No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,

Petitioners,

v.

REBECCA HARPER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1949, *amicus curiae* Conference of Chief Justices (the "Conference") is comprised of the Chief Justices or Chief Judges of the courts of last resort in all 50 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands. For over 70 years, the Conference has been a leading national voice on important issues concerning the administration of justice in state courts, the operation of state courts and judicial systems, and the role of state courts in our federal system.

The Conference files briefs *amicus curiae* only when critical interests of the state courts are at stake. This case involves the authority of state courts to interpret and review the constitutionality of state laws regulating the time, place, and manner of federal elections, and this Court's resolution may determine the constraints, if any, that the U.S. Constitution places on such state-court review. The Conference has a strong interest in the States' sovereign right to determine the structure of their state governments, including the authority of state courts and the role of state constitutions within that structure. The Conference recognizes that the States, including state courts, are limited by the U.S. Constitution, and the Conference has a significant interest in ensuring that those limits are properly interpreted to respect the independent sovereignty of the States; that state courts are the ultimate

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[1] No counsel for either party authored this brief in whole or in part. No person or entity, other than *amicus curiae* or its counsel, contributed to the preparation of submission of this brief. Both petitioners and respondents consented to the filing of this brief.

interpreters of the meaning of state law; and that power not expressly assigned to the federal government is "reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Conference also has a keen interest in obtaining clear guidance from this Court about whether and to what extent the Elections Clause, U.S. Const. art. I, § 4, cl. 1, affects state courts' capacity and responsibility to interpret state laws regulating federal elections and to engage in judicial review based on state constitutional provisions.

This brief has been reviewed and approved by the Amicus Committee of the Conference, chaired by the Chief Justice of Kentucky, and composed of the current or former Chief Justices of Delaware, Indiana, Missouri, North Dakota, Texas, and Utah. The Conference does not take a position on the proper disposition of this case. Instead, it supports an interpretation of the Elections Clause that reflects the proper role of state courts in our federal system.

SUMMARY OF ARGUMENT

The Elections Clause does not bar state court review of state laws governing federal elections under state constitutional provisions.

I.

The U.S. Constitution provides each State with authority over "the structure of its government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Both before and after the Framing of the U.S. Constitution, the States authorized judicial review under state charters; and, at the time of the Framing, that state practice was adopted in the U.S. Constitution, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and in numerous state constitutions. See Jeffrey S. Sutton, *51 Imperfect*

Solutions: States and the Making of American Constitutional Law 13 (Oxford Press 2018). Further, many state constitutions from the Founding era contained provisions regulating elections. This historical context strongly supports state court review of state election laws under state constitutions. And while the text of the Elections Clause requires that state legislatures prescribe the laws governing federal elections, it does not otherwise displace the States' established authority to determine the final content of their election laws, including through normal judicial review for constitutionality.

This conclusion is confirmed by the rest of the Elections Clause: the Clause specifies that Congress can override state election laws governing federal elections, yet Congress's enactments are presumed to remain subject to constitutional review. State election laws likewise remain subject to state court review under the state (and federal) constitutions.

State judicial review does not derogate from the primacy of the state legislature's role. The legislature enacts state election laws and often plays a significant role in shaping the state's constitution. And this Court's precedent has explicitly and implicitly authorized significant checks on legislative power to make election laws, including a gubernatorial veto (see *Smiley* v. *Holm*, 285 U.S. 355 (1932)), state judicial review (*Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019)), judicial remedial authority (*Growe* v. *Emison*, 507 U.S. 25 (1993)), and state plebiscites (*Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)).

Even if this Court were to interpret the Elections Clause to insulate state legislatures from *unwelcome* state court review, the Clause plainly would not prohibit the legislature from prescribing laws that include

such review. That is what the North Carolina General Assembly did here: It prescribed state court review for redistricting laws under the state constitution and established the state court's remedial authority, including interim redistricting plans. This legislative decision cannot be characterized as unconstitutional delegation. Judicial review is a check on lawmaking, but it is an exercise of judicial power, not lawmaking power; and it was expressly authorized by the legislature. This Court appears to have so recognized in *Rucho*, when it emphasized that state judicial review would provide a check on partisan gerrymandering in the States. 139 S. Ct. at 2506-07. And state judicial review under a state constitution intrudes no more on a state legislature's prerogatives than does review under the U.S. Constitution, which all agree the Clause contemplates. Moreover, the state court's authority to impose a remedial plan was also prescribed by the legislature; the court's authority was confined to interim plans and constituted an appropriate exercise of judicial, not legislative, power under this Court's precedents.

II.

