No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, ET AL.,

Petitioners,

v.

REBECCA HARPER, ET AL.,

Respondents.

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, ET AL.,

Petitioners,

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF *AMICI CURIAE* PROFESSORS AKHIL REED AMAR, VIKRAM DAVID AMAR AND STEVEN GOW CALABRESI IN SUPPORT OF RESPONDENTS

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Dated: October 24, 2022

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INTEREST OF *AMICI CURIAE*[1]

Akhil Reed Amar, Vikram David Amar, and Steven Gow Calabresi are constitutional scholars and historians who seek to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism.

SUMMARY OF ARGUMENT

In recent landmark rulings, this Court has properly recommitted itself to originalism, promising to interpret the Constitution as Americans publicly understood the document when adopting it, with special attention to governmental actions immediately preceding and immediately glossing the enacted text. *Dobbs v. Jackson Whole Women's Health Org.*, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Principled originalism compels rejection of Petitioners' claims. The more one knows about the Constitution's text, history, and deep structure, the clearer it is that Petitioners must lose. Petitioners also defy a long and consistent line of this Court's decisive precedents, a line that itself exemplifies principled originalism.[2]

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[1] No party or party's counsel authored or financially supported any of this brief. The parties have consented to its filing.

[2] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC")*, 576 U.S. 787, 807, 817-18 (2015) (holding that the Constitution's use of "legislature," understood in historical context, does not always confer power on a particular named body but often, as in Article I, allows states to make use of their own distinctive and dynamic lawmaking systems created by their own constitutions); *Rucho v. Common Cause*, 139 S.Ct. 2484, 2507-08 (2019) (explicitly blessing the application of substantive state constitutional limits enforced by state courts

Petitioners flout core tenets of the American Founding. State constitutions—the pride and joy of Revolutionary Americans—outranked mere state statutes, just as the federal Constitution outranked mere federal statutes. State supreme courts operated as specially privileged interpreters of state laws and state constitutions, much as this Court operated as a specially privileged interpreter of federal laws and the federal Constitution. The federal Constitution confirmed the wide freedom of each state's people, via its state constitution, to restructure its future governmental institutions, provided each state remained republican in form and substance.

If the federal Constitution had intended to severely limit a state's future ability to reallocate power between its own governmental branches, or between its own voters and elected officials—or if the federal Constitution meant to give a faraway federal Court lacking expertise in state law carte blanche over ordinary state-law issues—then we would expect to see abundant evidence for these pulverizations of the bedrock principles of 1776. Anti-Federalists would have sounded alarms; Federalists would have had lots

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in federal districting, as well as states' creation of unelected independent commissions for federal districting like the one upheld in *AIRC*). Petitioners slight this key passage of *Rucho*, which expressly endorses a major role for state courts in congressional elections. Petitioners also all but concede (at 40n.9) that they can prevail only by overruling *AIRC*. This overruling would have astonishing reverberations—logically calling into question whether veto-pen-wielding governors are, strictly speaking, part of the "legislature," as they have been understood to be for centuries, almost everywhere, for federal-election purposes. *See Smiley v. Holm*, 285 U.S. 355 (1932) (Hughes, C.J.); *infra* note 7, pp. 20-22.

of explaining to do. Petitioners offer nothing close to the massive evidence required.

And there are mountains of evidence on the other side, namely, early state constitutions and legislative practices. *Every single state that adopted a constitution in the critical time period (late 1777 through 1793) or that otherwise squarely addressed the issue—nine states in all—openly contradicted Petitioners' vision. No state embraced this vision.*

Elephants do not hide in mouse-holes, yet Petitioners would have us believe that T-Rexes lurk in insect-holes. In particular, Petitioners grossly exaggerate the significance of one or two post-ratification politicos, whose ideas failed to carry the day *anywhere*.

And then there is Petitioners' invocation of the alleged Pinckney Plan. *The language Petitioners have trumpeted to this Court is phony.* This language was no part of the real Pinckney Plan actually presented to the Philadelphia Convention. Beginning around 1819, a bogus document masqueraded as the Pinckney Plan. This bogus document was immediately questioned by James Madison and definitively discredited more than a century ago—facts well known to expert historians. The true story appears in the short Appendix to *Farrand's Records* that Petitioners cite but apparently never read to the end. Petitioners actually lead their brief with this fake and call this sham precursor to Article I, Section 4 "crucial[]" to their argument.[3]

[3] *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. D, at 595, 601-04 (Max Farrand ed. 1911) (summarizing the backstory of the fraudulent Pinckney Plan as distinct from the true Pinckney Plan). *Compare id.* at 597 (phony

This error is important both for its own sake and for a deeper point: Petitioners are not expert historians—alas, not even competent ones. We do not question their integrity but do challenge their reliability and credibility. Every Justice should exercise extreme caution before accepting *any* of Petitioners' assertions. Their brief is littered with major misstatements and half-truths. (We lack space to address them all, but highlight the biggest ones.)[4]

We ourselves do not claim infallibility, here or elsewhere. Errors doubtless infect our own work. But we do claim genuine expertise as legal scholars and historians.[5]

We three speak today as blunt but true *amici curiae*, and we intend to file future blunt briefs in other cases. Proper originalism is serious business, and the Court needs to hear from serious scholars—especially when asked by adventurous litigants to embrace new doctrines with vast and dangerous implications for our republic. Today and in other

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language repeatedly emphasized by Petitioners, at 2, 11, 15-16) *with* 605 (most reliable reconstruction of the Pinckney Plan containing no such language). For more on the significance of this gaffe, *see infra* note 13.

