

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TIMOTHY K. MOORE, IN HIS OFFICIAL)
4 CAPACITY AS SPEAKER OF THE)
5 NORTH CAROLINA HOUSE OF)
6 REPRESENTATIVES, ET AL.,)
7 Petitioners,)
8 v.) No. 21-1271
9 REBECCA HARPER, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Wednesday, December 7, 2022

15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:04 a.m.

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Thompson.

ORAL ARGUMENT OF DAVID H. THOMPSON

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

1 And I welcome the Court's questions.

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

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

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

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

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

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

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

1 veto, right?

2 MR. THOMPSON: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

17 MR. THOMPSON: I'm good.

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

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

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

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

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

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

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

5 JUSTICE BARRETT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 JUSTICE SOTOMAYOR: To reserve power
22 to the states to decide whether apportionment or
23 malapportionment should be prohibited. We've
24 already had a case, Groh, by Justice Scalia, who
25 said that that was perfectly okay for a state

1 constitution to prohibit malapportionment.

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

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

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

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

21 JUSTICE SOTOMAYOR: There were only
22 13.

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

25 JUSTICE SOTOMAYOR: There were 13

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE BARRETT: Mr. Thompson --

25 MR. THOMPSON: Yeah.

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

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

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

24 We understand that there are members
25 of the Court who take the opposite view, who say

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

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

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

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

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

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

22 JUSTICE JACKSON: Can I ask you a
23 question about it being a federal function? So
24 is it your argument that the state constitution
25 has no role to play, period?

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

3 JUSTICE JACKSON: Mm-hmm.

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

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

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

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

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

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

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

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

24 JUSTICE KAGAN: Well, if that's coming
25 from Leser, I mean -- so then you're going to

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

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

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

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

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

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

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

25 JUSTICE KAGAN: Yeah. I guess what

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

9 (Laughter.)

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

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

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

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

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

24 JUSTICE KAVANAUGH: Your --

25 MR. THOMPSON: It's right there in the

1 text.

2 JUSTICE SOTOMAYOR: Counsel --

3 JUSTICE KAVANAUGH: Your -- go ahead.

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

8 MR. THOMPSON: Correct, Your Honor.

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

13 MR. THOMPSON: Correct, Your Honor.

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

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

21 JUSTICE SOTOMAYOR: Right.

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

24 JUSTICE SOTOMAYOR: So let's go to the
25 -- your -- the substantive/procedural reasons

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

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

13 MR. THOMPSON: It's procedural.

14 JUSTICE SOTOMAYOR: Oh.

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

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

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

24 JUSTICE SOTOMAYOR: No, he -- the --
25 the constitutional provision permits him to --

1 to alter the contents.

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

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

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

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

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

17 JUSTICE SOTOMAYOR: Yes.

18 MR. THOMPSON: No.

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

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

24 JUSTICE SOTOMAYOR: What about a state
25 constitutional provision that precludes

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

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

7 JUSTICE SOTOMAYOR: All right.

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

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

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

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

24 MR. THOMPSON: And one --

25 JUSTICE SOTOMAYOR: And I simply --

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

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

15 JUSTICE JACKSON: But, Mr. --

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

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

1 actually act as the legislatures.

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

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

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

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

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

4 MR. THOMPSON: We're saying --

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

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

8 JUSTICE JACKSON: -- which entity?

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

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

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

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

25 MR. THOMPSON: And that's what Arizona

1 teach --

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

4 MR. THOMPSON: Arizona --

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

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

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

15 MR. THOMPSON: Well, because the --

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

25 MR. THOMPSON: Because Leser teaches

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

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

7 CHIEF JUSTICE ROBERTS: Counsel --

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

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

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

22 CHIEF JUSTICE ROBERTS: Counsel, you
23 make the point at -- at -- several points in
24 your brief about the nature of the state
25 limitation that the courts were interpreting, a

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

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

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

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

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

1 work had the hallmarks of legislation, Your
2 Honor. So it's both problems.

3 JUSTICE ALITO: Mr. Thompson --

4 JUSTICE KAVANAUGH: Mr. Thompson -- go
5 ahead, go ahead.

6 JUSTICE ALITO: Mr. Thompson, even
7 under your primary theory, however, isn't it
8 inevitable that there will be questions about
9 the meaning of statutes enacted by the
10 legislature to govern elections?

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

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

24 Under our primary theory, we take
25 state law however it's interpreted by the -- the

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

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

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

23 MR. THOMPSON: No, because that would
24 be a violation of -- there -- there would be no
25 standard. There would be no rule. And the

1 state courts would be seizing that power from
2 the legislature.

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

5 JUSTICE ALITO: I -- I --

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

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

25 And so I think the other side and the

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

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

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

24 So we would defer entirely for
25 purposes of our liability arguments in this

1 Court to -- and assume that what the North
2 Carolina Supreme Court did here was correct.

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

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

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

20 MR. THOMPSON: Well, the -- the Court
21 cited to and quoted from McPherson versus
22 Blacker for the proposition that there could not
23 be any limit on the power of the state
24 legislature. Then it vacated the opinion of the
25 Florida Supreme Court, and it sent it back on

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

7 JUSTICE KAVANAUGH: Did it say
8 substantive limit?

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

10 JUSTICE KAVANAUGH: I don't -- I don't
11 recall that.

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

15 JUSTICE KAVANAUGH: It didn't use the
16 word "substantive," though.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MR. THOMPSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Just -- at
24 page 33 of your reply brief, sort of the last
25 gasp of briefing --

1 (Laughter.)

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

7 MR. THOMPSON: Yes.

8 CHIEF JUSTICE ROBERTS: -- could you
9 articulate exactly what you think that is?

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

18 CHIEF JUSTICE ROBERTS: Well --

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: -- let's not
21 --

22 MR. THOMPSON: Okay.

23 CHIEF JUSTICE ROBERTS: I'm sorry. Go
24 ahead.

25 MR. THOMPSON: The neuroscientist who

1 drew these maps apparently knows how to -- to
2 draw the efficiency ratio.

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

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 Justice Alito, anything?

12 Justice Sotomayor?

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

20 MR. THOMPSON: No --

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

24 MR. THOMPSON: No, Your Honor --

25 JUSTICE SOTOMAYOR: -- for compliance.

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

11 JUSTICE SOTOMAYOR: Some of them were
12 created by the courts.

13 MR. THOMPSON: Yes, with judicially --

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

1 How is that any different than what we
2 normally do in our review?

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

7 JUSTICE SOTOMAYOR: But that --

8 MR. THOMPSON: -- was acceptable.
9 There is no judicial --

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

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

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

1 needed most, because legislators, we all know,
2 have their own self interests. They want to get
3 reelected. And so there are countless times
4 when they have incentives to suppress votes, to
5 dilute votes, to negate votes, to prevent voters
6 from having true access and true opportunity to
7 engage the political process.

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

18 MR. THOMPSON: Your Honor, so our --
19 our position is that checks and balances do
20 apply, but they come from the federal
21 Constitution and the panoply of federal laws
22 like the Voting Rights Act and other statutes
23 that are highly protective of voters. So there
24 is a check. There is a balance. And there's
25 also a political. So we've got the legal check

1 from federal law, and we've got the political
2 check that the founders envisioned of going to
3 Congress. And, as I mentioned, this very
4 Congress, this House of Representatives, voted
5 to ban partisan in gerrymandering in all 50
6 states.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

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

15 MR. THOMPSON: I think there are two,
16 and we can learn them from James Madison and
17 Joseph Story. So James Madison, as I mentioned,
18 specifically singled out South Carolina as a
19 place that had taken its gerrymander and
20 entrenched it right into the constitution
21 itself, and, of course, Virginia in 1830 does
22 the same thing, where the slave owners try to
23 aggrandize their political power by putting a
24 partisan gerrymander right in the state
25 constitution, and there's nothing anyone in the

1 state can do to -- do about it short, of course,
2 of amending the constitution or coming to
3 Congress.

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

15 JUSTICE GORSUCH: Subject to federal
16 constitutional constraints and federal court
17 review and state court review of federal
18 constitutional claims.

19 MR. THOMPSON: Absolutely, Your Honor.

20 JUSTICE GORSUCH: And, historically,
21 at least as I've looked at it, you've got the
22 example of Virginia trying to constitutionalize
23 the 3/5 rule with respect to African Americans.

24 MR. THOMPSON: Yes, Your Honor,
25 exactly right.

1 JUSTICE GORSUCH: You've got the
2 example in Maryland of -- of trying to deny the
3 opportunity to adopt the Nineteenth Amendment to
4 the Constitution.

5 MR. THOMPSON: That's right, Your
6 Honor.

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

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

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

22 I wanted to just make sure I
23 understood your colloquy with Justice Kavanaugh
24 and I believe the Chief Justice too, the
25 difference between this and the Bush versus Gore

1 circumstance that Chief Justice Rehnquist spoke
2 about in his concurrence. It seems to me there
3 are two types of problems. One is, is a state
4 court actually interpreting a statute or is it
5 going too far afield, to the point where someone
6 might say it's not following the statute?

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

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

13 MR. THOMPSON: I -- I -- I actually
14 think differently.

15 JUSTICE GORSUCH: Or am I wrong about
16 that?

17 MR. THOMPSON: Yeah, I think,
18 respectfully, Your Honor, you are because, even
19 though we actually think that's an accurate
20 description of what happened here, that's not
21 our position in this Court. Our court is assume
22 that the North Carolina Supreme Court was
23 entirely right about what they did and that it
24 was --

25 JUSTICE GORSUCH: As a matter of state

1 law?

2 MR. THOMPSON: As a matter of state
3 law, but that it is then still impermissible
4 because it is imposing a substantive limitation
5 on the state legislature.