Even if this Court determines that the Elections Clause authorizes federal judicial review of state court decisions about state elections law, such review should be rare, highly deferential, and under a clear standard to avoid undue intrusion on the state courts' prerogatives. The Constitution assigns the final determination of state law to state courts, see *Green* v. *Lessee of Neal*, 31 U.S. (6 Pet.) 291, 297 (1832). This Court has only rarely intruded on state courts' decisions interpreting state law. So long as the state court is using traditional tools of judicial decision making, its decision should be final unless it is not plausibly defensible under that approach and itself infringes federal constitutional interests.

Like their federal counterparts, state courts approach judicial decision making using a set of established tools. While they may not always use precisely the same interpretive frameworks as do federal courts—*e.g.*, they may use different resources in determining the legislators' or Framers' intent in drafting a law or constitutional provision—they nonetheless are engaged in judicial review, not legislative acts, when they determine the content and constitutionality of state laws. The Elections Clause does not eliminate this consequence of our federal system, and it does not authorize the federal courts to impose their approaches or outcomes on state courts' interpretation of state laws and state constitutions. Any federal review therefore must be exceedingly deferential.

The Conference is equally focused on the need for clear guidance about any constraints imposed on state courts by federal judicial review under the Elections Clause. Absent a clear standard, state courts will be unsure whether to apply otherwise applicable state laws and constitutional provisions, a consequence damaging to state sovereignty and judicial independence.

This concern is not addressed by the suggestion that state court judicial review is prohibited by the Elections Clause if it involves state constitutional provisions that are deemed too general or that impose substantive rather than procedural requirements. Such formulations do not provide state judges (or federal judges reviewing their decisions) with sufficient clarity to determine which constitutional provisions may be enforced, and the uncertainty will lead to disruptive litigation as state courts attempt to discern in expedited election-related proceedings which provisions they must disregard. Moreover, state courts have con-

strued and developed precedent under so-called general constitutional provisions for decades, just as federal courts have done. Nothing in the Elections Clause suggests that state judicial review—unlike federal judicial review—should be cabined in this manner.

The Elections Clause does not affect States' decisions to authorize judicial review of state laws, including under state constitutions. At a minimum, the Elections Clause should not be interpreted to authorize federal supervision of state court decisions about the content of state law except under a clear and highly deferential standard that respects the role of States and state courts in our federal system.

ARGUMENT

The Elections Clause of the U.S. Constitution provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. At issue here is whether, and if so, to what extent, the Elections Clause ousts state courts from their traditional role in reviewing election laws under state constitutions.

I. THE ELECTIONS CLAUSE DOES NOT PROHIBIT STATE COURTS FROM REVIEWING STATE LAWS REGULATING CONGRESSIONAL ELECTIONS

A state court may properly assess the state legislature's voting rules (including districting) for congressional elections under the state constitution for two reasons. As a general matter, the Elections Clause does not override States' sovereign choices about how to internally distribute and constrain authority to shape federal election regulations. And more specifically, the Elections Clause does not preclude States

and state legislatures from providing a role for courts as part of their prescribed time, place, and manner regulations.

A. The Elections Clause Does Not Displace State Constitutional Rules Governing State Regulations of Federal Elections

The Constitution's guarantee of state sovereignty means that each State retains the ability to choose "the structure of its government," *Gregory*, 501 U.S. at 460, including the role and authority of state courts. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* See also *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Since the Framing, States have adopted constitutions that create state legislatures and define those legislatures' powers and that set forth the supreme law of the State. As this Court has explained, all legislatures are "Creatures of the Constitution" and "owe their existence to" it; and therefore "all their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.P. 1795) (Patterson, J.).

Judicial review—review of a legislature's act for its compliance with other laws and the constitution—preceded the Founding and is embedded in the U.S. Constitution and numerous state constitutions of the Founding era. "The first use of the power occurred in the state courts and arose under the state constitutions." J. Sutton, *51 Imperfect Solutions*, *supra* at 13 (citing Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 929-

39 (2003)). "State courts in at least seven states invalidated state or local laws under their State constitutions before 1787." *Id.*

Thus, the Framers surely recognized that in a republican government, the judiciary would construe and constrain the legislature's enactments. See *The Federalist* No. 78 (Alexander Hamilton). Scholarly authority confirms "that the state judiciaries had asserted, and were properly endowed with, the power to refuse to enforce unconstitutional statutes." S.B. Prakash & J. Yoo, 70 U. Chi. L. Rev. at 933-35. See also William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States*, *1790-1860*, 120 U. Pa. L. Rev. 1166, 1169-70 (1972).

