the early republic  
3 occurred during Massachusetts' 1820  
4 Constitutional Convention.

5           Joseph Story, then a sitting Justice  
6 on this Court, explained that a proposed  
7 constitutional amendment requiring  
8 representatives to be elected in districts would  
9 violate the Elections Clause because that clause  
10 vested state legislatures "with an unlimited  
11 discretion in the subject."

12           Justice Story's view was an echo of  
13 Alexander Hamilton's father-in-law, Senator  
14 Philip Schuyler, who took the exact same  
15 position on behalf of the entire New York State  
16 Senate just one month after the ratification of  
17 the Constitution. And for the first 140 years  
18 of the republic, there was not a single state  
19 court that invalidated on substantive grounds  
20 any congressional redistricting plan.

21           This Court's decision in *Leser* teaches  
22 that the Founders tasked state legislatures with  
23 federal functions that transcend any substantive  
24 limitation sought to be imposed by the people of  
25 the state.

1                   And I welcome the Court's questions.

2                   JUSTICE THOMAS: Counsel, this case is  
3 from a state supreme court that interpreted and  
4 applied a state constitution. So it would be --  
5 help -- be helpful if you would take some time  
6 to explain what we're -- what exactly we are  
7 reviewing, what decision we're reviewing, and  
8 what is the basis of our jurisdiction.

9                   MR. THOMPSON: Yes, Your Honor. Thank  
10 you. So the Court is reviewing the decision --  
11 there was an order on February 4th of the North  
12 Carolina Supreme Court, and it was accompanied  
13 10 days later by a written opinion, and in that  
14 written opinion, there was a liability  
15 determination that the Elections Clause did not  
16 apply, and, importantly, there was also a  
17 remedial determination -- and we can see this at  
18 Petition Appendix 142 -- where it empowered the  
19 North Carolina Supreme Court, empowered the  
20 lower state court to draw the maps if necessary.  
21 And so that is a final order of the North  
22 Carolina Supreme Court, and it passed on the  
23 relevant questions.

24                   In addition, there's a second final  
25 order, which is, on February 23rd, there was a

1 denial of a stay application, and that too is --  
2 is a final order of this Court.

3 JUSTICE THOMAS: We don't normally  
4 review state supreme courts' interpretations of  
5 state constitutions, so what I'm looking for is  
6 why -- for example, if this were a case about a  
7 state legislator -- or legislative district, it  
8 would be doubtful that you'd be here under the  
9 state constitution. So I'm looking for an  
10 explanation as to why this case is here and  
11 what's the jurisdiction for this case. How does  
12 it differ from a purely state case?

13 MR. THOMPSON: Well, Your Honor,  
14 our -- our position on the merits is to take as  
15 given state law as interpreted by the North  
16 Carolina Supreme Court. We're not asking this  
17 Court to second-guess or reassess. We say take  
18 the North Carolina Supreme Court's decision on  
19 face value and as fairly reflecting North  
20 Carolina law, and when one does that, we see  
21 that there's a violation of the Elections  
22 Clause, and -- and that's why we're here.

23 CHIEF JUSTICE ROBERTS: You concede  
24 that state legislative action under the  
25 Elections Clause is subject to the governor's



1 veto, right?

2 MR. THOMPSON: Yes, Your Honor.

3 CHIEF JUSTICE ROBERTS: Well, the  
4 governor is not part of the legislature. Why is  
5 -- why -- why do you concede that point?

6 MR. THOMPSON: Well, Your Honor, first  
7 of all, we're not here to relitigate Smiley.  
8 We're -- we're prepared to accept all the  
9 Court's precedents, number one.

10 Number two, I think the -- the Arizona  
11 dissent pointed out that Samuel Johnson defined  
12 "legislature" by reference to Matthew Hale's  
13 definition, where he said the three branches of  
14 the legislature, the two Houses of Parliament  
15 and the king, because it was understood at the  
16 time of the founding New York and Massachusetts  
17 had gubernatorial veto. So it was understood  
18 that the -- the governor had a role to play at  
19 the time of the founding, and at least it's  
20 arguably grounded in the text.

21 CHIEF JUSTICE ROBERTS: Well, given  
22 Smiley, if your concession doesn't undermine  
23 your position, doesn't Smiley? I mean, that's a  
24 pretty significant exception. You have  
25 otherwise a very categorical case, and it's sort

1 of, well, with this one exception. But vesting  
2 the power to veto the actions of the legislature  
3 significantly undermines the argument that it  
4 can do whatever it wants.

5 MR. THOMPSON: Well, Your Honor,  
6 that's a procedural limitation. And as we  
7 understood Smiley, it was talking about defining  
8 the legislative power. And, here, we have a  
9 separate issue. We have trying to limit that  
10 legislative power. So however the legislative  
11 power is defined under Arizona, under Smiley, we  
12 are not -- you know, we -- we can take those  
13 precedents as given. But what can't happen is  
14 there can't be a substantive limitation by some  
15 in power.

16 CHIEF JUSTICE ROBERTS: Well, just  
17 last -- and last question at least for a while:  
18 Why do you say it's procedural? Let's say the  
19 governor is opposed to the legislative action  
20 with respect to the elections than -- that the  
21 legislature endorses. He's the opposite  
22 political party, has a whole different view, and  
23 says -- you know, gives a speech saying, you  
24 know, it's wrong because of this, not because of  
25 procedure.

1                   That strikes me as saying, oh, you  
2 know, they're supposed to have, you know, two  
3 votes on it or whatever and they didn't or, you  
4 know, it's a -- they need a committee report.  
5 That sort of thing is procedure. Straight out  
6 veto, we really don't know what it is.

7                   MR. THOMPSON: We're proposing a  
8 formalistic test for procedural, which is, is it  
9 a step, a hoop that needs to be jumped through?  
10 And if presentment is one of the hoops that the  
11 state legislature needs to jump through, then,  
12 under a formalistic approach that we're  
13 suggesting, then that would be procedural, Your  
14 Honor.

15                   JUSTICE BARRETT: Is that -- I'm  
16 sorry. Please finish.

17                   MR. THOMPSON: I'm good.

18                   JUSTICE BARRETT: I was just going to  
19 ask, is your formalistic test just a way of  
20 trying to deal with our precedent, or are you  
21 rooting that in the Constitution itself?  
22 Because you do have a problem with explaining  
23 why these procedural limitations are okay but  
24 substantive limitations are not.

25                   MR. THOMPSON: Well, Your Honor, we --

1 we certainly have tried to craft an argument  
2 that is consistent with all of the Court's  
3 precedents, but we think that it -- it's --  
4 there -- there are good reasons why there would  
5 be a substantive limitation even if not a  
6 procedural limitation.

7           We can see this in James Madison's  
8 remarks. I would refer the Court to the third  
9 volume of Elliot's Debates, page 367, where  
10 James Madison laments partisan gerrymandering,  
11 and he singles out one state, South Carolina,  
12 for opprobrium for their partisan gerrymander.  
13 And their partisan gerrymander was found right  
14 in the state constitution.

15           And that's the rule that my friends on  
16 the other side are advocating for. They're  
17 saying you can have a partisan gerrymander, but  
18 you have to put it in the state constitution.

19           JUSTICE BARRETT: So that's not so  
20 much -- your argument then on this  
21 procedural/substantive distinction is not  
22 so much a matter of the text, that it's you're  
23 pulling some things from the history and saying  
24 that James Madison's comment supports this  
25 procedural/substantive line?

1           MR. THOMPSON: Well, we -- we ground  
2     it in precedent, Your Honor, and -- and text and  
3     structure and history. So I'll take those one  
4     at a time if I may.

5           JUSTICE BARRETT: Sure.

6           MR. THOMPSON: So the precedent would  
7     be Smiley on the one hand seems to suggest that  
8     procedural limitations can be circumscribed on  
9     the legislature, and Palm Beach County, as we  
10    read it, teaches that substantive limits cannot  
11    be placed on a state legislature. So that's the  
12    precedent.

13           In terms of the text, I think all of  
14    us agree, Your Honor, that it's a law-making  
15    function and so -- and the text shows that where  
16    it says prescribe regulations, this is the --  
17    the law-making function, and so it makes sense  
18    the Founders structurally would have said, okay,  
19    there's a pre-existing entity, the state con- --  
20    the state legislature, and we're going to have  
21    that be bound by its procedures, but we're going  
22    to have federal substantive limitations, and you  
23    can see this with state courts. State courts --

24           JUSTICE JACKSON: But can I ask you a  
25    question? Can I ask you a question, because

1 you -- you -- you suggest that there's this  
2 thing called the legislature that the Framers  
3 were familiar with, and I'm trying to understand  
4 why what counts as the legislature isn't a  
5 creature of state constitutional law.

6 MR. THOMPSON: Well, Your Honor, I --  
7 I think this Court in Arizona did say that the  
8 states have a lot of flexibility in terms of  
9 defining what state legislature means, but what  
10 Arizona did not say is that there could be  
11 substantive limitations.

12 JUSTICE JACKSON: But -- but -- well,  
13 I don't understand how that's a different thing.  
14 In other words, if the state constitution tells  
15 us what the state legislature is and what it can  
16 do and who gets on it and what the scope of  
17 legislative authority is, then, when the state  
18 supreme court is reviewing the actions of an  
19 entity that calls itself the legislature, why  
20 isn't it just looking to the state constitution  
21 and doing exactly the kind of thing you say when  
22 you -- when you admitted that this is really  
23 about what authority the legislature has?

24 In other words, the authority comes  
25 from the state constitution, doesn't it?

1           MR. THOMPSON: No, Your Honor, it's a  
2 federal function, we know that from Leser. So  
3 this Court in Leser held it's a federal  
4 function. When these duties are assigned to the  
5 states, that is a duty that is assigned by the  
6 federal --

7           JUSTICE JACKSON: Yes, it's a duty.  
8 The duty is to make this legislative  
9 determination, that is, the determination about  
10 elections.

11           My question is, where does the  
12 entity's power come from to make any  
13 determinations at all, right? I mean, yes, I  
14 see that the federal Constitution is giving them  
15 the right to make a particular determination,  
16 but they're not giving just anybody in the state  
17 that right. They're giving somebody called the  
18 legislature, and, in order for us to have a  
19 thing called the legislature, we have to look at  
20 the state constitution to determine where  
21 those -- you know, what that entity's powers is  
22 -- are -- are, how they can be exercised.

23           Other than that, I don't really  
24 understand how the legislature is authorized to  
25 act at all.

1                   MR. THOMPSON: Well, Your -- Your  
2 Honor, we know that's not right because, in  
3 Leser, the people of Maryland tried to prevent  
4 women from voting, and the way they did that is  
5 they put in their state constitution a  
6 prohibition on adopting the Nineteenth  
7 Amendment, and then it came to this Court and  
8 this Court said that this is a federal function  
9 and that substantive limit of the state  
10 constitution was inapplicable. So that's what  
11 we're dealing with here, is a federal function.

12                   JUSTICE SOTOMAYOR: But that was  
13 because it -- it violated the federal  
14 Constitution, not because it violated the state  
15 constitution. But let me go back to what I  
16 don't fundamentally understand about this case.

17                   The text of the Constitution of the  
18 Elections Clause says the legislature in each  
19 state shall prescribe "the time, place, and  
20 manner" of elections.

21                   We know that before the founding, at  
22 the founding of the Constitution, decades after,  
23 and even to today that state constitutions have  
24 regulated time, place, and manner. We have the  
25 voice votes. We have one constitution that set



1 elections at the courthouse and not in the  
2 county where the legislature wanted it. We have  
3 laws about voice votes as opposed to ballot  
4 votes.

5           It seems to me that if I'm a  
6 textualist and I read that the legislature in  
7 each state shall prescribe "the time, place, and  
8 manner" of elections that your argument would  
9 have to be that you can't regulate -- the state  
10 constitution can't regulate that. But there is  
11 no substantive limitation in the Constitution.

12           And the Tenth Amendment says the  
13 powers not delegated to the United States by the  
14 Constitution, nor prohibited by it to the  
15 states, are reserved to the states respectively  
16 or to the people. And if there's no substantive  
17 limitation in the Elections Clause, I don't know  
18 how we could read one in.

19           MR. THOMPSON: Your Honor, so I think  
20 there are a few points there --

21           JUSTICE SOTOMAYOR: It's a reserved  
22 power to the states to decide whether  
23 apportionment or malapportionment should be  
24 prohibited. We've already had a case, *Grove*, by  
25 Justice Scalia, who said that that was perfectly

1     okay for a state constitution to prohibit  
2     malapportionment.

3                     Under your theory, the state  
4     constitution shouldn't have been permitted to do  
5     that substantive thing. So explain it to me.

6                     MR. THOMPSON: Yes. So let me start  
7     with where Your Honor started, which was with  
8     the history, and we read the history very  
9     differently than my friends on the other side  
10    because it's -- they point to 16 constitutions  
11    early in the founding of the republic that they  
12    claim regulate federal elections. Five of those  
13    relate to transitional governments.

14                    There was no state legislature. So it  
15    would have been impossible for the state  
16    legislature to adopt the first rules, and by  
17    their own terms, they were schedules that faded  
18    away once the state legislature had been  
19    elected.

20                    Then that leaves nine which say --  
21    that have regulations relating to --

22                    JUSTICE SOTOMAYOR: There were only  
23    13.

24                    MR. THOMPSON: Well, I -- I'm giving  
25    them credit --

1 JUSTICE SOTOMAYOR: There were 13  
2 colonies, counselor. If I got six of them doing  
3 something that's contrary to what you're saying,  
4 that seems like a fairly substantial majority to  
5 me.

6 MR. THOMPSON: Well, Your Honor, I --  
7 I'm going to get --

8 JUSTICE SOTOMAYOR: You can -- you can  
9 try to knock them down one at a time, but you're  
10 still with about six of them that can't be  
11 disputed.

12 MR. THOMPSON: I -- I'm going to knock  
13 them all down with one, so it'll be 12 to 1 in  
14 my favor by the time I'm done, Your Honor.

15 JUSTICE SOTOMAYOR: Yes. If you  
16 rewrite history, it's very easy to do.

17 MR. THOMPSON: I'm not rewriting  
18 history, Your Honor. What we're saying is that  
19 when it says all elections, it's referring to  
20 the offices that were created by that  
21 constitution.

22 You can see that in Vermont. It says  
23 all freeholders shall be eligible for office.  
24 It's not talking about the presidency of the  
25 United States because there's an age

1 qualification. It's talking about the --

2 JUSTICE SOTOMAYOR: So why is it that  
3 in all of those states the legislatures  
4 understood that all elections meant that you  
5 were going to have paper elections, ballots, in  
6 both federal and congressional?

7 MR. THOMPSON: I -- I think it is  
8 telling what those state legislatures  
9 understood, and if we look at Pennsylvania and  
10 Tennessee, they took those all elections shall  
11 be by ballot and they promulgated two statutes  
12 to implement -- to implement and regulate  
13 their -- their elections laws.

14 For the state ones, they passed a law  
15 saying all elections shall be by ballot for the  
16 state races, and they cited back to those state  
17 constitutional provisions. And then they passed  
18 a separate law for the federal elections and  
19 they did not cite back to that provision. Why  
20 not? Because, presumably, they understood that  
21 they were not bound by that, but they were  
22 simply trying to harmonize --

23 JUSTICE SOTOMAYOR: That -- that --  
24 that is a large step, counsel.

25 JUSTICE BARRETT: Mr. Thompson --

1 MR. THOMPSON: Yeah.

2 JUSTICE BARRETT: -- if I can just  
3 piggyback quickly on Justice Sotomayor's  
4 question. At the outset, Justice Sotomayor  
5 said, you know, pointing to the Tenth Amendment  
6 and other structural assumptions of the  
7 Constitution, that we presume that states  
8 possess power unless they've given it up.

9 So this is my question about the  
10 Elections Clause. If it did not appear in the  
11 Constitution, would the baseline assumption have  
12 been that the states possess the power to  
13 regulate elections for federal office anyway?  
14 Because, if so, I don't see how it's a  
15 delegation as suppose -- as opposed to a clause  
16 that clips state authority perhaps by saying it  
17 must be exercised by the legislature and by  
18 giving Congress the power of override. But I  
19 wouldn't describe that as a delegation if the  
20 states had the baseline power to start.

21 MR. THOMPSON: Your Honor, in U.S.  
22 Term Limits, this Court held -- the majority  
23 held that it was a delegation of power from the  
24 federal government.

25 We understand that there are members

1 of the Court who take the opposite view, who say  
2 no, it was a reserved power and it was -- and --  
3 and it's protected by the Tenth Amendment. And  
4 nothing in our argument today depends upon the  
5 resolution of that debate which we understand is  
6 ongoing on the Court.

7           What we're saying is, regardless of  
8 whether it was a delegated power or a reserved  
9 power or maybe both, where they reserved it and  
10 it was given to them, regardless of how one  
11 resolves that, it is a federal function.

12           That's what Leser teaches. It's a  
13 federal function. And if we go back to the  
14 words of Alexander Hamilton, you look in for  
15 purposes of judicial review of what's the  
16 commission that this power is, and the  
17 commission means mandate. That's how Samuel  
18 Johnson defined "commission." And the mandate  
19 comes from the federal Constitution.

20           Your Honor, I'd like to go back to  
21 your question about structure. You know, you  
22 had asked me where are we getting this  
23 distinction between substance and procedure, and  
24 I had mentioned precedent, and I had said there  
25 was a lawmaking function in the text, and I was

1 getting to the structure.

2           The structure is -- is a familiar one.  
3 We obviously see the Founders, in cases like  
4 Leser, taking that preexisting state legislature  
5 and assigning a federal function to it, but we  
6 also see it in state courts, state courts bound  
7 by state procedures and yet having exclusive  
8 federal question jurisdiction until 1875. So  
9 this was a structure that was understood by the  
10 Founders to take an existing entity with  
11 existing procedures but to empower it to  
12 exercise federal authority, and -- and that's  
13 what we see.

14           And that's what Joseph Story, in 1820,  
15 when he rises and eloquently, you know, speaks  
16 as to why there can't be a limit on the power,  
17 it's because it's a federal function. And I  
18 think Joseph Story's speech in 1820 is relevant  
19 too with respect to what do all elections mean,  
20 because the Massachusetts Constitution of 1780  
21 had a provision that says all elections shall be  
22 free.

23           JUSTICE JACKSON: Can I ask you a  
24 question about it being a federal function? So  
25 is it your argument that the state constitution

1 has no role to play, period?

2 MR. THOMPSON: In terms of imposing  
3 substantive limits --

4 JUSTICE JACKSON: Mm-hmm.

5 MR. THOMPSON: -- on the exercise of  
6 that federal function, that is our position.

7 JUSTICE JACKSON: So what are -- what  
8 procedural limits can the state constitution  
9 impose in this context?

10 MR. THOMPSON: Presentment would be a  
11 -- a limitation. So Smiley teaches that if  
12 there's if -- if it requires presentment to the  
13 governor so that the governor can veto it, then  
14 that would be a -- a procedural limitation that  
15 can be imposed by the state constitution.

16 JUSTICE KAGAN: Mr. Thompson, I mean,  
17 why doesn't Smiley stand for maybe a broader but  
18 simpler proposition, which is, when we under --  
19 when we think about this word "legislature,"  
20 we're thinking about it as embedded in a system  
21 of constraints, and one of those constraints is  
22 the governor, and another of those constraints  
23 is the courts. And that's the normal way that  
24 legislatures operate and act, is as subject, not  
25 as absolute, but as subject to constraints. And



1 Smiley said we take that system as we find it.  
2 We take the constraint of the governor as we  
3 find it. Why not too then the constraint of the  
4 courts?

5 MR. THOMPSON: We -- we agree, Your  
6 Honor, the -- the constraint of the court  
7 applying federal law. That's the teaching of  
8 Palm Beach County as we read that case. There  
9 was a vacatur of the Florida Supreme Court to  
10 send it back after having cited --

11 JUSTICE KAGAN: But it would be  
12 ordinary constraints, and the constraints can  
13 come from the federal Constitution or the  
14 constraints can come from the state  
15 constitutions. State actors, state courts,  
16 operate in both spheres and do both things, and  
17 that's the ordinary operation of the courts.  
18 And that's what Smiley says. It's the  
19 legislature subject to the ordinary set of  
20 constraints that operate on them.

21 MR. THOMPSON: We read Leser to teach  
22 that when it's -- the ordinary constraint is  
23 federal law that it's bound by federal law.  
24 That's the ordinary constraint.

25 JUSTICE KAGAN: Well, if that's coming

1 from Leser, I mean -- so then you're going to  
2 sort of our precedent, and I would think that  
3 our precedent gives you a lot of problems, I  
4 mean, if you really take every statement that  
5 this Court has said about the matter at hand.  
6 I'll just read you a few of them and they're --  
7 they're pretty recent, you know?

8           Smiley is the one we've been talking  
9 about, and that says, just as Congress is  
10 subject to limitations in the federal  
11 Constitution, when it makes laws -- and now I'm  
12 quoting -- "there is no intimation of a purpose  
13 to exclude a similar restriction imposed by  
14 state constitutions upon state legislatures."

15           And then, in Arizona, we say nothing  
16 in the Elections Clause instructs and this Court  
17 has never held that a state legislature may  
18 prescribe regulations on the time, place, and  
19 manner of holding federal elections in defiance  
20 of provisions of the state's constitution.

21           And on -- as to that point, the  
22 dissent was right with the majority. So both of  
23 them took issue with the proposition that  
24 legislatures would exercise their authority  
25 without the constitutional checks that a state

1 court provides.

2           And then, in Rucho, three years ago,  
3 the Court assured everybody in a case very much  
4 like this one, it was a case about  
5 gerrymandering, and it says complaints about  
6 districting need not echo into a void because  
7 provisions in state statutes and state  
8 constitutions can provide standards and guidance  
9 for state courts to apply in addressing  
10 gerrymandering.

11           So one, two, three, in all recent  
12 cases, we've said: Of course, state courts  
13 applying state constitutions typically constrain  
14 state legislatures when they redistrict, when  
15 they enact election laws.

16           MR. THOMPSON: Let me start if I may  
17 with Arizona, Your Honor. In Arizona, the  
18 plaintiff was the Arizona state legislature.  
19 The Arizona state legislature did not make any  
20 complaints about the substantive restrictions in  
21 that referendum, and it's not clear it would  
22 have had Article III standing to complain about  
23 a constraint being placed on a different entity.  
24 So nothing in this Court's decision went to the  
25 substance that was in that --

1 JUSTICE KAGAN: Yeah. I guess what  
2 I'm saying is that in each of these three we  
3 have very clear statements, and I appreciate the  
4 fact that this issue was not the one before us  
5 in each of those three, just as it wasn't in the  
6 case that you mentioned to me that started off  
7 my quoting other things. If you're going to  
8 quote one at me, I'm going to quote three at  
9 you.

10 (Laughter.)

11 JUSTICE KAGAN: And, you're right,  
12 we're here for the first time dealing with this  
13 issue. This is a novel challenge. So I'm not  
14 saying that we've, like, sat here as a Court and  
15 addressed hundreds of pages of briefing on this  
16 challenge. I'm saying that three times in not  
17 so many years we've understood this to be an  
18 established proposition of law.

19 MR. THOMPSON: So, Your Honor, let me  
20 now address Rucho, the most recent, where this  
21 Court said "we express no view" on these policy  
22 proposals. And many of the policy proposals  
23 that were identified in Rucho are ones that are  
24 fully consistent with the line we are drawing.  
25 The Rucho majority pointed to statutes in Iowa

1 and Delaware that pan -- that banned partisan  
2 gerrymandering. The Rucho majority pointed to a  
3 constitutional amendment in Missouri that  
4 designated and created the office of a state  
5 demographer to draw state lines.