6 JUSTICE GORSUCH: Via this mélange of
7 state constitutional provisions?

8 MR. THOMPSON: Yes, Your Honor.

9 JUSTICE GORSUCH: Okay. All right. I
10 -- I -- I understand it now. Thank you.

11 MR. THOMPSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: In interpreting
15 the state statutes, can a state court rely
16 on canons of interpretation that say interpret
17 those state statutes in light of state
18 constitutional provisions?

19 MR. THOMPSON: Your Honor, so what
20 Chief Justice Rehnquist said in the Bush versus
21 Gore concurrence was he said look to the
22 novelty, look to see whether, when you look at
23 the text, you look at the canons of
24 construction, you look at any other sources, at
25 precedent, you look at all the panoply of

1 different tools available to state court judges,
2 and if it would be a surprise to someone that
3 this is what the statute meant, he had a novelty
4 test. And -- and so that would be the way you
5 would do it.

6 Of course, in this case, that's not --
7 JUSTICE KAVANAUGH: Is that -- is that
8 a yes to the question?

9 MR. THOMPSON: Well, Your Honor, yes,
10 you would look at state canons of construction
11 in that very different context.

12 JUSTICE KAVANAUGH: Which could be
13 rooted in the state constitution?

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

19 JUSTICE KAVANAUGH: And then the
20 Conference of Chief Justices' brief makes the
21 point, I think, as do the other briefs, that
22 nearly all state constitutions regulate federal
23 elections in some way and that that is, as
24 earlier questions have pointed out, some of the
25 early state constitutions did that. What do we

1 do with that historical practice in thinking
2 about how to analyze this question?

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

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

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

19 MR. THOMPSON: Yeah.

20 JUSTICE KAVANAUGH: -- historical
21 practice in the states and those federal
22 statutes.

23 MR. THOMPSON: Your Honor, we think
24 the way to think about this is consistent with
25 the Court's opinion in Bruen last term where it

1 looked very focused on the time of the founding,
2 1791, obviously, we're looking for the public
3 meaning of the Constitution. As that founding
4 generation passes away, Adams and Jefferson die
5 on the 50th anniversary of the Declaration of
6 Independence, as we get out of the 1820s,
7 there's very limited information you can get as
8 to the original public meaning of the
9 Constitution.

10 But -- so it can be a confirming --
11 that subsequent history as in Bruen can be a
12 confirming historical tradition that -- that --
13 but it can't undermine what the text and the
14 founding era history show to be the case.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: So could you -- I
19 want to follow up on Justice Kavanaugh's
20 question about Chief Justice Rehnquist's
21 concurrence in Bush versus Gore. So I
22 understand that that's not this case because
23 that was an interpretation of a statute and
24 we're talking about a state constitution. But I
25 take it that if we were talking about an

1 interpretation of a statute you would agree with
2 Chief Justice Rehnquist's approach?

3 MR. THOMPSON: Yes. Yes. Yes, we do
4 agree.

5 JUSTICE BARRETT: And on the theory
6 that at that point the state court would not be
7 acting as a court but would be acting more as a
8 legislature?

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

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

21 Now it couldn't in Bush versus Gore.
22 There wasn't enough time. But the point is --
23 and we think the concurrence was correct, but I
24 just wanted to make the point that it does not
25 necessarily follow that if the Court rules in

1 our favor in this case that that case would come
2 out the -- the way the -- the concurrence did in
3 Bush versus Gore.

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

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

20 MR. THOMPSON: Well, just to be clear,
21 Your Honor, so in terms of figuring out whether
22 there has been an impermissible distortion of a
23 statute --

24 JUSTICE BARRETT: Mm-hmm.

25 MR. THOMPSON: -- that's where you

1 have to look to see whether it's novel.

2 JUSTICE BARRETT: Right. But I
3 thought you said you agreed with that approach.

4 MR. THOMPSON: I do. I'm just saying
5 that in this case where we're -- none of that is
6 implicated.

7 JUSTICE BARRETT: I understand that.

8 MR. THOMPSON: Yeah. Okay. And so I
9 -- I apologize.

10 JUSTICE BARRETT: Well, I guess I
11 think substance and -- substance and procedure,
12 as many of the questions --

13 MR. THOMPSON: Yes.

14 JUSTICE BARRETT: -- that you've
15 gotten indicate, are difficult to separate out.
16 And so I'm saying --

17 MR. THOMPSON: Yeah.

18 JUSTICE BARRETT: -- you're leaning
19 pretty hard on the lack of judicially manageable
20 standards for things like free and fair
21 elections. So I'm saying, why should we take
22 solace in a substance/procedure definition as
23 a -- as a more manageable line?

24 MR. THOMPSON: Well, thank you, Your
25 Honor. And I would point to the Court's

1 decision from 1946, Murphree, where it is
2 talking about the Rules Enabling Act and is
3 setting up the line between substance and
4 procedure.

5 JUSTICE BARRETT: Which is, as a -- as
6 a former civil procedure teacher, I can tell you
7 is a hard line to draw and a hard line to teach
8 students in that context as well.

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

18 And so this isn't even close to the
19 line. But we think my friends on the other
20 side, they're trying to adopt and asking the
21 Court to adopt a functionalist approach.
22 They're saying -- they say on page 57 of the
23 state Respondents' brief that, yes, there is
24 something to this idea that the -- that there
25 are limits on the extent to which the state

1 constitution can control the state legislature.
2 The state legislature has to have "a central
3 role." That is a functionalist test if ever
4 there was one. And how do you define the
5 center, and how far from the center can you go?
6 And, oh, by the way, if this is in the center,
7 then the center is pretty much coterminous with
8 the circumference because, you know, we've been
9 --

10 JUSTICE BARRETT: Okay.

11 MR. THOMPSON: -- sidelined
12 completely.

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

16 You were pointing out that state
17 constitutions entrench norms and so they're more
18 problematic than statutes.

19 MR. THOMPSON: Yes.

20 JUSTICE BARRETT: But a lot of state
21 constitutions can be amended by simple
22 majorities in, say, the referendum process. And
23 so, you know, we know from Hildebrant that if a
24 districting is done by referendum, that's okay,
25 you know, that doesn't violate the Elect --

1 Elections Clause.

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

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

18 JUSTICE BARRETT: But you're stuck
19 with Hildebrant. I thought you weren't trying
20 to get rid of it.

21 MR. THOMPSON: I'm not trying to get
22 rid of it, but if we're trying to say why
23 would -- why would the founders have objected
24 and been worried about partisan gerrymanders in
25 a state constitution, they would have been

1 worried about it because it was maximally
2 entrenching.

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

9 But, typically, you know, if you want
10 to try to solidify something to the maximum
11 extent possible politically, you typically put
12 it into a constitution.

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

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

21 MR. THOMPSON: We -- we think the
22 dissent in Arizona was correct and that the
23 legislature meant the legislature plus the
24 gubernatorial veto.

25 JUSTICE JACKSON: Legislature defined

1 by whom?

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

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

12 MR. THOMPSON: And that is what the
13 Arizona majority said, and we're perfectly
14 content to abide by that.

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

23 So, in other words, the Elections
24 Clause says you get the right to make this
25 decision, that you have that policy

1 determination. But the state constitution is
2 the thing that gives this particular entity its
3 authority to make any determinations and the
4 state constitution says things like, when you
5 make a determination about things in your
6 policymaking role, in the legislative power that
7 we're giving you, you have to make sure that,
8 you know, people are treated equally.

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

15 And so I guess what I'm trying to
16 understand is why are you suggesting that in the
17 context of the Elections Clause, when this
18 entity would ordinarily be bound by all of the
19 limitations in the state constitution in its
20 legislative authority role, why suddenly in this
21 context do you say, no, no, no, all those other
22 constitutional provisions that would bind or
23 constrict legislative authority that the state
24 gives you because you're the state legislature,
25 right, why -- why do those evaporate in this

1 world?

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

8 Why am I wrong about sort of
9 conceptualizing it in that way?

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

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

21 But the authority for that body,
22 wherever it is, that's called the legislature,
23 comes from the state because -- you know,
24 that -- that was my example about we have two
25 different entities in the state fighting. Who's

1 the legislature, right? It's what the
2 constitution of the state says that gives you
3 the power, entity X, to be the one who is the
4 legislature making this elections decision.

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

14 MR. THOMPSON: And U.S. Term Limits
15 says that is not right.

16 JUSTICE JACKSON: All right.

17 MR. THOMPSON: That the premise of
18 your question is not right.

19 JUSTICE JACKSON: All right. Thank
20 you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Katyal.

24

25

1 ORAL ARGUMENT OF NEAL K. KATYAL
2 ON BEHALF OF THE PRIVATE RESPONDENTS

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

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

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

20 It's also rejected by this Court in
21 cases such as Smiley and Hildebrant. Just three
22 years ago in *Rucho*, this Court promised state
23 constitutions can provide standards for state
24 courts to apply and singled out for approval a
25 Florida court decision that used a state

1 constitution to invalidate a federal map.

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

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

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

22 Finally, the blast radius from their
23 theory would sow elections chaos, forcing a
24 confusing two-track system with one set of rules
25 for federal elections and another for state

1 ones. Case after case would wind up in this
2 Court with a political party on either side of
3 the V. That would put this Court in a difficult
4 position instead of leaving it to the 50 states.

5 JUSTICE THOMAS: Mr. Katyal, would you
6 spend some time on discussing the source of the
7 state court's involvement in a federal election.