The Elections Clause requires that state legislatures enact state laws governing federal elections and authorizes Congress to override such state laws. However, the Clause does not otherwise displace the States' authority to structure their governments, including the process for determining state law. The States' power to authorize state courts to interpret all state statutes definitively and to determine whether those statutes comply with state constitutions is neither a "power[] … delegated to the United States by the Constitution, nor [a power] prohibited to the States," U.S. Const., amend. X. Thus, the States' power to structure their governments to include judicial review is also protected by the Tenth Amendment.[2]

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[2] Petitioners' claim that the Elections Clause overrides the States' freedom to subject all state statutes to judicial review because elections statutes fulfill a "federal function," *see* Pet. Brief 22-23, ignores their related claim that the Supremacy Clause, U.S. Const. art. VI, cl. 2, also vests the "duty" of applying federal law in state Judges. Pet. Brief 19. This Court has made clear that this duty applies only where the State chooses to "create a court competent to hear the case in which the federal claim is presented." *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990). Put differently,

Framing-era history confirms that the Framers did not create an exception to state constitutional supremacy, including the State's power to establish judicial review, in the Elections Clause. "Most of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*¸ 53 St. Mary's L.J. 445, 479 (2022) (providing examples). Thus, at the Framing, state constitutional restrictions on state legislatures were "well known." *Smiley*, 285 U.S. at 368. And four of the six state constitutions adopted or revised right after the Framing addressed elections; more than half of the eleven states that ratified the Constitution in 1787 and 1788 had state constitutions that regulated state legislatures with respect to elections.[3] Finally, since the Civil War, state courts have routinely reviewed the lawfulness of state election laws, including those governing federal elections, for consistency with state constitutions. Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (draft at 40-43) (forthcoming 2023), draft available at

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"federal law takes the state courts as it finds them" with respect to valid and neutral state jurisdictional rules. *Id.* The Elections Clause's "federal duty" takes state legislatures as their state constitutions design them.

[3] Hayward H. Smith, , *Revisiting the History*, 53 St. Mary's L.J. at 456, 488 (Delaware Constitution of 1792 explicitly referred to federal elections; and the several other state constitutions adopted between 1789 and 1803 "were understood by the Founding generation to apply to all elections held in the state, including federal elections"); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. Ct. Rev. 1, 22-23 & n.59, 24.

https://bit.ly/3LyWSqq. This "long settled and established practice" should have "great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

In this setting, the Framers' decision to assign to the state legislature the task of prescribing state laws governing congressional elections cannot reasonably be read to eliminate state-court judicial review, including review under state constitutions. "[U]nder the Articles of Confederation, it was understood that legislatures were normal legislatures, subject to substantive regulation by state constitutions." H. Smith, *Revisiting the History*, 53 St. Mary's L.J. at 482. Similarly, the U.S. Constitution protects the States' authority to structure their governments. The historical context reveals that state constitutions were the supreme law of the States; that judicial review by state courts, including for constitutionality, was well established at the Framing; and that rules governing state and federal elections routinely appeared in state constitutions. See M. Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (draft at 36-37) (besides Delaware's congressional-specific provision, other early constitution's "provisions applied to both state and federal elections alike; nearly every state constitution set out voter qualifications, and most included express protections for the right to vote or guarantees of free and equal elections") (footnote omitted).

The Elections Clause's structure further refutes the suggestion that the textual reference to a State's "legislature" displaces this foundational understanding of federalism and overcomes the clear import of pre- and post-Framing history. When the Framers intended to give unreviewable authority to a specific branch of government, they did so clearly. See, *e.g.*, U.S. Const. art.

I, § 3, cl. 6 (the Senate has the "sole power to try all Impeachments"). The Elections Clause does not give sole power to state legislatures to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives"; it also authorizes "Congress" to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. All agree that the Elections Clause's reference to "Congress" does not preclude judicial review of Congress's regulation of federal elections. Thus, the reference to the state "Legislature" likewise should not be read to preclude state judicial review of the laws enacted by state legislatures.

Moreover, the Constitutional Convention contains no suggestion that the Framers intended to eliminate the State's pre-Framing authority to internally allocate power to determine congressional election regimes and instead to free legislatures from all state constitutional rules. The Convention debates focused on ensuring that state legislatures were checked and constrained given significant distrust of their susceptibility to the influence of self-interest or political factions. See *Ariz. State Legislature*, 576 U.S. at 815 ("The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.").

Given these concerns and the provision for congressional override, "it is hard to imagine the Framers intended the Elections Clause to eliminate this important check on state legislatures." M. Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (draft at 32-33), especially as the Framers "had faith in the state courts as protectors of liberty. They created one Supreme Court but left it to Congress to decide whether to create 'inferior' courts, which implies that they had little doubt that

state courts would enforce federal and state constitutional rights." J. Sutton, *51 Imperfect Solutions*, *supra* at 180.