6 And, essentially, that's what we have  
7 here in North Carolina. Partisan gerrymandering  
8 has now been banned at the state level for the  
9 state races, and we're not here challenging  
10 that, and that presumably will have a salutary  
11 influence, if the actual legislature itself is  
12 not gerrymandered, then when it comes to the  
13 role of doing congressional races. And there  
14 were referendum -- independent commissions were  
15 referenced by the Rucho majority, and we're not  
16 debating that.

17 And Congress -- and Congress just this  
18 -- this session, the House of Representatives,  
19 which has more at stake than the Senate in terms  
20 of redistricting, passed a bill that would have  
21 banned partisan gerrymandering in all 50 states.  
22 And that's what the Founders envisioned the  
23 solution to this problem was, was a political  
24 solution going to Congress.

25 JUSTICE KAVANAUGH: Your --

1 MR. THOMPSON: It's right there in the  
2 text.

3 JUSTICE SOTOMAYOR: Counsel --

4 JUSTICE KAVANAUGH: Your -- go ahead.

5 JUSTICE SOTOMAYOR: -- you don't  
6 dispute that there could be judicial review by  
7 the state court of a federal constitutional  
8 violation?

9 MR. THOMPSON: Correct, Your Honor.

10 JUSTICE SOTOMAYOR: You don't dispute  
11 that federal courts and state courts can both  
12 review a provision for violation to the federal  
13 Constitution?

14 MR. THOMPSON: Correct, Your Honor.

15 JUSTICE THOMAS: But you are disputing  
16 that the states can't review -- state courts  
17 can't review a state legislative voting system  
18 to find whether it complies with the state  
19 constitution?

20 MR. THOMPSON: Well, it can for  
21 procedural reasons, like in Smiley --

22 JUSTICE SOTOMAYOR: Right.

23 MR. THOMPSON: -- like -- there wasn't  
24 presentment to the governor.

25 JUSTICE SOTOMAYOR: So let's go to the

1 -- your -- the substantive/procedural reasons  
2 still -- distinction makes no sense to me  
3 because the only thing the Constitution, as I  
4 mentioned earlier, controls is the procedural  
5 issues, time, place, and manner.

6 But take a line item veto provision,  
7 for example. In more than 40 states, these  
8 provisions empower governors to accept or reject  
9 -- legislation by altering its content. If, for  
10 example, a governor partially vetoes a bill to  
11 appropriate funds to administer congressional  
12 elections, is that a substantive constraint or a  
13 procedural constraint? Just a yes or no.

14 MR. THOMPSON: It's procedural.

15 JUSTICE SOTOMAYOR: Oh.

16 MR. THOMPSON: It's a hoop that has to  
17 be jumped through.

18 JUSTICE SOTOMAYOR: Okay. So the  
19 governor vetoes a map drawn by the legislature  
20 and decides it's constitutionally permitted.  
21 Why is it substantive?

22 MR. THOMPSON: We're not saying.  
23 We're saying, if a governor -- consistent with  
24 Smiley, if a governor vetoes --

25 JUSTICE SOTOMAYOR: No, he -- the --

1 the constitutional provision permits him to --  
2 to alter the contents.

3 MR. THOMPSON: Oh, to alter the  
4 content. Well, that --

5 JUSTICE SOTOMAYOR: That's what I  
6 said.

7 MR. THOMPSON: -- that's the key  
8 distinction. If it's a hoop that has to be  
9 jumped through in order for the -- the  
10 legislature to get the code of elections it  
11 wants, it's procedural. If it's a limit on  
12 their substantive ability to get the code they  
13 want, then --

14 JUSTICE SOTOMAYOR: It's a yes or no,  
15 can the governor do this?

16 MR. THOMPSON: Can -- can the governor  
17 change the substance?

18 JUSTICE SOTOMAYOR: Yes.

19 MR. THOMPSON: No.

20 JUSTICE SOTOMAYOR: No. So that  
21 becomes substance instead of procedure. So your  
22 first answer has now changed.

23 MR. THOMPSON: A veto is permissible.  
24 Changing the substance is not.

25 JUSTICE SOTOMAYOR: What about a state



1 constitutional provision that precludes  
2 legislators from acting during special sessions  
3 on certain matters? Could a state court reject  
4 the Congressional Election Bill if it is outside  
5 the scope of a special session? Yes or no?

6 MR. THOMPSON: If it's outside the  
7 scope of a special session, that is a --

8 JUSTICE SOTOMAYOR: All right.

9 MR. THOMPSON: -- substantive  
10 limitation because they can't start the process.

11 JUSTICE SOTOMAYOR: It seems to me  
12 it's procedural in its most common understanding  
13 because it's a question of how you do things,  
14 not what's in it.

15 MR. THOMPSON: If you can't start the  
16 process, then it's a substantive limitation.

17 JUSTICE SOTOMAYOR: Well, I -- it  
18 seems that every answer you give is to get you  
19 what you want, but it makes little sense. We  
20 have more than one occasion said that we  
21 describe the task in *Mistretta* of distinguishing  
22 between substantive and procedural rules as a  
23 logical morass that the Court is loathe to  
24 enter.

25 MR. THOMPSON: And one --

1                   JUSTICE SOTOMAYOR: And I simply --  
2 I -- what I don't understand is the question  
3 that Justice Jackson asked you, which is, if  
4 judicial review is in the nature of ensuring  
5 that someone's acting within their  
6 constitutional limits, I don't see anything in  
7 the words of the Constitution that take that  
8 power away from the states.

9                   MR. THOMPSON: It comes from the fact  
10 that it's a federal function, and with respect  
11 to the legal morass, that's when this Court has  
12 taken a functionalist approach. We're adopting  
13 a formalistic approach, and it's my friends on  
14 the other side who are adopting a functionalist  
15 test. You can see this on page 57 --

16                   JUSTICE JACKSON: But, Mr. --

17                   MR. THOMPSON: -- of the state  
18 Respondents' brief.

19                   JUSTICE JACKSON: -- Mr. Thompson,  
20 just following up on what was just mentioned, I  
21 guess what I don't understand is how you can cut  
22 the state constitution out of the equation when  
23 it is giving the state legislature the authority  
24 to exercise legislative power. It's the state  
25 constitution that is telling the legislature

1 when and under what circumstances it can  
2 actually act as the legislatures.

3 Let me -- let me ask it this way.  
4 What if what is at issue is not any particular  
5 exercise of the state's legislature --  
6 legislative authority, such its -- as its -- its  
7 ability to make time, place, and manner  
8 determinations, but whether the entity that is  
9 purporting to exercise that power qualifies as  
10 this particular state's legislature?

11 So you can imagine that we have two  
12 different state entities who claim to be the  
13 legislature for the purpose of the Elections  
14 Clause, and both of them start acting as such.  
15 They set election dates. They have procedures.  
16 They issue competing maps and set -- set out  
17 different statements about when elections would  
18 be held.

19 Would that dispute, the dispute over  
20 which entity is really the state's legislature,  
21 be decided by federal or state courts and which  
22 law would apply?

23 MR. THOMPSON: It -- it's state law.  
24 I think that's a lot of what was happening in  
25 the Arizona, where the independent commissioning

1 was saying we're the legislature --

2 JUSTICE JACKSON: I'm sorry, state's  
3 substantive constitutional law, we look to the  
4 state --

5 MR. THOMPSON: We're saying --

6 JUSTICE JACKSON: -- constitution to  
7 decide --

8 MR. THOMPSON: Because it's a --

9 JUSTICE JACKSON: -- which entity?

10 MR. THOMPSON: Well, it's a procedural  
11 issue as to who is the legislature. But we --

12 JUSTICE JACKSON: I'm sorry, why is  
13 that a procedural issue? My question is we have  
14 these two entities, both of which say we are the  
15 "legislature" of the state for the purpose of  
16 the Elections Clause, and there's a dispute  
17 about that.

18 I think you're agreeing with me that  
19 that would go to the state supreme court, and  
20 I'm asking, wouldn't the state supreme court  
21 look at the state constitution and -- and what  
22 it says about who gets to act as the legislature  
23 and what authority they have.

24 Wouldn't it be looking at the state  
25 constitution to make that determination?

1 MR. THOMPSON: And that's what Arizona  
2 teach --

3 JUSTICE JACKSON: I'm sorry, yes or  
4 no? Did --

5 MR. THOMPSON: Arizona --

6 JUSTICE JACKSON: -- would it be  
7 looking at the state constitution or the federal  
8 Constitution?

9 MR. THOMPSON: Arizona teaches that  
10 the states have the authority, wide latitude, to  
11 define state legislature how they want. This is  
12 a separate analytical question as Justice --

13 JUSTICE JACKSON: Okay. But what I'm  
14 trying to understand is why it's a different  
15 analytical question --

16 MR. THOMPSON: Well, because the --

17 JUSTICE JACKSON: -- because, to the  
18 extent that the state constitution tells us what  
19 the legislature is and what the scope of its  
20 authority, how it's supposed to act, what it's  
21 supposed to do, if that's a state constitutional  
22 issue, then what I don't understand is, why  
23 aren't all of that entity's actions necessarily  
24 involving the state constitution? It only gets  
25 its authority from that document.

1           MR. THOMPSON: Because Leser teaches  
2 exactly the opposite is true. In Leser, the  
3 state constitution forbade Maryland from  
4 ratifying the Nineteenth Amendment, and this  
5 Court said it didn't apply that state  
6 constitution.

7           JUSTICE JACKSON: No, but that's --

8           CHIEF JUSTICE ROBERTS: Counsel --

9           JUSTICE JACKSON: -- that's because --  
10 that's because that particular issue was  
11 delegated to someone else. I'm talking about  
12 the authority of the state to act.

13           MR. THOMPSON: Well, Your Honor, under  
14 U.S. Term Limits, the majority of this Court  
15 said that the power to act in this place, in --  
16 in this sphere, comes from the federal  
17 Constitution.

18           Now what -- so the whole premise of  
19 this line of inquiry is faulty, but what I'm  
20 saying is that our position is, whether the Term  
21 Limits majority or dissent was correct, it's a  
22 federal function.

23           CHIEF JUSTICE ROBERTS: Counsel, you  
24 make the point at -- at -- several points in  
25 your brief about the nature of the state

1 limitation that the courts were interpreting, a  
2 free election, a fair election. Is -- is that a  
3 substantive argument or is that just sort of a  
4 style point or -- I mean, if they had a more  
5 precise articulation of what the limits were  
6 that they were going to apply, whether it's  
7 going to be a particular percentage of  
8 gerrymandering, a -- a departure, or something  
9 more substantive.

10 Is it the problem that they're just  
11 interpreting something that gives them free  
12 rein, or is that not a consideration?

13 MR. THOMPSON: Well, there are two  
14 problems, Your Honor. And so, under our primary  
15 theory, the problem is that there's a  
16 substantive limit of any sort being imposed by  
17 the state constitution on the state legislature.

18 But, under our backup liability  
19 theory, the problem is that there is a lack of  
20 judicially manageable and discoverable standards  
21 and that as this Court said in *Rucho*, judicial  
22 action must be governed by standard, by rule.

23 And when the state supreme court was  
24 freed of standards and rules, it was no longer  
25 acting as the judiciary. It was taking

1 legislative power, and its -- the result of its  
2 work had the hallmarks of legislation, Your  
3 Honor. So it's both problems.

4 JUSTICE ALITO: Mr. Thompson --

5 JUSTICE KAVANAUGH: Mr. Thompson --  
6 no, go ahead, go ahead.

7 JUSTICE ALITO: Mr. Thompson, even  
8 under your primary theory, however, is it  
9 inevitable that there will be questions about  
10 the meaning of statutes enacted by the  
11 legislature to govern elections?

12 So isn't it inevitable that the state  
13 courts are going to have to interpret those  
14 provisions, and isn't it inevitable that state  
15 election officials in the Executive Branch are  
16 going to have to make decisions about all sorts  
17 of little things that come up concerning the  
18 conduct of elections?

19 MR. THOMPSON: I'd like to make two  
20 points about that, Your Honor. First of all,  
21 our theory does not relate to the interpretation  
22 of statutes. Chief Justice Rehnquist's  
23 concurrence in Bush versus Gore was focused on  
24 that issue, and that's a separate issue.

25 Under our primary theory, we take



1 state law however it's interpreted by the -- the  
2 state -- supreme court as given. And so there  
3 isn't a matter of having to -- I just want to be  
4 clear we're not talking about statutes, point  
5 one.

6 Point two, under our theory, because  
7 this power has been vested in the state  
8 legislature, that there are -- nondelegation  
9 principles apply. And they -- they can delegate  
10 this authority to local and state officials and  
11 all 50 states have done that, but they just need  
12 to accompany it by an intelligible principle.

13 JUSTICE ALITO: Well, if your theory  
14 doesn't apply to statutes, what would happen if  
15 all the provisions of the North Carolina  
16 Constitution on which the state supreme court  
17 relied were statutory? So there's a statute  
18 that says elections in North Carolina shall be  
19 free, and the North Carolina Supreme Court said,  
20 well, what that means is that there can't be any  
21 partisan gerrymandering, districting has to be  
22 done under one of these methods that we set out.  
23 That would be okay?

24 MR. THOMPSON: No, because that would  
25 be a violation of -- there -- there would be no

1 standard. There would be no rule. And the  
2 state courts would be seizing that power from  
3 the legislature.

4 I'm just pointing out here, Your  
5 Honor, we're not coming to the Court --

6 JUSTICE ALITO: I -- I --

7 MR. THOMPSON: -- on a statute, but  
8 that statute would be permissible -- that  
9 statute would be permissible but not for this  
10 type of claim. So, if there were some other  
11 claim where they said, well, the election isn't  
12 free because of, you know, there's not  
13 one-person, one-vote, okay, well, that's a  
14 judicially manageable standard.

15 JUSTICE KAVANAUGH: Your position  
16 seems to go further than Chief Justice  
17 Rehnquist's position in *Bush v. Gore*, where he  
18 seemed to acknowledge that state courts would  
19 have a role interpreting state law and that  
20 federal court review of that should be, in his  
21 words, deferential and simply should be a check  
22 to make sure that the state court had not  
23 significantly departed from state law. And he  
24 drew on a body of precedent that has existed  
25 previously.

1                   And so I think the other side and the  
2                   Solicitor General say that stands for a general  
3                   principle which they're okay with that there can  
4                   be some federal court review of state court  
5                   review of state law, deferential, so long as  
6                   there's no significant departure. That's a  
7                   general principle.

8                   Why is that -- your position seems to  
9                   go further than that, and I'm -- where are you  
10                  getting that out of Chief Justice Rehnquist's  
11                  concurrence, or are you saying that was wrong?

12                  MR. THOMPSON: No. No, Your Honor.  
13                  What we're saying is that we have a -- that that  
14                  was dealing with statutes. We're dealing with  
15                  constitutions, and we have a even more  
16                  deferential, a maximally deferential position.  
17                  We say just take whatever the state supreme  
18                  court says the law is, the substantive law is,  
19                  just take it at face value. Do not examine in  
20                  any way whether it is novel, a significant  
21                  departure, an impermissible distortion. Just  
22                  take it at face value, and then assess, did it  
23                  place a substantive limit on the state  
24                  legislature?

25                  So we would defer entirely for

1 purposes of our liability arguments in this  
2 Court to -- and -- and assume that what the  
3 North Carolina Supreme Court did here was  
4 correct.

5 JUSTICE KAVANAUGH: What do you think  
6 is the best case supporting this  
7 substance/procedure distinction?

8 MR. THOMPSON: I -- I -- I would say  
9 Palm Beach County. I think the Florida Supreme  
10 Court --

11 JUSTICE KAVANAUGH: Palm -- Palm Beach  
12 County, I -- I thought, was simply saying that  
13 there is a federal issue here, and we're going  
14 to remand to the Florida Supreme Court so that  
15 it can assess how to interpret its state law in  
16 light of the fact that there is a federal issue.  
17 I didn't -- correct me if I'm wrong, or tell me  
18 what your position is, but I didn't see it doing  
19 a whole lot more than that. It was a 9-0  
20 opinion, I think, just recognizing there's a  
21 federal issue.

22 MR. THOMPSON: Well, the -- the Court  
23 cited to and quoted from McPherson versus  
24 Blacker for the proposition that there could not  
25 be any limit on the power of the state

1 legislature. Then it vacated the opinion of the  
2 Florida Supreme Court, and it sent it back on  
3 remand for the Florida Supreme Court to assess  
4 and to clarify whether it was, in fact, using  
5 the state constitution to operate as a  
6 substantive limit. And the Florida Supreme  
7 Court understood because their prior opinion had  
8 gone on at some length --

9 JUSTICE KAVANAUGH: Did it say  
10 substantive limit?

11 MR. THOMPSON: It -- it -- it said --

12 JUSTICE KAVANAUGH: I don't -- I don't  
13 recall that.

14 MR. THOMPSON: It says, "operates as a  
15 limitation upon the state in respect of any  
16 attempt to circumscribe the legislative power."

17 JUSTICE KAVANAUGH: It didn't use the  
18 word "substantive," though.

19 MR. THOMPSON: Well, any limit. So  
20 maybe it's even more robust. But -- and would  
21 sweep aside --

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 MR. THOMPSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Just -- at

1 page 33 of your reply brief, sort of the last  
2 gasp of briefing --

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: -- you have,  
5 you suggest that there's a "narrower alternative  
6 ground" to decide the case in your favor which  
7 would allow some substantive state restrictions  
8 to be enforced. Could --

9 MR. THOMPSON: Yes.

10 CHIEF JUSTICE ROBERTS: -- could you  
11 articulate exactly what you think that is?

12 MR. THOMPSON: Yes. So, for example,  
13 if the North Carolina Constitution had said  
14 partisan gerrymandering is -- cannot be allowed  
15 if there's an efficiency ratio of more than 7  
16 percent, then that would be a judicially  
17 discoverable and manageable standard. You could  
18 -- I mean, we all know how to calculate the  
19 efficiency ratio.

20 CHIEF JUSTICE ROBERTS: Well --

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: -- let's not  
23 --

24 MR. THOMPSON: Okay.

25 CHIEF JUSTICE ROBERTS: I'm sorry. Go

1 ahead.

2 MR. THOMPSON: The neuroscientist who  
3 drew these maps apparently knows how to -- to  
4 draw the efficiency ratio.

5 But, in any event, so that would be an  
6 example of a provision that would flunk our  
7 primary test because it would be a substantive  
8 limitation, but it would pass our backup test  
9 because there was judicially discoverable and  
10 manageable standards.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Justice Thomas?

13 Justice Alito, anything?

14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: I -- I take your  
16 answer to mean that there are no judicially  
17 enforceable standards to interpret the Freedom  
18 of Speech, Freedom of Assembly, and Equal  
19 Protection Clauses of the Constitution because  
20 they, on their face, would appear to be as  
21 unmanageable --

22 MR. THOMPSON: No --

23 JUSTICE SOTOMAYOR: -- or broad, and  
24 yet we routinely let federal and state courts  
25 review those provision -- acts --

1 MR. THOMPSON: No, Your Honor --

2 JUSTICE SOTOMAYOR: -- for compliance.

3 MR. THOMPSON: -- that's not our  
4 position at all. Our position is you need to  
5 look at the type of claims. So take equal  
6 protection. That's sweeping and capacious  
7 language. And if it's the type of claim where  
8 you're looking to assess whether race is the  
9 predominant motive or whether there's a  
10 violation of one-person, one-vote, there are  
11 judicially discoverable and manageable  
12 standards.

13 JUSTICE SOTOMAYOR: Some of them were  
14 created by the courts.

15 MR. THOMPSON: Yes, with judicially --

16 JUSTICE SOTOMAYOR: But the point --  
17 and so what's different than what the court did  
18 here in North Carolina, where it looked to the  
19 meaning of -- to the meaning of the English Bill  
20 of Rights of 1689, which apparently was the  
21 basis for the state's constitution, and it said  
22 that the meaning was to curb royal efforts to  
23 manipulate parliamentary elections. It then  
24 looked to other states that had read in the Free  
25 Election Clause and -- and other clauses of the



1 state constitution to find that political  
2 gerrymandering violated this term.

3 How is that any different than what we  
4 normally do in our review?

5 MR. THOMPSON: Nothing in the English  
6 Bill of Rights told the North Carolina Supreme  
7 Court whether an efficiency ratio of 6, 7, 8, 9,  
8 10 percent --

9 JUSTICE SOTOMAYOR: But that --

10 MR. THOMPSON: -- was acceptable.  
11 There is no judicial --

12 JUSTICE SOTOMAYOR: You -- you're not  
13 answering my question. Absent the Election  
14 Clause, are -- is this term so unmanageable that  
15 you're saying that the North Carolina court  
16 would not have power to determine what Free  
17 Election Clause meant in their constitution?

18 MR. THOMPSON: They would be  
19 exercising legislative power. It's just like  
20 Rucho. This is the exact same issue that  
21 divided this Court in Rucho, and for the same  
22 reason it was a violation of Article III, namely  
23 there were no judicials -- there were no  
24 standards, there were no rules, and so it wasn't  
25 a case or controversy, so too, here, it would be

1 an act of legislative power for a court to make  
2 this determination.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: If I could,  
5 Mr. Thompson, I'd like to step back a bit and  
6 just, you know, think about consequences,  
7 because this is a theory with big consequences.

8 It -- it would say that if a  
9 legislature engages in the most extreme forms of  
10 gerrymandering, there is no state constitutional  
11 remedy for that, even if the courts think that  
12 that's a violation of the constitution. It  
13 would say that legislatures could enact all  
14 manner of restrictions on voting, get rid of all  
15 kinds of voter protections that the state  
16 constitution, in fact, prohibits. It might  
17 allow the legislatures to insert themselves, to  
18 give themselves a role, in the certification of  
19 elections and -- and -- and -- and -- and the  
20 way election results are calculated.

21 So -- and, in all these ways, I think  
22 what might strike a person is that this is a  
23 proposal that gets rid of the normal checks and  
24 balances on the way big governmental decisions  
25 are made in this country. And -- and you might

1 think that it gets rid of all those checks and  
2 balances at exactly the time when they are  
3 needed most, because legislators, we all know,  
4 have their own self interests. They want to get  
5 re-elected. And so there are countless times  
6 when they have incentives to suppress votes, to  
7 dilute votes, to negate votes, to prevent voters  
8 from having true access and true opportunity to  
9 engage the political process.

10           And so I just thought, I -- I mean, I  
11 would give you a chance to respond to that  
12 because it seems very much out of keeping with  
13 the way our governmental system works and is  
14 meant to work. And I think, if I could just  
15 connect it up to the last question that I asked,  
16 it's why in all these recent cases we have  
17 statements that say, of course, when the  
18 legislature act -- acts, it's subject to the  
19 normal constraints, I mean, in this area of all  
20 areas I guess I would add.

21           MR. THOMPSON: Your Honor, so our --  
22 our position is that checks and balances do  
23 apply, but they come from the federal  
24 Constitution and the panoply of federal laws  
25 like the Voting Rights Act and other statutes

1 that are highly protective of voters. So there  
2 is a check. There is a balance. And there's  
3 also a political. So we've got the legal check  
4 from federal law, and we've got the political  
5 check that the Founders envisioned of going to  
6 Congress. And, as I mentioned, this very  
7 Congress, this House of Representatives, voted  
8 to ban partisan in gerrymandering in all 50  
9 states.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch?

13 JUSTICE GORSUCH: And on that history  
14 in terms of checks and balances, what -- what  
15 sorts of concerns might --- might the Founders  
16 have had if state constitutions were allowed to  
17 trump over state legislatures?