8 MR. KATYAL: Yeah, we --

9 JUSTICE THOMAS: I understand the
10 court is created under state constitution, but
11 this is a federal matter.

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

20 And, Justice Thomas, if I may, in two
21 decades of arguing before you, I've waited for
22 this precise case because it speaks to your
23 method of interpretation, which is history, and
24 the founding evidence here is overwhelming, and
25 I'd point you to four things.

1 First, the Constitution uses the same
2 word, legislatures, as the Articles of
3 Confederation, and 10 state constitutions under
4 the Articles regulated federal delegates.

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

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

23 And lastly and most importantly, the
24 dog never barked. The Federalist Papers have
25 three different Federalist Papers on everything

1 he's been talking about about the Elections
2 Clause. Not a person said anything like that
3 they were trying to create this strange animal.
4 This isn't looking like into a crowd and trying
5 to pick out your friends. This is like looking
6 into the Lollapalooza crowd and picking
7 out everyone who speaks 15 languages. They --
8 JUSTICE GORSUCH: I don't know about
9 --
10 CHIEF JUSTICE ROBERTS: Okay. That --
11 JUSTICE GORSUCH: -- lollapalooza.
12 (Laughter.)
13 JUSTICE GORSUCH: But, while we're
14 looking at crowds, Mr. Katyal -- I'm sorry,
15 Chief. You want to go ahead?
16 CHIEF JUSTICE ROBERTS: No, no, Go
17 ahead. I'm still trying to sort the analogy
18 out.
19 JUSTICE GORSUCH: You want to touch
20 the lollapalooza, yeah, yeah.
21 (Laughter.)
22 JUSTICE GORSUCH: Right. That's --
23 that was a lollapalooza.
24 It is a small point, but, on Smiley,
25 on -- on the veto question, just narrowly on the

1 veto question, you know, Locke, Montesquieu, The
2 Federalist Papers treat that as a legislative
3 power and -- and a sharing of the legislative
4 power. And it's in Article I, which kind of
5 suggests it's -- the founders considered it a
6 legislative power. So I -- I guess I'm a little
7 less moved by -- by -- by that lollapalooza than
8 you are. Maybe you can help me out, though.

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

20 JUSTICE GORSUCH: And nobody here
21 thinks the North Carolina Supreme Court is
22 exercising a legislative function. We all agree
23 on that too, right?

24 MR. KATYAL: Correct. Correct.

25 JUSTICE GORSUCH: Okay. So that kind

1 of takes care of that argument --

2 MR. KATYAL: Well --

3 JUSTICE GORSUCH: -- I mean, doesn't
4 it?

5 MR. KATYAL: -- no, no, because I
6 think --

7 JUSTICE GORSUCH: What am I missing?

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

16 JUSTICE GORSUCH: Yeah.

17 MR. KATYAL: But, here --

18 JUSTICE GORSUCH: And -- and that's
19 because, if we want to look at our friends in
20 the Federalist Papers and everywhere else, that
21 was considered sharing of -- there was no
22 absolute separation of powers. There was an
23 exception that --

24 MR. KATYAL: Right.

25 JUSTICE GORSUCH: -- that they had to

1 be mixed. You know -- you know your Federalist
2 41 and 47 and 51 better than I do, I'm sure.
3 But -- but that that was a legislative function
4 that was given to the President and there it is
5 in Article I.

6 MR. KATYAL: Not disagreeing with that
7 --

8 JUSTICE GORSUCH: Okay. All right.

9 MR. KATYAL: -- Justice Gorsuch. What
10 I am saying is that Smiley focused on two
11 things, the word "legislature" but also the word
12 "regulate."

13 JUSTICE GORSUCH: All right.

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

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

22 MR. KATYAL: So far more established
23 than the veto. And so, you know, seven
24 different states had judicial review at the
25 founding. If the method of Smiley -- the method

1 of Smiley is to say, look, the founders knew
2 about the veto because it was in two states, did
3 they textually exclude it in the language? The
4 answer was no.

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

13 And so that's the part that I keep
14 getting hung up on. Can you -- can you help? I
15 mean, we have said at certain times here in the
16 questioning today that various entities are
17 exercising legislative power or not, or maybe
18 the Court is exercising legislative power. I
19 thought we told -- we -- we were able to tell
20 when something is a legislative power by
21 reference to the state's constitution, that they
22 tell us when legislative power is being
23 exercised at all, validly or whatever. Am I
24 wrong about thinking about it in this way?

25 MR. KATYAL: You're absolutely right,

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

15 Now, with respect to this federal
16 function argument you were asking about, Smiley
17 dead rejects it. That's exactly what the
18 Minnesota Supreme Court said below. They
19 actually called it a federal agency. And what
20 this Court did unanimously reversed and it said
21 no because, here, you are acting "as a
22 law-making body," which is what I was saying to
23 Justice Gorsuch from page 364.

24 It's the exact opposite of his example
25 of -- of the Leser case. Leser is about Article

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

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

18 MR. KATYAL: We don't think it would
19 be, Your Honor. So we think, in general, there
20 may be some redefinition of the legislature that
21 Arizonans -- the Arizona decision might permit.
22 That isn't what we are arguing here. We're
23 talking about ordinary checks and balances like
24 judicial review, and so --

25 JUSTICE ALITO: All right. Suppose

1 that the state constitution says that the
2 legislature can adopt congressional maps, but in
3 that instance, the state supreme court shall sit
4 as a council of revision to determine whether
5 the maps are fair.

6 MR. KATYAL: Yes.

7 JUSTICE ALITO: Is that okay?

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

14 JUSTICE ALITO: Well, that's not
15 really judicial review. That is because they're
16 not --

17 MR. KATYAL: Correct.

18 JUSTICE ALITO: -- reviewing it for
19 anything. So --

20 MR. KATYAL: Right.

21 JUSTICE ALITO: -- what was your
22 answer there? That is okay or that is not okay?

23 MR. KATYAL: Nothing in our position
24 depends on it, Your Honor, but the historical
25 test, which is what he's using, New York in

1 1792, did exactly that.

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

9 MR. KATYAL: The constitution says
10 that the map adopted by the legislature is or
11 the state court says that?

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

20 MR. KATYAL: Yes, Your Honor, we think
21 that would -- again, nothing turns on that here,
22 but the answer to your question is yes, we think
23 that would be constitutional, and the reason why
24 is because there's a trident of safeguards that
25 would prevent any sort of abuse. The first one,

1 the safeguard, is in the state process itself.
2 As Judge Sutton's work explains, state courts
3 have all sorts of mechanisms to restrain them,
4 including popular accountability and, as Justice
5 Barrett pointed out a moment ago, a much easier
6 amendment process.

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

20 MR. KATYAL: Yes, Your Honor, we do,
21 and the reasons for that are threefold. Number
22 one, there are any number of checks on that
23 process, including, as Justice Barrett says, the
24 amendment process and other things that Judge
25 Sutton warns about.

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

8 JUSTICE ALITO: But can't you say the
9 same thing about allowing the legislature to
10 do -- which is popularly elected, to do the --
11 to make the map? Congress can always come in.

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

20 And, third, with respect to your
21 question of the catastrophic consequences, we
22 think, for reasons Justice Kagan said, that cuts
23 entirely the other way. I mean, the blast
24 theory by their -- by their theory -- blast
25 radius by their theory starts at the size extra

1 large. It starts with invalidating 50 different
2 state constitutions today. Elections clauses
3 are in 27. All states have equal protection
4 clauses, speech clauses, assembly clauses.
5 Thirty of them guarantee the right to a secret
6 ballot. There's vote -- five of them, voter ID
7 --

8 JUSTICE ALITO: What about the -- what
9 about the approach set out by Justice -- by
10 former Chief Justice Rehnquist? Does that -- is
11 that also a lollapalooza? Does that have a --

12 MR. KATYAL: No.

13 JUSTICE ALITO: -- huge blast radius?

14 MR. KATYAL: No, Your Honor, as long
15 as we understand, as Justice Kavanaugh said a
16 moment ago, that that is about statutes. And,
17 here --

18 JUSTICE ALITO: Well, as applied --
19 how about if it's applied to a state
20 constitution --

21 MR. KATYAL: Right.

22 JUSTICE ALITO: -- as well?

23 MR. KATYAL: So, for 233 years, this
24 Court has never second-guessed a state court
25 interpretation of its own constitution in any

1 context. Forget about the election --

2 JUSTICE ALITO: Oh, I don't think --
3 is that true?

4 MR. KATYAL: I --

5 JUSTICE ALITO: We have to decide
6 whether there is an adequate and independent
7 state ground, right, for --

8 MR. KATYAL: Right.

9 JUSTICE ALITO: -- a rule that's --
10 that a state court invokes?

11 MR. KATYAL: You certainly do decide
12 it. I don't think you've ever second-guessed it
13 and said they've gotten it wrong. My friends
14 from the --

15 JUSTICE ALITO: We've never said that
16 one is inadequate?

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

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

21 MR. KATYAL: Yes.

22 JUSTICE ALITO: -- or rule?

23 MR. KATYAL: So that's -- and that's
24 the distinction I was drawing, referring to
25 Justice Kavanaugh. With respect to -- with

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

12 JUSTICE ALITO: All right. Thank you.

13 MR. KATYAL: -- then --

14 JUSTICE ALITO: Thank you, Mr. Katyal.
15 I have a few more questions, but I'll wait for
16 the next period.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Mr. Katyal, you quote in your brief,
19 and we heard it this morning as well, the
20 language from Rucho that say -- says provisions
21 in state constitutions can provide standards and
22 guidance for state courts to apply in
23 redistricting. Do you think the phrase "fair
24 and free elections" is providing standards and
25 guidelines?

