No. 21-1271

In The Supreme Court of the United States

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

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF AMICI CURIAE THE REPUBLICAN NATIONAL COMMITTEE, THE NRCC & THE NORTH CAROLINA REPUBLICAN PARTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are all political committees that assist their Republican members achieve electoral success.

The Republican National Committee ("RNC") manages the Republican Party's business at the national level; supports Republican candidates and state parties; coordinates fundraising and election strategy; and develops and promotes the national Republican platform.

The NRCC (formerly the National Republican Congressional Committee) supports the election of Republicans to the United States House of Representatives by providing direct financial contributions; offering technical and political guidance; and making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities.

The North Carolina Republican Party is the statewide political organization of the Republican Party. It represents the interests of Republican voters and candidates at all levels throughout the

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[1] Pursuant to Rule 37.3(a), both Petitioners and Respondents have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than Amici and the counsel below contributed the costs associated with the preparation and submission of this brief.

State. It carries out the day-to-day functions of the political party, including recruiting candidates for office, supporting those candidates, and assisting party officials elected under its banner.

Collectively, Amici have a profound interest in the laws that affect redistricting. Congressional districts and legislative redistricting affect Amici's members, as well as their members' constituents, campaigns, elections, and successors in office. For this reason, the North Carolina Supreme Court's ruling has widespread implications for Amici.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Shorn of the political histrionics that have surrounded this case from the outset, the constitutional issue presented is both straightforward and uncontroversial. Article I, Section 4 of the United States Constitution delegates to State legislatures the prerogative to set "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" to the United States Congress. The North Carolina Supreme Court usurped this *federal* grant of authority based on an interminable provision in the *State*'s constitution. The State Supreme Court's brazen annexation is the precise encroachment that this Court can, and should, correct.

Although the legal issues that Petitioners raise are rather straightforward, you would not know it from the overblown lamentations spewing from some corners of the legal and political communities. By redundantly bellowing the "independent state legislature" mantra, many self-anointed constitutional law experts have convinced a healthy cross-section of armchair Court watchers that, should the Court decide this case the wrong way, it would signal the end of democracy.

Nonsense. Any modicum of honest scrutiny reveals that framing this case in that way transforms the question presented from one about the proper responsibilities for the organs of state government to a cynical, pejorative smear.

To be certain, resolving this case for Petitioners will not give state legislatures *carte blanche* to retroactively enact state voting laws in ways that contravene the results of an election. While the Constitution gives state legislatures primary authority to prescribe the manner of conducting federal elections—including the right to draw congressional district boundaries—this authority is *not* plenary. State legislatures must, above all else, show fealty to every clause of the United States Constitution. Federal statutes, like the Voting Rights Act, further constrain state legislatures from engaging in the fanciful mischief many imaginative members of the legal community have contrived. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 811 n.20 (2015) ("[A] state is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map."). Indeed, even State courts maintain a role.

But while courts should universally stay out of the lawmaking business because of their judicial (not legislative) role, by granting power expressly to state *legislatures*, Article I, Section 4, provides an additional, federal constitutional reason to ensure that state courts say no more than "what the law is," rather than decreeing what they want the law to be. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

ARGUMENT

Resolving this case for Petitioners will promote confidence in the electoral process and ensure that duly enacted state laws governing federal elections receive the deference for which they are owed.

Otherwise, to permit state courts "to negate the duly-enacted election laws of a state" would be "toxic to the concepts of the rule of law and fair election[s]." *Carson v. Simon*, 978 F. 3d 1051, 1054, 1061 (8th Cir. 2020) (per curiam).

I. THE ELECTIONS CLAUSE PROTECTS A STATE LEGISLATURE'S FEDERAL ELECTION REGULATIONS FROM BEING COUNTERMANDED BY STATE COURTS; IT DOES NOT GIVE STATE LEGISLATURES UNBOUNDED POWER.

Given the overblown reaction this case has engendered, it bears reiterating that the narrow issue presented turns on a state court's unabashed seizure of quintessentially legislative power. Stated more bluntly, Petitioners want this Court to rebuke the unconstitutional excesses of North Carolina's judicial branch. It does not follow that confining the North Carolina Supreme Court to its judicial role means that the North Carolina General Assembly may exercise its legislative role unrestrained.