[4] The Court should also discount the claims of Professor Michael Morley for reasons explained in Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 41-42&nn.102-108 (2022).

[5] One important role for expert *amici* is to forcefully counter misstatements by neophyte academics or unreliable litigants. *Cf. AIRC*, 576 U.S. at 835-37 (Roberts, C.J., dissenting) (mistakenly invoking the fraudulent Pinckney Plan, likely in reliance on an erroneous 2005 student Note).

briefs we will advance nonpartisan positions that we have taken as academics long before any partisan implications could have been known. We are dismayed that many legal scholars and academic historians today view their scholarship as extensions of their personal politics. By contrast, we aim to help the Court get the law and the facts right, regardless of whose political ox is gored. In the spirit of candor, we offer below direct answers to the big questions raised by the case. We also steer the Court to reliable primary sources and secondary scholarship providing more detail than we can offer in this brief . . . brief.

ARGUMENT

I. What Core Constitutional Question Does This Case Raise?

In a nutshell: ISL theory.

Less cryptically: Petitioners' challenge is premised on what has come to be known as the "Independent State Legislature (ISL) Theory," which claims that under Article I (and also under Article II, governing presidential elections)[6] each state's ordinary elected legislature enjoys a federal entitlement to have its enactments concerning federal-election logistics take full effect notwithstanding anything in the state constitution that creates and bounds the legislature. ISL thus denies the ability of states, through their constitutions, to decide what the state legislature shall consist of, what its procedures shall be, and what substantive limits it must respect. ISLers also say that, even if some state constitutional limits do

[6] ISL is especially implausible in the Article II context. See Question 9, *infra*.

legitimately constrain a given state's ordinary elected legislature, *federal* rather than *state* courts should primarily interpret and apply those limits.[7]

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[7] Petitioners (at 24) waffle, suggesting that although state *courts* cannot generally be involved in congressional-election regulation, state constitutional features of gubernatorial presentment and ("perhaps") direct democracy are permissible. But logic is logic. If, as Petitioners claim, the federal Constitution made a "deliberate" choice to vest congressional-election-regulation power specifically and completely in the state's ordinary "legislature" (which is somehow defined other than by reference to state constitutional provisions structuring a lawmaking system), then this choice ousts governors, referenda, initiatives, and independent redistricting commissions. (None were part of typical state "legislatures" circa 1789, see *infra* pp. 20-22.) If, instead, as we maintain, Article I's reference to "legislature" preserved state peoples' and state constitutions' broad discretion to restructure their lawmaking systems post-1789, then governors, referenda, initiatives, and commissions are all kosher ingredients—as are state courts, if a post-1789 state constitution so decides. See *AIRC* (upholding broad discretion).

Elsewhere, Petitioners (at 40n.9) in effect concede the illogic of their waffle and openly invite overruling *AIRC*—a case that in fact reached the right result via sound originalist and doctrinal analysis. Were the Court to accept Petitioners' radical overture, the obvious next station on the logic train would oust veto-pen-wielding governors from the federal election process—a truly radical proposition overturning century-or-more-old practice in virtually every state and undeniably violating this Court's unanimous and universally accepted ruling in *Smiley* (1932). This would logically follow because vetoes were generally absent from most state constitutions in 1789 and—under Petitioners' flatfooted faux-textualism—because "governors" are distinct from "legislatures" today and were also distinct in 1789. *See infra* pp.20-22.

II. How Does ISL Fare Under an Originalist Lens?

Miserably.

Start with the text. What does "shall be prescribed in each State by the Legislature thereof" mean? In particular, what is a state "legislature" for these purposes?

More precisely still: May a "legislature" include a veto-pen-wielding governor? May it consist of an independent agency, or the people themselves engaged in direct democracy via initiatives, referenda, conventions, or town meetings? May a state constitution permissibly define its state "legislature" to mean a body that must regulate federal elections in a particular substantive manner?[8]

The public meaning of state "legislature" was clear at the time of ratification: A state's "legislature" was not just something created to make laws on behalf of the people; it was something created and constrained by the state constitution.

This basic starting point—that state legislatures were creatures of state constitutions, creatures whose very existence and shape derived from state constitutions—suffices to defeat ISL. As a matter of Founding-era first principles, when Article I refers to and empowers state "legislatures," it means things inherently subordinate to their state peoples and state constitutions. Article I takes state

[8] Though some have suggested that this Court could cleanly distinguish between state-constitutional procedural and state-constitutional substantive limits on state legislatures, such a made-up distinction in this domain is neither principled nor workable. *See* Amar & Amar, *supra* note 4, at 18n.47.

legislatures as it finds them—that is, as defined and limited by their parent constitutions.