The responsive claim that the Elections Clause forecloses judicial review because it was intended to ensure that "the rules governing [federal] elections are determined by 'the will of the people,'" see Pet. Brief 20, is mistaken. Even assuming the Framers wanted to ensure that regulations of congressional elections reflect the popular will, the people of the States, both at the Framing and now, have established state constitutions that reflect their determination that their own popular will in this context is best mediated through a more complex set of intragovernmental relationships. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 880 (2021) ("popular sovereignty is a defining principle of state constitutions," which "seek to reconcile popular sovereignty with representative democracy"). These intragovernmental checks include gubernatorial vetoes (upheld in *Smiley*) and judicial review under state constitutional provisions (upheld in *Rucho*) and more recently plebiscites (upheld in *Arizona State Legislature*). If the constitutional norm purporting to justify legislative "primacy" is the people's ability to influence congressional election schemes, that norm favors letting the people decide how they want to guide or constrain state legislative decisions through judicial review based on their state constitutions, which also reflect (then and now) a form of popular will.[4]

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[4] This is especially so given that the overwhelming majority of States have made their courts directly accountable to the people through partisan or nonpartisan elections, reelections, retention elections, or recall elections, and have made their constitutional rulings more readily susceptible to overriding amendments. *See*

This Court's precedents support the view that the Elections Clause does not displace judicial review of state election laws governing congressional elections. In *Smiley*, this Court held that "there is nothing in article 1, section 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power," 285 U.S. at 372-73, emphasizing that the Elections Clause does not alter a State's constitutional rules for lawmaking. The Court relied on the veto provision's consistency with historic practice, explaining that the governor's veto was a "well known" check on legislatures at the time of the Framing and therefore "cannot be regarded as repugnant to the grant of legislative authority," *id.* at 368—even though significantly fewer States at the Framing provided for gubernatorial veto (two) than provided for state court review of federal elections regulations. See *supra* at 9.[5] Overall, the Court could "find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which

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J. Sutton, *51 Imperfect Solutions*, *supra* at 18 ("people at the state level also have other remedies at their disposal: an easier constitutional amendment process and, for richer or poorer, judicial elections").

[5] The suggestion that *Smiley* endorsed only constitutional checks on procedure but not substance, Pet. Brief 24-25, ignores the historical practice that informed the Court's conclusion. Five Framing-era state constitutions addressed the substantive issue of whether votes should be registered by ballot or voice. "This was one of the most important, and most contested, issues of election administration in the post-Founding era, with many concerned about the potential for fraud in ballot voting and for undue influence in voice voting." M. Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (draft at 36).

the Constitution of the state has provided that laws shall be enacted." 285 U.S. at 367-68.

The Court expanded upon that point in *Arizona State Legislature*, 576 U.S. at 817-18, saying: "Nothing in th[e] [Elections] Clause instructs … that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[6]

Most recently, in *Rucho*, 139 S. Ct. 2484, this Court acknowledged that a State may authorize its courts to review state laws governing federal elections to determine compliance with state constitutional provisions even though federal courts may not invoke the U.S. Constitution to cabin political gerrymandering. The Court explained that it did "not condone excessive partisan gerrymandering," and that such complaints would not go unheard: "The States, for example, are actively addressing the issue on a number of fronts," including in "[p]rovisions in … state constitutions [which] can provide standards and guidance for state courts to apply" in redistricting cases. *Id.* at 2506-07. To illustrate, the Court noted that "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the" state constitution, and that "in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts." *Id.* at 2507.

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[6] The Chief Justice's dissent, while maintaining that a state legislature may not be entirely excluded from a State's lawmaking process, did not suggest that such lawmaking must be protected from state court review under substantive state constitutional provisions. *See Ariz. State Legislature*, 576 U.S. at 825-26 (Roberts, C.J., dissenting).

The Court has also endorsed the "legitimacy of state *judicial* redistricting," *Growe*, 507 U.S. at 34, in the context of congressional as well as state representative elections, an endorsement wholly inconsistent with the view that the Elections Clause allows only the state legislature to determine congressional districting schemes. The Court unanimously held that, while the Clause "leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts," a State may fulfill its responsibility "through its legislature *or other body*," including through a state court. *Id.* (emphasis added).

Neither the textual reference to the "Legislature," nor contemporary historical understandings and practices, nor the Framers' intentions, nor structural norms, nor this Court's precedent supports the view that the Elections Clause displaces the States' power to authorize their state courts to review their legislature's regulations of congressional elections for conformity with their state constitutions, and to issue appropriate remedies. Most state constitutions give state courts this role, and the Framers enshrined in the U.S. Constitution the States' right to decide for themselves how to check-and-balance the exercise of state power. State court review of state laws governing congressional elections under state constitutions does not violate the Elections Clause.