The extremities of this case are palpable and worth revisiting. In its entirety, the Elections Clause of Article I, Section 4 states that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.[2]

Under the Elections Clause, State Legislatures (and the federal Congress) get to decide how federal elections will proceed. State courts have no role in *creating* those parameters. If a state court supplants the state legislature's role, as the North Carolina Supreme Court did here, it violates the federal constitution. These principles are not complicated, and they should not be seen as controversial.

The North Carolina Supreme Court transgressed the Elections Clause in precisely this fashion. It twice struck the Congressional districts drawn by the North Carolina legislature, and then allowed the North Carolina Superior Court to hire its own cartographers to draw the State's Congressional districts as it saw fit. And it did so under the auspices of a hopelessly vague and open-ended state constitutional provision that provides simply that

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[2] Although not the subject of the present case, the Presidential Electors Clause of the Constitution similarly directs each State to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2.

"[a]ll elections shall be free." *Harper v. Hall*, 868 S.E.2d 499, 510 (N.C. 2022) (quoting N.C. Const. art. I, § 10), *cert. granted sub. nom. Moore v. Harper*, No. 21-1271 (June 30, 2022).

That wasn't the job of a court. *That's* the problem presented by this case. If accepted, the North Carolina Supreme Court's sweeping power grab would enshrine near universal power in the states' judicial branches to rewrite the states' "time, place and manner" statutes when they regulate federal elections. This power cannot be squared either with the plain text of Article I, Section 4 or with rudimentary separation-of-powers principles. "[T]he breadth of the [North Carolina] Supreme Court's decision" should not be lost on this Court. *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 739 (2021) (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari).

Naturally, the court below insisted it was not "usurping the political power and prerogatives" of its state legislature. *Harper*, 868 S.E.2d at 510. What it was doing, then, remains inscrutable. In reality, the North Carolina Supreme Court's halfhearted hand-waving is dwarfed by the unmistakable rhetoric of policy-making that betrays the judicial legislating it undertook. In the context of Congressional district boundaries, concerns about "the fundamental principle of political equality" are concerns unique to the legislatures tasked with drawing those Congressional districts, and not the courts that sit in judgment of the legislature's work. *Id.* at 539-40, 546. The Court has recognized this precise dividing line. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499-501, 2507 (2019) ("[J]udges have no license to

reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

Indeed, in the opening paragraphs of the opinion under review, the North Carolina Supreme Court tells on itself. Frustrated with perceived failures by the people's representatives, the court below throws up its hands and declares that "the only way that partisan gerrymandering can be addressed is through the courts." *Harper*, 868 S.E.2d at 509. The judiciary must act, according to the North Carolina Supreme Court, because the State's legislators "are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority." *Id.*[3] And in the State Supreme Court's view, in North Carolina, which has no "citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hand of the people." *Id.*[4]

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[3] Of course, there is a grand logical leap in this pronouncement when considering that the question this Court has been asked to resolve in this case involves Congressional districts only, and not the state legislative districts in which the legislators who drew them hold office. There is no state in the Country where incumbent members of Congress draw their own districts under state law.

[4] *Cf. Ariz. State Legis.*, 576 U.S. at 824 (the Elections Clause does not "diminish a State's authority to determine its own *lawmaking process*," it "doubly empowers the people," who "may control the State's lawmaking process in the first

By embracing this argument, the court below engaged in an analysis that this Court has repeatedly spurned—*i.e.*, that the judiciary "*can* address the problem of partisan gerrymandering because it *must*." *Rucho*, 139 S. Ct. at 2507 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (emphases in original)). Such reasoning "is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures," that this Court cannot allow it to stand. *Ariz. State Legislature*, 576 U.S. at 859 (Scalia, J., dissenting). The Court was correct to reject this reactionary reasoning in *Rucho* and *Gill*, and it should do so again here.