The adoption of new republican state constitutions across the American continent was a transcendent achievement in the late 1770s, acclaimed by Americans everywhere. These new state constitutions were the beating heart of the American Revolution. In a now-famous letter to his wife Abigail on May 17, 1776, John Adams explained, with pride and awe, the monumental import of the Confederation Congress's decisive vote to encourage each state to adopt is own new constitution: A "whole [state] Government of our own Choice, managed by Persons who We love, revere, and can confide in, has charms for which Men will fight."[9]

So of course state constitutions were understood as supreme over state legislatures at the Founding! And of course state courts could—and did—enforce these state higher laws against state legislatures. Prominent state judicial review under state constitutions predated the Philadelphia Convention, *The Federalist* No. 78, and *Marbury v. Madison*. Indeed, state constitutions formed the basic template for the federal Constitution.[10]

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[9] *See generally* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840, at 152–62 (2021) [hereinafter TWTMU] ("If we are to understand what all the shouting was about in 1776—what the main point of the conversation was—we must first ponder the state constitutions that sprouted like so many daffodils up and down the continent in the springtime of the New World."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 46–132 (1969).

[10] *See* TWTMU, *supra* note 9, at 181–96.

The language and logic of the Article VI Supremacy Clause confirmed the supremacy of state constitutions over mere state statutes, in the very same breath that the clause confirmed the supremacy of the federal Constitution over mere federal statutes. The clause enumerated five types of law. In every instance, the *textual* location of each type of law tracked its *legal* rank, from highest law to lowest law: The U.S. Constitution came first, then federal statutes, then federal treaties, then state constitutions, then state statutes. *In that order, textually and legally*: "[1] This Constitution, and [2] the Laws of the United States which shall be made in Pursuance thereof; and [3] all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in [4] the Constitution or [5] Laws of any State to the Contrary notwithstanding."[11]

Listen again, with fresh ears, to Chief Justice John Marshall's concluding passage in *Marbury v. Madison*:

> [I]n declaring what shall be the supreme law of the land, the Constitution itself is *first mentioned*, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, *supposed to be essential to all written*

[11] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 299-307 (2005) [hereinafter ACAB].

> *Constitutions, that a law repugnant to the Constitution is void*, and that *courts, as well as other departments, are bound by that instrument.*

5 U.S. (1 Cranch) 137, 180 (1803) (emphasis added).

Now consider America's experience under the Articles of Confederation. In words that directly foreshadowed the words of Article I's Elections Clause, the Confederation's Article V expressly provided that "delegates [to the Confederation Congress] shall be annually appointed *in such manner as the legislature of each State shall direct*" (emphasis added). Between the time this text was finalized (in November 1777) and the time the Constitution's essentially identical text was unveiled (about a decade later), there were three, and only three, states that adopted or revised their state constitutions. Each of these three state constitutions expressly regulated its state legislature in the selection of Confederation congressmen. *Thus, in all three of the states that engaged in state constitution-making in the wake of the Articles of Confederation, the elected state legislatures were emphatically NOT independent.*

Concretely: The 1778 South Carolina Constitution required state lawmakers to choose Confederation Congressmen "by ballot"; the Massachusetts Constitution of 1780 specified the month and manner in which the legislature had to appoint Confederation Congressmen (June, meeting in joint session in one room); and the New Hampshire Constitution of 1784 prescribed the timing of legislative action as well as the qualifications of

eligible Congressional delegations, among other things.[12]

The words of the Articles ("in such manner as the legislature of each State shall direct") and the later words of the Constitution (the "manner . . . shall be prescribed in each State by the Legislature thereof") are semantically indistinguishable; the Constitution simply echoed the Articles on this point. If state constitutions could (and did) dictate rules for state legislatures in the congressional-selection process under the Articles, surely state constitutions could likewise dictate rules for state legislatures in the congressional-selection process under the Constitution.[13]

Indeed—in deed—state constitutions did just that. Post-ratification, state constitutions continued to do precisely what they had done pre-ratification, namely, regulate state legislatures in the domain of congressional selection.

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[12] S.C. CONST. of 1778, art. XXII; MASS. CONST. of 1780, ch. IV; N.H. CONST. of 1784, pt. II (clause beginning "The delegates"). Petitioners (at 31) imaginatively imply that these constitutional provisions violated the Articles, but cite precisely zero persons at the Founding who said so. We call balderdash.

[13] The Articles used the word "direct"; the Constitution, "prescribe[]." These two words are essentially synonymous.

Let's now reconsider the fake Pinckney Plan. The Philadelphia framers never made any deliberate decision to change Pinckney's alleged word "state" to the word "legislature," as Petitioners (at 2, 11, 15-16) falsely claim and indeed deem "crucial[]." The framers simply borrowed blandly from the Articles' language, *which came with an anti-ISL gloss from all the relevant state constitutions!*

Oddly, Petitioners (at 31) essentially concede that "state" and "legislature" were interchangeable in the Articles. But the Constitution is the same as the Articles on this exact point.

Six of the seven state constitutions that were adopted or revised in the Constitution's earliest years of operation regulated the manner of federal elections and thereby cabined the independence of state legislatures.[14] Delaware's 1792 Constitution required that voters elect congressional representatives "at the same places" and "in the same manner" as state representatives.[15] Three other state constitutions—Georgia's in 1789, Pennsylvania's in 1790, and Kentucky's in 1792—required "all elections" to be "by ballot" rather than *viva voce*. Though not singling out congressional and presidential elections by name, these provisions by their express terms applied to *all elections*—annual elections for statewide offices, of course, but also biennial elections for federal House members and whatever quadrennial elections for presidential electors might operate in the future.[16]

Likewise, the 1792 New Hampshire Constitution and the 1793 Vermont Constitution spoke universally in promising that "elections" of every sort "ought to be free." Even stronger language—"elections shall be free and equal"—appeared in the 1790 Pennsylvania Constitution; and the 1792 Kentucky and Delaware Constitutions were if anything even more categorical: "*all* elections [emphasis added] shall be free and equal." (At least four pre-1788 state constitutions—Virginia's,

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[14] The U.S. Constitution did not commence operation until 1789. Over the next five years, seven states revised their prior constitutions or adopted new ones: Georgia in 1789; Pennsylvania, and South Carolina in 1790; Delaware, Kentucky, and New Hampshire in 1792; and Vermont in 1793.