1 MR. KATYAL: I -- I do. Let me say
2 two things about that. Number one, Your
3 Honor --

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

9 MR. KATYAL: You said --

10 CHIEF JUSTICE ROBERTS: -- with
11 respect to partisan gerrymandering --

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

24 I think that point cuts the other way
25 with respect to this case because, if you left

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

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

24 CHIEF JUSTICE ROBERTS: Just --

25 MR. KATYAL: Five Justices -- sorry.

1 CHIEF JUSTICE ROBERTS: Yeah. And
2 just to be clear, when you say "you," you mean
3 the Court, right?

4 MR. KATYAL: Exactly.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MR. KATYAL: Yes.

7 (Laughter.)

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

17 When you're falling back in that
18 situation, do you bump into Mr. Thompson when
19 he's falling back the other way?

20 (Laughter.)

21 MR. KATYAL: Ha. No, because he
22 actually just disclaimed it. He said, I'm not
23 second-guessing the North Carolina state
24 legislature. So the separate opinion that was
25 written in this case earlier, all those

1 arguments, I take it, are now off the table
2 about the North Carolina court going too far or
3 misreading its own constitution.

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

11 And we'd say the corollary is it's an
12 equal affront to say a state can't even have
13 these clauses in its constitution, that they're
14 unenforceable. You know, things like the free
15 elections clause have been around since 1776 in
16 North Carolina. They predate the Declaration of
17 Independence.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas -- Thomas, anything
21 further?

22 JUSTICE THOMAS: Actually, I don't,
23 but I've been waiting 30 years to ask him a
24 question.

25 (Laughter.)

1 MR. KATYAL: That was good.

2 CHIEF JUSTICE ROBERTS: Drum roll.

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

7 MR. KATYAL: Yeah, I don't think it
8 was -- I think you can declare it
9 unconstitutional, any number of things like
10 that. But to say that they just got their own
11 constitution wrong is -- just as a matter of
12 interpretation, that is, as a --

13 JUSTICE THOMAS: But it was purely an
14 interpretation of their own constitution and --

15 MR. KATYAL: And a violation of
16 federal law, right? So --

17 JUSTICE THOMAS: Well, yeah, I mean,
18 but that's just a way -- I mean, you can
19 raise -- you -- it's -- in the end, it was
20 invalidating their interpretation of their
21 redistricting principles.

22 MR. KATYAL: And -- and, Justice
23 Thomas, our only point to you, and it's the same
24 point picking up on Justice Kavanaugh's question
25 to my friend, at page 78 of Bush versus Palm

1 Beach Canvassing Board, you said that -- the
2 Court said that -- that sovereignty is at --

3 JUSTICE THOMAS: Well, I was there
4 too, yeah.

5 MR. KATYAL: Sovereignty was at its
6 apex when you're talking about state
7 constitutions and interpretations by state
8 courts.

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

17 MR. KATYAL: So the -- if -- yes, I
18 mean, if there is --

19 JUSTICE THOMAS: You just -- Justice
20 Gorsuch said it seems as though it depends on
21 whose ox is being gored. So I'm changing which
22 ox is being gored.

23 MR. KATYAL: Yeah. No, we don't think
24 anything turns on the substance of the
25 individual decisions here.

1 JUSTICE THOMAS: But you would still
2 be there --

3 MR. KATYAL: Our point --

4 JUSTICE THOMAS: -- making the same
5 argument?

6 MR. KATYAL: -- our point to you,
7 Justice Thomas, is that this Court has never
8 second-guessed state court interpretations of
9 their own constitution. And so, if there's a
10 general clause and it happens to benefit or hurt
11 --

12 JUSTICE THOMAS: Yeah.

13 MR. KATYAL: -- minority voters, as
14 Judge Sutton says, that's a process the states
15 deal with. And as I was saying to Justice
16 Alito, there's a special safeguard here, which
17 is the second half of the Elections Clause,
18 which allows Congress to supplant whatever that
19 errant state court decision is.

20 JUSTICE THOMAS: So when is it --
21 again, I'd like you to just tell me, what is the
22 source of the authority for the State of North
23 Carolina Supreme Court to be involved in a
24 federal election? I understand that there's no
25 disagreement about a state legislator. But this

1 is a federal election, and it's similar to the
2 problem we had with the presidential election in
3 Bush v. Gore.

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

12 I think you're absolutely right, the
13 spirit of your question, for 233 years, this
14 Court's never gotten involved and said, hey,
15 we're going to, you know, rove and say the North
16 Carolina court got it wrong or their provision
17 was too abstract for enforcement or anything
18 like that. Rather, this Court has always stayed
19 on the sidelines, let the state process unfold,
20 subject to that other part of the trident check,
21 Congress in the second half of the Elections
22 Clause.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: I was asking some
25 questions earlier about instances in which it is

1 necessary for a federal court in applying
2 federal law to delve into the meaning of state
3 law. And while federal courts generally take
4 state law to be whatever the state supreme court
5 says it is, there are instances where that is
6 not the rule, and I mentioned one.

7 Put aside for a moment your
8 distinction between a state constitution and a
9 state statute. Whether -- whether a rule
10 invoked by the state supreme court is an
11 adequate rule, in deciding whether there is an
12 adequate and independent state ground for a --
13 for a rule that the -- the state supreme court
14 applies, right, that's an instance of that?

15 MR. KATYAL: Correct.

16 JUSTICE ALITO: All right. How about
17 the Contract Clause, whether the -- was there a
18 violation of the Contract Clause? Doesn't the
19 Court have to determine whether there really was
20 a contract under the law of the state at the
21 time when the contract in question was formed?

22 MR. KATYAL: Right. We don't doubt
23 that. It's just under a very deferential
24 standard review. We're not disagreeing.

25 JUSTICE ALITO: What about the Takings

1 Clause, was there a taking of property?
2 Property is defined by state law, but what -- if
3 the state supreme court says this thing is not
4 property, does that answer the federal question?

5 MR. KATYAL: Again, not -- not -- you
6 know, yes, we think all of those are examples of
7 this Court looks into it. Here, of course,
8 we're talking about state constitutions being
9 interpreted by state courts, so it's a little
10 different than these scenarios, but yes.

11 JUSTICE ALITO: All right. What about
12 if there's -- along the same lines, what if
13 there is a claim that there was a deprivation of
14 property? Once again, property is primarily
15 defined by state law, but does the state supreme
16 court have free rein to say, no, there was no
17 deprivation because there was no property?

18 MR. KATYAL: So the state court does
19 under its own processes depending on the text
20 and the history in that state, which differs
21 from state to state for reasons Judge Sutton
22 says, and this is the same answer I'd given to
23 Justice Thomas. We don't doubt that there is
24 some review by this Court in the most -- in
25 extreme circumstances. It's just that the

1 standard is incredibly high.

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

12 JUSTICE ALITO: Well, but you -- I
13 mean, you say the standard is incredibly high,
14 but does it go up to the stratosphere or, you
15 know, into outer space? When you say that it
16 would be okay for a state to set up the state
17 supreme court as the council of revision or that
18 it would be okay for the supreme court -- a
19 state supreme court simply to say the essence of
20 our constitution is fairness, you would say that
21 that can be done. So that sounds like no
22 standard at all.

23 MR. KATYAL: Again, Your Honor, we're
24 saying ordinary checks and balances, that's all
25 you have to do here, but, yes, we think there

1 are other checks that deal with that, those
2 precise problems. If there is in a clause
3 that's abstract and being misinterpreted, both
4 the state process itself as well as Congress can
5 come in and supplant that.

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

14 JUSTICE ALITO: But Congress can -- I
15 don't know why that's an answer because Congress
16 can come in anytime, under any circumstances, no
17 matter what we say the Elections Clause means.
18 Congress can always come in and --

19 MR. KATYAL: Right.

20 JUSTICE ALITO: -- establish the
21 manner of conducting congressional elections.

22 MR. KATYAL: But what this Court said
23 is that what that clause reflects is a distrust
24 of state legislatures. That's what you said in
25 Hildebrant and in Smiley, and there -- excuse

1 me, in Smiley and Wesberry, and in those cases,
2 you rejected that precise argument. And so it
3 is a check on judicial adventurism to the extent
4 you're worried about it.

5 JUSTICE ALITO: What is the check on
6 -- last question. What is the check on an
7 appointed state supreme court? Suppose a state
8 supreme court, the justices of the state supreme
9 court had the same protection against removal
10 and all of the other protections that federal
11 court --

12 MR. KATYAL: Yeah.

13 JUSTICE ALITO: -- federal courts do.
14 What is the check on them?

15 MR. KATYAL: So it is the amendment
16 process, which, as Justice Barrett -- Justice
17 Barrett said, I think, boomerangs on them when
18 you try to exempt state statute -- statutes
19 because amendment processes are often easier.
20 Judge Sutton's book talks about that. And you
21 have the congressional check.

22 And my last point to you, Justice
23 Alito, is, what's the check on the other side?
24 All he's giving you is federal constitutional
25 review, which is, you know, only a few clauses

1 of the Constitution, as Rucho says, many of
2 them nonjusticiable.

3 So the states have regulated this for
4 233 years in a particular way. The blast radius
5 from his theory can extend to state statutes. I
6 understand he's disclaiming them, but the next
7 petitioner won't, the theory's going to apply
8 and may even reach delegations to state
9 officials, which would be a -- you know, a
10 dramatic change, as the Ben Ginsberg amicus
11 brief explains.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Counselor, could
16 you deal with the examples, the historical
17 examples your colleague spoke about as
18 supporting his position, Virginia's 3/5 rule,
19 Maryland's Nineteenth Amendment rule? I think
20 your brief does an adequate job on the Story
21 issue, but --

22 MR. KATYAL: So -- so the Maryland one
23 is just about the amendment process, and that's
24 Leser, and that's just a totally different text
25 and so on and certainly doesn't bear on the

1 original meaning of the Elections Clause.