II. STATE LEGISLATURES ACTING UNDER ARTICLE I, SECTION 4 MUST ANSWER TO CONGRESS AND FEDERAL COURTS.

Clarifying what this case is about crystallizes what it is *not* about. And what it is not about is augmenting the power of state legislatures. Nothing here casts doubt upon the notion that "[t]he federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the [U.S.] Constitution

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instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures" (emphasis added)).

itself." *United States Term Limits v. Thornton*, 514 U.S. 779, 842 (1995) (Stevens, J., concurring). In fact, this Court has long recognized various constraints on state legislative prerogatives to enact "time, place and manner" laws governing federal elections. See *id*. at 834; *Ariz. State Legis*, 576 U.S. at 811 n.20.

To be sure, the Elections Clause provides state legislatures with "'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). This authority, however, is not without limit. "[T]he Framers understood the Elections Clause as a grant of authority to issue *procedural* regulations." *Id.* (emphasis added) (quoting *United States Term Limits*, 514 U.S. at 833-34). But it has never been understood as "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.*; see also *id*. at 527 (Kennedy, J., concurring) (quoting the same). Properly understood, the Elections Clause includes sufficient restraints to prevent a rogue state legislature from ever causing the hypothetical and fanciful mayhem posited by the critics of Petitioners' case.

A. Congress has express constitutional authority to supersede state legislative determinations about the time, place, and manner of Federal elections.

1. The text of the Elections Clause itself provides the first guardrails for state legislatures. If Congress disapproves of the federal election laws created by a

state legislature, it may "at any time by Law make or alter" them. U.S. Const. art. I, § 4, cl. 1. While it imposes a "duty" on state legislatures to "prescribe the time, place, and manner of electing Representative and Senators," it cabins that duty by conferring on Congress "the power to alter those regulations or supplant them altogether." *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8 (2013) (citing *United States Term Limits*, 514 U.S. at 804-05; *id.* at 862 (Thomas, J., dissenting)).

This textual constraint responds to the Framers' concern—echoed in modern times—about the potential for abuse that unfettered discretion, left to state legislatures, could produce. Indeed, one of "the Framers' overriding concerns was the potential for" abuse by state legislatures under the Elections Clause. *United States Term Limits*, 514 U.S. at 808-09. As Hamilton explained in Federalist No. 59:

> Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.

The Federalist No. 59.

James Madison defended the need to give a "supervisory authority to the National government," explaining that "State Legislatures will sometimes fail or refuse to consult the common interest." *Rucho*, 139 S. Ct. at 2495. Madison later described the prevalent concern as the "impossib[ility] to foresee all the abuses that might be made of the

discretionary power." *United States Term Limits*, 514 U.S. at 809 (quoting 2 Farrand 240).

To ameliorate these concerns, the Framers vested Congress with authority to oversee (and where necessary, overrule) state legislatures in setting the rules for federal elections. *Id.* This "congressional safeguard" was so important that when some at the Convention attempted to remove it, "the motion was soundly defeated." *Id.* During debates over the Constitution's ratification, the Federalists defended the provision against attacks from the Anti-Federalists. "[A]mong other justifications," the Federalists contended that "the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment." *Rucho*, 139 S. Ct. at 2495.

In other words, the Framers were acutely aware of the need to provide supervision to state legislatures exercising their Elections Clause prerogative. Relevant to this case, they were concerned with "electoral districting problems and considered what to do about them." *Id.* Their solution was to "expressly check[] and balance[]" state legislative power by empowering "the Federal Congress." *Id.*

Rather than chart new terrain, this solution was "a characteristic approach" that showcased the Framers' primary reliance on the people's representatives to exercise "a discretionary power over elections." *Id.*; see also *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (describing the Presidential Electors Clause as granting to state legislatures the power to direct the appointment of electors and

"recogniz[ing] that the people act through their representatives in the legislature"). This approach did not involve, and does not require, the unbridled authority claimed by the North Carolina Supreme Court below.

2. Because Congress is "the Framers' insurance against" rogue state legislatures, Congress has frequently used this "grant of congressional power." *Inter Tribal Council of Ariz.*, 570 U.S. at 8. Congressional authority has been enhanced even more by this Court's broad construction of the Elections Clause. According to the Court, the Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Inter Tribal Council of Ariz.*, 570 U.S. at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). When Congress overrides state legislatures in this arena, its power "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Inter Tribal Council of Ariz.*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)); see also *Foster*, 522 U.S. at 69.