[15] DEL. CONST. of 1792, art. VIII, § 2.

[16] GA. CONST. of 1789, art. IV, § 2; PA. CONST. of 1790, art. III, § 2; KY. CONST. of 1792, art. III, § 2.

Maryland's, and North Carolina's in 1776, and Massachusetts's in 1780—had similar language.)[17] *These clauses are obvious precursors of the language of the current North Carolina Constitution that Petitioners cavalierly denigrate in their Question Presented and elsewhere (at 2) as improperly "vague."*

No early state legislature—none!—flaunted its supposed independence by flouting its state constitution. Petitioners do not cite a single actual example of an early state legislature regulating congressional elections contra its state constitution. Petitioners do, however, cite two fake examples.[18]

Moreover, the two 1789 states that provided for vetoes of general legislative action employed such veto provisions in federal-election legislation. In Massachusetts, bills regulating federal elections were not enacted by the legislative houses alone but were presented to—and subject to disapproval by—the governor. In New York, such bills went to a Council of Revision that included the governor and various state judges. In these two key places—the only states with veto rules in 1789— *the legislature* was thus plainly

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[17] N.H. CONST. of 1792, pt. I, art. XI; VT. CONST. of 1793, ch. I, art. 8; PA. CONST. of 1790, art. IX, § v; KY. CONST. of 1792, art. XII, § 5; DEL. CONST. of 1792, art. I, § 3.

[18] Petitioners (at 32-35) are flatly wrong in suggesting that the New York and Massachusetts legislatures violated their state constitutions in early federal elections. These constitutions contained no rules whatsoever governing House or Senate elections under the Constitution. *How could they? Adopted in 1777 and 1780, respectively, they predated the federal Constitution.* Petitioners have merely shown that, after 1788, state legislatures were no longer bound by state constitutional rules governing *annual appointment* to a *Confederation Congress* that no longer existed. N.Y. CONST. of 1777, art. XXX ("annually"); MASS. CONST. of 1780, ch. IV ("annually").

understood from Day One as *the lawmaking system.*[19] This is precisely the view we endorse, and the view repeatedly and consistently embraced by this Court over the course of a century. It is, however, precisely contrary to Petitioners' flatfooted, faux-textualist view that "legislature" in Article I refers to a *fixed institution* and not a *lawmaking system.*

In sum: Nine early states—Georgia, Pennsylvania, South Carolina, Delaware, Kentucky, New Hampshire, Vermont, Massachusetts and New York—squarely rejected ISL. No early state among the remaining six—Rhode Island, Connecticut, New Jersey, Maryland, Virginia, and North Carolina—embraced ISL. None of these six adopted a new Constitution in the key time period, late 1777 through 1793. Nor did any of these six make executive or judicial officers part of the ordinary lawmaking process. In these six, the ISL issue never squarely arose.

Ultimately, Petitioners offer . . . almost nothing. They identify no evidence that *any* early state ever acted on the basis of ISL ideas. They point (at 25) to the "absence during the Early Republic of any state-court opinion invalidating a state legislature's congressional map." But if, as we believe, state legislatures were generally and cheerfully abiding by the constraints they (rightly) understood state constitutions could impose, then there would of course be nothing to see in state courts. To repeat, Petitioners identify no affirmative state-legislative violations.

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[19] Amar & Amar, *supra* note 4, at 24-25.

Next, petitioners repeatedly assert (at 25-26) that in the early republic "*no state adopted* any state-constitutional provision that purported to control congressional districting" and that "*no state*" constitutionally regulated congressional elections (italics in original). False! Petitioners elsewhere concede (at 2, 35-39) the falsity of their claim, undeniably as applied to Delaware.

Finally, Petitioners cite one or two Founding-era New York lawmakers[20] who, in an irrelevant context (see *supra* note 18), arguably professed complete discretion in regulating federal elections. Even if so, so what? New York did not enact any law violative of the state constitution. Plus, the legislature took pains to present its proposed laws regulating congressional elections to a Council of Revision that included state judges. These judges were not part of the "legislature," if that word is read in flatfooted ISL fashion, but were indeed part of the "legislature" if the word means "legislative system as state constitutionally defined," as we maintain and as this Court's binding precedents, *Smiley* and *AIRC*, make emphatically clear.

So Petitioners' early American evidence boils down to this: In a country of millions, one or two persons articulated an ISL understanding of Article I. In the end, Petitioners point to NO government action by ANY early state legislative or constitutional body that necessarily reflected ISL belief; they fail to adduce even a single example of a state legislative

[20] Although Petitioners (at 34) say that two separate speakers pushed ISL, the source they cite says otherwise, attributing both comments to General Philip Schuyler.

body that, declaring independence (!), openly transgressed its state constitution.