B. The Elections Clause Does Not Deprive State Legislatures of Their Authority to Provide for State Court Judicial Review of Congressional Election Regimes as Part of Their Prescribed Time, Place, and Manner Regulations

State courts are generally authorized to entertain suits raising constitutional challenges to their state statutes, including those governing federal elections.

Sometimes legislatures authorize such review through grants of general jurisdiction (sometimes confirmed with special venue or other procedural provisions). Sometimes there are jurisdictional grants that specifically authorize judicial review of federal districting schemes and/or other elections rules. North Carolina falls into the latter category.[7] Even if the Elections Clause could be interpreted to protect state legislatures from *unwanted* state judicial review under state constitutions, the Clause surely does not *forbid* state legislatures from *choosing* to "prescribe" state court review under state constitutional provisions.

The contention that by doing so the state legislature unconstitutionally delegated its lawmaking authority to the state courts cannot withstand scrutiny. State court adjudication, while a form of check on the legality of lawmaking, is not itself lawmaking. It is the exercise of judicial power. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137; see *State* v. *Berger*, 781 S.E.2d 248, 250 (N.C. 2016) (the "judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution"). When a state legislature authorizes state courts to act, it authorizes courts to exercise *judicial* rather than legislative power. Such a grant of jurisdiction to engage in traditional judicial review is not a delegation of legislative power.[8] And of course *Rucho* affirmatively embraced state-court, state-constitutional review of state

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[7] *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4(a1).

[8] State courts granted authority to engage in judicial review are not receiving "quintessentially legislative power." Pet. Brief 45. State legislatures and Congress are exercising legislative power when they make state election laws that govern federal elections or that override such laws, respectively. Yet neither state courts

regulations of federal elections. See *Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Fla.* v. *Detzner*, 172 So. 3d 363 (2015)).

Courts do not cease to act judicially when they interpret and apply general constitutional provisions such as " 'free' or 'fair' elections" or "equal protection." Contra Pet. Brief 46. Federal courts have long crafted extensive and complex legal doctrines from similarly general language without violating non-delegation principles or acting as legislators.[9]

The related contention that the General Assembly impermissibly delegated its prescribing authority by granting state courts power to craft redistricting plans is also wrong. State courts implement their own redistricting plans only in a remedial capacity; this is part of the judicial power. See John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 81-82 (2014) ("Judicial review is based on the assumption that the courts have the power to decide cases and to give parties remedies that prevent or alleviate legally cognizable harms."). And this Court has already approved state courts' crafting of remedial redistricting plans for both congressional and state legislative districts. See *Growe*, 507 U.S. at 34 (in parallel proceedings, federal courts should defer to state courts' remedial redistricting plans); *Abrams* v. *Johnson*, 521 U.S. 74, 79 (1997) (rejecting argument

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reviewing state election laws nor federal courts reviewing congressional enactments that override such laws are legislating. Both are exercising judicial power.

[9] Significantly, this Court has frequently applied general federal constitutional provisions while reviewing election regulations. *See*, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 793-94 (1983) (candidate filing deadline violates free association rights); *Reynolds* v. *Sims*, 377 U.S. 533, 565-66 (1964) (undue population discrepancies among electoral districts violate equal protection).

that district court's redistricting plan "exceeded the remedial power authorized by our decisions . . . by failing to follow policies of the state legislature").[10]

II. ANY FEDERAL COURT REVIEW OF STATE COURT DECISIONS INTERPRETING STATE LAWS GOVERNING FEDERAL ELECTIONS MUST BE TIGHTLY CIRCUMSCRIBED AND APPLY CLEAR LIMITS

A. Because the Constitution Assigns Final Decisions about State Law to State Courts, Any Federal Judicial Review Under the Elections Clause Must Be Highly Deferential

The preceding analysis shows that subjecting state laws regulating federal elections to state judicial review under state constitutions does not usurp a state legislature's authority to prescribe rules governing federal elections. No federal interest fairly reflected in the Elections Clause's text, history, or structure warrants deviation from the well-settled presumption, grounded in the U.S. Constitution, that state courts'

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[10] Even if incorrectly characterized as a delegation of legislative power, the General Assembly's grant of limited judicial redistricting authority would easily pass muster under the federal nondelegation doctrine (assuming it applies to the separation of powers regime adopted by a particular state constitution), which requires only that a federal statute provide an intelligible principle to guide decision making. *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2010). That standard applies when Congress exercises its Elections Clause power to "make or alter" a State's prescribed rules for congressional elections, and the Clause provides no basis to use a different standard when state legislatures prescribe these rules in the first instance. Here, the General Assembly provided courts with a constrained and time-limited grant of districting authority. *See* N.C. Gen. Stat. § 120-2.4(a), (a1).

decisions about the meaning of state law are authoritative. See *Green*, 31 U.S. (6 Pet.) at 298 (state court interpretations of state law "should be considered as final by this court"); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 611 (1874) ("This court has habitually accepted 'as a rule of decision' the adjudications of the State courts on such questions [of state laws or constitutions] in all cases arising within the respective States"); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938).