18 MR. THOMPSON: I think there are two,  
19 and we can learn them from James Madison and  
20 Joseph Story. So James Madison, as I mentioned,  
21 specifically singled out South Carolina as a  
22 place that had taken its gerrymander and  
23 entrenched it right into the constitution  
24 itself, and, of course, Virginia in 1830 does  
25 the same thing, where the slave owners try to

1 aggrandize their political power by putting a  
2 partisan gerrymander right in the state  
3 constitution, and there's nothing anyone in the  
4 state can do to -- do about it short, of course,  
5 of amending the constitution or coming to  
6 Congress.

7           And the flip side of that is what  
8 Joseph Story in Section 820 of his Commentaries  
9 on the Constitution says, which is he -- he  
10 calls it a boon, a boon that the state  
11 legislatures have this, what he said on -- on  
12 the floor of the Massachusetts Convention,  
13 unlimited discretion. The boon is because they  
14 have adaptability, adaptability to what he said  
15 were local politics, local convenience, and you  
16 don't have that adaptability when it's in a  
17 state constitution.

18           JUSTICE GORSUCH: Subject to federal  
19 constitutional constraints and federal court  
20 review and state court review of federal  
21 constitutional claims.

22           MR. THOMPSON: Absolutely, Your Honor.

23           JUSTICE GORSUCH: And, historically,  
24 at -- at least as I've looked at it, you've got  
25 the example of Virginia trying to

1 constitutionalize the 3/5 rule with respect to  
2 African Americans.

3 MR. THOMPSON: Yes, Your Honor,  
4 exactly right.

5 JUSTICE GORSUCH: You've got the --  
6 the example in Maryland of -- of trying to deny  
7 the opportunity to adopt the Nineteenth  
8 Amendment to the Constitution.

9 MR. THOMPSON: That's right, Your  
10 Honor.

11 JUSTICE GORSUCH: And I believe,  
12 during the Civil War, there were examples as  
13 well of states that in their constitutions would  
14 not have permitted absent soldiers from voting  
15 in their home state elections but for the fact  
16 that state legislatures refused to follow those  
17 rules.

18 MR. THOMPSON: That's right, Your  
19 Honor, and the Supreme Court of New Hampshire,  
20 the Supreme Court of Vermont took this up and  
21 said these state substantive limitations, they  
22 do not apply because it's a federal function.

23 JUSTICE GORSUCH: So the political  
24 saliency point, I think, you know, depends on  
25 whose ox is being gored at what particular time.

1                   I wanted to just make sure I  
2 understood your colloquy with Justice Kavanaugh  
3 and I believe the Chief Justice too, the  
4 difference between this and the Bush versus Gore  
5 circumstance that Chief Justice Rehnquist spoke  
6 about in his concurrence. It seems to me there  
7 are two types of problems. One is, is a state  
8 court actually interpreting a statute or is it  
9 going too far afield, to the point where someone  
10 might say it's not following the statute?

11                   MR. THOMPSON: Yes, that's one --  
12 that's the Bush versus Gore concurrence problem.

13                   JUSTICE GORSUCH: And then you have a  
14 separate problem of when a state court does not  
15 even try to interpret the law and just annuls  
16 the law outright, and that's this case.

17                   MR. THOMPSON: I -- I -- I actually  
18 think differently.

19                   JUSTICE GORSUCH: Or am I wrong about  
20 that?

21                   MR. THOMPSON: Yeah, I think,  
22 respectfully, Your Honor, you are because, even  
23 though we actually think that's an accurate  
24 description of what happened here, that's not  
25 our position in this Court. Our court is assume

1 that the North Carolina Supreme Court was  
2 entirely right about what they did and that it  
3 was --

4 JUSTICE GORSUCH: As a matter of state  
5 law?

6 MR. THOMPSON: As a matter of state  
7 law, but that it is then still impermissible  
8 because it is imposing a substantive limitation  
9 on the state legislature.

10 JUSTICE GORSUCH: Via this melange of  
11 state constitutional provisions?

12 MR. THOMPSON: Yes, Your Honor.

13 JUSTICE GORSUCH: Okay. All right. I  
14 -- I -- I understand it now. Thank you.

15 MR. THOMPSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh?

18 JUSTICE KAVANAUGH: In interpreting  
19 the state statutes, can a state court rely  
20 on canons of interpretation that say interpret  
21 those state statutes in light of state  
22 constitutional provisions?

23 MR. THOMPSON: Your Honor, so what  
24 Chief Justice Rehnquist said in the Bush versus  
25 Gore concurrence was he said look to the



1 novelty, look to see whether, when you look at  
2 the text, you look at the canons of  
3 construction, you look at any other sources, at  
4 precedent, you look at all the panoply of  
5 different tools available to state court judges,  
6 and if it would be a surprise to someone that  
7 this is what the statute meant, he had a novelty  
8 test. And -- and so that would be the way you  
9 would do it.

10 Of course, in this case, that's not --

11 JUSTICE KAVANAUGH: Is that -- is that  
12 a yes to the question?

13 MR. THOMPSON: Well, Your -- Your  
14 Honor, yes, you would look at state canons of  
15 construction in that very different context.

16 JUSTICE KAVANAUGH: Which could be  
17 rooted in the state constitution?

18 MR. THOMPSON: It -- it -- I'm not an  
19 expert on that, Your Honor. It's not implicated  
20 by -- this case -- you can rule in our favor in  
21 this case and it will not determine the result  
22 of that case.

23 JUSTICE KAVANAUGH: And then the  
24 Conference of Chief Justices' brief makes the  
25 point, I think, as do the other briefs, that

1 nearly all state constitutions regulate federal  
2 elections in some way and that that is, as  
3 earlier questions have pointed out, some of the  
4 early state constitutions did that. What do we  
5 do with that historical practice in thinking  
6 about how to analyze this question?

7 MR. THOMPSON: In -- in -- at the time  
8 of the founding, the original 13 states, our  
9 view properly understood was that there was only  
10 one state that did it. It was Delaware. It was  
11 an outlier. There was no debate whatsoever  
12 about the Elections Clause. And it said that,  
13 you know, voting will be by ballot.

14 JUSTICE KAVANAUGH: What about the  
15 historical practice over time, which has  
16 certainly developed in a way that state  
17 constitutions do regulate federal elections?  
18 What weight, if any, do we place on that?

19 Also, there are some federal statutes  
20 as well that are cited by the other side. I  
21 just want to make sure you've had a chance to  
22 talk about those as well. So the --

23 MR. THOMPSON: Yeah.

24 JUSTICE KAVANAUGH: -- historical  
25 practice in the states and those federal

1 statutes.

2 MR. THOMPSON: Your Honor, we think  
3 the way to think about this is consistent with  
4 the Court's opinion in Bruen last term where it  
5 looked very focused on -- on the time of the  
6 founding, 1791, obviously, we're looking for the  
7 public meaning of the Constitution. As that  
8 founding generation passes away, Adams and  
9 Jefferson die on the 50th anniversary of the  
10 Declaration of Independence, as we get out of  
11 the 1820s, there's very limited information you  
12 can get as to the original public meaning of the  
13 Constitution.

14 But -- so it can be a confirming --  
15 that subsequent history as in Bruen can be a  
16 confirming historical tradition that -- that --  
17 but it can't undermine what the text and the  
18 founding era history show to be the case.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: So could you -- I  
23 want to follow up on Justice Kavanaugh's  
24 question about Chief Justice Rehnquist's  
25 concurrence in Bush versus Gore. So I

1 understand that that's not this case because  
2 that was an interpretation of a statute and  
3 we're talking about a state constitution. But I  
4 take it that if we were talking about an  
5 interpretation of a statute you would agree with  
6 Chief Justice Rehnquist's approach?

7 MR. THOMPSON: Yes. Yes. Yes, we do  
8 agree.

9 JUSTICE BARRETT: And on the theory  
10 that at that point the state court would not be  
11 acting as a court but would be acting more as a  
12 legislature?

13 MR. THOMPSON: That -- that's right,  
14 Your Honor. I do want to point out that if the  
15 Court were to rule in our favor in this case, it  
16 would not necessarily follow that it would have  
17 to rule the same way as the Bush versus Gore  
18 concurrence for this reason.

19 Statutes are always less problematic  
20 under the Elections Clause because they can be  
21 repealed. They can be rewritten by the state  
22 legislature. So, by definition, a statutory --  
23 an impermissible distortion of a statute, it can  
24 be remedied by the state legislature.

25 Now it couldn't in Bush versus Gore.

1 There wasn't enough time. But the point is --  
2 and we think the -- the concurrence was correct,  
3 but I just wanted to make the point that it does  
4 not necessarily follow that if the Court rules  
5 in our favor in this case that that case would  
6 come out the -- the way the -- the concurrence  
7 did in Bush versus Gore.

8 JUSTICE BARRETT: Well, I have a  
9 question that follows up on that, but before I  
10 move to that, I just want to ask you quickly, so  
11 if we're asking about novelty, if we're asking  
12 about an egregious departure, or if we're asking  
13 about the distinction between substance and  
14 procedure, those are kind of all notoriously  
15 difficult lines to draw, you know, but in your  
16 colloquy with Justice Sotomayor, you were  
17 talking about the lack of judicially manageable  
18 standards for, say, free and fair elections.

19 Why don't you think -- why do you  
20 think that that's less judicially manageable  
21 than, say, deciding whether something is  
22 substance versus procedure or an egregious  
23 departure, truly novel?

24 MR. THOMPSON: Well -- well, just to  
25 be clear, Your Honor, so in terms of figuring

1 out whether there has been an impermissible  
2 distortion of a statute --

3 JUSTICE BARRETT: Mm-hmm.

4 MR. THOMPSON: -- that's where you  
5 have to look to see whether it's novel. The --

6 JUSTICE BARRETT: Right. But I  
7 thought you said you agreed with that approach.

8 MR. THOMPSON: I -- I do. I'm just  
9 saying that in this case we're -- we're -- none  
10 of that is implicated.

11 JUSTICE BARRETT: I understand that.

12 MR. THOMPSON: Yeah. Okay. And so I  
13 -- I apologize.

14 JUSTICE BARRETT: Well, I guess I  
15 think substance and -- substance and procedure,  
16 as many of the questions --

17 MR. THOMPSON: Yes.

18 JUSTICE BARRETT: -- that you've  
19 gotten indicate, are difficult to separate out.  
20 And so I'm saying --

21 MR. THOMPSON: Yeah.

22 JUSTICE BARRETT: -- you're leaning  
23 pretty hard on the lack of judicially manageable  
24 standards for things like free and fair  
25 elections. So I'm -- I'm saying, why should we

1 take solace in a substance/procedure definition  
2 as a -- as a more manageable line?

3 MR. THOMPSON: Well, thank you, Your  
4 Honor. And I would point to the Court's  
5 decision from 1946, Murphree, where it is  
6 talking about the Rules Enabling Act and is  
7 setting up the line between substance and  
8 procedure.

9 JUSTICE BARRETT: Which is, as a -- as  
10 a former civil procedure teacher, I can tell you  
11 is a hard line to draw and a hard line to teach  
12 students in that context as well.

13 MR. THOMPSON: Well, and the Court  
14 could take a functionalist or a formalistic  
15 approach, but we're saying take a formalistic  
16 approach. Say that if it is a hoop that needs  
17 to be jumped through, then it is procedural.  
18 And if it's an effort to limit the content --  
19 and -- and this is an easy case, that this is  
20 obviously substantive, because there was a map  
21 and it was thrown in the trash by the courts.

22 And so this isn't even close to the  
23 line. But we think my friends on the other  
24 side, they're trying to adopt and asking the  
25 Court to adopt a functionalist approach.

1 They're saying -- they say on page 57 of the  
2 state Respondents' brief that, yes, there is  
3 something to this idea that the -- that there  
4 are limits on the extent to which the state  
5 constitution can control the state legislature.  
6 The state legislature has to have "a central  
7 role." That is a functionalist test if ever  
8 there was one. And how do you define the  
9 center, and how far from the center can you go?  
10 And, oh, by the way, if this is in the center,  
11 then the center is pretty much coterminous with  
12 the circumference because we -- we, you know, we  
13 -- we've been --

14 JUSTICE BARRETT: Okay.

15 MR. THOMPSON: -- sidelined  
16 completely.

17 JUSTICE BARRETT: I'm sorry to cut you  
18 off. I just don't want to take too much of my  
19 time. I just want to ask one last question.

20 You were pointing out that state  
21 constitutions entrench norms and so they're more  
22 problematic than statutes.

23 MR. THOMPSON: Yes.

24 JUSTICE BARRETT: But a lot of state  
25 constitutions can be amended by simple



1 majorities in, say, the referendum process. And  
2 so, you know, we know from Hildebrant that if a  
3 districting is done by referendum, that's okay,  
4 you know, that doesn't violate the Elect --  
5 Elections Clause.

6           So why is it any different, say, if a  
7 state constitution is amended and some  
8 substantive provision is added by referendum,  
9 but it would be problematic, why is that  
10 problematic? When it can be changed by a simple  
11 majority, why is that more entrenchment? And  
12 why would we say that having it appear in the  
13 Constitution is problematic when, if it appeared  
14 through the referendum process and the  
15 legislative process, it's not?

16           MR. THOMPSON: Well, respectfully,  
17 Your Honor, if we're trying to get at the  
18 original public meaning of the Constitution, I  
19 think everyone had agreed in Arizona that these  
20 referenda were unknown at the time of the  
21 founding. And so James Madison --

22           JUSTICE BARRETT: But you're stuck  
23 with Hildebrant. I thought you weren't trying  
24 to get rid of it.

25           MR. THOMPSON: I -- I'm not trying to

1 get rid of it, but if we're trying to say why  
2 would -- why would the Founders have objected  
3 and been worried about partisan gerrymanders in  
4 a state constitution, they would have been  
5 worried about it because it was maximally  
6 entrenching.

7           That's -- if the question is why would  
8 they have drawn the line the way they drew the  
9 line, that I'm saying they draw -- drew the line  
10 is because Madison was worried about  
11 entrenchment in the state constitution, and some  
12 states may have this procedure, others don't.

13           But, typically, you know, if you want  
14 to try to solidify something to the maximum  
15 extent possible politically, you typically put  
16 it into a constitution.

17           JUSTICE BARRETT: Thank you.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20           JUSTICE JACKSON: Yes. Excuse me. Do  
21 you agree with me that the Elections Clause  
22 doesn't take any position as to who the entity  
23 in the state is that qualifies as the  
24 legislature?

25           MR. THOMPSON: We -- we think the

1 dissent in Arizona was correct and that the  
2 legislature meant the legislature plus the  
3 gubernatorial veto.

4 JUSTICE JACKSON: Legislature defined  
5 by whom?

6 MR. THOMPSON: Well, I would point the  
7 Court to Samuel Johnson's definition where he  
8 said the three branches of the legislature --

9 JUSTICE JACKSON: So not the state  
10 constitution? That doesn't -- I mean, I -- I  
11 read the Elections Clause as essentially giving  
12 the entity, whoever it is, that is the  
13 legislature the power to make this decision but  
14 not taking a position as to who the legislature  
15 is.

16 MR. THOMPSON: And that is what the  
17 Arizona majority said, and we're perfectly  
18 content to abide by that.

19 JUSTICE JACKSON: Okay. So, if that's  
20 true, if it is the state's constitution that  
21 tells us who the legislature is and whether what  
22 they're doing is a valid exercise of legislative  
23 authority, then I guess what I don't understand  
24 is why constitutional limits on the exercise of  
25 that entity on its power don't still apply, even

1 in this context.

2           So, in other words, the Elections  
3 Clause says you get the right to make this  
4 decision, that you have that policy  
5 determination. But the state constitution is  
6 the thing that gives this particular entity its  
7 authority to make any determinations and the  
8 state constitution says things like, when you  
9 make a determination about things in your  
10 policymaking role, in the legislative power that  
11 we're giving you, you have to make sure that,  
12 you know, people are treated equally.

13           You have to -- whatever the  
14 constitutional provisions are that we say --  
15 that you're saying are so vague or whatnot, are  
16 limitations on that entity's legislative  
17 authority not just in this area but in every  
18 area whenever they undertake to make a law.

19           And so I guess what I'm trying to  
20 understand is why are you suggesting that in the  
21 context of the Elections Clause, when this  
22 entity would ordinarily be bound by all of the  
23 limitations in the state constitution in its  
24 legislative authority role, why suddenly in this  
25 context do you say, no, no, no, all those other

1 constitutional provisions that would bind or  
2 constrict legislative authority that the state  
3 gives you because you're the state legislature,  
4 right, why -- why do those evaporate in this  
5 world?

6 I read it as though the state court is  
7 essentially saying our constitution authorizes  
8 you to be the legislature only insofar as you  
9 act in accordance with our constitution's  
10 tenets, and you haven't done that in this  
11 instance.

12 Why am I wrong about sort of  
13 conceptualizing it in that way?

14 MR. THOMPSON: Because it's a federal  
15 function. And that's what Leser teaches. So  
16 there was a constitutional prohibition on the  
17 Maryland legislature allowing women to vote, and  
18 the Maryland --

19 JUSTICE JACKSON: No, I'm asking --  
20 can I just -- what it -- when you say "federal  
21 function," I guess maybe that's where I'm  
22 getting hung up. I -- I thought it was a -- a  
23 determination, a delegation of, you know,  
24 policymaking power in the sense of you get to  
25 make this decision.

1                   But the authority for that body,  
2           wherever it is, that's called the legislature,  
3           comes from the state because -- you know,  
4           that -- that was my example about we have two  
5           different entities in the state fighting. Who's  
6           the legislature, right? It's what the  
7           constitution of the state says that gives you  
8           the power, entity X, to be the one who is the  
9           legislature making this election's decision.

10                   If I'm right about that, then what is  
11           being delegated from the federal Constitution is  
12           not your power as a legislature, it is just  
13           delegating to you the decision about time,  
14           place, and manner, which is fine, but you have  
15           to do that consistent with the authority that  
16           you have as an entity to make legislative  
17           decisions, and that comes from the state  
18           constitution.

19                   MR. THOMPSON:   And U.S. Term Limits  
20           says that is not right.

21                   JUSTICE JACKSON:   All right.

22                   MR. THOMPSON:   That the premise of  
23           your question is not right.

24                   JUSTICE JACKSON:   All right. Thank  
25           you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Katyal.

4 ORAL ARGUMENT OF NEAL K. KATYAL  
5 ON BEHALF OF THE PRIVATE RESPONDENTS

6 MR. KATYAL: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 For 233 years, states have not read  
9 the Elections Clause the way you just heard.  
10 There are two reasons to affirm. One is that  
11 when enacting legislation, there's no such thing  
12 as an independent state legislature. The other  
13 is that North Carolina statutes authorized what  
14 the North Carolina court did. I'll focus on the  
15 first.

16 Petitioners' idea that state  
17 legislatures created by state constitutions are  
18 independent of them is wrong. It is rejected by  
19 the Articles of Confederation, rejected by the  
20 early state constitutions, rejected by the  
21 founding practice, especially New York, where  
22 judges vetoed federal election bills.

23 It's also rejected by this Court in  
24 cases such as Smiley and Hildebrant. Just three  
25 years ago in Rucho, this Court promised state

1 constitutions can provide standards for state  
2 courts to apply and singled out for approval a  
3 Florida court decision that used a state  
4 constitution to invalidate a federal map.

5 To accept Petitioners' claim, you'd  
6 have to ignore the text, history, and structure  
7 of our federal Constitution as well as nearly  
8 every state constitution today.

9 Petitioners say for two centuries  
10 nearly everyone has been reading the clause  
11 wrong. That's a lot of wrong and a lot of wrong  
12 past elections. Frankly, I'm not sure I've ever  
13 come across a theory in this Court that would  
14 invalidate more state constitutional clauses as  
15 being federally unconstitutional, hundreds of  
16 them from the founding to today.

17 It's worth taking a pause to think  
18 about what Petitioners are saying. They claim  
19 the word "legislature" means a species of state  
20 law that has literally never existed. State  
21 law-making unconstrained by a state  
22 constitution. If the Founders intended to  
23 create that animal, surely someone would have  
24 said something.

25 Finally, the blast radius from their



1 theory would sow elections chaos, forcing a  
2 confusing two-track system with one set of rules  
3 for federal elections and another for state  
4 ones. Case after case would wind up in this  
5 Court with a political party on either side of  
6 the V. That would put this Court in a difficult  
7 position instead of leaving it to the 50 states.

8 JUSTICE THOMAS: Mr. Katyal, would you  
9 spend some time on discussing the source of the  
10 state court's involvement in a federal election?

11 MR. KATYAL: Yeah, we --

12 JUSTICE THOMAS: I understand the  
13 court is created under state constitution, but  
14 this is a federal matter.

15 MR. KATYAL: Correct, and we for  
16 reasons Justice Kavanaugh said, Your Honor,  
17 think that Palm Beach basically says there is  
18 some sort of federal issue here with respect to  
19 Elections Clause, and we think, obviously, the  
20 state court got it right and didn't violate the  
21 Elections Clause, but we think that's the source  
22 of authority here.

23 And, Justice Thomas, if I may, in two  
24 decades of arguing before you, I've waited for  
25 this precise case because it speaks to your

1 method of interpretation, which is history, and  
2 the founding evidence here is overwhelming, and  
3 I'd point you to four things.

4           First, the Constitution uses the same  
5 word, legislatures, as the Articles of  
6 Confederation, and 10 of state constitutions  
7 under the Articles regulated federal delegates.

8           Second, after the Constitution was  
9 ratified, states kept regulating it. States  
10 like Delaware and Maryland and Mississippi  
11 expressly regulated federal elections, as did  
12 three quarters of the states.

13           Third, New York in 1792, this example  
14 is really important, I think it's truly action  
15 as opposed to the talk from Schuyler and Justice  
16 Story. In 1792, the Council of Revision, which  
17 has four people on it, three judges, one  
18 governor, vetoed a federal elections bill for  
19 the selection of delegates to the House of  
20 Representatives. It was a time, place, manner  
21 thing. Why did they -- why did they veto it?  
22 They said because it is "repugnant to the state  
23 constitution." That is very strong evidence.  
24 That's exactly the example you used in Smiley to  
25 build your decision there.

1                   And lastly and most importantly, the  
2 dog never barked. The Federalist Papers have  
3 three different Federalist Papers on everything  
4 he's been talking about about the Elections  
5 Clause. Not a person said anything like that  
6 they were trying to create this strange animal.  
7 This isn't looking like into a crowd and trying  
8 to pick out your friends. This is like looking  
9 into the Lollapalooza crowd and picking  
10 out everyone who speaks 15 languages. They --

11                   JUSTICE GORSUCH: I don't know about  
12 --

13                   CHIEF JUSTICE ROBERTS: Okay. That --

14                   JUSTICE GORSUCH: -- Lollapalooza.

15                   (Laughter.)

16                   JUSTICE GORSUCH: But, while we're  
17 looking at crowds, Mr. Katyal -- and I'm sorry,  
18 Chief. You want to go ahead?

19                   CHIEF JUSTICE ROBERTS: No, no, Go  
20 ahead. I'm still trying to sort the analogy  
21 out.

22                   JUSTICE GORSUCH: You want to touch  
23 the Lollapalooza, yeah, yeah.

24                   (Laughter.)

25                   JUSTICE GORSUCH: Right. That's --

1 that was a Lollapalooza.

2 It is a small point, but, on Smiley,  
3 on -- on the veto question, just narrowly on the  
4 veto question, you know, Locke, Montesquieu, The  
5 Federalist Papers treat that as a legislative  
6 power and -- and a sharing of the legislative  
7 power. And it's in Article I, which kind of  
8 suggests it's -- the Founders considered it a  
9 legislative power. So I -- I guess I'm -- I'm a  
10 little less moved by -- by -- by that  
11 Lollapalooza than you are. Maybe you can help  
12 me out, though.