By contrast, Americans in every state where the ISL issue arose in the 1780s and early 1790s did not simply speak, but ACTED, directly contrary to ISL tenets. These official actions involved hundreds of government decisionmakers who NECESSARILY rejected ISL. If ISL were the background understanding of the words of Article I (and the nearly identical words of the precursor Articles of Confederation), then there would have been massive recorded pushback in many places. But no dogs barked.

A quick originalist addendum: Petitioners invoke episodes many decades after ratification. This history must be discounted appropriately. *See Bruen,* 142 S. Ct. at 2163 (Barrett, J., concurring) ("How long after ratification may subsequent practice illuminate original public meaning?"). Also, in any assessment of evidence after 1793 —the closing date of our analysis here[21]—the Court should give great weight to the many later state constitutions emulating the early state-constitutional practice we have highlighted today. *See* Brief of Non-State Respondents (forcefully rebutting Petitioners' grossly misleading counts).[22]

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[21] This closing date—marking the fifth anniversary of the Constitution's launch in 1788-89—is not cherry-picked for argumentative advantage. In fact, in 1796, Tennessee, became the *tenth* state (out of ten) with an anti-ISL Constitution and the tenth that strongly foreshadowed the very language of the North Carolina constitutional clause at issue today—a clause Petitioners mock as "vague" in their Question Presented. *See* TENN. CONST. of 1796, art. III, §3; art. XI, § 5.

[22] We suggest that Joseph Story's mistaken pro-ISL remarks in 1820—issued nonjudicially and impromptu, without

III. Don't ISL Critics Essentially Ignore the Word "Legislature" in Article I?

Au contraire, we better explain this word than do ISLers, who rip it from its historical and structural context.

The word "legislature" did not float freely—independently—in the eighteenth-century air. Rather, the word was grounded in Founding-era law and theory: A "legislature" was a creature of its master constitution.

Consider the federal legislature. Nobody thinks that the simple word "Congress" in the Constitution enables the federal legislature to ignore its master Constitution or its companion federal Supreme Court specially tasked with enforcing its master Constitution. So too, a state legislature is presumptively bound by its master state constitution and companion supreme court.

The word "Congress" appears in the federal Constitution over 60 times. Context makes clear that the word sometimes describes the House and Senate, *but not the President* (as when the Constitution discusses the "sessions" of Congress, or the President's provision of information to Congress). But more often, "Congress" means House and Senate

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adversarial briefing or extended deliberation—deserve little if any weight. A towering figure, Story nonetheless erred on many federal/state power issues: He wrongly championed a general federal common law, wrongly embraced a federal common law of crimes, wrongly overrode legitimate state free-soil rules, and wrongly suggested that lower federal courts were constitutionally required. Story's off-the-cuff 1820 remarks are of a piece with this pattern of error. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (offering a similar critique of Story).

acting *with the President* via lawmaking, whether or not the document specifies that "Congress" must act "by law." In many important contexts, the word "Congress," even without the "by law" qualifier, has been properly understood—thanks to history, structure, and context—to mean a *lawmaking system* rather than a *particular institution*.[23]

Ditto for the Constitution's various references to a given state's "legislature." In context, this word often means a state's *lawmaking system*—as this Court has repeatedly held in a century-old line of cases. *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565 (1916) (White, C.J.); *Smiley* (1932) (Hughes, C.J.); *AIRC* (2015).

Consider also the executive heads of departments. "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. Imagine that Congress passed a law vesting appointment power for an assistant Attorney General in the Attorney General, the head of the Justice Department. Would sensible interpreters argue that the President lacked power to direct the AG concerning the appointment? No, even though the Constitution distinguishes here between the "President" and "Heads of Departments." Everyone would concede presidential power to cabin AG power here. No one would read "Heads of Departments" to mean "*Independent* Heads of Departments."

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[23] Vikram David Amar, *(Yet) Another Reason ISL Theory is Wrong About the Meaning of Term State "Legislature": The Constitution's References to the Federal Counterpart — "Congress,"* JUSTIA.COM (June 30, 2022) https://bit.ly/3s2iymR. *See also AIRC*, 576 U.S. at 808.

IHD theory—to coin a phrase—makes no sense because there exists a backdrop principle of unitary executive power over executive department heads.[24] The president is his underlings' master. Likewise, there exists a backdrop principle that state constitutions are masters of state legislatures. Both backdrop principles appear explicitly in the federal Constitution: The emphatic Article II Vesting Clause repudiates IHD, and the five-tiered Article VI Supremacy Clause repudiates ISL.[25]

But the stubborn question remains: Why did the Founders write the Election Clause as they did, reiterating the Articles of Confederation's specific reference to each state's "legislature"? And more pointedly: Does our reading make this word meaningless?

Not at all.

The framers focused most intently on the issues of the 1780s, not the 2020s. In 1787, the word "legislature" identified an extant off-the-shelf lawmaking apparatus in every state. The word offered a comforting textual continuity with the Articles (as glossed by the three key mid-1780s state constitutions we have highlighted) and cohered with democratic principles. Most important of all: The

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[24] *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2012); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[25] On Article II, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); On Article VI, see *supra* text at note 11.

word cleanly jumpstarted the upcoming 1789 federal election in most jurisdictions. In eleven states, executives and judges were wholly outside the regular lawmaking apparatus, but various executives and judges nonetheless sometimes participated in elections and appointments for *state* officials. In these eleven states, Article I made clear that such executives and judges would not make the rules for the first *federal* elections. Had Article I said "state" instead of "legislature," there might have been more ambiguity (and possible infinite-regress issues: who within a "state" would decide who would decide?) in the first federal elections in various places. "Legislature" was a handy specification in 1789.