Lest there be any residual concern, Congress's power in this space provides authority to supplant state legislatures in enacting uniform procedural rules for congressional elections. If it desires, Congress even has the authority to draw the congressional district lines of a state itself. See *Ariz. State Legislature*, 576 U.S. at 812 ("There can be no dispute that Congress itself may draw a State's

congressional-district boundaries."). Short of taking on this responsibility wholesale, Congress may, and has, prescribed limitations on a state legislature's line drawing authority. See 2 U.S.C. § 2a(c) (providing for a backup if a state does not draw new district lines); 2 U.S.C. § 2c (providing for single-member districts for the U.S. House).

Congress has, moreover, shown itself particularly capable of remedying "more than one evil" that may arise from state legislative action vis-a-vis federal elections. See *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884). Indeed, it "has regularly exercised its Elections Clause power, including to address partisan gerrymandering." *Rucho*, 139 S. Ct. at 2495.[5] And it has not been shy about regulating

[5] See *Rucho*, 139 S. Ct. at 2495 ("The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be 'composed of contiguous territory,' Act of June 25, 1842, ch. 47, 5 Stat. 491, in 'an attempt to forbid the practice of the gerrymander,' . . . . Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U. S. C. §2c.) . . . . Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U.S.C. §§ 10101 *et seq.*" (some citations omitted)).

other areas of federal elections otherwise left to state legislatures.[6]

3. While Congress may override state legislatures in other areas under its Supremacy Clause powers, its regulations under the Elections Clause are unique. Routine Supremacy Clause cases generally labor under an "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In contrast, this Court has "never mentioned" a similar constraint "in [its] Elections Clause cases." *Inter Tribal Council of Ariz.*, 570 U.S. at 13 (quotation omitted). Indeed, "[t]here is good reason for treating Elections Clause legislation differently" than general federal laws that conflict with state legislation. *Id.* at 13-14.

Special considerations weigh against an "assumption that Congress is reluctant to pre-empt . . . when Congress acts under that constitutional provision, which empowers Congress to 'make or alter' state election regulations." *Id.* at 14 (quoting U.S. Const. art. I, § 4, cl. 1). Because the Elections Clause authorizes Congress to legislate

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[6] See, *e.g.*, The Voting Rights Act of 1965, 52 U.S.C. §§ 10301, *et seq.*, as amended; The Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. §§ 20101, *et seq.*, as amended; The Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301, *et seq.*, as amended; The National Voter Registration Act of 1993, 52 U.S.C. §§ 20501, *et seq.*, as amended; The Help America Vote Act of 2002, 52 U.S.C. §§ 20901, *et seq.*, as amended.

against a mandatory state regime for congressional elections, conflict will inevitably arise. This is because, unlike in other areas where state and federal conflict *may* occur, under the Elections Clause the *only* power Congress is granted is to displace state law. See *id.*

Federalism concerns—which underlie the general presumption against preemption—are also dispelled when Congress legislates under the Elections Clause. A State's "historic police powers" have always commanded great deference from federal preemption. See *id.* at 14-15. But the responsibility to set the times, places, and manners of federal elections does not emanate from the states' residual police powers; it is instead a prerogative dispensed solely by the federal constitution. Although the state legislature's role remains "weighty and worthy of respect," it has "always existed subject to the express qualification that it 'terminated according to federal law.'" *Id.* (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)). In other words, the Constitution (as envisioned by the Framers) contains an explicit role for Congress over state legislatures that provides a powerful check against the hypothetical excesses feared by those who tout the specter of the "independent state legislature" boogeyman.

B. Federal courts remain well poised to resolve disputes about federal election regulations.

1. Because a state legislature's power to regulate federal elections is derived exclusively from the U.S. Constitution, federal courts—not state courts—are

the natural arena to adjudicate federal-elections cases. The Constitution established our national government, and, without it, there would be no need to regulate elections for representatives to our national legislature. See *United States Term Limits*, 514 U.S. at 805 ("[A]s the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself."). Because a "state can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them," the analysis of a state's authority to enact regulations of federal elections begins and ends with the text of the Constitution. *United States Term Limits*, 514 U.S. at 802 (quoting 1 Story § 627); see also *Cook*, 531 U.S. at 523 ("the States may regulate the incidents of" congressional elections "only within the exclusive delegation of power under the Elections Clause").