13 MR. KATYAL: Sure. Of course. And I  
14 think it's reflected in the Chief Justice's  
15 comments to my friend on the other side. There  
16 is certainly something legislative there, but I  
17 think that the overall point of Smiley is to say  
18 -- and my friend says this in the reply brief at  
19 page 6 -- you take legislatures as you find  
20 them. He agrees with that proposition. That's  
21 what Smiley did as well. The legislature as it  
22 found -- as it was found in Minnesota in  
23 Smiley was --

24 JUSTICE GORSUCH: And nobody here  
25 thinks the North Carolina Supreme Court is

1 exercising a legislative function. We all agree  
2 on that too, right?

3 MR. KATYAL: Correct. Correct.

4 JUSTICE GORSUCH: Okay. So that kind  
5 of takes care of that argument --

6 MR. KATYAL: Well --

7 JUSTICE GORSUCH: -- I mean, doesn't  
8 it?

9 MR. KATYAL: -- no, no, because I  
10 think --

11 JUSTICE GORSUCH: What am I missing?

12 MR. KATYAL: -- underlying Smiley is  
13 something more specific than that. It's  
14 basically saying that the conditions on the  
15 law-making power -- that's the language at page  
16 365 -- apply, and, certainly, one condition on  
17 the law-making power only in two states at the  
18 founding but more at the time of Smiley was the  
19 governor's veto.

20 JUSTICE GORSUCH: Yeah.

21 MR. KATYAL: But, here --

22 JUSTICE GORSUCH: And -- and that's  
23 because, if we want to look at our friends in  
24 the Federalist Papers and everywhere else, that  
25 was considered sharing of -- there was no

1 absolute separation of powers. There was an  
2 exception that --

3 MR. KATYAL: Right.

4 JUSTICE GORSUCH: -- that they had to  
5 be mixed. You know -- you know your Federalist  
6 41 and 47 and 51 better than I do, I'm sure.  
7 But -- but that that was a legislative function  
8 that was given to the President and there it is  
9 in Article I.

10 MR. KATYAL: Not disagreeing with that  
11 --

12 JUSTICE GORSUCH: Okay. All right.

13 MR. KATYAL: -- Justice Gorsuch. What  
14 I am saying is that Smiley focused on two  
15 things, the word "legislature" but also the word  
16 "regulate."

17 JUSTICE GORSUCH: All right.

18 MR. KATYAL: And together they create  
19 a law-making system, and what Smiley says is  
20 you're then subject to the constraints of that  
21 law-making system, one of which was judicial  
22 review, well-established at the founding, far  
23 more established than the veto.

24 JUSTICE GORSUCH: All right. Now  
25 we're off on another tangent. Go for it.

1           MR. KATYAL: So far more established  
2 than the veto. And so, you know, seven  
3 different states had judicial review at the  
4 founding. If the method of Smiley -- the method  
5 of Smiley is to say, look, the Founders knew  
6 about the veto because it was in two states, did  
7 they textually exclude it in the language? The  
8 answer was no.

9           JUSTICE JACKSON: Mr. Katyal, I don't  
10 -- I don't hear your friend on the other side  
11 really questioning now at least whether there is  
12 judicial review. I understood his primary  
13 argument to be, you know, even though the  
14 states, we agree, he says, can come in and look  
15 at this, what they have to be doing is applying  
16 federal law.

17           And so that's the part that I keep  
18 getting hung up on. Can you -- can you help? I  
19 mean, we have said at certain times here in the  
20 questioning today that various entities are  
21 exercising legislative power or not, or maybe  
22 the Court is exercising legislative power. I  
23 thought we told -- we -- we were able to tell  
24 when something is a legislative power by  
25 reference to the state's constitution, that they

1 tell us when legislative power is being  
2 exercised at all, validly or whatever. Am I  
3 wrong about thinking about it in this way?

4 MR. KATYAL: You're absolutely right,  
5 Justice Jackson. So two points. One, we can't  
6 figure out what Petitioners' theory honestly is.  
7 What they just told you is the opposite of what  
8 they started with on page 1 of their brief,  
9 where they said state courts have no role. They  
10 said legislature means legislature. But then  
11 you get caveat after caveat. It includes  
12 governor. It includes referenda. It includes  
13 independent commissions in the reply brief they  
14 say. Then they say, well, but state courts  
15 can't do it, but maybe they can for federal  
16 review, maybe they can if it's procedural or  
17 non-abstract. I mean, the one thing we know,  
18 they're not making a textual argument anymore.

19 Now, with respect to this federal  
20 function argument you were asking about, Smiley  
21 dead rejects it. That's exactly what the  
22 Minnesota Supreme Court said below. They  
23 actually called it a federal agency. And what  
24 this Court did unanimously reversed and it said  
25 no because, here, you are acting "as a



1 law-making body," which is what I was saying to  
2 Justice Gorsuch from page 364.

3 It's the exact opposite of his example  
4 of -- of the Leser case. Leser is about Article  
5 V. It's about a totally different text. The  
6 text of Article V is application of the state  
7 legislatures. The whole point of Smiley,  
8 Justice Jackson, is to say this is different  
9 because it's a law-making system not just  
10 because of the word "legislature" but also  
11 because of the word "regulation." There is no  
12 regulation that has ever existed that has been  
13 exogenous to the -- the state constitution.  
14 It's literally a species that never existed.

15 JUSTICE ALITO: Mr. Katyal, can I ask  
16 you some questions about the boundaries of your  
17 argument. So suppose a state constitution says  
18 that congressional districts will be determined  
19 by the state supreme court exercising  
20 legislative power. Is that consistent with the  
21 Elections Clause?

22 MR. KATYAL: We don't think it would  
23 be, Your Honor. So we think, in general, there  
24 may be some redefinition of the legislature that  
25 Arizonans -- the Arizona decision might permit.

1 That isn't what we are arguing here. We're  
2 talking about ordinary checks and balances like  
3 judicial review, and so --

4 JUSTICE ALITO: All right. Suppose  
5 that the state constitution says that the  
6 legislature can adopt congressional maps, but in  
7 that instance, the state supreme court shall sit  
8 as a Council of Revision to determine whether  
9 the maps are fair.

10 MR. KATYAL: Yes.

11 JUSTICE ALITO: Is that okay?

12 MR. KATYAL: We do think that the  
13 history there would suggest it is. Nothing in  
14 our argument, of course, depends on it. Again,  
15 ordinary judicial review, that is all we think  
16 you should reach in this case. Not that, but  
17 the New York example is exactly that.

18 JUSTICE ALITO: Well, that's not  
19 really judicial review. That is because they're  
20 not --

21 MR. KATYAL: Correct.

22 JUSTICE ALITO: -- reviewing it for  
23 anything. So --

24 MR. KATYAL: Right.

25 JUSTICE ALITO: -- what was your

1 answer there? That is okay or that is not okay?

2 MR. KATYAL: Nothing in our position  
3 depends on it, Your Honor, but the historical  
4 test, which is what he's using, New York in  
5 1792, did exactly that.

6 JUSTICE ALITO: Well, I'm not sure I  
7 understand your argument, but, okay, on to  
8 another example. Suppose the state supreme  
9 court says the essence of our state constitution  
10 is fairness and we don't think that the map  
11 adopted by the legislature is fair. Is that  
12 okay?

13 MR. KATYAL: The constitution says  
14 that the map adopted by the legislature is or  
15 the state court says that?

16 JUSTICE ALITO: The state constitution  
17 -- the state -- the state supreme court says  
18 that the essence of our state constitution is  
19 fairness. It doesn't point to a particular  
20 provision in the state constitution. It just  
21 says the essence of our state constitution is  
22 fairness to all of our citizens, and the map  
23 adopted by the legislature is not fair.

24 MR. KATYAL: Yes, Your Honor, we think  
25 that would -- again, nothing turns on that here,

1 but the answer to your question is yes, we think  
2 that would be constitutional, and the reason why  
3 is because there's a trident of safeguards that  
4 would prevent any sort of abuse. The first one,  
5 the safeguard, is in the state process itself.  
6 As Judge Sutton's work explains, state courts  
7 have all sorts of mechanisms to restrain them,  
8 including popular accountability and, as Justice  
9 Barrett pointed out a moment ago, a much easier  
10 amendment process.

11 JUSTICE ALITO: Well, that's a little  
12 bit -- that's a little bit off the point. As  
13 far as popular accountability is concerned, we  
14 have seen examples of state well -- many state  
15 supreme courts are elected. And some states  
16 allow partisan elections. So there's been a lot  
17 of talk about the impact of this decision on  
18 democracy. Do you think that it furthers  
19 democracy to transfer the political controversy  
20 about districting from the legislature to  
21 elected supreme courts where the candidates are  
22 permitted by state law to campaign on the issue  
23 of districting?

24 MR. KATYAL: Yes, Your Honor, we do,  
25 and the reasons for that are threefold. Number

1 one, there are any number of checks on that  
2 process, including, as Justice Barrett says, the  
3 amendment process and other things that Judge  
4 Sutton warns about.

5 Second, the Founders laced into the  
6 Elections Clause itself a specific remedy for  
7 your concern, which is that Congress can come in  
8 and supplant -- any particular state court  
9 decision they don't like, they can say this  
10 North Carolina map should be reinstated, they  
11 could supplant all the state constitutions.

12 JUSTICE ALITO: But can't you say the  
13 same thing about allowing the legislature to  
14 do -- which is popularly elected, to do the --  
15 to make the map? Congress can always come in.

16 MR. KATYAL: Sure, and that's exactly  
17 what Smiley and -- and -- Smiley rejected, this  
18 idea that there's only -- that that's the one  
19 remedy, in *Wesberry* as well. They said that's  
20 just indicia of the fact that the Founders  
21 distrusted state legislatures and wanted checks  
22 and balances. Here, of course, we're only  
23 seeking ordinary ones.

24 And, third, with respect to your  
25 question of the catastrophic consequences, we

1 think, for reasons Justice Kagan said, that cuts  
2 entirely the other way. I mean, the blast  
3 theory by their -- by their theory -- blast  
4 radius by their theory starts at the size extra  
5 large. It starts with invalidating 50 different  
6 state constitutions today. Elections clauses  
7 are in 27. All states have equal protection  
8 clauses, speech clauses, assembly clauses.  
9 Thirty of them guarantee the right to a secret  
10 ballot. There's vote -- five of them, voter ID  
11 --

12 JUSTICE ALITO: What about the -- what  
13 about the approach set out by Justice -- by  
14 former Chief Justice Rehnquist? Does that -- is  
15 that also a Lollapalooza? Does that have a --

16 MR. KATYAL: No.

17 JUSTICE ALITO: -- huge blast radius?

18 MR. KATYAL: No, Your Honor, as long  
19 as we understand, as Justice Kavanaugh said a  
20 moment ago, that that is about statutes. And,  
21 here --

22 JUSTICE ALITO: Well, as applied --  
23 how about if it's applied to a state  
24 constitution --

25 MR. KATYAL: Right.

1 JUSTICE ALITO: -- as well?

2 MR. KATYAL: So, for 233 years, this  
3 Court has never second-guessed a state court  
4 interpretation of its own constitution in any  
5 context. Forget about the election --

6 JUSTICE ALITO: Oh, I don't think --  
7 is that true?

8 MR. KATYAL: I --

9 JUSTICE ALITO: We have to decide  
10 whether there is an adequate and independent  
11 state ground, right, for --

12 MR. KATYAL: Right.

13 JUSTICE ALITO: -- a rule that's --  
14 that a state court invokes?

15 MR. KATYAL: You -- you certainly do  
16 decide it. I don't think you've ever  
17 second-guessed it and said they've gotten it  
18 wrong. My friends from the --

19 JUSTICE ALITO: We've never said that  
20 one is inadequate?

21 MR. KATYAL: I don't think you've ever  
22 said a constitutional provision is, Your Honor.

23 JUSTICE ALITO: Well, have we ever  
24 said that a state law is inadequate --

25 MR. KATYAL: Yes.

1 JUSTICE ALITO: -- or rule?

2 MR. KATYAL: So that's -- and that's  
3 the distinction I was drawing, referring to  
4 Justice Kavanaugh. With respect to -- with  
5 respect to a statute, there's one set of  
6 standards, but with a constitution, there does  
7 have to be a sky-high standard. So we don't  
8 doubt, Justice Alito, if the state constitution  
9 said, for example, that absentee balloting is  
10 required, and some judge came in -- or a state  
11 statute even, some judge came in and said the  
12 state supreme court said, you know, we don't  
13 like absentee voting, we like -- voting is a  
14 civic thing, you've got to do it in person  
15 for policy reasons --

16 JUSTICE ALITO: All right. Thank you.

17 MR. KATYAL: -- then --

18 JUSTICE ALITO: Thank you, Mr. Katyal.  
19 I have a few more questions, but I'll wait for  
20 the next period.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Mr. Katyal, you quote in your brief,  
23 and we've heard it this morning as well, the  
24 language from Rucho that say -- says provisions  
25 in state constitutions can provide standards and



1 guidance for state courts to apply in  
2 redistricting. Do you think the phrase "fair  
3 and free elections" is providing standards and  
4 guidelines?

5 MR. KATYAL: I -- I do. Let me say  
6 two things about that. Number one, Your  
7 Honor --

8 CHIEF JUSTICE ROBERTS: Just before  
9 you -- I'll let you get in, but providing  
10 standards and guidelines in the context of an  
11 opinion that emphasized how unmanageable and  
12 indeterminate the various proposals were --

13 MR. KATYAL: You said --

14 CHIEF JUSTICE ROBERTS: -- with  
15 respect to partisan gerrymandering --

16 MR. KATYAL: Right. But you said that  
17 about the federal -- the federal review. And I  
18 think it's very different at the state level for  
19 two reasons. One is, of course, states don't  
20 have the same type of non-justiciability  
21 concerns. And, second, you anchored it in  
22 really a political legitimacy point about this  
23 Court at page 2507. You said we can't -- we're  
24 one Supreme Court. These cases are inherently  
25 political. Everything is going to wind up here

1 and be seen and through a -- you know, seen by  
2 the outsiders through a political lens.

3 I think that point cuts the other way  
4 with respect to this case because, if you left  
5 it to the decentralized 50 state systems with  
6 their own traditions -- and this is something  
7 that Judge Sutton's work talks about -- yes, you  
8 can have an abstract clause. Many state  
9 constitutions do. And for the most important of  
10 reasons, that suggests actually -- you know,  
11 that -- those are sometimes the most fundamental  
12 provisions to the state. That's what the state  
13 constitutional -- law scholars' brief explains.  
14 So the idea that you could just nullify those by  
15 saying they're too abstract is really  
16 problematic.

17 And the other thing I'd say is, when  
18 you use that language, he just chalked it up to  
19 you saying that's about the congressional  
20 proposals and that -- he said it was about it --  
21 that the words that "we express no view" apply  
22 to that language that you just read. That's  
23 just a flat misreading of the case. You used  
24 that language I said, then there was some talk  
25 about congressional proposals and the U.S.

1 Congress, that's what you said you expressed no  
2 view on.

3 CHIEF JUSTICE ROBERTS: Just --

4 MR. KATYAL: Five Justices -- sorry.

5 CHIEF JUSTICE ROBERTS: Yeah. And  
6 just to be clear, when you say "you," you mean  
7 the Court, right?

8 MR. KATYAL: Exactly.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 MR. KATYAL: Yes.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: When -- at  
13 page -- near the end of your brief, at page 49,  
14 you say that this Court "always has jurisdiction  
15 to intervene in rare cases where state courts  
16 act lawlessly to obstruct federal rights." And  
17 you look to Chief Justice Rehnquist's opinion as  
18 saying that the standards would be reviewable  
19 when the -- they significantly depart from  
20 well-established meaning of state law.

21 When you're falling back in that  
22 situation, do you bump into Mr. Thompson when  
23 he's falling back the other way?

24 (Laughter.)

25 MR. KATYAL: Ha. No, because he

1 actually just disclaimed it. He said, I'm not  
2 second-guessing the North Carolina state  
3 legislature. So the separate opinion that was  
4 written in this case earlier, all those  
5 arguments, I take it, are now off the table  
6 about the North Carolina court going too far or  
7 misreading its own constitution.

8           For us, Mr. Chief Justice, because  
9 this Court has never really confronted the  
10 situation of saying a state court got it wrong  
11 on its own constitution, we think that standard  
12 has to be sky high. It is the, you know,  
13 ultimate affront to sovereignty of a state to  
14 say its own state court got things wrong.

15           And we'd say the corollary is it's an  
16 equal affront to say a state can't even have  
17 these clauses in its constitution, that they're  
18 unenforceable. You know, things like the Free  
19 Elections Clause have been around since 1776 in  
20 North Carolina. They predate the Declaration of  
21 Independence.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Justice Thomas -- Thomas, anything  
25 further?

1 JUSTICE THOMAS: Actually, I don't,  
2 but I've been waiting 30 years to ask him a  
3 question.

4 (Laughter.)

5 JUSTICE GORSUCH: That was pretty  
6 funny.

7 MR. KATYAL: That was good.

8 CHIEF JUSTICE ROBERTS: Drum roll.

9 JUSTICE THOMAS: You said that the --  
10 this Court doesn't normally second-guess state  
11 court interpretations of their own constitution.  
12 Would you say that in the case of Baker v. Carr?

13 MR. KATYAL: Yeah, I don't think it  
14 was -- I think you can declare it  
15 unconstitutional, any number of things like  
16 that. But to say that they just got their own  
17 constitution wrong is -- just as a matter of  
18 interpretation, that is, as a --

19 JUSTICE THOMAS: But it was purely an  
20 interpretation of their own constitution and --

21 MR. KATYAL: And a violation of  
22 federal law, right? So --

23 JUSTICE THOMAS: Well, yeah, I mean,  
24 but that's just a way -- I mean, you can  
25 raise -- you -- it's -- in the end, it was

1       invalidating their interpretation of their  
2       redistricting principles.

3               MR. KATYAL:   And -- and, Justice  
4       Thomas, our only point to you, and it's the same  
5       point picking up on Justice Kavanaugh's question  
6       to my friend, at page 78 of Bush versus Palm  
7       Beach Canvassing Board, you said that -- the  
8       Court said that it -- that sovereignty is at --

9               JUSTICE THOMAS:   Well, I was there  
10       too, yeah.

11              MR. KATYAL:   That was a good one.  
12       Sovereignty was at its apex when you're talking  
13       about state constitutions and interpretations by  
14       state courts.

15              JUSTICE THOMAS:   Let me ask you this  
16       just as -- it may be a bit unfair.   If the state  
17       legislature had been very, very generous to  
18       minority voters in their redistricting and the  
19       state supreme court said under their state  
20       constitution that -- that this was -- violated  
21       their own state constitution of North Carolina,  
22       would you be making the same argument?

23              MR. KATYAL:   So the -- if -- yes, I  
24       mean, if there is --

25              JUSTICE THOMAS:   You just -- Justice

1 Gorsuch said its -- it seems as though it  
2 depends on whose ox is being gored. So I'm  
3 changing which ox is being gored.

4 MR. KATYAL: Yeah. No, we don't think  
5 anything turns on the substance of the  
6 individual decisions here.

7 JUSTICE THOMAS: But you would still  
8 be there --

9 MR. KATYAL: Our point --

10 JUSTICE THOMAS: -- making the same  
11 argument?

12 MR. KATYAL: -- our point to you,  
13 Justice Thomas, is that this Court has never  
14 second-guessed state court interpretations of  
15 their own constitution. And so, if there's a  
16 general clause and it happens to benefit or hurt  
17 --

18 JUSTICE THOMAS: Yeah.

19 MR. KATYAL: -- minority voters, as  
20 Judge Sutton says, that's a process the states  
21 deal with. And as I was saying to Justice  
22 Alito, there's a special safeguard here, which  
23 is the second half of the Elections Clause,  
24 which allows Congress to supplant whatever that  
25 errant state's or court decision is.

1 JUSTICE THOMAS: So when is it --  
2 again, I'd like you to just tell me, what is the  
3 source of the authority for the State of North  
4 Carolina Supreme Court to be involved in a  
5 federal election? I understand that there's no  
6 disagreement about a state legislator. But this  
7 is a federal election, and it's similar to the  
8 problem we had with the presidential election in  
9 Bush v. Gore.

10 MR. KATYAL: It's just like Smiley,  
11 Your Honor. It's the exact same thing. So  
12 there is a federal issue. The North Carolina  
13 court is interpreting the elections clauses and  
14 powers, and -- and the question is whether or  
15 not they have misread it or not. And so I think  
16 that's the source of the -- of the substantive  
17 -- alleged substantive violation here.

18 I think you're absolutely right, the  
19 spirit of your question, for 233 years, this  
20 Court's never gotten involved and said, hey,  
21 we're going to, you know, rove and say the North  
22 Carolina court got it wrong or their provision  
23 was too abstract for enforcement or anything  
24 like that. Rather, this Court has always stayed  
25 on the sidelines, let the state process unfold,



1 subject to that other part of the trident check,  
2 Congress in the second half of the Elections  
3 Clause.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: I was asking some  
6 questions earlier about instances in which it is  
7 necessary for a federal court in applying  
8 federal law to delve into the meaning of state  
9 law. And while federal courts generally take  
10 state law to be whatever the state supreme court  
11 says it is, there are instances where that is  
12 not the rule, and I mentioned one.

13 Put aside for a moment your  
14 distinction between a state constitution and a  
15 state statute. Whether -- whether a rule  
16 invoked by the state supreme court is an  
17 adequate rule, in deciding whether there is an  
18 adequate and independent state ground for a --  
19 for a rule that the -- the state supreme court  
20 applies, right, that's an instance of that?

21 MR. KATYAL: Correct.

22 JUSTICE ALITO: All right. How about  
23 the Contract Clause, whether the -- was there a  
24 violation of the Contract Clause? Doesn't the  
25 Court have to determine whether there really was

1 a contract under the law of the state at the  
2 time when the contract in question was formed?

3 MR. KATYAL: Right. We don't doubt  
4 that. It's just under a very deferential  
5 standard review. We're not disagreeing.

6 JUSTICE ALITO: What about the Takings  
7 Clause, was there a taking of property?  
8 Property is defined by state law, but what -- if  
9 the state supreme court says this thing is not  
10 property, does that answer the federal question?

11 MR. KATYAL: Again, not -- not -- you  
12 know, yes, we think all of those are examples of  
13 this Court looks into it. Here, of course,  
14 we're talking about state constitutions being  
15 interpreted by state courts, so it's a little  
16 different than these scenarios, but yes.

17 JUSTICE ALITO: All right. What about  
18 if there's -- along the same lines, what if  
19 there is a claim that there was a deprivation of  
20 property? Once again, property is primarily  
21 defined by state law, but does the state supreme  
22 court have free rein to say, no, there was no  
23 deprivation because there was no property?

24 MR. KATYAL: So the -- the state court  
25 does under its own processes depending on the

1 text and the history in that state, which  
2 differs from state to state for reasons Judge  
3 Sutton says, and this is the same answer I'd  
4 given to Justice Thomas. We don't doubt that  
5 there is some review by this Court in the most  
6 -- in extreme circumstances. It's just that the  
7 standard is incredibly high.

8           What my friend is saying is, well,  
9 because it's a federal function, it's somehow  
10 immunized from state court review altogether.  
11 And that's just not -- there's no conflict  
12 between federal and state schemes. It's like,  
13 for example, Spending Clause litigate --  
14 legislation, like the Clean Air Act or Clean  
15 Water Act, which require the passage of state  
16 laws to enforce, but nobody says they're exempt  
17 from the state constitution.