But as previously noted, there was one final wrinkle to be ironed out in two key states: Did "legislature" mean an *institution* (like the Congress without the President) or a *lawmaking system* (like Congress acting with the President)? In eleven states, these two interpretations converged in result; the *institution* known as the "legislature" made the laws, and no one outside this institution participated in the *lawmaking system*. But in two states—Massachusetts and New York—executives (and in New York, judges too) were indeed part of the ordinary lawmaking system in 1787, via a defeasible veto.

Were these actors—who were surely legislative in function but arguably not legislature-ish in name—part of the "legislature" within the original meaning of Article I? *In both states, these actors were indeed part of the first federal elections!* The Founding generation understood "legislature" here to mean not an institution, but a lawmaking system. This is precisely the definition we endorse, and precisely the

definition this Court has used for more than a century. (The *Smiley* case is especially decisive, holding that a veto-pen-wielding governor is indeed part of the Article I "legislature.") Petitioners (at 32-35) highlight the first federal elections in Massachusetts and New York. But the actual practice in these two states—*the only two states where the issue arose in 1789*—utterly destroys Petitioners' flatfooted definition of "legislature" as an institution and not as a lawmaking system. *See Smiley*, 285 U.S. at 369-70 (stressing this exact point about these two states in 1789).

Under a proper originalist understanding of "legislature," each state's people, acting though its state constitution, retained broad power to redefine the legislative system for all subsequent elections—for example, by adding a gubernatorial veto to the ordinary 1780s legislative system or by adopting an alternative or supplemental legislative device, such as initiative or referendum.

Note also that even as Revolutionary Massachusetts gave its governor a personal veto pen and thus made him and him alone, in effect, a third lawmaking branch, New York's governor shared veto power with judges. *But judges are the very actors Petitioners wrongly contend cannot generally be involved in federal-election policymaking!*

Today, every state governor enjoys one-person veto power, à la Revolutionary Massachusetts. And Article I is understood in every state—and by this Court, unanimously, in the 1932 *Smiley* case—to include the governor as part of the "legislature" for congressional-election purposes. *Thus, in twelve of the original thirteen states, the "legislature" today*

refers to a different institutional cluster than it did in the 1780s. This result has come about because Article I from Day One has respected the broad power of state constitutions to redefine from time to time the contours of their respective "legislatures." The word "legislature" must be—and in fact is, everywhere and uncontroversially—understood dynamically, not statically.

At any given moment, the "legislature" of a state for Article I purposes is thus whatever the state people, via their state constitution and consistent with republican-government principles, say the "legislature"—or more precisely, the state's *lawmaking system*—is.[26]

This Court has said just that, and recently, in the landmark *AIRC* case, whose core insight was expressly endorsed in the even more recent and high-profile *Rucho* case. *See supra* note 2. These cases in turn built squarely on earlier landmark cases—*Smiley* (1932) and *Hildebrant* (1915)—stretching back a full century. Each of these early landmark rulings was unanimous. Each opinion issued from this Court's Chief Justice.

IV. Is Empowering State Judges in Congressional Districting Particularly Problematic?

No, although we appreciate why people steeped in federal-courts jurisprudence might think so. From the 1700s to the present, the relationship between state legislatures and state courts has been very different than the relationship between Congress and federal courts.

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[26] Amar & Amar, *supra* note 4, at 17-26.

At the Founding, many state judges had powerful legislative roles. As noted above, New York's top judges, sitting in a Council of Revision with the state executive, had a veto over ordinary legislation. Also, state legislators at times had judicial roles. Influenced by the British House of Lords, some states at the Founding vested high judicial duties in the state legislature's upper chamber or the legislature as a whole. *See Calder v. Bull*, 3 U.S. (3 Dall.) 368 (1798). The super-strict distinction that ISLers rely upon—a sharp delineation between state legislatures and state courts—simply did not exist.[27]

Reflecting this Revolutionary-era landscape, the U.S. Constitution did not generally prevent a state from giving lawmaking and adjudicative power to the same body. The Constitution has always allowed a state to have two supreme courts or two legislatures. (Today, Texas has two supreme courts and many states split legislative power between an ordinary legislature and a special initiative/referendum process.) The Constitution also allows a state to make its supreme "court" its supreme "legislature" or vice versa, as this Court's members said long ago in *Calder v. Bull*.

Even now, state courts are often more like ordinary legislatures than are unelected independent redistricting commissions, which the Court explicitly upheld in *AIRC* and blessed in *Rucho*. State judges are often elected, and they openly fashion common-law policy. In one of the twentieth century's most

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[27] *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1070n.116 (1994). ACAB, *supra* note 11, at 210.

iconic cases, Justice Brandeis was emphatic: "[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Petitioners turn federalism on its head when they stymie states' ability to restructure their governments as they see fit. Petitioners take a clause designed to respect and involve states and turn it into a clause straitjacketing states and wrongly aggrandizing one faraway federal court that could never be expert on the unique laws of each state.