2 With respect to Virginia, it
3 absolutely cuts the other way. That's the
4 1830s.

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

7 MR. KATYAL: So it's not the Bruen,
8 you know, time period of the founding, and we
9 have provision after provision even before the
10 founding with the Articles of Confederation
11 which I think blow apart their historical
12 theory.

13 But, with respect to Virginia, yeah,
14 one person said this would violate the Elections
15 Clause and, you know what happened, James
16 Madison and the Chief Justice of this Supreme
17 Court, John Marshall, did -- voted for the bill
18 even after that objection. So, if anything, it
19 cuts the other way. But I am not aware of a
20 decision by this Court that invalidates early
21 state constitutional provisions as being
22 federally unconstitutional in the way that this
23 theory does.

24 JUSTICE SOTOMAYOR: And you don't take
25 quarrel with the fact that a state could

1 interpret a state constitution in a way that
2 violates the federal Constitution? That's what
3 they're arguing here.

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

13 JUSTICE SOTOMAYOR: Well, I -- I
14 thought of those cases as basically saying that
15 there was a due -- federal due process problem
16 if an interpretation violates due process in
17 some way.

18 MR. KATYAL: Correct. There's a
19 novelty concern, particularly in the criminal
20 context, about adequate and independent state
21 grounds, picking up on Justice Alito's point.
22 Novelty I don't think applies quite here because
23 we're not talking about fair warning in the same
24 way as the federal context.

25 JUSTICE SOTOMAYOR: Exactly, but I

1 always thought of those cases, those extremes
2 being rooted in the federal Constitution's due
3 process.

4 MR. KATYAL: It can be in that
5 context. Here, I think it's rooted in the
6 Elections Clause itself, which was my answer to
7 Justice Thomas.

8 JUSTICE SOTOMAYOR: Okay.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: If I could go over
11 some of the ground that you've been asked about
12 about the Rehnquist concurrence and make sure I
13 understand your position and the issues that are
14 in front of us and so forth.

15 So, as I understand it, the -- the one
16 area of agreement I found between you and
17 Mr. Thompson is you also think that the
18 Rehnquist concurrence is about statutes, not
19 about Constitution --

20 MR. KATYAL: Correct.

21 JUSTICE KAGAN: -- as in this case.
22 So your view, as Mr. Thompson's view, is that
23 the Rehnquist concurrence by its terms isn't
24 implicated here?

25 MR. KATYAL: Correct.

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

4 MR. KATYAL: Yes.

5 JUSTICE KAGAN: So does that mean it's
6 not just like there may be a corollary? You
7 think that there is a corollary?

8 MR. KATYAL: Yeah, I think the
9 Elections Clause at some point could be violated
10 in the -- like the example of absentee voting
11 that I gave you a moment ago.

12 JUSTICE KAGAN: Yeah, but you say so
13 it's sky high, it's stratospheric, it's
14 whatever. So, when you look at the Rehnquist
15 concurrence, and it was only a concurrence, so
16 it didn't really have to pick a single standard,
17 there were actually a lot of different standards
18 floating around in the Rehnquist concurrence,
19 and some of them sound easier to satisfy than
20 others. You know, like, one is like not a fair
21 reading, which doesn't sound all that difficult.
22 One is absurd, which sounds a lot more
23 difficult. But you're saying even more than the
24 highest --

25 MR. KATYAL: I mean --

1 JUSTICE KAGAN: -- statement in the
2 Rehnquist opinion --

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

4 JUSTICE KAGAN: -- because the
5 Constitution is different?

6 MR. KATYAL: Right, I think absurd,
7 inconceivable is what he uses at one place, or
8 no basis. The Conference of Chief Justices, all
9 50 Chief Justices are before you saying at page
10 19 of their brief the standard is no plausibly
11 defensible basis for the state court's
12 determination. I think all of these, regardless
13 of the words that are used here, Justice Kagan,
14 I think --

15 JUSTICE KAGAN: But you're saying it
16 should be higher on the constitutional side than
17 on the statute.

18 MR. KATYAL: Correct.

19 JUSTICE KAGAN: And why is that?

20 MR. KATYAL: Because we are -- it is
21 the apex, as Palm Beach Canvassing Board says,
22 of a state's sovereignty, as a state's
23 constitution. And to say that their own high
24 court got it wrong is really a very grave thing.
25 I -- I still am not sure that that's ever

1 happened in any context from this Court.

2 JUSTICE KAGAN: And -- and whatever
3 the exact wording of the standard is that you
4 think applies on the constitutional side, would
5 that be implicated in this case?

6 MR. KATYAL: Oh, no, not at all,
7 because he just disclaimed it anyway in his
8 argument today. And he said, we're not asking
9 you to second-guess the North Carolina
10 constitution.

11 But, if you adopt his view about
12 abstract clauses or things like that, I don't
13 know what is abstract and what isn't abstract.
14 I mean, you know, you could imagine even the
15 most concrete provision, polls shall close -- be
16 open until 8 p.m., that sounds very concrete,
17 but, as the amici briefs say, like the Ben
18 Ginsberg brief, what about a hurricane or a
19 plumbing leak or a terrorist attack. Every
20 clause is going to have open-ended stuff in
21 them, and you're opening Pandora's Box if you
22 side with any version, and he's got nine
23 different versions.

24 JUSTICE KAGAN: Right. I -- I was
25 asking a somewhat different thing. I -- I was

1 just asking whether this decision in this case
2 can remotely be understood to run into the
3 constitution -- the constitutional corollary of
4 the Rehnquist principle.

5 MR. KATYAL: Miles away from it, which
6 is why I think he's disclaiming it. I mean,
7 that was thorough judicial interpretation for
8 reasons our brief explains.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: First, just a -- a
12 point of clarification, Mr. Katyal. You -- you
13 take the position that Virginia correctly
14 understood the Constitution when it adopted the
15 3/5 requirement --

16 MR. KATYAL: So --

17 JUSTICE GORSUCH: -- for purposes of
18 calculating African American persons in its
19 constitution?

20 MR. KATYAL: No, Your Honor. So
21 there -- there's several different provisions
22 being debated in 1830. One is the 3/5
23 provision. We're not talking about 3/5. We're
24 talking about the regulation of federal
25 districts, which is what the Elections --

1 JUSTICE GORSUCH: But --

2 MR. KATYAL: -- Clause violation was
3 about.

4 JUSTICE GORSUCH: But you're saying
5 what Virginia did at that time was consistent
6 with a proper understanding of the Elections
7 Clause.

8 MR. KATYAL: Well, the Elections
9 Clause, yes.

10 JUSTICE GORSUCH: Yeah. That's what
11 I'm asking.

12 MR. KATYAL: Yes.

13 JUSTICE GORSUCH: Okay. So you are
14 defending that.

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

16 JUSTICE GORSUCH: I guess I'm
17 surprised by that given that when the Elections
18 Clause issue was raised in that debate as I
19 understand it from the briefs before us, the
20 convention attendees and others basically said,
21 yeah, that might be so, but who cares, we have
22 to protect our -- our property interests in
23 slavery.

24 MR. KATYAL: Yeah. So that's a
25 different provision, Justice Gorsuch, so that's

1 why I'm saying, you know, it's a nice smear of
2 what happened in 1830 that has been levied by my
3 friend on the other side. But the Elections
4 Clause --

5 JUSTICE GORSUCH: You'd agree that
6 they were not attending to the Elections Clause,
7 they were attending to their perceptions of what
8 their property rights were?

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

12 JUSTICE GORSUCH: What would -- what
13 would -- fine. If -- if you don't answer that,
14 maybe you can get at it this way. What would
15 prevent a state before the Civil War from
16 adopting what you say didn't happen and would
17 never have happened, a 3/5 rule in their state
18 constitutions?

19 MR. KATYAL: So the state
20 constitutions, they could adopt that rule and
21 whatever that is, and it may be consistent with
22 the federal rule at the time, you know, pre the
23 Civil War.

24 JUSTICE GORSUCH: So you would defend
25 that as -- as consistent with an appropriate

1 understanding of the Elections Clause?

2 MR. KATYAL: No, I'm saying it has
3 nothing to do with it, with what we're talking
4 about here.

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

7 MR. KATYAL: No --

8 JUSTICE GORSUCH: -- be able through
9 its Elections Clause --

10 MR. KATYAL: No --

11 JUSTICE GORSUCH: On what ground?

12 MR. KATYAL: No position on that.
13 We're only talking --

14 JUSTICE GORSUCH: No position on that?

15 MR. KATYAL: -- about ordinary checks
16 and balances, Justice Gorsuch, and --

17 JUSTICE GORSUCH: No position on that
18 at all?

19 MR. KATYAL: -- Justice Gorsuch, where
20 we're --

21 JUSTICE GORSUCH: All right. How
22 about -- how about a state then that puts a
23 political gerrymander into its state
24 constitution?

25 MR. KATYAL: Yeah, so --

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

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

8 JUSTICE GORSUCH: It's in the state
9 constitutions.

10 MR. KATYAL: Still, state
11 constitutions often have --

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

14 MR. KATYAL: Yeah. So then I -- I
15 don't think that it would necessarily -- it
16 would state a federal Elections Clause violation
17 at that point.