18           JUSTICE ALITO: Well, but you -- I  
19 mean, you say the standard is incredibly high,  
20 but does it go up to the stratosphere or, you  
21 know, into outer space? When you say that it  
22 would be okay for a state to set up the state  
23 supreme court as the Council of Revision or that  
24 it would be okay for the supreme court -- a  
25 state supreme court simply to say the essence of

1 our constitution is fairness, you would say that  
2 that can be done. So that sounds like no  
3 standard at all.

4 MR. KATYAL: Okay. Again, Your Honor,  
5 we're saying ordinary checks and balances,  
6 that's all you have to do here, but, yes, we  
7 think there are other checks that deal with that  
8 -- those precise problems. If there is in a  
9 clause that's abstract and being misinterpreted,  
10 both the state process itself as well as  
11 Congress can come in and supplant that.

12 So their -- you know, those  
13 accusations -- this is Judge Griffith's brief --  
14 are made all the time about even decisions by  
15 this Court. He points to Citizens United and  
16 Heller as examples. And what this Court has --  
17 what he says is there's a special check here  
18 because you have Congress being able to come in  
19 --

20 JUSTICE ALITO: But Congress can -- I  
21 don't know why that's an answer because Congress  
22 can come in anytime, under any circumstances, no  
23 matter what we say the Elections Clause means.  
24 Congress can always come in and --

25 MR. KATYAL: Right.

1 JUSTICE ALITO: -- establish the  
2 manner of conducting congressional elections.

3 MR. KATYAL: But what this Court said  
4 is that what that clause reflects is a distrust  
5 of state legislatures. That's what you said in  
6 Hildebrant and in Smiley, and there -- excuse  
7 me, in Smiley and Wesberry, and in those cases,  
8 you rejected that precise argument. And so it  
9 is a check on judicial adventurism if -- to the  
10 extent you're worried about it.

11 JUSTICE ALITO: What is the check on  
12 -- last question. What is the check on an  
13 appointed state supreme court? Suppose a state  
14 supreme court, the justices of the state supreme  
15 court had the same protection against removal  
16 and all of the other protections that federal  
17 court --

18 MR. KATYAL: Yeah.

19 JUSTICE ALITO: -- federal courts do.  
20 What is the check on them?

21 MR. KATYAL: So it is the amendment  
22 process, which, as Justice Barrett -- Justice  
23 Barrett said, I think, boomerangs on them when  
24 you try to exempt state statute -- statutes  
25 because amendment processes are often easier.

1 Judge Sutton's book talks about that. And you  
2 have the congressional check.

3 And my last point to you, Justice  
4 Alito, is, what's the check on the other side?  
5 All he's giving you is federal constitutional  
6 review, which is, you know, only a few clauses  
7 of the Constitution, as Rucho says, many of  
8 them non-justiciable.

9 So the states have regulated this for  
10 233 years in a particular way. The blast radius  
11 from his theory can extend to state statutes. I  
12 understand he's disclaiming them, but the next  
13 petitioner won't, the theory's going to apply  
14 and may even reach delegations to state  
15 officials, which would be a -- you know, a  
16 dramatic change, as the Ben Ginsberg amicus  
17 brief explains.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Counselor, could  
22 you deal with the examples, the historical  
23 examples your colleague spoke about as  
24 supporting his position, Virginia's 3/5 rule,  
25 Maryland's Nineteenth Amendment rule? I think

1 your brief does an adequate job on the Story  
2 issue, but --

3 MR. KATYAL: So -- so the Maryland one  
4 is just about the amendment process, and that's  
5 Leser, and that's just a totally different text  
6 and so on and certainly doesn't bear on the  
7 original meaning of the Elections Clause.

8 With respect to Virginia, it  
9 absolutely cuts the other way. That's the  
10 1830s.

11 JUSTICE SOTOMAYOR: That's what I  
12 thought.

13 MR. KATYAL: So it's not the Bruen,  
14 you know, time period of the founding, and we  
15 have provision after provision even before the  
16 founding with the Articles of Confederation  
17 which I think blow apart their historical  
18 theory.

19 But, with respect to Virginia, yeah,  
20 one person said this would violate the Elections  
21 Clause and, you know what happened, James  
22 Madison and the Chief Justice of this Supreme  
23 Court, John Marshall, did -- voted for the bill  
24 even after that objection. So, if anything, it  
25 cuts the other way. But I am not aware of a

1 decision by this Court that invalidates early  
2 state constitutional provisions as being  
3 federally unconstitutional in the way that this  
4 theory does.

5 JUSTICE SOTOMAYOR: And you don't take  
6 quarrel with the fact that a state could  
7 interpret a state constitution in a way that  
8 violates the federal Constitution? That's what  
9 they're arguing here.

10 MR. KATYAL: Right. No, we don't  
11 doubt that. It's just under, as we were talking  
12 about, that stratospheric standard of review  
13 because it's never -- to my knowledge, it's  
14 never really happened by this Court. And I  
15 think Bush versus Palm Beach Canvassing Board  
16 says it's got to be the highest standard, higher  
17 than Chief Justice Rehnquist's opinion in Bush  
18 versus Gore.

19 JUSTICE SOTOMAYOR: Well, I -- I  
20 thought of those cases as basically saying that  
21 there was a due -- federal due process problem  
22 if an interpretation violates due process in  
23 some way.

24 MR. KATYAL: Correct. There's a  
25 novelty concern, particularly in the criminal



1 context, about adequate and independent state  
2 grounds, picking up on Justice Alito's point.  
3 Novelty I don't think applies quite here because  
4 we're not talking about fair warning in the same  
5 way as the federal context.

6 JUSTICE SOTOMAYOR: Exactly, but I  
7 always thought of those cases, those extremes  
8 being rooted in the federal Constitution's due  
9 process.

10 MR. KATYAL: It can be in that  
11 context. Here, I think it's rooted in the  
12 Elections Clause itself, which was my answer to  
13 Justice Thomas.

14 JUSTICE SOTOMAYOR: Okay.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: If I could go over  
17 some of the ground that you've been asked about  
18 about the Rehnquist concurrence and make sure I  
19 understand your position and the issues that are  
20 in front of us and so forth.

21 So, as I understand it, the one -- the  
22 one area of agreement I found between you and  
23 Mr. Thompson is you'd also think that the  
24 Rehnquist concurrence is about statutes, not  
25 about Constitution --

1 MR. KATYAL: Correct.

2 JUSTICE KAGAN: -- as in this case.  
3 So your view, as Mr. Thompson's view, is that  
4 the Rehnquist concurrence by its terms isn't  
5 implicated here?

6 MR. KATYAL: Correct.

7 JUSTICE KAGAN: But you say there, you  
8 say you have no doubt that there's a kind of  
9 corollary for the constitutional side of things.

10 MR. KATYAL: Yes.

11 JUSTICE KAGAN: So does that mean it's  
12 not just like there may be a corollary? You  
13 think that there is a corollary?

14 MR. KATYAL: Yeah, I think the  
15 Elections Clause at some point could be violated  
16 in the -- like the example of absentee voting  
17 that I gave you a moment ago.

18 JUSTICE KAGAN: Yeah, but you say so  
19 it's sky high, it's stratospheric, it's  
20 whatever. So, when you look at the Rehnquist  
21 concurrence, and it was only a concurrence, so  
22 it didn't really have to pick a single standard,  
23 there were actually a lot of different standards  
24 floating around in the Rehnquist concurrence,  
25 and some of them sound easier to satisfy than

1 others. You know, like, one is like not a fair  
2 reading, which doesn't sound all that difficult.  
3 One is absurd, which sounds a lot more  
4 difficult. But you're saying even more than the  
5 highest --

6 MR. KATYAL: I mean --

7 JUSTICE KAGAN: -- statement in the  
8 Rehnquist opinion --

9 MR. KATYAL: Well, I think absurd --

10 JUSTICE KAGAN: -- because the  
11 Constitution is different?

12 MR. KATYAL: Right, I think absurd,  
13 inconceivable is what he uses at one place, or  
14 no basis. The Conference of Chief Justices, all  
15 50 Chief Justices are before you saying at page  
16 19 of their brief the standard is no plausibly  
17 defensible basis for the state court's  
18 determination. I think all of these, regardless  
19 of the words that are used here, Justice Kagan,  
20 I think --

21 JUSTICE KAGAN: But you're saying it  
22 should be higher on the constitutional side than  
23 on the statute.

24 MR. KATYAL: Correct.

25 JUSTICE KAGAN: And why is that?

1                   MR. KATYAL: Because we are -- it is  
2 the apex, as Palm Beach Canvassing Board says,  
3 of a state's sovereignty, as a state's  
4 constitution. And to say that their own high  
5 court got it wrong is really a very grave thing.  
6 I -- I still am not sure that this -- that's  
7 ever happened in any context from this Court.

8                   JUSTICE KAGAN: And -- and whatever  
9 the exact wording of the standard is that you  
10 think applies on the constitutional side, would  
11 that be implicated in this case?

12                   MR. KATYAL: Oh, no, not at all,  
13 because he just disclaimed it anyway in his  
14 argument today. And he said, we're not asking  
15 you to second-guess the North Carolina  
16 constitution.

17                   But, if you adopt his view about  
18 abstract clauses or things like that, I don't  
19 know what is abstract and what isn't abstract.  
20 I mean, you know, you could imagine even the  
21 most concrete provision, polls shall close -- be  
22 open until 8 p.m., that sounds very concrete,  
23 but, as the amici briefs say, like the Ben  
24 Ginsberg brief, what about a hurricane or a  
25 plumbing leak or a terrorist attack. Every

1 clause is going to have open-ended stuff in  
2 them, and you're opening Pandora's Box if you  
3 side with any version, and he's got nine  
4 different versions.

5 JUSTICE KAGAN: Right. I -- I was  
6 asking a somewhat different thing. I -- I was  
7 just asking whether this decision in this case  
8 can remotely be understood to run into the  
9 constitution -- the constitutional corollary of  
10 the Rehnquist principle.

11 MR. KATYAL: Miles away from it, which  
12 is why I think he's disclaiming it. I mean,  
13 that was thorough judicial interpretation for  
14 reasons our brief explains.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17 JUSTICE GORSUCH: First, just a -- a  
18 point of clarification, Mr. Katyal. You -- you  
19 take the position that Virginia correctly  
20 understood the Constitution when it adopted the  
21 3/5 requirement --

22 MR. KATYAL: So --

23 JUSTICE GORSUCH: -- for purposes of  
24 calculating African American persons in its  
25 constitution?

1                   MR. KATYAL: No, Your Honor. So  
2                   there -- there's several different provisions  
3                   being debated in 1830. One is the 3/5  
4                   provision. We're not talking about 3/5. We're  
5                   talking about the regulation of federal  
6                   districts, which is what the Elections --

7                   JUSTICE GORSUCH: But --

8                   MR. KATYAL: -- Clause violation was  
9                   about.

10                  JUSTICE GORSUCH: But you're saying  
11                  what Virginia did at that time was consistent  
12                  with a proper understanding of the Elections  
13                  Clause.

14                  MR. KATYAL: Well, the Elections  
15                  Clause, yes.

16                  JUSTICE GORSUCH: Yeah. That's what  
17                  I'm asking.

18                  MR. KATYAL: Yes.

19                  JUSTICE GORSUCH: Okay. So you are  
20                  defending that.

21                  MR. KATYAL: Not the 3/5 --

22                  JUSTICE GORSUCH: I guess I'm  
23                  surprised by that given that when the Elections  
24                  Clause issue was raised in that debate as I  
25                  understand it from the briefs before us, the

1 Convention attendees and others basically said,  
2 yeah, that might be so, but who cares, we have  
3 to protect our -- our property interests in  
4 slavery.

5 MR. KATYAL: Yeah. So that's a  
6 different provision, Justice Gorsuch, so that's  
7 why I'm saying, you know, it's a nice smear of  
8 what happened in 1830 that has been levied by my  
9 friend on the other side. But the Elections  
10 Clause --

11 JUSTICE GORSUCH: You'd agree that  
12 they were not attending to the Elections Clause,  
13 they were attending to their perceptions of what  
14 their property rights were?

15 MR. KATYAL: No. This was about the  
16 districting, and that's what was at issue in the  
17 Elections Clause. And they --

18 JUSTICE GORSUCH: What would -- what  
19 would -- fine. If -- if you don't want to  
20 answer that, maybe you can get at it this way.  
21 What would prevent a state before the Civil War  
22 from adopting what you say didn't happen and  
23 would never have happened, a 3/5 rule in their  
24 state constitutions?

25 MR. KATYAL: So the state

1 constitutions, they could adopt that rule and  
2 whatever that is, and it may be consistent with  
3 the federal rule at the time, the -- you know,  
4 pre the Civil War.

5 JUSTICE GORSUCH: So you would defend  
6 that as -- as consistent with an appropriate  
7 understanding of the Elections Clause?

8 MR. KATYAL: No, I'm saying it has  
9 nothing to do with it, with -- with what we're  
10 talking about here.

11 JUSTICE GORSUCH: I'm asking you would  
12 a state prior to the Civil War --

13 MR. KATYAL: No --

14 JUSTICE GORSUCH: -- be able through  
15 its Elections Clause --

16 MR. KATYAL: No --

17 JUSTICE GORSUCH: On what ground?

18 MR. KATYAL: No position on that.

19 We're only talking --

20 JUSTICE GORSUCH: No position on that?

21 MR. KATYAL: -- about ordinary checks  
22 and balances, Justice Gorsuch, and --

23 JUSTICE GORSUCH: No position on that  
24 at all?

25 MR. KATYAL: -- Justice Gorsuch, we're



1 -- we're --

2 JUSTICE GORSUCH: All right. How  
3 about -- how about a state then that puts a  
4 political gerrymander into its state  
5 constitution?

6 MR. KATYAL: Yeah, so --

7 JUSTICE GORSUCH: And this Court as  
8 a -- as a federal matter, as you know, has said  
9 we abstain from dealing with those things under  
10 Rucho. So a state could do that too, right?

11 MR. KATYAL: Oh, I don't -- well, I  
12 think there'll be any number of state violations  
13 that may be at issue there if that happens.

14 JUSTICE GORSUCH: It's in the state  
15 constitutions.

16 MR. KATYAL: Still, state  
17 constitutions often have --

18 JUSTICE GORSUCH: Let's just say it's  
19 as a matter of state law pristine. Then what?

20 MR. KATYAL: Yeah. So then I -- I  
21 don't think that it would necessarily -- it  
22 would state a federal Elections Clause violation  
23 at that point.

24 JUSTICE GORSUCH: Yeah.

25 MR. KATYAL: Again, nothing in here

1 turns on it. We're talking about ordinary  
2 judicial review, checks and balances akin to --

3 JUSTICE GORSUCH: I understand -- I --

4 MR. KATYAL: -- what the Chief Justice  
5 was talking about the veto --

6 JUSTICE GORSUCH: -- I understand the  
7 mantra, okay? Let me ask you to turn back to  
8 the -- the question about, you know, if we -- if  
9 you think the Rehnquist view is appropriate on  
10 constitutional grounds, what do we do with this  
11 opinion?

12 At least some -- some of the amici  
13 tell us that we've never had a state court  
14 strike down a state law with respect to federal  
15 congressional districting on political  
16 gerrymandering grounds until the last several  
17 years. So, if we're talking about 200 years'  
18 worth of history, this one's pretty new too,  
19 right?

20 MR. KATYAL: Not exactly. So I'd say  
21 a couple of things about that. First --

22 JUSTICE GORSUCH: Just really quickly,  
23 because I don't want -- I don't want to expend  
24 too much time. When -- when was the first one  
25 of these in -- in your understanding, political

1 --

2 MR. KATYAL: 1854, Massachusetts, the  
3 Warren decision.

4 JUSTICE GORSUCH: All right. Besides  
5 that.

6 MR. KATYAL: Yeah. And so then a lot  
7 in 1932, but that's just for maps, so --

8 JUSTICE GORSUCH: And then -- and then  
9 it's 2015, right, or not?

10 MR. KATYAL: No, I don't think that's  
11 right. So, first of all --

12 JUSTICE GORSUCH: Okay. All right.

13 MR. KATYAL: -- outside of maps,  
14 states --

15 JUSTICE GORSUCH: Fine. All right.  
16 Let's put that aside. Let's put that aside.

17 MR. KATYAL: Okay.

18 JUSTICE GORSUCH: Put that aside.

19 What do we do with the fact that in  
20 this opinion that we have before us, the North  
21 Carolina Supreme Court said it had to do  
22 something because the legislature would not act.  
23 The only way that -- that partisan  
24 gerrymandering can be addressed is through the  
25 courts.

1           About five, seven years ago, it -- it  
2 refused a political gerrymandering claim itself  
3 under the open-ended Good of the Whole Clause.  
4 And now it's come back and cited a -- a mélange  
5 of -- of open-ended other provisions that it's  
6 now accepting.

7           So I understand the standard is sky  
8 high, but at least given some contestable  
9 history, and I understand you contest it, but  
10 put that there. You've got -- you've got this  
11 novelty within North Carolina and switching  
12 positions with North Carolina, let me add one  
13 more and then I'll -- I'll shut up.

14           We have a very lengthy opinion from  
15 the North Carolina Supreme Court. It addresses  
16 the elections -- federal Elections Clause issue  
17 in three paragraphs on page 122 of the Petition  
18 Appendix.

19           At the very least, all of these  
20 interesting and important issues, and able  
21 counsel on both sides, were not available to  
22 that court then. What should we do in that  
23 circumstance?

24           MR. KATYAL: Well, certainly, with  
25 respect to that federal issue, we think it only

1 honestly needed three paragraphs because, in  
2 those three paragraphs, they talk about all of  
3 the things we just talked about, obviously not  
4 the detail, and I'd love to give you more  
5 detail, Justice Gorsuch.

6 But, you know, then you said, well,  
7 the -- the decision was based -- the decision  
8 talked about it being hard for the legislature  
9 to act. And I understand that was the basis of  
10 a separate opinion by this Court.

11 I think that point actually  
12 underscores the caution this Court should have  
13 when reviewing state court decisions because  
14 that's not what the North Carolina Supreme Court  
15 actually said at those pages at 8A.

16 JUSTICE GORSUCH: That's at page 8 --

17 MR. KATYAL: Yes, page 8A. I  
18 understand.

19 JUSTICE GORSUCH: -- that -- that the  
20 only way that partisan --

21 MR. KATYAL: Exactly.

22 JUSTICE GORSUCH: -- gerrymandering  
23 can be addressed --

24 MR. KATYAL: And it's not saying that  
25 it's too difficult to -- for the legislature to

1 act. They're making a point about like --

2 JUSTICE GORSUCH: Oh, no.

3 MR. KATYAL: -- John Hart Ely --

4 JUSTICE GORSUCH: That they can't do  
5 that. Right. No, I understand that.

6 MR. KATYAL: -- they're making a John  
7 Hart Ely point about how the legislature has  
8 been captured. It's the same point the Chief  
9 Justice made at oral argument in Rucho. And  
10 it's -- and they're basically saying -- and this  
11 is page 88 to 90 of the opinion -- that because  
12 there's a process defect, there's a special role  
13 for this Court in North Carolina, and they trace  
14 it back to 1787 North Carolina Supreme Court in  
15 Bayard, which said the exact same thing, that we  
16 were worried about legislative self-dealing --

17 JUSTICE GORSUCH: All right.

18 MR. KATYAL: -- and installing  
19 themselves.

20 JUSTICE GORSUCH: Got it.

21 MR. KATYAL: So it's the heart of the  
22 tradition.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: I just wanted to

1 follow up on your discussion with Justice Kagan  
2 on pages 48 to 50 of your brief and pages 26 to  
3 28 of the Solicitor General's brief on the -- on  
4 the Rehnquist concurrence there.

5 And you -- I think you said state  
6 court -- a check to prevent state court judicial  
7 adventurism I think was your phrase or to ensure  
8 that state courts don't manipulate state law to  
9 frustrate federal rights.

10 And, as Justice Alito pointed out,  
11 there are civil rights due process cases, Treaty  
12 Clause, Contract Clause, adequate and  
13 independent state ground we had a few weeks ago,  
14 that kind of issue.

15 And I -- I read Justice Ginsburg's  
16 dissent in Bush v. Gore to actually accept the  
17 principle or at least not dispute the principle,  
18 although she, of course, vigorously disputed the  
19 application of that principle in that case.

20 Then I go to your brief on 48 to 50,  
21 and I thought you said it's unremarkable  
22 proposition. I didn't see in your brief a  
23 distinct standard between statutes and  
24 constitutions. I don't think that's there in 48  
25 to 50.

1                   And I guess following up on Justice  
2 Kagan's, why would we use -- we're going to have  
3 to work on the adjectives and adverbs if we --

4                   MR. KATYAL: Yeah.

5                   JUSTICE KAVANAUGH: -- follow  
6 something like that, but why would we say, you  
7 know, significant departure for statutes and  
8 plainly indefensible for constitutional  
9 interpretations --

10                  MR. KATYAL: Right.

11                  JUSTICE KAVANAUGH: -- is that going  
12 to really help the cause at all?

13                  MR. KATYAL: Right. So I do think  
14 it's in our brief. We quote the language from  
15 Bush versus Palm Beach Canvassing Board and  
16 about -- about constitutions and state  
17 constitutions being at the apex, Justice  
18 Kavanaugh. And the reason for that is twofold.

19                  Number one, there's very serious  
20 federal --

21                  JUSTICE KAVANAUGH: But -- but -- keep  
22 going.

23                  MR. KATYAL: -- there's very serious  
24 federalism concerns generally. All those  
25 contexts you gave me before about adequate,



1 independent, those are actually reviewing  
2 procedural rules, state statutes and the like.  
3 Reviewing state constitutions, again, the apex  
4 of state sovereignty. I think federalism is  
5 generally different.

6           And then B, in this unique context,  
7 where Congress already has a backup check and  
8 can supplant any state court decision it doesn't  
9 want by name or supplant -- supplant state  
10 courts altogether in the second half of the  
11 Elections Clause, whatever the standard is for  
12 Bush versus Gore or something like that, to the  
13 extent you might think there was a  
14 constitutional issue, it's going to be even  
15 higher here because the Framers put Congress in  
16 and how to check specifically for this problem.

17           JUSTICE KAVANAUGH: Okay. I  
18 understand the apex, but just to be clear,  
19 you're not saying no federal judicial review  
20 when the state court has interpreted the state  
21 constitution in a case of this nature, correct?

22           MR. KATYAL: We -- we -- if the -- no,  
23 we think it should be under the highest standard  
24 of review --

25           JUSTICE KAVANAUGH: Right.

1 MR. KATYAL: -- if it's a state  
2 constitution, yes.

3 JUSTICE KAVANAUGH: And I'll repeat  
4 the question then. You're not saying no  
5 judicial review -- federal judicial review of  
6 state court interpretation of state  
7 constitutions in this area, correct?

8 MR. KATYAL: Right, we're not saying  
9 that. It's just under a high -- sky-high  
10 standard.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: My question picks up  
15 on Justice Kavanaugh's. So, in terms of what  
16 the federal content is to this state question,  
17 I'll tell you one way that I've been thinking  
18 about it and you can tell me if it's consistent  
19 or inconsistent with your view.

20 Just as, say, in the due process  
21 context we say property is a state law question,  
22 but there's some core beyond which a state can't  
23 depart, so it's -- it's a -- it's a federal  
24 question and the state can't depart so greatly  
25 from it that it's no longer really property for

1 purposes of the federal Constitution.