Although the Chief Justice's dissent in *AIRC* tried to distinguish between state devices that *supplement* the ordinary state legislature and those that *supplant* it, the *AIRC* Court correctly rejected this distinction, which cannot be squared with Article I's text. If "legislature" is read flatfootedly à la Petitioners, then any "mere" supplementation of modern bicameral "legislatures" (even by governors, to say nothing of auxiliary commissioners or judges) would violate the (flatfootedly-defined) "legislature's" power to "prescribe"—to call the shots. If, instead, as we maintain, "legislature" means *the lawmaking system established by the state constitution*, then even a supplanting redistricting commission or state court is permissible.[28]

If a state constitution can leave redistricting to the elected legislature but prescribe every jot and tittle of the criteria and process the legislature must

[28] *See* Vikram David Amar, *Response to Baude/McConnell on ISL,* JUSTIA.COM (Oct. 17, 2022) https://verdict.justia.com/2022/10/17/response-to-baude-mcconnell-on-isl.

use, the state constitution must also be allowed to generously empower other institutions for redistricting purposes.[29]

More recently in *Rucho*, the Court doubled down on *AIRC*, in an opinion by the Chief Justice himself, joined by both of the remaining *AIRC* dissenters (Justices Thomas and Alito), plus Justices Gorsuch and Kavanaugh. 139 S. Ct. at 2507-08.

V. Weren't Legislatures Chosen Because They Are the Most Representative Bodies?

This structural argument boomerangs.

If a state's legislature is preferred because it answers to the state's voters, then what is being privileged is the sovereignty/will of the state's people, not the legislature per se. If the people of a given state decide that the best way to effectuate their will is by creating or amending their state constitution to constrain or restructure legislative power, contra ISL, then that state-constitutional decision actually promotes the underlying values of popular sovereignty and federalism.

VI. What About Other Provisions of the Constitution?

They may well be different.

Unlike Articles I and II, some constitutional provisions use specific language that reflects specific historical concerns with some state governmental institutions vis-à-vis others.

For example, Section 2 of the Seventeenth Amendment, in a single sentence, pointedly

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[29] *See* Amar & Amar, *supra* note 4, at 31-35.

differentiates between the legislatures and executive authorities of states, and confers appointment powers only on the latter. As one of us (Vikram Amar) has shown elsewhere, leading proponents of that Amendment publicly voiced concerns about malapportionment and the racial discrimination it often reflected. These specific concerns help explain an express Seventeenth Amendment preference for governors over state legislatures in filling Senate vacancies. (Governors, elected statewide, were immune from gerrymandering and malapportionment.)[30]

But no comparably pointed linguistic contrast between a state legislature and other state organs—much less between a state legislature and the state constitution that creates it—exists in Articles I and II. Nor is there any meaningful history to support such distinctions.

VII. What is the Proper Role for Federal Courts Here?

A limited one, resting on bedrock principles underlying *Erie* and the Tenth Amendment.[31]

Generally, federal courts should intervene only when state judges so grossly misinterpret state law

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[30] U.S. CONST. amend. XVII, § 2 ("When vacancies happen . . . the legislature of any State may empower the executive thereof to make temporary appointments. . .."); *see* Vikram David Amar, *Are Statutes Constraining Gubernational Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONST. L.Q. 727, 744-50 (2008).

[31] *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 800-01 (1995).

that their conduct when applied to *state elections* violates due process or other rule-of-law principles.[32]

What might seem at first blush to a federal court as state-court overreaching might in fact be proper under that state's legal and interpretive traditions. There is no general federal common law of state constitutional interpretation (or state legislative interpretation or state common-law interpretation).

The test cannot be whether a state supreme court is suitably "textualist," as some members of this Court might seek to define textualism. A given state legislature, the state people who elect that state legislature, and the spirit of that state's overarching state constitution that gave birth to and sustains that state legislature might well *prefer* a state-law jurisprudence that is more purposive, or structural/holistic, or precedent-based, or representation-reinforcing, or democracy-promoting, or canon-driven, than relentlessly textual.

Petitioners seductively urge this Court to intermeddle in the name of the state legislature, which may well prefer a different interpretive method than the one favored by Petitioners, see Question 10, *infra*.

If state justices err, they are subject to correction by state legal actors. But not so if this Court errs. North Carolina state judges were picked by North Carolinians. This Court's members were not. (Have any of the current justices taken the North Carolina bar or practiced law in North Carolina?) As

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[32] For elaboration, *see* Amar & Amar, *supra* note 4, at 48-49.

tempting as a large federal judicial role might be, it runs afoul of Federalism 101.[33]

Indeed, Petitioners violate federalism's first principles in at least three distinct ways. First, Petitioners twist a clause designed to affirm states' rights into a proposed doctrine sharply limiting a state people's ability to structure its own legislative system—its general right to redesign its "legislature" as it sees fit. Second, Petitioners deny that state supreme courts are the definitive interpreters of state law. Third, Petitioners fail to recognize that even when the U.S. Constitution builds on state laws and state institutions, federal courts must generally defer to good-faith state-court interpretations of state law.[34]

In short, Petitioners are urging on this Court a massive national power grab. In response, the Court should remain true to bedrock principles of federalism and institutional modesty.

VIII. What About this Court's Prior Caselaw?

Definitive caselaw cuts hard against Petitioners.

Petitioners (at 41) invoke language from *McPherson v. Blacker*, 146 U.S. 1 (1892), but the cryptic language from this case is rank dicta, and confused dicta at that.[35] The hurried pace of litigation in *Bush v. Gore*, 531 U.S. 98 (2000) prompted mistakes by three Justices, whose views were rejected

[33] *See Amicus* Br. of Conference of Chief Justices.