If this Court nonetheless concludes that the Elections Clause *does* permit federal courts to impose some limit on state courts' interpretations and applications of state constitutional law to state laws establishing the time, place or manner of congressional elections, the standard of review must be exceedingly deferential. State sovereignty includes the power of each State to structure its own government and determine the relationships between the legislative and judicial branches. Where a State has established judicial review of its laws under the state constitution, federal judicial review of state decisions about state law must defer to state courts to avoid inappropriate intrusions on state sovereignty.

If a state court has used the interpretive and decision making tools traditionally used by judicial officers to reach judgments under state election laws, it cannot be said that the court has trenched on the state legislature's prerogatives under the Elections Clause. And where a state court has used such traditional tools, a federal court should let state court decisions reviewing state election laws stand unless there exists no plausibly defensible basis for the court's determination and the decision infringes a clear federal interest.

This proposed standard is consistent with those employed in the other highly unusual contexts in which

federal courts review state court interpretations of state law out of concern for the obstruction of a federally protected interest, such as when necessary to determine the "adequacy" of an independent state law ground invoked by state courts to defeat a claim of federal right. See, *e.g.*, *Ind. ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938) (when addressing Contract Clause claims and reviewing state court decisions as to whether a contract was made under state law, "we accord respectful consideration and great weight to the views of the state's highest court"); *Walker* v. *Martin*, 562 U.S. 307, 320 (2011) (state procedural rules ostensibly barring federal court review of federal claims "may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law" or when state rules have been "applied infrequently, unexpectedly, or freakishly") (cleaned up). Here, the federal interest under the Elections Clause involves protection of *state laws* enacted by a state legislature governing federal elections, and thus should respect a State's decision to structure its laws to include judicial review.[11]

B. State Courts Using Traditional Judicial Approaches When Interpreting State Laws and Conducting Judicial Review Under State Constitutions Are Engaged in Judicial, Not Legislative, Acts

Like their federal counterparts, state courts use the traditional tools of judging to determine the meaning

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[11] The proposed standard is more deferential than that proposed in the concurrence in *Bush* v. *Gore*, 531 U.S. 98 (2000) (per curiam), that is, whether the state court interpreted state law in a manner "beyond what a fair reading" allows, *id.* at 115 (Rehnquist, C.J., concurring).

of ambiguous text or to fill in the gaps left by a statutory scheme or to resolve the meaning of a general constitutional provision. And again, like their federal counterparts, when they do so, state courts are engaged in judging, not legislating or policymaking.

Each state court, of course, operates under the unique state constitutional and statutory regime established by the people and governments of its State. State constitutions may reflect different "conceptions of separation of powers." See Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 Loyola U. Chi. L.J. 89, 109 (2002). And while virtually all judges begin the interpretive process with the text of a statute or constitutional provision, state courts differ with respect to their willingness to discover the intent of their legislatures or the framers of their constitutions in other sources, such as legislative history or statements of purpose.[12] Some state legislatures instruct their courts to use particular interpretative approaches.[13] Some states have par-

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[12] Richard H. Pildes, *Judging 'New Law' in Election Disputes*, 29 Fla. St. U. L. Rev. 691, 720-21 (2002) (purposive and textual interpretation reflect different views of the relationship between courts and legislatures"). *See also State* v. *Webb*, 398 So. 2d 820, 824 (Fla. 1981) ("It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute."); *M.J. Farms, Ltd.* v. *Exxon Mobil Corp.*, 998 So. 2d 16, 27 (La. 2008), *amended on reh'g* (Sept. 19, 2008) ("We have often noted the paramount consideration in statutory interpretation is ascertainment of the legislative intent.").