2           This federal content or the federal  
3 check, is it from the word "legislature," so the  
4 clause says, "shall be prescribed in each state  
5 by the legislature thereof." And at some point,  
6 if a state court adopts an interpretation of a  
7 statute or a constitutional provision that's --  
8 pick your adjective or adverb -- you know,  
9 significantly departs from, so novel, egregious,  
10 it's no longer acting as a court exercising the  
11 normal judicial review function but is acting  
12 like -- like a legislature, is that how you  
13 would articulate the argument?

14           MR. KATYAL: I think so in general, so  
15 I'd make -- I have a couple of tweaks to it. So  
16 I agree with you the ultimate test is, is the  
17 court, you know, have such little legal  
18 reasoning that it can only be understood as  
19 seizing the policymaking apparatus that would  
20 otherwise exist.

21           And we would ground that not just in  
22 the word "legislature" but also in the word  
23 "regulation," and so, if it's ordinary judicial  
24 review as it has been for 233 years, we don't  
25 think there'd be a violation.

1                   And lastly, Justice Barrett, we would  
2 ground it in what -- something you mentioned a  
3 moment -- to my friend on the other side, the  
4 Eleventh Amendment and the -- excuse me, the  
5 Tenth Amendment --

6                   JUSTICE BARRETT: Right.

7                   MR. KATYAL: -- and the special  
8 solicitude there for state processes as -- as  
9 they take them. And, indeed, their reply brief  
10 at page 6 says, look, we'll take the state  
11 processes as we find them. And, here, that  
12 state process includes judicial review and there  
13 should be only review by this Court in the most  
14 extreme circumstances, which can only be  
15 policymaking, not any of his other, you know,  
16 tests or backup tests and the like.

17                   JUSTICE BARRETT: Okay. Again,  
18 putting aside what specific language we would  
19 adopt for that test, accepting that it would be  
20 stratospheric, sky high, why would it be  
21 different in the constitutional context, in  
22 other words, a state court interpreting a state  
23 constitution as opposed to a state court  
24 interpreting a state statute if what we're  
25 getting at grounded in the language of the

1 clause in both instances is, is this a  
2 regulation or is this a legislature?

3 MR. KATYAL: They're -- they're  
4 absolutely both incredibly high, which is why  
5 this Court's never second-guessed anything.

6 I do think there's something, you  
7 know, special about state constitutions, but I  
8 don't want that to be, like, a framing effects  
9 thing to say just because that standard is  
10 extraordinarily high, that means the statutory  
11 standard is lower, a lot lower. It's not.

12 I mean, this Court doesn't do that.  
13 It is one of those cardinal principles going  
14 back to Neal's Lessee in 1832 that state courts  
15 are the masters of --

16 JUSTICE BARRETT: Well, I --

17 MR. KATYAL: -- their own statutes.

18 JUSTICE BARRETT: -- I get that. But  
19 that's just about where we locate the standard.  
20 That doesn't deny the proposition that there's  
21 some federal content there that there would have  
22 to be some federal check.

23 MR. KATYAL: I -- I think there  
24 probably would be. Again, my friend on the  
25 other side somehow disclaiming statutes and

1 saying you shouldn't, so we don't think you  
2 should get into statutes here at all.

3 JUSTICE BARRETT: Right.

4 MR. KATYAL: But I do worry the blast  
5 radius of this theory is going to reach  
6 statutes, and that's something this Court should  
7 worry about.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Jackson?

11 JUSTICE JACKSON: Yeah. I'm just --  
12 to follow up on what Justice Barrett just said,  
13 I -- I'm wondering whether the answer about why  
14 a state constitution is different in this  
15 context is because the state constitution is the  
16 font of authority for all the relevant parties  
17 in terms of this dispute. The -- the state  
18 constitution is what tells the state legislature  
19 what it cannot -- can and cannot do, what the  
20 state court can and cannot do.

21 And I understand we have the -- the  
22 peculiar circumstance of the state supreme court  
23 being the one to interpret the state  
24 constitution, but it is different in terms of  
25 its legal consequence and stature than a

1 statute.

2 Am I wrong in thinking about it that  
3 way?

4 MR. KATYAL: No, we think you're  
5 absolutely right. And so that's why state  
6 constitutions reflect the most fundamental  
7 principles, like the Free Elections Clause,  
8 often in broad, open-ended language, just like  
9 the federal Constitution in McCulloch versus  
10 Maryland.

11 JUSTICE JACKSON: And they apply in  
12 different ways. Like, you know, it's not just  
13 the state constitutional provisions that speak  
14 specifically to elections that apply and  
15 constrain the state legislature.

16 I guess what I'm a little worried  
17 about is the -- the suggestion that when the  
18 legislature is acting -- is -- is exercising  
19 legislative authority in this context, it does  
20 not have to adhere to any state constitutional  
21 constraints on its power when it's the state  
22 constitution that gives it its power and tells  
23 us when it is appropriately acting as the  
24 legislature not just with respect to the issue  
25 of elections but in general.

1           MR. KATYAL: That's a hundred percent  
2 right, Justice Jackson. We've never had a  
3 creation of that animal in the state -- in -- in  
4 the federal Constitution empowering states to do  
5 that. And if that were what the Founders  
6 intended, surely someone would have said so and  
7 it would have prompted a massive debate. There  
8 are three Federalist Papers on the Elections  
9 Clause. Not a word, anything like this. What  
10 he would do is gut the ordinary --

11           JUSTICE JACKSON: So --

12           MR. KATYAL: -- checks and balances.

13           JUSTICE JACKSON: And so, to me, it's  
14 not so much the sort of troubling worry of we  
15 have the state legislature violating federal  
16 constitutional law because we as the Supreme  
17 Court and other courts in the federal system can  
18 look at that because it's a question of did they  
19 violate the federal Constitution.

20           Here, he's saying, no, we do have to  
21 comply with the federal Constitution. What we  
22 can violate is the state constitution. And what  
23 I don't -- I -- I can't wrap my mind around that  
24 argument.

25           MR. KATYAL: I can't either, Your



1 Honor. In Shelby County, this Court said it's  
2 up to states primarily to regulate elections  
3 through their constitutions and statutes. And  
4 what he would do is gut the ability of states to  
5 do that.

6 All 50 states have clauses, equal  
7 protection, assembly, speech, and others. He  
8 would nullify them all --

9 JUSTICE JACKSON: Thank you.

10 MR. KATYAL: -- in addition to the  
11 smaller voting regulations.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Verrilli.

15 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
16 ON BEHALF OF THE STATE RESPONDENTS

17 MR. VERRILLI: Mr. Chief Justice, and  
18 may it please the Court:

19 I'd like to make three points. First,  
20 Petitioners' argument cannot be reconciled with  
21 Smiley. Smiley held that because the Elections  
22 Clause invokes the state legislature's  
23 law-making function, the conditions which attach  
24 to the making of state laws apply.

25 Judicial review is such a condition,

1 and there's no basis in text or history for  
2 concluding that a governor's veto can act as a  
3 substantive check on the legislative  
4 prerogative, but judicial review cannot.

5           Second, the -- the General Assembly's  
6 statutory authorization makes this an even  
7 clearer case for affirmance, and in particular,  
8 it establishes conclusively that North Carolina  
9 courts do not in any way usurp the legislative  
10 function when they draw remedial maps in the  
11 manner that the statute describes.

12           And third, since the founding, state  
13 constitutions have always limited how state  
14 legislatures discharge their Elections Clause  
15 responsibilities.

16           Today, in addition to the states'  
17 constitutions that expressly express partisan  
18 gerrymandering, constitutions address absentee  
19 voting, voting by the military, voter ID, and  
20 primary elections and many other aspects of the  
21 electoral process.

22           That -- excuse me -- that Petitioners  
23 must repudiate all of that longstanding and  
24 comprehensive history is a very powerful  
25 indication that they are misreading the

1 Elections Clause.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Verrilli, the --  
4 how far would you go with that? There's been  
5 some discussion about we can only review state  
6 courts at a sky-high level or a stratospheric  
7 level or -- we -- we ran into a similar problem  
8 with that in Bush v. Gore.

9 How would you articulate our review  
10 standard --

11 MR. VERRILLI: Yes, Justice Thomas.

12 JUSTICE THOMAS: -- for state supreme  
13 courts?

14 MR. VERRILLI: Justice Thomas, I -- I  
15 appreciate the opportunity to do so. And let me  
16 just try to articulate what we think a clear  
17 correct standard is. And we think the standard  
18 is that you -- you'd ask whether the state  
19 decision is such a sharp departure from the  
20 state's ordinary modes of constitutional  
21 interpretation that it lacks any fair and  
22 substantial basis in state law. We think that  
23 is actually the best distillation of the kinds  
24 of tests that were identified in the Bush v.  
25 Gore concurrence as being potentially relevant.

1                   Now I will say that we think that's a  
2 highly deferential test. We think also it has  
3 to be -- it's of vital importance to recognize  
4 that states can have different modes of  
5 constitutional interpretation than this Court  
6 has with respect to the federal Constitution,  
7 and those have to be respected.

8                   But -- and then, you know, I think  
9 probably the -- the line in *Bush v. Gore* in the  
10 concurrence that best sums it up is that, does  
11 it -- does the state court decision  
12 impermissibly distort beyond any fair reading  
13 the state law? So we -- we think that's the --  
14 the operative test here, again, highly  
15 deferential, have to respect the way in which  
16 state courts go about constitutional  
17 interpretation. But I think that's the test.

18                   And if I -- if I could build on that,  
19 I think, Mr. Chief Justice, that is the answer  
20 actually to the question that Your Honor raised  
21 about vague and general provisions. What my  
22 friends on the other side have said is those are  
23 categorically unenforceable. They're  
24 categorically unenforceable under the Elections  
25 Clause.

1                   That just can't be right. There's no  
2 textual basis for that. And as a  
3 jurisprudential matter, the -- the federal  
4 Constitution, of course, has vague and general  
5 provisions, and no one requires that level of  
6 specificity before they can be enforced in -- in  
7 the elections context.

8                   CHIEF JUSTICE ROBERTS: Well, if you  
9 --

10                  MR. VERRILLI: So --

11                  CHIEF JUSTICE ROBERTS: -- just -- I  
12 recognize your point about categorically  
13 unenforceable, but where do you line up on that  
14 and some of the detail, like what's going to be  
15 applied is an efficiency gap of whatever in a  
16 judicial determination? Is -- is -- is that  
17 categorically unenforceable, or can you say that  
18 in this case that seems specific enough to be  
19 carrying out the duty under the constitution of  
20 the legislature?

21                  MR. VERRILLI: If I could make a  
22 prefatory point, and then I'll --

23                  CHIEF JUSTICE ROBERTS: Yeah.

24                  MR. VERRILLI: -- I'll answer Your  
25 Honor's question directly.

1 CHIEF JUSTICE ROBERTS: Sure.

2 MR. VERRILLI: The prefatory point is  
3 this. I just want to make sure this -- that  
4 this -- we all keep this in mind: They are not  
5 making an argument that the -- that the North  
6 Carolina Supreme Court's decision in this case  
7 would be struck down under the standard I  
8 articulated or any other standard. In fact,  
9 they began their argument, and they said, I  
10 think, by my count, six or seven times that they  
11 accept the North Carolina Supreme Court's  
12 decision as a fair reading of North Carolina  
13 law. So whatever the Court concludes with  
14 respect to the application of that -- the -- the  
15 -- the need for a standard like this, it's  
16 not -- it's not a basis to overturn the decision  
17 here for -- for the reasons I identified.

18 Now, with respect to Your Honor's  
19 question, I think I would -- the way I read the  
20 North Carolina Supreme Court decision is a  
21 little different, starting with the fair -- the  
22 Free Elections Clause. It basically, as I read  
23 the opinion, conducted a historical analysis of  
24 the kind that should be familiar as a matter of  
25 constitutional interpretation. They went back

1 to the English Bill of Rights, which was about  
2 the manipulation of electoral processes so that  
3 the Parliament would be in the king's pocket  
4 essentially. They looked at comparable events  
5 that occurred in North Carolina at the time of  
6 the founding.

7           And then, although this was not in the  
8 opinion, you know, of course, I do think that  
9 the -- what James Madison was saying about the  
10 Elections Clause itself -- and the best place to  
11 look for that is page 27 of The Founding Era  
12 scholars' brief -- he talked about, because this  
13 was general language, the risks of abuse were --  
14 were manifold and could not all be imagined.

15           And what he was basically talking  
16 about, one thing he says -- and this is the  
17 August 9th debates of the Convention -- one  
18 thing he says in those August 9th debates is,  
19 you know, there's a real risk that the powers  
20 that are in control of the state legislatures  
21 will rig the process for choosing members of  
22 Congress in a way that they can project their  
23 disproportionate power in the state into the  
24 Congress. So those --

25           CHIEF JUSTICE ROBERTS: Well, maybe

1 that gets -- touches a point that may be a  
2 little too abstract to address, but the nature  
3 of judicial authority at the time of the  
4 founding and thereafter I think is quite  
5 different than the nature of judicial authority  
6 today. I mean, even just looking at court  
7 opinions, you can see that what -- what courts  
8 do as a general matter can be really quite  
9 specific in terms of injunctive relief and the  
10 sort of thing that is at issue here.

11 And I wonder if the -- I -- I guess I  
12 wonder how we should go about taking that into  
13 account.

14 MR. VERRILLI: Yeah. And so --

15 CHIEF JUSTICE ROBERTS: Their early  
16 statements about this is what the Court did in  
17 1800 and whatever. And I wonder if the same  
18 concerns that are at issue today about the  
19 exercise of judicial authority were really on  
20 the plate back then.

21 MR. VERRILLI: So I -- I guess the way  
22 I would think about that, Mr. Chief Justice, is  
23 that what -- what the North Carolina Supreme  
24 Court was doing here, I think, was saying this  
25 is the historical genesis of the Free Elections



1 Clause. This is the kind of problem it has to  
2 -- that it's -- it's there to address. The  
3 extreme partisan gerrymandering -- and this was  
4 an extreme gerrymander -- the extreme partisan  
5 gerrymandering we face here is a cognate kind of  
6 problem. We have to figure out, using modern  
7 doctrine and modern approaches, how to address  
8 it.

9           And I do think, if I could -- I don't  
10 want to be presumptuous here -- but, as I read  
11 the opinion for the Court in Rucho, the idea of  
12 the -- of the Court there was that looking at  
13 this Court's understanding and history of the  
14 Equal Protection Clause and the Free Speech  
15 Clause, you know, given that history, it wasn't  
16 possible to derive particular and manageable  
17 standards.

18           But there's a key -- as I read it at  
19 least, a key predicate there is that -- and the  
20 opinion reflects this -- that the Equal  
21 Protection Clause doesn't impose any restriction  
22 on partisan motivation or intent, and,  
23 therefore, the only thing you can look at is the  
24 result and, you know, how -- how fair is unfair.

25           CHIEF JUSTICE ROBERTS: But --

1 MR. VERRILLI: But --

2 CHIEF JUSTICE ROBERTS: Go ahead.

3 MR. VERRILLI: If I could. The -- the  
4 key difference I think, one key difference and  
5 it applies here, is that if one looks at those  
6 number -- number of state constitutional  
7 provisions that expressly limit or prohibit  
8 partisan gerrymandering, and there are quite a  
9 number now -- I don't know, seven, eight,  
10 including many of the big states -- there, they  
11 focus on intent. And policing for an  
12 impermissible intent is something that courts  
13 know how to do and is subject to  
14 judicially manageable standards. You know, with  
15 respect to race, of course, you have the  
16 Arlington Heights framework.

17 And I think, again, that they have not  
18 challenged this opinion. They said it's fair --

19 CHIEF JUSTICE ROBERTS: Right, but --

20 MR. VERRILLI: -- but -- but I -- but  
21 I will say it does have a very substantial  
22 intent focus, and I would point the Court in  
23 particular to pages 125a to 129a of the --

24 CHIEF JUSTICE ROBERTS: If I -- if I  
25 could?

1                   MR. VERRILLI: -- appendix to the  
2 petition. I'm sorry.

3                   CHIEF JUSTICE ROBERTS: The -- you  
4 have -- again, today, particularly in the  
5 redistricting area, if the court is involved,  
6 it's often -- I don't know if it's typical or  
7 whatever -- they act through the appointment of  
8 special masters. The judges don't sit in the  
9 back room with lines drawing the districts, but  
10 other -- other people do. And I wonder if  
11 there's a disconnect between the level of the  
12 grant of authority, whether it's along the lines  
13 that Chief Justice Rehnquist put in -- in the  
14 Palm Beach case or something else, and how it's  
15 actually practiced on the ground.

16                   MR. VERRILLI: Yeah. So I think that  
17 whatever might be the case in other situations,  
18 here, of course, in North Carolina, we have an  
19 express statutory authorization saying a  
20 particular three-judge court shall impose a  
21 remedial map and shall do so under the following  
22 constraints. It's good for one trip only, its  
23 interim map. It -- the legislature has to be  
24 given a full and fair opportunity to remedy the  
25 constitutional problem before that remedial

1 process kicks in.

2           And then -- and then, third, the map  
3 has to deviate as minimally as possible from the  
4 map that the legislature enacted. And then,  
5 within those constraints, that remedial process  
6 occurs. And so I -- I think that -- and I --  
7 and I guess, more generally, I would think, if  
8 one recognizes, as I think has to be the case,  
9 that states do have the constitutional authority  
10 to enforce state constitutional provisions here  
11 and they declare that a state legislative act is  
12 unconstitutional, in the case of a redistricting  
13 map, then it naturally follows that there is  
14 going to be remedial authority, and that  
15 remedial authority in this instance really  
16 responds to a profound practical problem, which  
17 is you have to have a map to have an election.

18           CHIEF JUSTICE ROBERTS: Thank you.

19           JUSTICE KAGAN: So --

20           MR. VERRILLI: Somebody's got to step  
21 in.

22           JUSTICE KAGAN: -- Mr. Verrilli, I  
23 mean, what if you were in a state which didn't  
24 have the kind of procedures that North Carolina  
25 had? And, as you say, there has to be a remedy.

1 But let's say a state just sort of did it on its  
2 own without even -- you know, without kicking it  
3 back, without saying, look -- let -- let's say  
4 there was time enough to kick it back, and --  
5 and -- and the state court did not kick it back.  
6 Are there any limits on this? Should there be  
7 any limits on this?

8 MR. VERRILLI: So there might be. You  
9 know, a useful analogue on the federal side,  
10 there's a whole body of equitable principles  
11 that -- that apply in precisely this context  
12 that say, as a matter of exercise of equitable  
13 jurisdiction, the court's got to give the  
14 legislature a full and fair shot to remedy it  
15 first, should deviate as little as possible from  
16 the -- the map that the legislature enacted.

17 And I -- I -- I guess that in order  
18 for those to apply in the state situation, they  
19 would have to have a basis in the constitution.  
20 I could envision an argument that those kinds of  
21 constraints on remedies could be something that  
22 you could think of as within the -- as -- as  
23 appropriate, given the Elections Clause. But,  
24 again, this case, it's very straightforward.  
25 This is as constrained a remedial situation as

1 you are going to see.

2 JUSTICE KAGAN: And just --

3 JUSTICE GORSUCH: And -- oh, sorry.

4 JUSTICE KAGAN: No, go ahead.

5 JUSTICE GORSUCH: No, please.

6 JUSTICE KAGAN: Just a quick question.

7 Is -- when you gave your standard, the -- the

8 sort of, you know --

9 MR. VERRILLI: Sharp departure from --

10 JUSTICE KAGAN: Yes.

11 MR. VERRILLI: -- the state's ordinary

12 modes of --

13 JUSTICE KAGAN: Yeah, which is --

14 MR. VERRILLI: -- constitutional

15 interpretation --

16 JUSTICE KAGAN: And -- and you said --

17 MR. VERRILLI: -- that lacks any fair

18 and substantial basis in state law.

19 (Laughter.)

20 JUSTICE KAGAN: Good. Your -- your

21 highly deferential standard, and deferential as

22 to interpretive method as well as to anything

23 else.

24 MR. VERRILLI: Yes, thank you.

25 JUSTICE KAGAN: Yeah. Is -- is that

1 standard for you, should that be the same  
2 standard as for statutes, or do you agree with  
3 Mr. Katyal that there actually is a gap between  
4 the two?

5 MR. VERRILLI: Yeah, I'm not sure that  
6 I see a gap between the two, and -- I mean,  
7 except in the following sense, that one could, I  
8 think -- think -- one could think that with  
9 respect to a statute, because there's a  
10 difference between interpreting a statute and  
11 interpreting a constitution, that with respect  
12 to the interpretation of a constitution, there  
13 -- there may -- state supreme courts may have  
14 more leeway because there -- there is after all  
15 a constitution they're interpreting. And so I  
16 -- I could see in application the standard might  
17 work out differently in some cases, but -- but I  
18 don't think it's a difference in the standard as  
19 much as in the application of the standard.

20 JUSTICE GORSUCH: Actually, this  
21 follows right up on that, so that was very  
22 helpful. I'm glad I waited. The question I  
23 think, as Justice Barrett suggested, is, has the  
24 legislature prescribed the time, place, and  
25 manner? And I think -- I think -- your standard

1 and our -- our sky-high, astronomical, and I  
2 think we ventured into outer space at points  
3 standard, is asking have the -- has the judicial  
4 opinion in interpreting the law, let's deal with  
5 statutes first, gone so far afield that we can  
6 no longer fairly say as a matter of federal law  
7 that the legislature is the one who prescribed  
8 the time, place, and manner? Is that a fair  
9 understanding of -- of our task here as --

10 MR. VERRILLI: I think the -- that --

11 JUSTICE GORSUCH: -- under federal  
12 law?

13 MR. VERRILLI: -- I think that's kind  
14 of the underpinning of the idea that what you're  
15 trying to solve for is the problem of a state  
16 court going so far afield and being so  
17 disconnected from existing precedent, from  
18 history, et cetera, that you would come to the  
19 conclusion that they're really not engaging in  
20 the function of judicial review --

21 JUSTICE GORSUCH: Well, the -- the  
22 legislature didn't prescribe these things. I  
23 mean, that's the text that we're asked to  
24 interpret, right?

25 MR. VERRILLI: Well, right, but I -- I



1 guess, Your Honor, I would say that --

2 JUSTICE GORSUCH: Have they gone so  
3 far afield that we --

4 MR. VERRILLI: -- when it comes to the  
5 question, if I could just -- if I could just say  
6 it this way.

7 JUSTICE GORSUCH: Well, I just want to  
8 make --

9 MR. VERRILLI: Yeah, yeah.

10 JUSTICE GORSUCH: -- just -- just make  
11 sure we're on the same page. You know, that's  
12 the --

13 MR. VERRILLI: Well --

14 JUSTICE GORSUCH: -- that's the  
15 federal standard, and one way of analyzing that,  
16 I think, if I'm understanding you, and if I'm  
17 not, please say so, when we're dealing with  
18 statutory law is, if they've gone so far afield  
19 or into outer space, that's an indication that  
20 it's no longer the legislature prescribing it.

21 MR. VERRILLI: Well, I guess I would  
22 put it differently.

23 JUSTICE GORSUCH: Okay.

24 MR. VERRILLI: I guess what I would --

25 JUSTICE GORSUCH: How?

1 MR. VERRILLI: -- say is that the --  
2 that the Framers took legislatures as they found  
3 them, that the -- that the judicial review under  
4 the state constitution is a condition of the  
5 normal operation of state law and the language  
6 of Smiley, that -- and, therefore, it should be  
7 expected that courts will review federal  
8 election regulation by state legislatures under  
9 the state constitution, that that -- and that  
10 they --

11 JUSTICE GORSUCH: Okay. Thank you --

12 MR. VERRILLI: -- can validate --

13 JUSTICE GORSUCH: -- Mr. Verrilli.

14 Thank you.

15 JUSTICE JACKSON: Can I just follow up

16 --

17 CHIEF JUSTICE ROBERTS: Thank you.

18 JUSTICE JACKSON: -- on that? Oh.

19 CHIEF JUSTICE ROBERTS: We'll --

20 JUSTICE JACKSON: Sorry.

21 CHIEF JUSTICE ROBERTS: -- we'll go

22 through.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Is your standard a

1 standard that can be flunked?