18 JUSTICE GORSUCH: Yeah.

19 MR. KATYAL: Again, nothing in here
20 turns on it. We're talking about ordinary
21 judicial review, checks and balances akin to --

22 JUSTICE GORSUCH: I understand -- I --

23 MR. KATYAL: -- what the Chief Justice
24 was talking about --

25 JUSTICE GORSUCH: -- I understand the

1 mantra, okay? Let me ask you to turn back to
2 the question about, you know, if we -- if you
3 think the Rehnquist view is appropriate on
4 constitutional grounds, what do we do with this
5 opinion?

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

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

16 JUSTICE GORSUCH: Just really quickly,
17 because I don't want -- I don't want to expend
18 too much time. When -- when was the first one
19 of these in -- in your understanding, political
20 --

21 MR. KATYAL: 1854, Massachusetts, the
22 Warren decision.

23 JUSTICE GORSUCH: All right. Besides
24 that.

25 MR. KATYAL: Yeah. And so then a lot

1 in 1932, but that's just for maps, so --

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

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

6 JUSTICE GORSUCH: Okay. All right.

7 MR. KATYAL: -- outside of maps,
8 states --

9 JUSTICE GORSUCH: Fine. All right.
10 Let's put that aside. Let's put that aside.

11 MR. KATYAL: Okay.

12 JUSTICE GORSUCH: Put that aside.

13 What do we do with the fact that in
14 this opinion that we have before us, the North
15 Carolina Supreme Court said it had to do
16 something because the legislature would not act.
17 The only way that -- that partisan
18 gerrymandering can be addressed is through the
19 courts.

20 About five, seven years ago, it -- it
21 refused a political gerrymandering claim itself
22 under the open-ended Good of the Whole Clause.
23 And now it's come back and cited a -- a m@lange
24 of -- of open-ended other provisions that it's
25 now accepting.

1 So I understand the standard is sky
2 high, but at least given some contestable
3 history, and I understand you contest it, but
4 put that there. You've got -- you've got this
5 novelty within North Carolina and switching
6 positions with North Carolina, let me add one
7 more and then I'll -- I'll shut up.

8 We have a very lengthy opinion from
9 the North Carolina Supreme Court. It addresses
10 the elections -- federal Elections Clause issue
11 in three paragraphs on page 122 of the Petition
12 Appendix.

13 At the very least, all of these
14 interesting and important issues, and able
15 counsel on both sides, were not available to
16 that court then. What should we do in that
17 circumstance?

18 MR. KATYAL: Well, certainly, with
19 respect to that federal issue, we think it only
20 honestly needed three paragraphs because, in
21 those three paragraphs, they talk about all of
22 the things we just talked about, obviously not
23 the detail, and I'd love to give you more
24 detail, Justice Gorsuch.

25 But, you know, then you said, well,

1 the -- the decision was based -- the decision
2 talked about it being hard for the legislature
3 to act. And I understand that was the basis of
4 a separate opinion by this Court.

5 I think that point actually
6 underscores the caution this Court should have
7 when reviewing state court decisions because
8 that's not what the North Carolina Supreme Court
9 actually said at those pages at 8A.

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

11 MR. KATYAL: Yes, page 8A. I
12 understand.

13 JUSTICE GORSUCH: -- that -- that the
14 only way that partisan --

15 MR. KATYAL: Exactly.

16 JUSTICE GORSUCH: -- gerrymandering
17 can be addressed --

18 MR. KATYAL: And it's not saying that
19 it's too difficult to -- for the legislature to
20 act. They're making a point about like --

21 JUSTICE GORSUCH: Oh, no.

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

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

25 MR. KATYAL: -- they're making a John

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

11 JUSTICE GORSUCH: All right.

12 MR. KATYAL: -- and installing
13 themselves.

14 JUSTICE GORSUCH: Got it.

15 MR. KATYAL: So it's the heart of the
16 tradition.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: I just wanted to
20 follow up on your discussion with Justice Kagan
21 on pages 48 to 50 of your brief and pages 26 to
22 28 of the Solicitor General's brief on the -- on
23 the Rehnquist concurrence there.

24 And you -- I think you said state
25 court -- a check to prevent state court judicial

1 adventurism I think was your phrase or to ensure
2 that state courts don't manipulate state law to
3 frustrate federal rights.

4 And, as Justice Alito pointed out,
5 there are civil rights due process cases, treaty
6 clause, contract clause, adequate and
7 independent state ground we had a few weeks ago,
8 that kind of issue.

9 And I -- I read Justice Ginsburg's
10 dissent in Bush v. Gore to actually accept the
11 principle or at least not dispute the principle,
12 although she, of course, vigorously disputed the
13 application of that principle in that case.

14 Then I go to your brief on 48 to 50,
15 and I thought you said it's an unremarkable
16 proposition. I didn't see in your brief a
17 distinct standard between statutes and
18 constitutions. I don't think that's there in 48
19 to 50.

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

23 MR. KATYAL: Yeah.

24 JUSTICE KAVANAUGH: -- follow
25 something like that, but why would we say, you

1 know, significant departure for statutes and
2 plainly indefensible for constitutional
3 interpretations --

4 MR. KATYAL: Right.

5 JUSTICE KAVANAUGH: -- is that going
6 to really help the cause at all?

7 MR. KATYAL: Right. So I do think
8 it's in our brief. We quote the language from
9 Bush versus Palm Beach Canvassing Board and
10 about -- about constitutions and state
11 constitutions being at the apex, Justice
12 Kavanaugh. And the reason for that is twofold.

13 Number one, there's very serious
14 federal --

15 JUSTICE KAVANAUGH: But -- but -- keep
16 going.

17 MR. KATYAL: -- there's very serious
18 federalism concerns generally. All those
19 contexts you gave me before about adequate,
20 independent, those are actually reviewing
21 procedural rules, state statutes and the like.
22 Reviewing state constitutions, again, the apex
23 of state sovereignty. I think federalism is
24 generally different.

25 And then B, in this unique context,

1 where Congress already has a backup check and
2 can supplant any state court decision it doesn't
3 want by name or supplant -- supplant state
4 courts altogether in the second half of the
5 Elections Clause, whatever the standard is for
6 Bush versus Gore or something like that, to the
7 extent you might think there was a
8 constitutional issue, it's going to be even
9 higher here because the framers put Congress in
10 and how to check specifically for this problem.

11 JUSTICE KAVANAUGH: Okay. I
12 understand the apex, but just to be clear,
13 you're not saying no federal judicial review
14 when the state court has interpreted the state
15 constitution in a case of this nature, correct?

16 MR. KATYAL: We -- we -- if the -- no,
17 we think it should be under the highest standard
18 of review --

19 JUSTICE KAVANAUGH: Right.

20 MR. KATYAL: -- if it's a state
21 constitution, yes.

22 JUSTICE KAVANAUGH: And I'll repeat
23 the question then. You're not saying no
24 judicial review -- federal judicial review of
25 state court interpretation of state

1 constitutions in this area, correct?

2 MR. KATYAL: Right, we're not saying
3 that. It's just under a high -- sky-high
4 standard.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

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

14 Just as, say, in the due process
15 context we say property is a state law question,
16 but there's some core beyond which a state can't
17 depart, so it's -- it's a -- it's a federal
18 question and the state can't depart so greatly
19 from it that it's no longer really property for
20 purposes of the federal Constitution.

21 This federal content or the federal
22 check, is it from the word "legislature," so the
23 clause says, "shall be prescribed in each state
24 by the legislature thereof." And at some point,
25 if a state court adopts an interpretation of a

1 statute or a constitutional provision that's --
2 pick your adjective or adverb -- you know,
3 significantly departs from, so novel, egregious,
4 it's no longer acting as a court exercising the
5 normal judicial review function but is acting
6 like -- like a legislature, is that how you
7 would articulate the argument?

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

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

20 And lastly, Justice Barrett, we would
21 ground it in something you mentioned a moment --
22 to my friend on the other side, the Eleventh
23 Amendment and the -- excuse me, the Tenth
24 Amendment --

25 JUSTICE BARRETT: Right.

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

11 JUSTICE BARRETT: Okay. Again,
12 putting aside what specific language we would
13 adopt for that test, accepting that it would be
14 stratospheric, sky high, why would it be
15 different in the constitutional context, in
16 other words, a state court interpreting a state
17 constitution as opposed to a state court
18 interpreting a state statute if what we're
19 getting at grounded in the language of the
20 clause in both instances is, is this a
21 regulation or is this a legislature?

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

25 I do think there's something, you

1 know, special about state constitutions, but I
2 don't want that to be, like, a framing effects
3 thing to say just because that standard is
4 extraordinarily high, that means the statutory
5 standard is lower, a lot lower. It's not.

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

10 JUSTICE BARRETT: Well, I --

11 MR. KATYAL: -- their own statutes.

12 JUSTICE BARRETT: -- I get that. But
13 that's just about where we locate the standard.
14 That doesn't deny the proposition that there's
15 some federal content there that there would have
16 to be some federal check.

17 MR. KATYAL: I -- I think there
18 probably would be. Again, my friend on the
19 other side somehow disclaiming statutes and
20 saying you shouldn't, so we don't think you
21 should get into statutes here at all.

22 JUSTICE BARRETT: Right.

23 MR. KATYAL: But I do worry the blast
24 radius of this theory is going to reach
25 statutes, and that's something this Court should

1 worry about.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

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

15 And I understand we have the -- the
16 peculiar circumstance of the state supreme court
17 being the one to interpret the state
18 constitution, but it is different in terms of
19 its legal consequence and stature than a
20 statute.

21 Am I wrong in thinking about it that
22 way?

23 MR. KATYAL: No, we think you're
24 absolutely right. And so that's why state
25 constitutions reflect the most fundamental

1 principles, like the free elections clause,
2 often in broad, open-ended language, just like
3 the federal Constitution in McCulloch versus
4 Maryland.