[34] Amar & Amar, *supra* note 4, at 29n.71.

[35] *Id.* at 30-31.

by a Court majority that day.[36] The earlier *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), decided precisely nothing on the merits.[37]

By contrast, three other cases—*Hildebrant*, *Smiley*, and *AIRC*—directly rejected earlier ISL claims brought before this Court. All three squarely held that in Article I, a state's "legislature" means its *entire legislative system as defined by its master state Constitution*.[38] Even more recently, this Court's high-profile *Rucho* opinion went out of its way to embrace *AIRC*. Save for Justices Barrett and Jackson, every member of the current Court has authored or joined a Court opinion directly repudiating ISL.[39]

There is no way *Hildebrant*, *Smiley*, and *AIRC* could have come out the way they did—or *Rucho* been written the way it was—if ISL were valid.

Petitioners all but admit (at 40 n.9) they can win only if *AIRC* is overruled. But then, *Smiley* and governors' veto pens would logically be the next to go.[40]

Such a direct assault on *Smiley*'s unanimous, venerable, correctly decided, nonpartisan, and deeply entrenched ruling would be catastrophic for the country, the Constitution, and this Court.

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[36] *Id.* at 8-9, 17-33.

[37] *Id.* at 15.

[38] *Id.* at 31-35

[39] *Id.* at 33-36. *See also supra* note 1, pp. 24-25.

[40] *See supra* note 7.

IX. What About ISL for Article II?

Although not at issue in this case, Article II may be on the Court's mind, given that many have assumed that ISL works the same for Articles I and II. In fact, were Petitioners' convoluted logic to prevail for Article I, ISL for Article II would necessarily fail.

For presidential electors, Article II provides that "[e]ach state shall appoint [electors], in a manner the legislature thereof may direct." Unlike Article I, Article II makes *each state*, not "the legislature thereof" the empowered actor. That is, "each state"— not each state "legislature" —is authorized and obligated to appoint presidential electors.

True, Article II mentions "legislatures," but says only that state legislatures "*may*"— not "shall" or "must"— direct the manner of elections.

So even if "legislature" somehow were to mean an "unconstrained" or "independent" body, rather than a lawmaking system, the words of Article II by their very terms do not require that this be the body that adopts presidential-selection regulations.

Attempting to compensate for their lack of serious originalist arguments, Petitioners fixate on (their awkward interpretation of) the word "legislature" in Article I. Consistency demands that they must fixate equally on the facts that Article II empowers "each state" and *not* each state's "legislature" and that Article II says that state legislatures "may"—but need not—be involved.

To be clear, we are not suggesting that ISL works for Article I but not for Article II. It doesn't

work for either.[41] But were this Court to embrace ISL for congressional elections, this embrace could be based only on a very particular, faux-textualist, way of parsing Article I. Neutral principles would then require the same judicial parsing of Article II, which in turn would doom ISL for Article II. This is not what Petitioners would want; but they would be hoisted by their own petard.[42]

X. Must This Court Address ISL in This Case?

No.

This Court could instead affirm on the narrow ground that the North Carolina Supreme Court has concluded that the North Carolina legislature has chosen to enlist state courts in guaranteeing that congressional elections in the state conform to state constitutional principles. Even if the North Carolina constitution somehow does not apply *of its own force*, it applies because the state legislature has *incorporated it by reference.*[43] If this Court has any doubt about this, it could remand to the court below for clarification.

Even if a state legislature were somehow free to ignore its parent state constitution, that legislature could surely *choose* to abide by that constitution and to invite state courts to enforce that constitution as the backdrop of all election-law statutes, state and federal.[44] The North Carolina legislature has

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[41] See Amar & Amar, *supra* note 4, *passim*.

[42] Petitioners expressly concede (at 2) they would lose if Article I empowered "each state."

[43] *See* Amar & Amar, *supra* note 4, at 26-30.

[44] An analogy: Even though the Federal Rules of Civil Procedure do not directly apply of their own force to states, a

seemingly done that, by conferring jurisdiction on its state courts to entertain claims of constitutional violation in both federal and state elections.

Suppose that the North Carolina legislature had passed a hyper-explicit statute unambiguously specifying that the state constitution's election-law principles, as definitively construed by the state supreme court, should apply to all federal elections, and that the state supreme court should disregard any statutory language inconsistent with the state constitution. If so, surely the North Carolina Supreme Court could have done what it did in this case.[45]

The question thus becomes: Are the North Carolina jurisdictional enactments in the present case best interpreted as functionally identical to our hypothetical statute? This is a pure question of state law for the North Carolina Supreme Court.

CONCLUSION

We respectfully urge this Court to affirm the judgment below.

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state legislature could choose to apply these Rules in state courts by incorporating them by reference.

[45] We reject Petitioners' assertions (at 12, 44-48) that this would violate nondelegation principles. Whether some *state* constitutional nondelegation principle applies is a question for North Carolina courts. Any new-minted *federal* rule that state legislatures may be commandeered into federal service and may not enlist the help of others would intrude enormously on state autonomy, as guaranteed by the Tenth Amendment, the Republican Government Clause, and basic principles of federalism. *Cf. New York v. United States*, 505 U.S. 144 (1992).

Respectfully submitted,

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Dated: October 24, 2022