This principle makes issues about a state legislature's Elections Clause enactments particularly well suited for federal court resolution. True, there is no "indication that the Framers had ever heard of courts" playing a role in matters of federal elections. *Rucho*, 139 S. Ct. at 2496. Even so, this Court has since recognized that there is "a role for the courts with respect to at least some issues" related to a state legislature's regulation of federal elections. *Id.* at 2495-96. That role has, however, traditionally involved enforcing the mandates of the U.S. Constitution and federal law. See*, e.g.*, *id.* at 2495-97 (discussing the courts role in one-person, one-vote and racial gerrymandering cases, which derive from rights under the U.S. Constitution and

federal law). This, in turn, is a task tailor-made for federal, not state, courts.

Federal courts also have a crucial role in ensuring that the excesses of state courts do not derail the regulations enacted by state legislatures under the Elections Clause. Because the U.S. Constitution provides state legislatures with primary authority to regulate federal election laws at the state level, any "significant departure from the legislative scheme" by a state court "presents a federal constitutional question." *Bush v. Gore*, 531 U. S. 98, 113 (2000) (Rehnquist, C.J., concurring).[7] Federal court assumption of this role "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (quoting *Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis in original)).

Put simply, "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws." *Id.* (Kavanaugh, J., concurring in denial of application to vacate stay); see also *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam). If this Court

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[7] Although *Bush v. Gore* discusses the Presidential Electors Clause under Article II, Section 1 of the Constitution, the Court was interpreting the portion of that Clause that "leaves it to the legislature exclusively to define the method" of appointing electors. See 531 U.S. at 113 (quoting *McPherson*, 146 U.S. at 27).

were to "attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning," it would be an "abdicat[ion]" of its responsibility to enforce the text of the Constitution. *Id*. When a state supreme court's interpretation of its state election laws about federal elections "impermissibly distort[s] them beyond what a fair reading require[s]," the Constitution demands a remedy that federal courts are best equipped to provide. *Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

2. Concerns of stability also favor concluding that federal courts are the best judicial venue to resolve issues under the Elections Clause. The constitutional duty imposed on state legislatures concerns issues of great national interest: the election of federal representatives to the national Congress. These interests transcend those of any individual state and confer obligations that impact the functioning of our national government. As Professor Vikram Amar recognizes, such issues are ones for which the Framers sought to establish "smooth, orderly, and uncontroversial" ways to determine the "validity and legitimacy of" states' actions. Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1073 (2000).

Settling these issues in federal court promotes confidence in the election process and ensures uniform outcomes across varying states. Professor Michael Morley has explained that:

> When a legislature structures a congressional election . . . its acts may be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions.

Michael Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 37 (2021).

In sum, asking federal courts to decide questions about a state legislature's actions under the Elections Clause advances the Framers' goals of minimizing uncertainty and maximizing legitimacy. See *id.* at 37 n.162.

C. State courts provide another check, so long as they do not engage in legislating from the bench.

There remains a limited role for state courts, one far more circumscribed than the antics conducted by the North Carolina Supreme Court. State courts may, for example, ensure that their state legislature's regulations follow federal law. That said, they never may claim a "blank check to rewrite state election laws for federal elections." *Democratic Nat'l Comm.*, 141 S. Ct. at 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). The plain text of the Elections Clause means "'the clearly expressed intent of the legislature must prevail' and that a state court may not depart from

the state election code enacted by the legislature." *Id.* (citing *Gore*, 531 U. S. at 120 (Rehnquist, C. J., concurring); see *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76-78 (per curiam); *McPherson*, 146 U.S. at 25).