5 JUSTICE JACKSON: And they apply in
6 different ways. Like, you know, it's not just
7 the state constitutional provisions that speak
8 specifically to elections that apply and
9 constrain the state legislature.

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

20 MR. KATYAL: That's a hundred percent
21 right, Justice Jackson. We've never had a
22 creation of that animal in the state -- in -- in
23 the federal Constitution empowering states to do
24 that. And if that were what the founders
25 intended, surely someone would have said so and

1 it would have prompted a massive debate. There
2 are three Federalist Papers on the Elections
3 Clause. Not a word, anything like this. What
4 he would do is gut the ordinary --

5 JUSTICE JACKSON: So --

6 MR. KATYAL: -- checks and balances.

7 JUSTICE JACKSON: And so, to me, it's
8 not so much the sort of troubling worry of we
9 have the state legislature violating federal
10 constitutional law because we as the Supreme
11 Court and other courts in the federal system can
12 look at that because it's a question of did they
13 violate the federal Constitution.

14 Here, he's saying, no, we do have to
15 comply with the federal Constitution. What we
16 can violate is the state constitution. And what
17 I don't -- I -- I can't wrap my mind around that
18 argument.

19 MR. KATYAL: I can't either, Your
20 Honor. In Shelby County, this Court said it's
21 up to states primarily to regulate elections
22 through their constitutions and statutes. And
23 what he would do is gut the ability of states to
24 do that.

25 All 50 states have clauses, equal

1 protection, assembly, speech, and others. He
2 would nullify them all --

3 JUSTICE JACKSON: Thank you.

4 MR. KATYAL: -- in addition to the
5 smaller voting regulations.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Verrilli.

9 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
10 ON BEHALF OF THE STATE RESPONDENTS

11 MR. VERRILLI: Mr. Chief Justice, and
12 may it please the Court:

13 I'd like to make three points. First,
14 Petitioners' argument cannot be reconciled with
15 Smiley. Smiley held that because the Elections
16 Clause invokes the state legislature's
17 law-making function, the conditions which attach
18 to the making of state laws apply.

19 Judicial review is such a condition,
20 and there's no basis in text or history for
21 concluding that a governor's veto can act as a
22 substantive check on the legislative
23 prerogative, but judicial review cannot.

24 Second, the General Assembly's
25 statutory authorization makes this an even

1 clearer case for affirmance, and in particular,
2 it establishes conclusively that North Carolina
3 courts do not in any way usurp the legislative
4 function when they draw remedial maps in the
5 manner that the statute describes.

6 And third, since the founding, state
7 constitutions have always limited how state
8 legislatures discharge their Elections Clause
9 responsibilities.

10 Today, in addition to the states'
11 constitutions that expressly express partisan
12 gerrymandering, constitutions address absentee
13 voting, voting by the military, voter ID, and
14 primary elections and many other aspects of the
15 electoral process.

16 That -- excuse me -- that Petitioners
17 must repudiate all of that longstanding and
18 comprehensive history is a very powerful
19 indication that they are misreading the
20 Elections Clause.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Verrilli, the --
23 how far would you go with that? There's been
24 some discussion about we can only review state
25 courts at a sky-high level or a stratospheric

1 level or -- we -- we ran into a similar problem
2 with that in Bush v. Gore.

3 How would you articulate our review
4 standard --

5 MR. VERRILLI: Yes, Justice Thomas.

6 JUSTICE THOMAS: -- for state supreme
7 courts?

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

20 Now I will say that we think that's a
21 highly deferential test. We think also it has
22 to be -- it's of vital importance to recognize
23 that states can have different modes of
24 constitutional interpretation than this Court
25 has with respect to the federal Constitution,

1 and those have to be respected.

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

12 And if I -- if I could build on that,
13 I think, Mr. Chief Justice, that is the answer
14 actually to the question that Your Honor raised
15 about vague and general provisions. What my
16 friends on the other side have said is those are
17 categorically unenforceable. They're
18 categorically unenforceable under the Elections
19 Clause.

20 That just can't be right. There's no
21 textual basis for that. And as a
22 jurisprudential matter, the -- the federal
23 Constitution, of course, has vague and general
24 provisions, and no one requires that level of
25 specificity before they can be enforced in -- in

1 the elections context.

2 CHIEF JUSTICE ROBERTS: Well, if you

3 --

4 MR. VERRILLI: So --

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

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

17 CHIEF JUSTICE ROBERTS: Yeah.

18 MR. VERRILLI: -- I'll answer Your
19 Honor's question directly.

20 CHIEF JUSTICE ROBERTS: Sure.

21 MR. VERRILLI: The prefatory point is
22 this. I just want to make sure this -- that
23 this -- we all keep this in mind: They are not
24 making an argument that the -- that the North
25 Carolina Supreme Court's decision in this case

1 would be struck down under the standard I
2 articulated or any other standard. In fact,
3 they began their argument, and they said, I
4 think, by my count, six or seven times that they
5 accept the North Carolina Supreme Court's
6 decision as a fair reading of North Carolina
7 law. So whatever the Court concludes with
8 respect to the application of that -- the -- the
9 -- the need for a standard like this, it's
10 not -- it's not a basis to overturn the decision
11 here for -- for the reasons I identified.

12 Now, with respect to Your Honor's
13 question, I think I would -- the way I read the
14 North Carolina Supreme Court decision is a
15 little different, starting with the fair -- the
16 free elections clause. It basically, as I read
17 the opinion, conducted a historical analysis of
18 the kind that should be familiar as a matter of
19 constitutional interpretation. They went back
20 to the English Bill of Rights, which was about
21 the manipulation of electoral processes so that
22 the Parliament would be in the king's pocket
23 essentially. They looked at comparable events
24 that occurred in North Carolina at the time of
25 the founding.

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

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

19 CHIEF JUSTICE ROBERTS: Well, maybe
20 that gets -- touches a point that may be a
21 little too abstract to address, but the nature
22 of judicial authority at the time of the
23 founding and thereafter I think is quite
24 different than the nature of judicial authority
25 today. I mean, even just looking at court

1 opinions, you can see that what -- what courts
2 do as a general matter can be really quite
3 specific in terms of injunctive relief and the
4 sort of thing that is at issue here.

5 And I wonder if the -- I -- I guess I
6 wonder how we should go about taking that into
7 account.

8 MR. VERRILLI: Yeah. And so --

9 CHIEF JUSTICE ROBERTS: Their early
10 statements about this is what the Court did in
11 1800 and whatever. And I wonder if the same
12 concerns that are at issue today about the
13 exercise of judicial authority were really on
14 the plate back then.

15 MR. VERRILLI: So I -- I guess the way
16 I would think about that, Mr. Chief Justice, is
17 that what -- what the North Carolina Supreme
18 Court was doing here, I think, was saying this
19 is the historical genesis of the free elections
20 clause. This is the kind of problem it has to
21 -- that it's -- it's there to address. The
22 extreme partisan gerrymandering -- and this was
23 an extreme gerrymander -- the extreme partisan
24 gerrymandering we face here is a cognate kind of
25 problem. We have to figure out, using modern

1 doctrine and modern approaches, how to address
2 it.

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

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

19 CHIEF JUSTICE ROBERTS: But --

20 MR. VERRILLI: But --

21 CHIEF JUSTICE ROBERTS: Go ahead.

22 MR. VERRILLI: If I could. The -- the
23 key difference I think, one key difference and
24 it applies here, is that if one looks at those
25 number -- number of state constitutional

1 provisions that expressly limit or prohibit
2 partisan gerrymandering, and there are quite a
3 number now -- I don't know, seven, eight,
4 including many of the big states -- there, they
5 focus on intent. And policing for an
6 impermissible intent is something that courts
7 know how to do and is subject to
8 judicially manageable standards. You know, with
9 respect to race, of course, you have the
10 Arlington Heights framework.

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

13 CHIEF JUSTICE ROBERTS: Right, but --

14 MR. VERRILLI: -- but -- but I -- but
15 I will say it does have a very substantial
16 intent focus, and I would point the Court in
17 particular to pages 125a to 129a of the --

18 CHIEF JUSTICE ROBERTS: If I -- if I
19 could?

20 MR. VERRILLI: -- appendix to the
21 petition. I'm sorry.

22 CHIEF JUSTICE ROBERTS: The -- you
23 have -- again, today, particularly in the
24 redistricting area, if the court is involved,
25 it's often -- I don't know if it's typical or

1 whatever -- they act through the appointment of
2 special masters. The judges don't sit in the
3 back room with lines drawing the districts, but
4 other -- other people do. And I wonder if
5 there's a disconnect between the level of the
6 grant of authority, whether it's along the lines
7 that Chief Justice Rehnquist put in -- in the
8 Palm Beach case or something else, and how it's
9 actually practiced on the ground.

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

21 And then -- and then, third, the map
22 has to deviate as minimally as possible from the
23 map that the legislature enacted. And then,
24 within those constraints, that remedial process
25 occurs. And so I -- I think that -- and I --

1 and I guess, more generally, I would think, if
2 one recognizes, as I think has to be the case,
3 that states do have the constitutional authority
4 to enforce state constitutional provisions here
5 and they declare that a state legislative act is
6 unconstitutional, in the case of a redistricting
7 map, then it naturally follows that there is
8 going to be remedial authority, and that
9 remedial authority in this instance really
10 responds to a profound practical problem, which
11 is you have to have a map to have an election.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 JUSTICE KAGAN: So --

14 MR. VERRILLI: Somebody's got to step
15 in.

16 JUSTICE KAGAN: -- Mr. Verrilli, I
17 mean, what if you were in a state which didn't
18 have the kind of procedures that North Carolina
19 had? And, as you say, there has to be a remedy.
20 But let's say a state just sort of did it on its
21 own without even -- you know, without kicking it
22 back, without saying, look -- let -- let's say
23 there was time enough to kick it back, and --
24 and -- and the state court did not kick it back.
25 Are there any limits on this? Should there be

1 any limits on this?