2 MR. VERRILLI: Yeah, I assume it could  
3 be flunked.

4 JUSTICE ALITO: Give me an example of  
5 something that would flunk your standard.

6 MR. VERRILLI: So, you know, I think a  
7 -- a naked declaration that a -- that an act of  
8 a legislature under a free and fair elections  
9 clause is unfair, without any grounding in  
10 history or precedent or -- or sound analysis of  
11 a kind that the state -- that the state, you  
12 know, is appropriate under that state's mode of  
13 interpretation, I -- I think -- I think you  
14 could envision that possibility happening.

15 JUSTICE ALITO: Okay.

16 MR. VERRILLI: I do think that would  
17 be a rare case, but I think --

18 JUSTICE ALITO: Yeah, I appreciate  
19 that answer because I think the worst thing we  
20 could do, although it might be attractive for  
21 some reasons, is to say, well, there is a limit,  
22 but, you know, we -- we -- but it's one where --  
23 that in practice can never be exceeded, so we  
24 have a standard, but it's just -- you know, it  
25 doesn't mean anything.

1 Under that understanding, let me talk  
2 about the decision in this case. And we've  
3 heard about the English Bill of Rights. I mean,  
4 did any -- has anybody ever thought that the  
5 English Bill of Rights had anything to do with  
6 one-person, one-vote, much less political  
7 gerrymandering?

8 MR. VERRILLI: Well, the -- I -- I  
9 think it had the -- the historical roots of  
10 those doctrines, yeah, do trace back to the idea  
11 that the English Bill of Rights was trying to  
12 deal with, which was the manipulation of the  
13 electoral process, including the -- the -- who  
14 -- who is going to represent what area, in -- in  
15 order to entrench those in power.

16 JUSTICE ALITO: Well, wasn't it true  
17 -- you probably know more about British  
18 constitutional history than I do, but wasn't it  
19 true that well into the 19th Century the British  
20 Parliament was notorious for having rotten  
21 boroughs, you know, parliamentary districts  
22 where there were practically no inhabitants, but  
23 that was a good way of entrenching a Tory member  
24 or a Liberal member? Wasn't that true?

25 MR. VERRILLI: Well, but -- but that

1 was a bad thing, and I think it was --

2 JUSTICE ALITO: It was -- it was a bad  
3 --

4 MR. VERRILLI: -- something that the  
5 Framers were --

6 JUSTICE ALITO: -- yeah, it was a bad  
7 thing, but that was under the English Bill of  
8 Rights, was it not?

9 MR. VERRILLI: Well -- well, but the  
10 -- I guess the point is that what is this Free  
11 Elections Clause trying to get at in the North  
12 Carolina constitution and the other  
13 constitutions that adopted it at the time of the  
14 framing, and this is the problem.

15 JUSTICE ALITO: All right. 1776,  
16 200-plus years ago. Was anybody at that time  
17 saying election isn't free if there's political  
18 gerrymandering?

19 MR. VERRILLI: Well, you know, I don't  
20 know if they were saying it in exactly those  
21 terms, but there is an amicus brief that  
22 addresses what was going on in North Carolina.  
23 It's -- Penn Bank I think is the name -- Plan  
24 Bank maybe -- I'm sorry if I'm mispronouncing it  
25 -- which talks about actual controversies with

1 respect to the way districts were drawn in North  
2 Carolina in the 1770s.

3 JUSTICE ALITO: Well, sure there was  
4 controversy, and where -- and this isn't --  
5 political gerrymandering is no new thing, right?  
6 It was known at the time of the founding.

7 MR. VERRILLI: Yeah. Well, yes, but  
8 --

9 JUSTICE ALITO: That's where the name  
10 comes from, right?

11 MR. VERRILLI: Sure, sure, but the --  
12 but the -- the question is what problem is  
13 the -- is the North Carolina Supreme Court  
14 trying to address here, and my point is it's a  
15 problem very much in the nature of the problem  
16 that gave rise to the Free and Fair Elections  
17 Clause.

18 And if I could just make an -- it  
19 makes an obvious point, I guess, but, you know,  
20 when the Framers adopted the Free Speech Clause,  
21 they were principally concerned about prior  
22 restraints. But we don't interpret the Free  
23 Speech Clause as applying only to prior  
24 restraints, obviously, and so --

25 JUSTICE ALITO: And then the North

1 Carolina Supreme Court sets out certain methods  
2 that could be used in determining whether there  
3 is political gerrymandering, the mean/median  
4 difference, the efficiency gap, means  
5 simulations. Would that -- would anybody have  
6 understood that in 1776?

7 MR. VERRILLI: No, I -- I doubt it,  
8 but those are means of implementing a  
9 fundamental principle. Those aren't fundamental  
10 principles themselves. And the fundamental  
11 principle that I -- that the North Carolina  
12 Supreme Court articulated as I read the opinion  
13 is that you don't want the electoral districts  
14 to manipulate it, be manipulated so that one  
15 group of voters is severely disadvantaged as  
16 compared to another group of voters of a  
17 different party of the same size.

18 JUSTICE ALITO: Okay. So let's turn  
19 to precedent, which is another way of  
20 interpreting a state constitution. What  
21 grounding in North Carolina precedent was there  
22 for this decision? My understanding is that the  
23 most relevant decision, which is -- suggests  
24 that the North Carolina constitution doesn't  
25 address political gerrymandering.

1           MR. VERRILLI: Yes. So the -- so the  
2 Dodson case came up with my friend on the other  
3 side, I think, or maybe with Mr. Katyal, but I  
4 should talk about that for a minute. You know,  
5 to say that the partisan gerrymandering analysis  
6 in that, I mean, I -- it was a flea on the tail  
7 of a dog. When you read that opinion, it was --  
8 that was a case about racial gerrymandering.  
9 Ninety-nine percent of the opinion is about it.  
10 The parties threw in this kind of offhand  
11 argument in their opening brief that said, well,  
12 there's also a problem here in that it violates  
13 the Good of the Whole provision. And the -- and  
14 then the -- the appellees, the respondents in  
15 that case said, well, you haven't articulated  
16 any standard to decide which of these two  
17 competing maps better serves the good of the  
18 whole. And they -- the -- the appellants said  
19 nothing in the reply brief. The court said,  
20 well, you haven't articulated any basis for  
21 deciding on the difference between the two. And  
22 -- and, of course, the North Carolina Supreme  
23 Court recognized that in this very case.

24           JUSTICE ALITO: Were there -- were  
25 there prior decisions of the North Carolina



1 Supreme Court that step by step led to this  
2 conclusion --

3 MR. VERRILLI: So --

4 JUSTICE ALITO: -- that the Free  
5 Elections Clause prohibits political  
6 gerrymandering?

7 MR. VERRILLI: So I'm going to answer  
8 Your Honor's question, but I do want to just  
9 interject one more time that they have said that  
10 this decision is a fair representation of North  
11 Carolina law. They are not challenging it under  
12 the standard I articulated or any other  
13 standard. They have made a different argument,  
14 which is that this is categorically a violation  
15 of the -- of the Elections Clause for state  
16 supreme courts to invoke -- to apply vague and  
17 general provisions.

18 And so I'm happy to keep answering  
19 Your Honor's questions, I am, but -- but I just  
20 want to reinforce that that's -- they have  
21 conceded that this is a fair interpretation of  
22 North Carolina law.

23 JUSTICE ALITO: All right. And then  
24 we get to the introductory statement that  
25 Justice Gorsuch mentioned, and, boy, that seems

1 awfully close to what you said would be a  
2 violation.

3 MR. VERRILLI: I don't --

4 JUSTICE ALITO: Well, you know, they  
5 -- I mean, then there's a hundred pages, you  
6 know, of elaboration, but, basically, at the  
7 beginning, they say what they're doing, and,  
8 basically, they're saying in no uncertain terms,  
9 look, there's legislative malfunction here. The  
10 legislature has adopted a -- a political  
11 gerrymandering, and it's really hard to amend  
12 the state constitution and we don't have a  
13 referendum to correct it, so there's a big  
14 problem in the state and we have to step in.

15 MR. VERRILLI: Well, but --

16 JUSTICE ALITO: That's awfully close  
17 to what you just --

18 MR. VERRILLI: No, I -- I -- I -- I  
19 disagree quite strongly with that, first, with  
20 respect to the specific thing that they said in  
21 this paragraph -- and I think we're talking  
22 about the same paragraph -- and then with  
23 respect to the way in which the opinion analyzes  
24 it.

25 They -- they do say: Okay, we don't

1 have a referendum process. It's hard to amend  
2 the Constitution. The reason it's hard to amend  
3 the Constitution is because you've got -- you  
4 have to get 60 percent of the legislature as the  
5 first step. And the problem here, of course, is  
6 the actions of the legislature.

7           And then the -- what -- what -- and I  
8 think this is what Your Honor is referring to,  
9 but there -- you know, there's a sentence here  
10 which we haven't talked about, and what the  
11 North Carolina Supreme Court says, "it is no  
12 answer to say that responsibility for addressing  
13 partisan gerrymandering is in the hands of the  
14 people when they are represented by legislators  
15 who are able to entrench themselves by  
16 manipulating the very democratic process from  
17 which they derive their constitutional  
18 authority."

19           Now one can agree or disagree with  
20 that as a premise for judicial intervention, but  
21 that's essentially John Hart Ely's Democracy and  
22 Distrust. And you -- you may not think that  
23 that's an appropriate way to think about how the  
24 federal Constitution ought to be interpreted and  
25 applied, but I don't see how one could say that

1 that is so far outside the bounds of reasonable  
2 interpretive principles that the state court  
3 here was acting as a legislature and not a  
4 court. I just don't see how you could say that.

5 And then, of course, with respect to  
6 the specific analysis beyond the Free Elections  
7 Clause, there's a very lengthy Equal Protection  
8 Clause analysis, which is rooted in substantial  
9 precedent --

10 JUSTICE ALITO: Thank you.

11 MR. VERRILLI: -- and which --

12 JUSTICE ALITO: Thank you,  
13 Mr. Verrilli.

14 MR. VERRILLI: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor?

17 JUSTICE SOTOMAYOR: Mr. Verrilli, I --  
18 I'm trying to organize an opinion if I were to  
19 rule in your favor. And -- and you say some  
20 things are within bounds, some things are not.  
21 How would you write it, I mean, to answer some  
22 of the questions my colleagues have raised and  
23 to knock it down, okay?

24 I -- I guess, first, you would say  
25 take Petitioners' broadest view, that the

1 legislature means state legislators, not state  
2 courts, and so there can't be any judicial  
3 review. That's easy to write and say there  
4 obviously has to be judicial review because it's  
5 part of the regulation process.

6 What comes after that?

7 MR. VERRILLI: So --

8 JUSTICE SOTOMAYOR: How --- how do we  
9 deal with his distinction between procedural and  
10 substantive? How do we deal with this question  
11 of --

12 MR. VERRILLI: I think the Court could  
13 write a very --

14 JUSTICE SOTOMAYOR: -- did this Court  
15 -- why --

16 MR. VERRILLI: Sorry.

17 JUSTICE SOTOMAYOR: -- why we don't  
18 reach the question of whether this Court went  
19 too far with legislating and not reviewing?

20 MR. VERRILLI: I think the Court could  
21 write a very straightforward opinion, and -- and  
22 -- I -- I think -- it would -- a good place to  
23 start would be the following quote from Chief  
24 Justice Hughes's unanimous opinion for the Court  
25 in Smiley, which says: "The question then is

1 whether the provision of the Federal  
2 Constitution, thus regarded as determinative,  
3 invests a legislature with a particular  
4 authority and imposes upon it a corresponding  
5 duty, the definition of which imports a function  
6 different from that of a lawgiver" -- and then  
7 these are the key four words -- "and thus  
8 renders inapplicable the conditions which attach  
9 to the making of state laws."

10 In Smiley, the Court answered that  
11 question with an emphatic "no" with respect to  
12 the governor. An emphatic "no" is equally  
13 appropriate here. There is a limit to the -- to  
14 the state court's ability to enforce state  
15 constitutional provisions. That limit is the  
16 standard that I articulated twice and I won't  
17 articulate for a third time. And --

18 JUSTICE SOTOMAYOR: So we --

19 MR. VERRILLI: But -- and that - but  
20 the -- but the --

21 JUSTICE SOTOMAYOR: You're -- you  
22 think we should reach that question?

23 MR. VERRILLI: Well, but then I was  
24 going to say, but the Petitioners have not -- if  
25 the Court wants to save that for another day, it

1 can, but I guess we're comfortable with the  
2 articulation of it. The key point for us is the  
3 Petitioners have not made any argument under  
4 that standard, and, therefore, there is -- in  
5 fact, the opposite, they have conceded that this  
6 is a faithful and fair interpretation of North  
7 Carolina law and, therefore, there's no basis  
8 for overturning the decision of the North  
9 Carolina Supreme Court.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: Mr. Verrilli, I've  
12 been thinking a good deal about this  
13 constitutional analogue to the Rehnquist  
14 principle, and your colloquy with Justice Alito  
15 made me feel uneasy about it, and I think that  
16 the reason is because it shows how very good  
17 judges on very good courts can find it  
18 incredibly easy to disagree with each other.

19 And so, if Justice Alito asked you can  
20 it be flunked, I think what I want to ask you  
21 after hearing that colloquy is, is there a  
22 danger it's going to be satisfied too easily?

23 And I'll just -- you know, I think  
24 that every single one of us on this bench has  
25 written opinions at times, you know, saying that

1 other judges, whether it's other judges on this  
2 Court or -- or lower court judges, you know,  
3 have engaged in policymaking rather than in law.  
4 And, I mean, it's just sort of one of the things  
5 that judges say when they really disagree with  
6 another opinion.

7           And -- and so how -- you know, if you  
8 say acting as a legislature, not as a court,  
9 acting as a policymaker, not as a court, I mean,  
10 these really are things -- it's not just this  
11 Court, it's every court -- these are things that  
12 judges say to each other all the time. How is  
13 this going to be a check that's used rarely --

14           MR. VERRILLI: Well --

15           JUSTICE KAGAN: -- rather than, like,  
16 whenever you basically, you know, disagree  
17 strongly.

18           MR. VERRILLI: So I -- I apologize for  
19 putting it this way, but I think that's up to  
20 this Court, because this Court's going to be  
21 applying it. And I think the -- the phrase from  
22 the Bush against Gore concurrence that I think  
23 captures it pretty well is, does it  
24 impermissibly distort beyond any fair reading  
25 state law? That -- that is deferential, a very



1        deferential standard.  It, I think, encompasses  
2        the point that I made that you've got to respect  
3        the state courts' modes of constitutional  
4        interpretation.

5                    And then -- and I -- but I do think  
6        for all the reasons of federalism and state  
7        sovereignty and -- and comparative institutional  
8        competence, that, of course, it needs to be  
9        applied very deferentially.  There aren't going  
10      to be very many cases that -- I would think that  
11      would satisfy it.  There will be some perhaps,  
12      but there won't be very many.

13                   And -- and -- but -- but I think  
14      that -- but, anyway, that's the way I think it  
15      -- it would -- that's the way I think it would  
16      go.

17                   CHIEF JUSTICE ROBERTS:  Justice  
18      Gorsuch?

19                   Justice Kavanaugh?

20                   Justice Barrett?

21                   JUSTICE BARRETT:  Just quickly,  
22      Mr. Verrilli.  You got some questions about the  
23      remedy.  And, you know, the Chief Justice was  
24      asking about special masters drawing the map,  
25      and, you know, here, we had experts come in.

1 We've been talking primarily about the liability  
2 question. You did get some questions about  
3 remedy. Do you -- I just wanted to give you a  
4 chance to say something about our jurisdiction,  
5 whether we have jurisdiction to review --

6 MR. VERRILLI: You know, we --

7 JUSTICE BARRETT: -- the portion --

8 MR. VERRILLI: -- we don't think  
9 there's a final judgment here yet. I mean, the  
10 -- the question of the proper remedy is before  
11 the three-judge court on remand. And the, you  
12 know -- and the argument being -- that's at play  
13 there is, should the court accept the  
14 legislature's remedial plan or the alternative  
15 remedial plan drawn by the court? And that --  
16 that the answer to that could matter to the way  
17 the Court analyzes the issue.

18 Now I will say -- I take my -- the  
19 argument of my friends on the other side to be  
20 that the two issues of whether you could have a  
21 remedial process at all and whether you can have  
22 judicial review at all are so intimately bound  
23 up that you -- you should address that issue,  
24 and that's why I was focused on it.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: I just have one  
3 question that goes back to this issue of  
4 constitution being different than statute from  
5 -- from the perspective of us trying to figure  
6 out what to do here.

7 Justice Gorsuch asked, I thought, a  
8 very clarifying question, and it's sort of come  
9 up again with Justice Kagan's remarks, which is  
10 we're really trying to kind of sort of figure  
11 out when and under what circumstances the state  
12 legislature has usurped legislate -- legislative  
13 power in some sense. And I think Justice Kagan  
14 is correct that that's sort of in the eye of the  
15 beholder. But, you know, what -- what is the  
16 body of law that we would reference to answer  
17 the very standard that you have articulated,  
18 when it warps it? What -- what are we looking  
19 at to determine how --

20 MR. VERRILLI: So --

21 JUSTICE JACKSON: -- far --

22 MR. VERRILLI: -- I think the standard  
23 is drawn -- and I think Justice Alito in his  
24 colloquy with Mr. Katyal went through the  
25 various places where the Court applies that kind

1 of a standard, and the Bush against Gore  
2 concurrence references most of those.

3 JUSTICE JACKSON: Mm-hmm.

4 MR. VERRILLI: And we were drawing  
5 that standard from the -- that same body of law.  
6 And it's -- and it is a very good question.

7 JUSTICE JACKSON: But I guess I'm  
8 asking, do you do -- isn't the baseline what the  
9 state constitution says? We start there and  
10 then --

11 MR. VERRILLI: Sure.

12 JUSTICE JACKSON: -- we say are you  
13 doing something so far --

14 MR. VERRILLI: Yeah.

15 JUSTICE JACKSON: -- far beyond that?

16 MR. VERRILLI: Is it so far -- is it  
17 so far out of bounds that you -- you can't reach  
18 it.

19 JUSTICE JACKSON: And the reason we're  
20 doing that is because we're worried about some  
21 sort of separation of powers issue as between  
22 the state legislature and the state courts?

23 MR. VERRILLI: Well, there is some --  
24 I think there is some -- there is a federal  
25 interest at play, I think, is the -- is the

1 answer because of the Elections Clause. There's  
2 a federal interest at play. We think that the  
3 federal interest -- the -- the -- that the  
4 Elections Clause itself, as we've said, reflects  
5 a judgment that the state -- that the -- that  
6 you take state legislatures as you find them,  
7 which means that they're subject to judicial  
8 review under the state constitution because,  
9 otherwise -- you know, if they make a law that's  
10 unconstitutional under the state constitution,  
11 in the words of Marbury, it's no law at all.  
12 And so I think that --

13 JUSTICE JACKSON: And they're not  
14 really a legislature, presumably --

15 MR. VERRILLI: Right.

16 JUSTICE JACKSON: -- because the  
17 constitution tells them --

18 MR. VERRILLI: Well, that -- that --  
19 that's the argument.

20 JUSTICE JACKSON: Yes.

21 MR. VERRILLI: And if I could, there's  
22 just one last point I'd like to make about whose  
23 ox is being gored here, which I think is quite  
24 important.

25 Actually, there's a great deal of

1 sentiment in this country about the problems  
2 with extreme partisan gerrymandering, and this  
3 Court's opinion in Rucho acknowledged it. And  
4 states have actually responded in nonpartisan  
5 ways. I can think of four states, New York,  
6 Florida, California, and Ohio, all of which are  
7 in the control of one political party where,  
8 presumably, the incentives would have been lined  
9 up to maximize partisan advantage through the  
10 redistricting process, but in all four of those  
11 states, they amended their constitutions through  
12 the work of the people to restrict partisan  
13 gerrymandering, and -- and those provisions have  
14 been enforced. I mean, it was -- the provision  
15 was enforced in New York, of course, just  
16 earlier this year.

17           And so I do think it is more than  
18 whose ox is being gored. This is a really  
19 important issue in this country, and I think it  
20 would be an extraordinary thing to say, as my  
21 friends on the other side are saying here, that  
22 the Elections Clause requires that all of those  
23 provisions and countless others be -- be  
24 disabled with respect to congressional  
25 elections. That would be an extraordinary thing

1 to do, and, before doing that, I would hope that  
2 the Court would -- would see a case much, much  
3 clearer than the one that the Petitioners have  
4 presented. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 General Prelogar.

8 ORAL ARGUMENT OF GENERAL ELIZABETH B. PRELOGAR,  
9 FOR THE UNITED STATES, AS AMICUS CURIAE,  
10 SUPPORTING THE RESPONDENTS

11 GENERAL PRELOGAR: Mr. Chief Justice,  
12 and may it please the Court:

13 Throughout our nation's history, state  
14 legislatures enacting election laws have  
15 operated within the bounds of their state  
16 constitutions enforced by state judicial review.  
17 This practice dates from the Articles of  
18 Confederation, and the Framers carried it  
19 forward by using parallel language in the  
20 Elections Clause to assign state legislatures a  
21 duty to make laws.

22 Text, long-standing practice, and  
23 precedent show that the Elections Clause did not  
24 displace this ordinary check on state  
25 law-making. Petitioners' contrary theory

1 rejects all of this history and would wreak  
2 havoc in the administration of elections across  
3 the nation. Their theory would invalidate  
4 constitutional provisions in every single state,  
5 many tracing back to the founding. That would  
6 sow chaos on the ground as state and federal  
7 elections would have to be administered under  
8 divergent rules and federal courts, including  
9 this Court, would be flooded with new claims,  
10 often at the 11th hour, in the midst of hotly  
11 contested elections.

12 The Court should adhere to the  
13 consistent practice that has governed for more  
14 than two centuries and should reject  
15 Petitioners' atextual, ahistorical, and  
16 destabilizing interpretation of the Elections  
17 Clause.

18 JUSTICE THOMAS: General, I must say  
19 it's -- I think it's -- it's seems a bit ironic  
20 that you're on the other side of a federalism  
21 issue. The -- do you agree with the highly  
22 deferential standard that we've been discussing  
23 here?

24 GENERAL PRELOGAR: We do --

25 JUSTICE THOMAS: It would seem to take



1 you out of the equation or the national  
2 government out of the equation.

3           GENERAL PRELOGAR: No, not at all.  
4 Justice Thomas, we, of course, recognize that  
5 Congress has its own check under the second half  
6 of the Elections Clause, and that remains  
7 constant no matter what the states are doing  
8 through their state election laws.

9           But as well, with respect to this idea  
10 of whether there is an outer federal  
11 constitutional standard that could apply here,  
12 we agree that that's so and the Court could  
13 recognize that kind of constitutional claim.

14           Now we also agree that that would have  
15 to be highly deferential, and I think that that  
16 stems from the recognition that to state this  
17 kind of claim under the Elections Clause you  
18 would have to be identifying a situation where a  
19 state court isn't actually engaged in the  
20 process of judicial review.

21           We understand the Elections Clause to  
22 pick up through the law-making function that  
23 ordinary check and balance. And so, if a state  
24 court is conducting judicial review and is  
25 interpreting its state constitution, that --

1 that presents no fundamental conflict with the  
2 Elections Clause itself.