It remains true that "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. It is also true, however, that state courts are limited to enforcing the express policy prescriptions of the legislature and procedural limitations—such as the gubernatorial veto or initiative process—on the legislature's lawmaking powers.; See *Smiley v. Holm*, 285 U.S. 355, 369 (1932); *Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring); *Ariz. State Legislature*, 576 U.S. at 824.[8] None of this Court's precedents support the "conclusion that imposing some constraints on the legislature justifies deposing it entirely," in favor of giving a state's lawmaking power to its judiciary. *Ariz. State Legislature*, 576 U.S. at 841 (Roberts, C.J., dissenting); see also *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J., joined by Thomas and

[8] See also *McPherson*, 146 U.S. at 34 ("The power to appoint Presidential Electors 'is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.'" (quoting Senate Rep. 1st Sess. 43 Cong. No. 395 (1874)).

Gorsuch, JJ.) (when a state court replaces the policy prescriptions of the legislature with its own, "there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution").

All that said, however, "the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutor[y]" scheme. *Id*. State courts have no authority to "alter[] an important statutory provision enacted by" a state's legislature "pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party*, 141 S. Ct. at 1 (statement of Alito, J., joined by Thomas and Gorsuch, JJ.) (citing U.S. Const. art. I, § 4, cl. 1; Art. II, § 1, cl. 2; *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76 (per curiam)).

III. EXISTING FEDERAL LAW PROVIDES ROBUST PROTECTION AGAINST POST-ELECTION MISCHIEF, LIKE CHANGES TO VALID ELECTION RESULTS.

Finally, the Constitution itself, along with federal statutes, already impose multiple safeguards that would otherwise prevent a state legislature from overturning valid federal election results.

A. Congress has bound the states to adhere to a uniform election day.

The U.S. Constitution grants to Congress the authority to prescribe a uniform election day for federal offices throughout the United States. See U.S. Const. art I, § 4, cl. 1; art II, § 1, cl. 4. Exercising this Constitutional authority, Congress has set "[t]he Tuesday next after the 1st Monday in November, in

every even numbered year . . . as the day for the election." 2 U.S.C. § 7 (for electing members to Congress); 2 U.S.C. § 1 (setting same for Senators); 3 U.S.C. § 1 (setting "the Tuesday next after the first Monday in November, in every fourth year" as the election for presidential electors); see also *Foster*, 522 U.S. at 69-70 (recognizing that under its Constitutional authority, Congress has "set[] the date of the biennial election for federal offices").

Because "the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States," when a state attempts to prescribe a different date for its federal elections than the one set by Congress, such regulation must fall. *Foster*, 522 U.S. at 69 (quoting *United States Term Limits*, 514 U.S. at 832-33). In fact, this Court has struck down state law that purports to conduct a federal election on a date other than the date set by Congress.

In *Foster v. Love*, Louisiana adopted a statutory scheme providing for an "open primary" in October of federal election years in which all candidates, regardless of party, would appear on the same ballot and all voters may participate. 522 U.S. at 70. If no candidate received a majority of the vote, the State would hold a subsequent "general election" between the top two vote-getters on the federal election day set by Congress. *Id*. But if a candidate received a majority of the vote, he or she would be "elected" as a matter of law and no subsequent election would be held on federal election day. *Id*.

The Court halted this practice, explaining that "[b]y establishing a particular day as 'the day' on which" federal elections would be held, "the [federal] statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say." *Id.* at 71-72. Because Louisiana's "open primary" law was "applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void." *Id.* at 74. If an election for federal office "does take place, it may not be consummated" on a day other than "federal election day," as set by Congress. *Id.* 72 n.4.[9]

A similar result would occur if a state legislature tried to act outside the bounds of existing (*i.e.*, pre-election statutes) to select the winner of its federal election *after* Congress's prescribed election day. Although federal law leaves room to allow for run-off

[9] As an additional assurance that the valid winner of a congressional election is seated, Congress has provided a process for contesting the election of a member to the U.S. House. See 2 U.S.C. § 381, *et seq*. Recently, counsel for Respondent Harper in this case tested this safeguard by filing a "contest" with respect to the election of a U.S. Representative in Iowa. In that case, Iowa—using the process put in place by the state's legislature—determined that Dr. Miller-Meeks won her congressional election by six votes. After she was seated in the House, however, counsel for Respondents in this case filed a challenge before Congress asking that the House of Representatives alter the results of Iowa's election. Before a final determination was made the challenge was withdrawn. See Alex Rogers, *Iowa Democrat Announces Decision to Withdraw Effort to Contest House Race*, CNN (Mar. 31, 2021), https://www.cnn.com/2021/03/31/politics/rita-hart-withdraws-election-challenge-iowa-house-seat.