[13] For example, the Pennsylvania Statutory Construction Act directs courts that the "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly" and lists specific factors courts should use to

ticular histories and traditions that support some approaches to statutory interpretation or constitutional adjudication over others.[14] And state legislatures are generally presumed to be aware of their courts' particular interpretive approaches.[15] As a result, state courts often do not interpret language that appears in both state and federal constitutions in "lockstep" with federal courts. See Jeffrey S. Sutton et al., *51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation*, 103 Judicature 33, 45 (2019) (comment by Judge Sutton) (it "makes no sense" for state and federal courts to provide identical interpretations where "[t]he state court's method of interpretation" differs from that of federal courts). The same is true of statutory interpretation: "When potential conflicts between federal and state courts come down to little more than how best to read

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ascertain intent if "the words of the statute are not explicit." 1 Pa. Cons. Stat. § 1921(a). *See also* Tex. Gov't Code Ann. § 311.023, Statute Construction Aids ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.").

[14] *See generally* Linda Ross Meyer, Connecticut's *Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev. (forthcoming, 2022) (arguing that for particular historical reasons courts should prioritize common-law reasoning over originalism when interpreting Connecticut Constitution).

[15] *See*, *e.g.*, *State* v. *Sutherland*, 106, 804 P.2d 970, 977 (Kan. 1991) ("The legislature is aware of this court's established rules of statutory construction."); *People* v. *Hall*, 215 N.W.2d 166, 174 (Mich. 1974) ("This Court will presume that the legislature of this State is familiar with the principles of statutory construction.")

statutory texts—particularly those replete with seeming gaps and ambiguities—the difference in interpretation will frequently amount to a philosophical difference over how courts should generally go about interpreting statutes." R. Pildes, *Judging 'New Law' in Election Disputes*, 29 Fla. S. L. Rev. at 720. But state courts engaged in this activity are judging, just as federal courts are.

State courts employing traditional modes of judicial reasoning in unique state constitutional, statutory, and historical contexts are engaged in judging even if their chosen approaches and ultimate decisions are not precisely the same as those that would be reached by a federal court. And when they do so, state courts, like federal courts, are not legislating or promoting their own policy interests or preferences; they are exercising judicial power and seeking to enforce the policies in the laws of their states. Federal judicial review of state court decisions about state election laws should respect the state judiciary's framework and approach and defer to the outcomes of those processes except in extraordinary circumstances.

C. Any Federal Judicial Review of State Decisions About State Election Law Should Involve a Clear and Workable Standard To Prevent Unnecessary Intrusions on State Sovereignty

Any federal limit on the authority of state courts to resolve the meaning of state election laws must provide a clear and workable standard. Standards that would authorize state courts to apply specific constitutional provisions but not general provisions, or allow review under procedural constitutional requirements but not substantive constitutional requirements, fail to accord appropriate respect to the States' decisions about their individual judicial institutions or to state

courts' decisions. Such standards also fail to provide sufficient guidance to state courts reviewing state election laws or to federal courts reviewing those state court decisions. They invite litigation seeking federal court supervision over every state court decision reviewing the interpretation or application of a state election law.

For example, in this case, it has been argued that the Elections Clause prevents state courts from applying "open-ended" guarantees such as "free" or "fair" elections or "permissible partisanship," but might allow state courts to enforce "specific" standards such as "compactness." See Pet. Brief 46-47. That labeling is not workable even in this case.[16] More generally, what other constitutional guarantees should a state court assume are placed out-of-bounds? Federal courts have long crafted elaborate legal doctrines from equally open-ended language, such as "freedom of speech" and "impartial jury." Is a provision open-ended under this rule if it has been the subject of substantial constraining precedent by a state court? And courts of different

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[16] Here, the distinction is not self-evident: "compactness" for districting purposes is often defined as "not oddly shaped," which is no more judgment-free than "fair." *See* Roland G. Fryer Jr. & Richard Holden, *Measuring the Compactness of Political Redistricting Plans*, 54 J. Law & Econ 493, 494 (2011) ("This last consideration—distinct from the mathematical notion of a finite subcover of a topological space—refers to how oddly shaped a political district is. The Supreme Court has acknowledged the importance of compactness in assessing districting plans for nearly half a century. Yet, despite its importance as a factor in adjudicating gerrymandering claims, the court has made it clear that no manageable standards have emerged (see the judgment of Justice Antonin Scalia in *Vieth* v. *Jubelirer*, 541 U.S. 267 [2004]). There is no consensus on how to adequately measure compactness.") (footnote omitted).

sovereigns might reasonably reach different conclusions about which clauses are open-ended, each based on legitimate forms of legal reasoning.[17]

Likewise, how are courts to distinguish statutory and constitutional requirements that are procedural from those that are substantive? *Smiley* teaches that state constitutional provisions authorizing the governor to veto bills that regulate the time, place or manner of federal elections are permissible under the Electors Clause. See *supra* at 13-14. Is that a procedural limit on the state legislature's authority and, if so, why? What about state constitutional provisions requiring that bills address only a single subject or requiring that bills have a clear title, both of which influence legislative procedure but are designed to promote the substantive values of accountability and democracy?[18] Indeed, decades of litigation addressing what state rules are enforceable in federal courts sitting in diversity jurisdiction teaches that this distinction is elusive. See *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 414 (2010) (plurality) (saying that "undoubtedly some hard cases will