3 So the standard would have to be  
4 trying to identify those circumstances when a  
5 state court isn't really functioning through the  
6 process of ordinary judicial review, and we  
7 think that that would be an extraordinary  
8 situation that it's unlikely to arise very  
9 often, but there is an outside federal  
10 constitutional check that could be applied in  
11 this context.

12 JUSTICE GORSUCH: General, just to --  
13 oh, I'm sorry.

14 JUSTICE THOMAS: No. Just one last  
15 point. It would seem that that would preclude  
16 you, your involvement, if the Florida -- I'm --  
17 I'm sorry, the North Carolina Supreme Court had  
18 a decision or rendered a decision that was not  
19 generous or less generous or actually  
20 antagonistic to an interest that you would  
21 normally defend.

22 GENERAL PRELOGAR: We agree that our  
23 theory does not depend on the particular state  
24 constitutional provision that's being enforced.  
25 Of course, there are a panoply of federal laws

1 that apply in this context as well. And so, if  
2 there was some state constitutional provision  
3 like you were positing earlier that would be  
4 fundamentally in conflict with the Voting Rights  
5 Act, then, of course, under the Supremacy  
6 Clause, that provision would have to yield.

7 JUSTICE GORSUCH: General, I should  
8 have asked this question to Mr. Verrilli, so  
9 apologies to both of you. Just what is the  
10 status of the state court proceedings right now?

11 GENERAL PRELOGAR: So my understanding  
12 is that the appeal of the remedial map --

13 JUSTICE GORSUCH: Yeah.

14 GENERAL PRELOGAR: -- is still  
15 pending. And I -- I don't know when a decision  
16 is expected. I thought I saw in the briefing  
17 somewhere that it was expected by the end of  
18 this year, but I don't believe it's arrived yet.

19 JUSTICE GORSUCH: Okay. That's  
20 helpful. Thank you. And then I just wanted you  
21 to address what I understood the other side's  
22 argument to be -- and -- and I may be misstating  
23 it, so forgive me, both of you -- that Chief  
24 Justice Rehnquist's theory that there's some  
25 outer bounds, and we can disagree over or argue

1 about whether or how -- how far in the  
2 atmosphere it should go, make sense because, to  
3 the extent, as Justice Barrett was pointing out,  
4 the question before us is whether the rule, the  
5 time, place, and manner regulation has been  
6 prescribed by the legislature.

7           And we can say, hey, ordinarily,  
8 courts will interpret and apply the rules  
9 prescribed by the legislature, and executive  
10 agents will enforce the rules prescribed by the  
11 legislature pursuant to their ordinary  
12 obligations as executive officers. I get that.

13           But it's something different, I think  
14 the argument goes from the other side, when a  
15 state court says or any -- any institution says  
16 we're not going to enforce the rules prescribed  
17 by the legislature for whatever reason, in this  
18 case it's because of the state constitution, but  
19 it could be an executive officer who  
20 contumaciously refuses to do so or whatever one  
21 imagines.

22           But, here, by definition, I think  
23 we're in agreement that the rules prescribed by  
24 the legislature are not going to be applied in  
25 this case. So I think that's the argument as I

1 understand it. I just wanted to give you a  
2 chance to address it because I haven't heard  
3 anybody address it yet.

4 GENERAL PRELOGAR: Sure, and I  
5 appreciate the opportunity to do so. So I think  
6 that the premise of the question was focused  
7 on the legislature's power under the Elections  
8 Clause to set the time, place, and manner of  
9 federal elections. And if I'm understanding the  
10 question correctly, our view is not that it  
11 would transgress the legislature's power to  
12 depart from its law when that's the ordinary  
13 practice of judicial review. It might be the  
14 case that the legislature's work has to yield to  
15 a state constitutional provision because however  
16 they prescribe the time, place, and manner of  
17 elections could violate equal protection, for  
18 example, under the state constitution as well as  
19 the federal if it violates one-person, one-vote.

20 So sometimes state courts through the  
21 ordinary process of judicial review and  
22 constitutional adjudication are, of course,  
23 setting aside what the legislature has done with  
24 respect to its manner regulations.

25 JUSTICE GORSUCH: And -- and by

1 definition invoking some higher authority under  
2 state law to not enforce the rules about time,  
3 place, and manner prescribed by the legislature,  
4 right?

5           GENERAL PRELOGAR: Correct, and our  
6 theory is that that's consistent with the  
7 Elections Clause under this Court's precedent  
8 because the Framers vested the state legislature  
9 with their law-making power, and that has always  
10 been understood to be subject to state  
11 constitutional constraints.

12           There is no category of state law that  
13 has previously existed that detaches the state  
14 legislature from the state constitution and  
15 allows it free rein to have whatever laws it  
16 wants without that state constitutional check.  
17 And we think that the text and the history and  
18 precedent forcefully reinforce this idea that  
19 the Framers would have understood that when they  
20 were giving this law-making power it carried  
21 with it those ordinary checks and balances.

22           JUSTICE KAGAN: And when Mr. Thompson  
23 says, well, it should be subject to the  
24 constraint of federal review but not of -- of  
25 state constitutional review, what do you think

1 of that distinction?

2 GENERAL PRELOGAR: I think this Court  
3 has rejected that distinction already in cases  
4 like Smiley and Hildebrant, and they rejected  
5 exactly the theory that my friend has proposed  
6 about looking at the federal function.

7 In Smiley, the Court said that's not  
8 what you look at. You look at the specific  
9 function that's been assigned. And when it's a  
10 law-making function, that carries with it the  
11 ordinary checks and balances that apply to state  
12 law, including those applied by the state  
13 constitution.

14 That was the very distinction the  
15 Court draw -- drew with Hawke versus Smith and  
16 the separate ratification function. That's a  
17 different question. And cases like Leser that  
18 he's repeatedly relied on are looking at a  
19 different function under the Constitution.

20 But, with law-making, the relevant  
21 fact is that the Framers would have understood  
22 that that comes with it judicial review and  
23 state constitutional constraints, both  
24 substantive and procedural.

25 JUSTICE JACKSON: Because the

1 law-making authority of the entity in question  
2 comes from the state constitution, right? I  
3 mean, if it's a law-making function that we're  
4 tapping into, it's the state constitution that  
5 gives that entity its law-making power and tells  
6 it when and under what circumstances and how it  
7 can act as the legislature, right?

8           GENERAL PRELOGAR: Exactly. And this  
9 is blackletter law, Justice Jackson. A law that  
10 violates the Constitution is no valid law at  
11 all. And North Carolina, like in many other  
12 places, it's void ab initio. That is the kind  
13 of constraint that goes into and -- and  
14 describes the conditions that attach to the  
15 making of law in the first place.

16           JUSTICE JACKSON: So, in effect --

17           CHIEF JUSTICE ROBERTS: Well --

18           JUSTICE JACKSON: -- it's as though  
19 the state court is saying you are not "the  
20 legislature" for the purpose of the Elections  
21 Clause.

22           GENERAL PRELOGAR: Within the meaning  
23 of the Elections Clause --

24           JUSTICE JACKSON: Yes.

25           GENERAL PRELOGAR: -- yes, because



1 that's a law-making role, we think that the --  
2 that the Framers would have understood that it's  
3 carrying with it that constraint. And that  
4 traces directly from the Articles of  
5 Confederation because they similarly prescribed  
6 this kind of function on state legislatures to  
7 provide for the manner of selecting delegates to  
8 the Continental Congress, and virtually every  
9 state constitution in the relevant period, 10  
10 out of 11, had substantive constraints that  
11 hemmed in the legislature in how they carried  
12 out that function --

13 CHIEF JUSTICE ROBERTS: Well, it's not  
14 -- it's not --

15 GENERAL PRELOGAR: -- and that was a  
16 familiar practice.

17 CHIEF JUSTICE ROBERTS: -- it's not  
18 really that easy, is it, because the reason we  
19 have a case is because the power does not simply  
20 come from the state constitution, but the power  
21 comes from the federal Constitution, which  
22 authorizes the legislature to carry it into  
23 effect. So the reason there is a case is  
24 because of the concern that the state  
25 constitutional provision or, in analogous cases,

1 the statutes conflict with the federal  
2 Constitution, which authorizes the legislature,  
3 which -- a concept that was known to the Framers  
4 to undertake this responsibility. So I think  
5 whichever way you think about in terms of how it  
6 should come out, I think you have to address the  
7 fact that there is that tension, a -- a tension  
8 that we address on a regular basis between the  
9 state power and the federal power.

10 GENERAL PRELOGAR: Of course, I  
11 acknowledge that that makes this a case, Mr.  
12 Chief Justice, but I think using all of the  
13 traditional tools here, both with respect to  
14 text, history, precedent, each of those counsels  
15 forcefully against drawing this kind of  
16 substance/procedure distinction.

17 I don't see how you get there on the  
18 text alone because, once the Court has  
19 understood and explained in numerous cases that  
20 this is a law-making function, as Justice Kagan  
21 explained when she read aloud from this Court's  
22 cases, that has been understood to mean that all  
23 of the ordinary constraints on law-making  
24 attach. And this is one of the most fundamental  
25 and ordinary constraints on law-making.

1                   And then there's the history, the  
2 Articles of Confederation.

3                   CHIEF JUSTICE ROBERTS: Well, if I can  
4 -- I don't mean to -- well, I guess I do mean to  
5 interrupt, but the way you phrased it is  
6 exactly, I guess, where the argument this  
7 morning has mostly gone. You say the ordinary  
8 restraints, and I think that's what Chief  
9 Justice Rehnquist was trying to get at. That's  
10 what you -- whatever standard you want to say,  
11 whether it's ordinary or, you know, once in a  
12 blue moon, you're saying that that is the  
13 question, is what the state is doing, which has  
14 the impact on the federal constitutional  
15 authority given to the legislature, ordinary or  
16 outrageous, however you want to -- to say it.

17                   So you do accept the proposition that  
18 there is a role for this Court in particular to  
19 assess whether or not -- how that conflict is  
20 worked out in a particular case?

21                   GENERAL PRELOGAR: I do acknowledge  
22 that, but I would emphasize in trying to think  
23 about this both from a legal standpoint and if I  
24 could from a practical standpoint that I would  
25 think the Court would want to make clear that

1 this is a very deferential standard. It is not  
2 the ordinary case where the Court is  
3 second-guessing a state court's interpretation  
4 of its own state law.

5 Usually, the Court treats the state  
6 courts as conclusive expositors of state law  
7 because they have way more institutional  
8 competence in their own methodologies, which, of  
9 course, may differ from the methodologies this  
10 Court would deploy with respect to the federal  
11 Constitution, and they have a lot more  
12 familiarity with the content of their state law.

13 So I think, to situate this kind of  
14 test within this Court's broader doctrine in  
15 this area, it would be necessary to recognize  
16 that this is not just about thinking that the  
17 state court might have gotten it wrong or -- or  
18 even very wrong but rather trying to identify  
19 the narrow circumstances where the Court can't  
20 properly be understood to be conducting judicial  
21 review in the first place.

22 It's not acting like a court, because  
23 that is the kind of thing that would then seize  
24 the legislatures' policymaking power and be  
25 understood to transgress the Elections Clause.

1           And just a quick note on the practical  
2 point. Any I think lesser rule in this context  
3 would invite constant challenges brought in  
4 federal courts seeking to relitigate these state  
5 law issues often in the midst of these elections  
6 as they're unfolding on the ground, and I think  
7 it would be important to try to put a check on  
8 that type of second bite at the apple that  
9 litigants would otherwise try to obtain.

10           JUSTICE ALITO: May I ask you a couple  
11 of questions about your interpretation of two  
12 federal statutory provisions that you cite, 28  
13 U.S.C. 2(a)(C) and 2(a). And 2(a)(C) refers to  
14 the law of each state, and then it speaks about  
15 the law thereof.

16           Does that -- when it speaks about the  
17 law of such state, is it talking just about  
18 state law, or is it also talking about  
19 provisions of federal law that are applicable in  
20 that state and for that matter in every other  
21 state in the country? For example -- okay.  
22 Yeah.

23           GENERAL PRELOGAR: Go ahead.

24           JUSTICE ALITO: No.

25           GENERAL PRELOGAR: I was going to say

1 we --

2 JUSTICE ALITO: You first.

3 GENERAL PRELOGAR: -- we understand  
4 that provision to reflect Congress's recognition  
5 that a state can be apportioned in accordance  
6 with its law and I would say also in accordance  
7 with federal law as it would need to comply with  
8 federal law in multiple different ways,  
9 including through the involvement of different  
10 actors. And so the Court has already concluded  
11 in cases like Branch versus Smith that that  
12 would include court-drawn remedial maps, for  
13 example. That's apportionment --

14 JUSTICE ALITO: Okay. So these --

15 GENERAL PRELOGAR: -- by law.

16 JUSTICE ALITO: -- I mean, these --  
17 these provisions talk about districts prescribed  
18 by the law of such state, but it -- included  
19 within that are federal constitutional  
20 constraints, the federal Equal Protection  
21 Clause, one-person, one-vote, the Voting Rights  
22 Act, right, that is the law of the state?

23 GENERAL PRELOGAR: I would say yes,  
24 those are the present laws.

25 JUSTICE ALITO: And, if that's true,

1     why isn't the Election Clause the law of the  
2     state?

3                 GENERAL PRELOGAR: We think the  
4     Election Clause is the law of the state, but  
5     there's no incompatibility with that law --

6                 JUSTICE ALITO: Okay. But then that  
7     --

8                 GENERAL PRELOGAR: -- and with the  
9     recognition --

10                JUSTICE ALITO: Yeah.

11                GENERAL PRELOGAR: -- that when state  
12     legislatures are doing law-making, just as with  
13     the --

14                JUSTICE ALITO: Right. Okay.

15                GENERAL PRELOGAR: -- the governor's  
16     veto you can have state constitutional checks.

17                JUSTICE ALITO: No, I understand -- I  
18     understand all that. I'm just talking to --  
19     trying to see whether these statutes add  
20     anything, and in light of your answer, it  
21     doesn't seem to me they add anything because  
22     we're still back to the question of the  
23     interpretation of the federal Constitution,  
24     right?

25                GENERAL PRELOGAR: I agree there's a

1 federal constitutional question here. We think  
2 that these statutes add for purposes of this  
3 case just additional confirmation from Congress  
4 that it recognized that other organs of the  
5 state government, including courts, could play a  
6 role in the process.

7 JUSTICE ALITO: I don't think that's  
8 really responsive to my question. If the law  
9 thereof includes the Equal Protection Clause in  
10 the U.S. Constitution and it includes the Voting  
11 Rights Act, then it includes also the Elections  
12 Clause, and I understood you to agree with that.  
13 So we're back to these -- these statutes are not  
14 an alternative way to decide the case. It takes  
15 us back to the Election Clause constitutional  
16 question, right?

17 GENERAL PRELOGAR: That's right, we  
18 haven't asked --

19 JUSTICE ALITO: Okay. Thanks.

20 GENERAL PRELOGAR: -- the Court to  
21 resolve this case on the basis of these  
22 statutes.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Thomas, anything further?



1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: In fairness to  
3 Petitioner, I think that what they're trying to  
4 say when they draw this procedural/substantive  
5 line or this other line of open-ended or  
6 specific constitutional provisions, that they're  
7 trying to articulate, maybe inarticulately, but  
8 articulate that we have to reach the question of  
9 how -- when does the federal constitutional  
10 provision spring up, meaning at what point has a  
11 court acted not as in judicial review but in  
12 legislating, and so how would -- and I think Mr.  
13 Verrilli gave us a line. What's your line? How  
14 would you articulate it?

15 GENERAL PRELOGAR: So I'm happy to  
16 give you a line. I'll just say that I don't  
17 actually understand them to -- to try to  
18 conflate those two arguments. I think that they  
19 are trying to make a sweeping argument here that  
20 even if the court is acting like a court and  
21 faithfully engaged in the process of judicial  
22 review, they would nevertheless invalidate any  
23 number of constitutional provisions around the  
24 states and say those are unenforceable through  
25 that limited process of review.

1                   JUSTICE SOTOMAYOR: I -- I agree with  
2 you, that's what they're trying to say.

3                   GENERAL PRELOGAR: Yes. So -- but  
4 just to try to be responsive to your question  
5 about a standard, we think that there are  
6 obviously multiple formulations that have been  
7 offered and are available to the Court, but we  
8 think the closest analogue to try to track this  
9 problem I've described of when a court is not  
10 faithfully engaged in judicial review is to  
11 borrow from the adequate and independent state  
12 grounds context and specifically the civil  
13 rights cases, where the Court has said that if  
14 the state court decision is so lacking in any  
15 basis and has no fair or substantial support and  
16 can only be understood as an effort to frustrate  
17 federal rights, then the Court can look past  
18 that decision.

19                   And, again, we think that this is a  
20 high bar. It's not testing for exactly the same  
21 thing because, in that context, novelty might be  
22 important, for example, if you're surprising a  
23 civil rights plaintiff to try to deny a federal  
24 forum. Here, we don't think that novelty would  
25 carry much weight in the analysis.

1                   But we do think that formulation of  
2                   lacking any fair or substantial support with  
3                   deference shown to the state's own methodologies  
4                   and its constitutional interpretation is trying  
5                   to get at the same idea of when the court is  
6                   actually abdicating its judicial role and  
7                   instead claiming raw policymaking power.

8                   CHIEF JUSTICE ROBERTS: Justice Kagan?

9                   JUSTICE KAGAN: On your side of the  
10                  podium, we have one vote in favor of a gap  
11                  between constitutional and statutory questions  
12                  and one vote saying it's the -- it's the same,  
13                  so you get to decide.

14                  (Laughter.)

15                  GENERAL PRELOGAR: I love casting a  
16                  deciding vote. We don't think that there is  
17                  a --

18                  JUSTICE KAGAN: Just on your side of  
19                  the podium.

20                  GENERAL PRELOGAR: Sadly, yes. I  
21                  think that it wouldn't make sense to deploy a  
22                  different standard or formulation with respect  
23                  to statutory and constitutional questions  
24                  because, again, you'd be testing for the same  
25                  thing, when is this not the court acting like a

1 court when it has gone off the rails and it's  
2 just doing policy under the guise of statutory  
3 interpretation or constitutional interpretation.

4 But I agree with Mr. Verrilli that I  
5 think, in application, this could often come out  
6 differently in the sense that usually in  
7 statutory interpretation you have a text before  
8 you and it might be more evident whether this is  
9 just a stark departure from the legislature's  
10 work.

11 In the context of constitutional  
12 adjudication and contrast, there are often broad  
13 provisions, as there are under the federal  
14 Constitution, and I think that federal courts  
15 should not be in the business of saying that the  
16 state courts aren't giving those, for example,  
17 just a fair reading looking at their text alone  
18 because there is often a lot of additional  
19 methodology that has to go into properly  
20 interpreting those provisions and distilling  
21 them into principles and concrete cases.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 JUSTICE GORSUCH: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: Just finally, to be  
4 clear, the -- in -- in answer, in response to  
5 Justice Sotomayor, the reason you see the  
6 counsel on the other side as making a sweeping  
7 argument that doesn't really require us to  
8 employ a test to determine when a court is  
9 acting as a court is because they have conceded  
10 that this is a court acting as a court, but even  
11 still they say its decision needs to be cut out  
12 because it's based on state constitutional law  
13 and not federal constitutional law. Am I  
14 understanding?

15 GENERAL PRELOGAR: That's -- that's  
16 exactly right. So they have said multiple times  
17 today that they are not asking this Court to  
18 delve into the ins and outs of the North  
19 Carolina Supreme Court's decision here, that  
20 they -- they said they take it at faith -- faith  
21 -- face value --

22 JUSTICE JACKSON: Right.

23 GENERAL PRELOGAR: -- as an accurate  
24 understanding of North Carolina law. And  
25 they're instead making far more sweeping

1 arguments that would take off the table 233  
2 years of history in this country, state  
3 constitutional provisions that have applied  
4 under the Articles of Confederation, in the  
5 early decades of the republic, and still today,  
6 and we think that that would be a distortion of  
7 the meaning of the Elections Clause, and it  
8 would have enormous and drastic practical  
9 consequences.

10 JUSTICE JACKSON: So we can rule here  
11 today without adopting any particular test, like  
12 Mr. Verrilli's or anything else?

13 GENERAL PRELOGAR: Yes, we agree that  
14 it wouldn't be necessary in this case to  
15 articulate that standard because we don't think  
16 that they're pressing that kind of claim in this  
17 case.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Rebuttal, Mr. Thompson.

21 REBUTTAL ARGUMENT OF DAVID H. THOMPSON  
22 ON BEHALF OF THE PETITIONERS

23 MR. THOMPSON: Thank you, Mr. Chief  
24 Justice. Just a few quick points.

25 Number one, on what I meant -- the --

1 the extent to which we are accepting what the  
2 North Carolina Supreme Court's ruling was here  
3 as a valid and fair expression of state law, we  
4 are doing that for purposes of the two tests  
5 that we articulated in our brief. Number one,  
6 there can't be any substantive restraint on the  
7 state legislature, and number two, it lacked a  
8 judicially discoverable and manageable standard.

9 But make no mistake, would this Court  
10 say, well, we want to adopt a third standard, we  
11 want to take the Bush versus Gore standard and  
12 we want to apply it to state constitutions, I  
13 would make two points.

14 Number one, the test for a state  
15 constitution should be easier to meet than a  
16 statute because, for purposes of the Elections  
17 Clause, it's far more problematic when a state  
18 legislature has its hands tied by a state  
19 constitution than when it's tied by a state  
20 legislature -- an impermissible distortion of a  
21 statute which they can just go back and rewrite.

22 And the second point I would make is,  
23 under that standard, and we've heard a  
24 multiplicity of standards, but under any of the  
25 standards, we think what the North Carolina

1 Supreme Court here did would run afoul of all of  
2 those standards because it was not grounded in  
3 the text, it was not grounded in the history,  
4 and it was not grounded in precedent.

5 Now I would also like to address the  
6 suggestion that there will be an increase in  
7 cases if the Court were to adopt our standard as  
8 opposed to their standard. It's very important  
9 to understand that my friends on the other side  
10 are articulating two trip wires. They have now  
11 articulated two ways in which the Elections  
12 Clause could be violated. One is their panoply  
13 of stratospheric tests for running --  
14 impermissibly distorting state law.

15 But the second way, which they've  
16 never disclaimed, it's in their briefs on page  
17 57, is they acknowledge that if the legislature,  
18 state legislature is deprived a central role, a  
19 central role, then that would be a separate way  
20 to violate the Elections Clause, and they never  
21 tell this Court how that functionalist test is  
22 going to be interpreted, how it's going to be  
23 applied, and there will be far more litigation  
24 under the -- the standards and the tests that my  
25 friends on the other side are asking this Court



1 to apply.

2 Now I'd also like to point out that  
3 they've said that there would be two sets of  
4 rules, rules for federal elections and rules for  
5 state elections, if we prevail. From the  
6 founding of the republic, states have had the  
7 opportunity to have two different sets of  
8 elections code and they've consistently declined  
9 that invitation, and there's no reason to think  
10 that they would do so in this context.

11 And, finally, there was discussion  
12 about history and the Articles of Confederation,  
13 and, respectfully, their discussion of the  
14 Articles of Confederation ignores the  
15 fundamental structural change that occurred when  
16 the Articles of Confederation were replaced with  
17 the Elections Clause, and so we think that is  
18 not relevant.

19 I yield back the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel, all counsel. The case is submitted.

22 (Whereupon, at 12:57 p.m., the case  
23 was submitted.)

24

25

## Official

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