elections "in those States in which a majority of all the votes is necessary to elect a member," no similar exception exists for a state that seeks to undo the results of its election to "make a final selection of an officeholder" on a date after that set by Congress. *Id.* at 71, n.3 (quoting Cong. Globe, 42d Cong., 2d Sess., 677 (1872) (remarks of Sen. Thurman)).

At its core, an act by a state legislature that conflicts with an act of Congress regarding federal elections "must necessarily give way" to Congress's authority. *McPherson*, 146 U.S. at 41. In other words, Congress has all the authority necessary to ensure that no act by any state legislature will call into question the legitimate results of a free and fair election. For this reason, this Court should not lend its imprimatur to power usurpations undertaken by state courts under the guise of "protecting democracy" or out of fear regarding the "independent state legislature theory." Congress's power, and federal-court umpiring, should alleviate any concerns that applying the Elections Clause as written may somehow be the harbinger of tyranny. Fealty to the text of the Elections Clause will not allow a state legislature to run roughshod over the republican principles enshrined throughout the rest of our National Charter.

While this case is about Article I, Section 4, commentators in the media have suggested that it might open the door to state legislative advancement of slates of presidential electors who intend to cast votes for someone other than the person who won their state's popular vote on election day. This fanciful hypothesis is rooted neither in law nor logic. Federal law provides other important safeguards

against state changes to federal election laws *after* a federal election has occurred.[10] Where there is a dispute over the appointment of electors from a State, a resolution made under "laws enacted *prior* to the day fixed for the appointment of the electors" will be conclusive for the electoral college vote. 3 U.S.C. § 5 (emphasis added).

The Court has referred to this provision as "a 'safe harbor' for a State insofar as congressional consideration of its electoral vote is concerned." *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 77 (per curiam). Because 3 U.S.C. § 5 "contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election," state legislatures routinely structure their election codes to "take advantage of the 'safe harbor.'" *Id.* at 78. For that reason, courts are counseled to resist "any construction of" a state's electoral code, "that *Congress* might deem to be a change in the law." *Id.* (emphasis added). This same caution would apply to any rogue attempt to unsettle the balance of a state's federal election laws, including the manner of appointing presidential electors, after an election has occurred. See *McPherson*, 146 U.S. at 39-40.

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[10] Although this case does not involve the appointment of presidential electors, Amici felt compelled to briefly discuss this additional safeguard, which will not be disturbed by a resolution for Petitioners in this case.

B. The Fourteenth Amendment prohibits State legislatures from retroactively modifying election rules.

This Court has repeatedly recognized that the broad authorities conferred on state legislatures under the Elections Clause are subject to other constraints enshrined in the U.S. Constitution. See *Rucho*, 139 S. Ct. at 2495-97; see also *McPherson*, 146 U.S. at 35 (recognizing under the analogous Presidential Electors Clause state legislative power is limited by express constitutional provisions concerning the number of electors and ineligibility of certain persons). These constraints include the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 n. 4 (2020). Any post-election attempts to act outside existing election statutes to retroactively change the result of a valid election would trigger the protections promised by those twin Clauses. See *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 73 (per curiam).

This is especially true since "[t]he right to vote is protected in more than the initial allocation of the franchise"; indeed, "[e]qual protection applies as well to the manner of its exercise," since "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Gore*, 531 U.S. at 104-05 (per curiam); see also *McPherson*, 146 U.S. at 39-40. Put differently, "the right to vote as the legislature has prescribed is fundamental." *Gore*, 531 U.S. at 104. Choosing to implement unequal standards for evaluating votes cast; to include only part of the valid votes cast; or to set

aside the votes altogether tee up equal protection and due process challenges. See *generally id*. at 105-108; *id*. at 134 (Souter, J., dissenting) ("differing treatments of the expressions of voters' fundamental rights" are "wholly arbitrary" and raise "an equal protection claim (or, alternatively, a due process claim)"); see also *id*. at 145-46 (Breyer, J., dissenting) ("[B]asic principles of fairness may well have counseled the adoption of a uniform standard.").