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[17] "Open-ended" constitutional provisions do not necessarily lend themselves to liberal rather than conservative rights. "Fair" election provisions can support judicial rulings that prevent fraud, as well those that protect voter access. *See* J. Sutton, *51 Imperfect Solutions*, *supra* at 176 ("[t]here's nothing about the state constitutions that necessarily points toward liberal or conservative rights").

[18] *See* Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 Harv. J. on Legis. 103, 104 (2001) (single subject and clear title provisions are "intended to promote open, orderly, and deliberative legislative processes, and can be found in almost all state constitutions") (footnote omitted).

arise" in attempting to determine whether a rule "regulates substance or procedure"); *id.* at 419 (Stevens, J., concurring) ("The line between procedural and substantive law is hazy") (quoting *Erie*, 304 U.S. at 92 (Reed, J., concurring in result)); *id.* ("in some situations, 'procedure and substance are so interwoven that rational separation becomes well-nigh impossible'") (internal quotation omitted)).

The Conference submits that it is not feasible to develop a clear standard to identify the constitutional provisions that are too open-ended or too substantive to apply to state regulation of federal elections. How will a state court know if its interpretation of a statute or constitutional provision has invaded the legislature's authority to determine the time, place and manner of federal elections? Is the only criterion the plain meaning of the provision's text? May the court consider the historical events that led to the enactment of the statute or constitutional provision, or legislative developments that occurred after the statute or constitutional provision was enacted? If so, which sources may be consulted and how much weight should be accorded to each? May the court consider the way other state courts have interpreted similar provisions in their constitutions?[19] May it consider its own precedent interpreting the provision or other provisions in the statute or constitution that use similar language or raise analogous issues? May the court consider reasons why a particular interpretation is appropriate in

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[19] For example, *see Chavez* v. *Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009) ("Other states with similar constitutional provisions have generally interpreted a 'free and equal' election as one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot.")

light of other contextual and federalism-serving factors or conditions that might distinguish how laws function in that state from sister states and from the federal system? Unclear guidance (either through case-by-case judgments or hard-to-describe general guidelines) will leave state courts confused as to when and how they must eschew state law to hew to Elections Clause boundaries.

Likewise, without clear guidance, federal courts will face the same difficulties in reviewing claims that a state court usurped the legislature's power in violation of the Elections Clause. As a result, federal courts could face accusations of policy-driven decision making akin to the allegations that have been levied at some state courts.

Finally, any standard that does not provide a clear bright line will result in a flood of new claims about the enforcement of state laws governing federal elections. Litigants will challenge applications of state law by state election officials and state trial courts. Some litigants will undoubtedly seek initial review of state officials' decisions in federal district court. See, *e.g.*, *Carson* v. *Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam) (suit to enjoin election official's implementation of consent decree governing counting of absentee ballots). Parties who are sued in state court and lose constitutional challenges to state statutes or executive regulations, or who lose statutory challenges to executive regulations, will frequently seek this Court's review of their plausible Elections Clause claims. Only a highly deferential standard that establishes a clear standard can prevent repetitive, burdensome, high stakes and expedited litigation involving the most delicate matter—who will be our elected leaders.

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The Elections Clause does not derogate from state courts' authority to decide what state election law is, including whether it comports with state and U.S. Constitutions. But if this Court authorizes federal judicial review of state court decisions about the content of state election law based on use of the word "Legislature" in the Elections Clause, that review should be rare and extraordinarily deferential in light of its intrusion on a realm the U.S. Constitution assigns to state courts. And the standard for federal review should reflect a bright and administrable line; otherwise, federal courts, including this Court, will be flooded with requests to second-guess state court decisions interpreting and applying state elections laws during every election cycle, infringing on state sovereignty and repeatedly involving the federal judiciary in election disputes. Under these circumstances, any federal court supervision of state law interpretation should consider only whether the state court has reached a result that is not plausibly defensible as judicial decision making and that infringes a federal constitutional interest.

CONCLUSION

The Conference respectfully submits that this Court should clarify that the Elections Clause does not oust state courts from their traditional role in reviewing election laws under state constitutions. And if the Election Clause imposes any independent constraint on state-court review of state election laws governing federal elections—one that overrides the foundational rule that state courts authoritatively determine the meaning of state law—that review should apply a clear standard and be highly deferential to state court decisions.

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