Federal courts have repeatedly found that Equal Protection and Due Process violations arise when "the election process itself reaches the point of patent and fundamental unfairness." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Although such violations must "go well beyond the ordinary dispute over the counting and marking of ballots," federal courts are indeed willing to provide relief "where broad-gauged unfairness permeates" election results. *Id*. This is because "the Constitution of the United States protects the right of all qualified citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1963). And, this "constitutionally protected right to vote" extends to a right "to have . . . votes counted," and cannot be "destroyed by alteration of ballots." *Id*. at 554-55 (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Mosley*, 238 U.S. 383 (1915); *United States v. Classic*, 313 U.S. 299, 315 (1941)).

In *Griffin v. Burns*, for example, the First Circuit found a constitutional violation had arisen when voters, who relied "upon official inducements and using ballots printed and furnished by the state, cast their votes" in an election "only to have them nullified" by subsequent ruling of the state supreme court. 570 F.2d at 1071. Rhode Island election law

expressly permitted the use of absentee ballots in all elections, but it did not explicitly address their use in party primary elections. *Id.* at 1067. The Rhode Island Secretary of State and other election officials interpreted Rhode Island law to authorize the use of absentee ballots in party primary elections, and relying on past practices, advertised their use and issued several absentee ballots. *Id.* Consequently, over one hundred qualified voters cast absentee ballots in the 1977 Rhode Island Democratic primary for Providence City Council. *Id.*

Only after the primary had concluded did the unsuccessful candidate challenge the use of those absentee ballots. *Id.* After the winning candidate had been certified, the Rhode Island Supreme Court sided with the losing candidate and ordered the absentee ballots cast aside, declaring the previously unsuccessful candidate victorious. *Id.* at 1068. Following this reversal, federal courts stepped in.

Finding "an undoubted right, guaranteed by the Constitution[] to vote in primary elections on an evenhanded basis with other qualified voters," the federal district court declared that a constitutional violation occurred because "qualified electors lost their franchise . . . after having voted in reliance on absentee . . . procedures announced by state officials." *Id.* at 1069 (quoting *Griffin v. Burns*, 431 F. Supp. 1361, 1366 (D.R.I. 1977)). The First Circuit agreed that "the state's retroactive invalidation of the absentee . . . ballots in this primary violated the voters' rights under the Fourteenth Amendment." *Id.* at 1070; see also *Roe v. Alabama*, 43 F.3d 574, 579-81 (11th Cir. 1995) (per curiam) (explaining that to allow the counting of absentee ballots after an

election that did not comport with the affidavit requirements uniformly enforced before the election would "constitute a retroactive change in the election laws that will . . . implicat[e] fundamental fairness issues and raise a violation of the Fourteenth Amendment.).

To allow a state legislature to retroactively change the results of a valid federal election implicate similar issues of fundamental fairness that would trigger the protections enshrined in the Fourteenth Amendment. The U.S. Constitution itself provides adequate safeguards against the parade of horribles that critics of this case envision.

CONCLUSION

"The provisions of the Federal Constitution confer[] on state legislatures, not state courts, the authority to make rules governing federal elections." *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J., joined by Thomas and Gorsuch, JJ.). These provisions "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Id.* (citing U.S. Const. art. I, § 4, cl. 1; Art. II, § 1, cl. 2). Yet that is precisely what the North Carolina Supreme Court has done here.

Deciding this case for Petitioners will bolster democracy. It will not, as scores of critics would have it, harm the principles held dear to our Founders. Congress, the federal courts, the Fourteenth Amendment, and federal statutes all represent sentinels to ensure that the will of the electorate will emerge through the crucible of hard-fought elections. Allowing state courts to usurp legislative power is both unnecessary and counterproductive to ensuring that the voters get to decide who will represent them in the federal government.

For all these reasons, the Court should declare that the U.S. Constitution means what it says and reverse the opinion of the North Carolina Supreme Court.

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