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

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

21 JUSTICE KAGAN: And just --

22 JUSTICE GORSUCH: And -- oh, sorry.

23 JUSTICE KAGAN: No, go ahead.

24 JUSTICE GORSUCH: No, please.

25 JUSTICE KAGAN: Just a quick question.

1 Is -- when you gave your standard, the -- the
2 sort of, you know --

3 MR. VERRILLI: Sharp departure from --

4 JUSTICE KAGAN: Yes.

5 MR. VERRILLI: -- the state's ordinary
6 modes of --

7 JUSTICE KAGAN: Yeah, which is --

8 MR. VERRILLI: -- constitutional
9 interpretation --

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

11 MR. VERRILLI: -- that lacks any fair
12 and substantial basis in state law.

13 (Laughter.)

14 JUSTICE KAGAN: Good. Your -- your
15 highly deferential standard, and deferential as
16 to interpretive method as well as to anything
17 else.

18 MR. VERRILLI: Yes, thank you.

19 JUSTICE KAGAN: Yeah. Is that
20 standard for you, should that be the same
21 standard as for statutes, or do you agree with
22 Mr. Katyal that there actually is a gap between
23 the two?

24 MR. VERRILLI: Yeah, I'm not sure that
25 I see a gap between the two, I mean, except in

1 the following sense, that one could, I think --
2 think -- one could think that with respect to a
3 statute, because there's a difference between
4 interpreting a statute and interpreting a
5 constitution, that with respect to the
6 interpretation of a constitution, there may --
7 state supreme courts may have more leeway
8 because there is after all a constitution
9 they're interpreting. And so I -- I could see
10 in application the standard might work out
11 differently in some cases, but -- but I don't
12 think it's a difference in the standard as much
13 as in the application of the standard.

14 JUSTICE GORSUCH: Actually, this
15 follows right up on that, so that was very
16 helpful. I'm glad I waited. The question I
17 think, as Justice Barrett suggested, is, has the
18 legislature prescribed the time, place, and
19 manner? And I think your standard and our --
20 our sky-high, astronomical, and I think we
21 ventured into outer space at points standard, is
22 asking have the -- has the judicial opinion in
23 interpreting the law, let's deal with statutes
24 first, gone so far afield that we can no longer
25 fairly say as a matter of federal law that the

1 legislature is the one who prescribed the time,
2 place, and manner? Is that a fair understanding
3 of -- of our task here as --

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

5 JUSTICE GORSUCH: -- under federal
6 law?

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

15 JUSTICE GORSUCH: Well, the
16 legislature didn't prescribe these things. I
17 mean, that's the text that we're asked to
18 interpret, right?

19 MR. VERRILLI: Well, right, but I -- I
20 guess, Your Honor, I would say that --

21 JUSTICE GORSUCH: Have they gone so
22 far afield that we --

23 MR. VERRILLI: -- when it comes to the
24 question, if I could just -- if I could just say
25 it this way.

1 JUSTICE GORSUCH: Well, I just want to
2 make --

3 MR. VERRILLI: Yeah, yeah.

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

6 MR. VERRILLI: Well --

7 JUSTICE GORSUCH: -- that's the
8 federal standard, and one way of analyzing that,
9 I think, if I'm understanding you, and if I'm
10 not, please say so, when we're dealing with
11 statutory law is, if they've gone so far afield
12 or into outer space, that's an indication that
13 it's no longer the legislature prescribing it.

14 MR. VERRILLI: Well, I guess I would
15 put it differently.

16 JUSTICE GORSUCH: Okay.

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

18 JUSTICE GORSUCH: How?

19 MR. VERRILLI: -- say is that the --
20 that the framers took legislatures as they found
21 them, that the -- that the judicial review under
22 the state constitution is a condition of the
23 normal operation of state law and the language
24 of Smiley, that -- and, therefore, it should be
25 expected that courts will review federal

1 election regulation by state legislatures under
2 the state constitution, that that -- and that
3 they --

4 JUSTICE GORSUCH: Okay. Thank you --

5 MR. VERRILLI: -- can validate --

6 JUSTICE GORSUCH: -- Mr. Verrilli.

7 Thank you.

8 JUSTICE JACKSON: Can I just follow up

9 --

10 CHIEF JUSTICE ROBERTS: Thank you.

11 JUSTICE JACKSON: -- on that? Oh.

12 CHIEF JUSTICE ROBERTS: We'll --

13 JUSTICE JACKSON: Sorry.

14 CHIEF JUSTICE ROBERTS: -- we'll go

15 through.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: Is your standard a
19 standard that can be flunked?

20 MR. VERRILLI: Yeah, I assume it could
21 be flunked.

22 JUSTICE ALITO: Give me an example of
23 something that would flunk your standard.

24 MR. VERRILLI: So, you know, I think a
25 naked declaration that a -- that an act of a

1 legislature under a free and fair elections
2 clause is unfair, without any grounding in
3 history or precedent or -- or sound analysis of
4 a kind that the state -- that the state, you
5 know, is appropriate under that state's mode of
6 interpretation, I -- I think -- I think you
7 could envision that possibility happening.

8 JUSTICE ALITO: Okay.

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

11 JUSTICE ALITO: Yeah, I appreciate
12 that answer because I think the worst thing we
13 could do, although it might be attractive for
14 some reasons, is to say, well, there is a limit,
15 but, you know, we -- we -- but it's one where --
16 that in practice can never be exceeded, so we
17 have a standard, but it's just -- you know, it
18 doesn't mean anything.

19 Under that understanding, let me talk
20 about the decision in this case. And we've
21 heard about the English Bill of Rights. I mean,
22 did any -- has anybody ever thought that the
23 English Bill of Rights had anything to do with
24 one person/one vote, much less political
25 gerrymandering?

1 MR. VERRILLI: Well, I think the
2 historical roots of those doctrines, yeah, do
3 trace back to the idea that the English Bill of
4 Rights was trying to deal with, which was the
5 manipulation of the electoral process, including
6 the -- the who is going to represent what area,
7 in order to entrench those in power.

8 JUSTICE ALITO: Well, wasn't it true
9 -- you probably know more about British
10 constitutional history than I do, but wasn't it
11 true that well into the 19th Century the British
12 Parliament was notorious for having rotten
13 boroughs, you know, parliamentary districts
14 where there were practically no inhabitants, but
15 that was a good way of entrenching a Tory member
16 or a Liberal member? Wasn't that true?

17 MR. VERRILLI: Well, but that was a
18 bad thing, and I think it was --

19 JUSTICE ALITO: It was -- it was a bad
20 --

21 MR. VERRILLI: -- something that the
22 framers were --

23 JUSTICE ALITO: -- yeah, it was a bad
24 thing, but that was under the English Bill of
25 Rights, was it not?

1 MR. VERRILLI: Well -- well, but the
2 -- I guess the point is that what is this free
3 elections clause trying to get at in the North
4 Carolina constitution and the other
5 constitutions that adopted it at the time of the
6 framing, and this is the problem.

7 JUSTICE ALITO: All right. 1776,
8 200-plus years ago. Was anybody at that time
9 saying election isn't free if there's political
10 gerrymandering?

11 MR. VERRILLI: Well, you know, I don't
12 know if they were saying it in exactly those
13 terms, but there is an amicus brief that
14 addresses what was going on in North Carolina.
15 It's Pam -- Penn Bank I think is the name --
16 Plan Bank maybe -- I'm sorry if I'm
17 mispronouncing it -- which talks about actual
18 controversies with respect to the way districts
19 were drawn in North Carolina in the 1770s.

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

24 MR. VERRILLI: Yeah. Well, yes, but
25 --

1 JUSTICE ALITO: That's where the name
2 comes from, right?

3 MR. VERRILLI: Sure, sure, but the --
4 but the question is what problem is the -- is
5 the North Carolina Supreme Court trying to
6 address here, and my point is it's a problem
7 very much in the nature of the problem that gave
8 rise to the free and fair elections clause.

9 And if I could just make an obvious
10 point, I guess, but, you know, when the framers
11 adopted the free speech clause, they were
12 principally concerned about prior restraints.
13 But we don't interpret the free speech clause as
14 applying only to prior restraints, obviously,
15 and so --

16 JUSTICE ALITO: And then the North
17 Carolina Supreme Court sets out certain methods
18 that could be used in determining whether there
19 is political gerrymandering, the mean/median
20 difference, the efficiency gap, means
21 simulations. Would that -- would anybody have
22 understood that in 1776?

23 MR. VERRILLI: No, I -- I doubt it,
24 but those are means of implementing a
25 fundamental principle. Those aren't fundamental

1 principles themselves. And the fundamental
2 principle that I -- that the North Carolina
3 Supreme Court articulated as I read the opinion
4 is that you don't want the electoral districts
5 to manipulate it, be manipulated so that one
6 group of voters is severely disadvantaged as
7 compared to another group of voters of a
8 different party of the same size.

9 JUSTICE ALITO: Okay. So let's turn
10 to precedent, which is another way of
11 interpreting a state constitution. What
12 grounding in North Carolina precedent was there
13 for this decision? My understanding is that the
14 most relevant decision, which is -- suggests
15 that the North Carolina constitution doesn't
16 address political gerrymandering.

17 MR. VERRILLI: Yes. So the -- so the
18 Dodson case came up with my friend on the other
19 side, I think, or maybe with Mr. Katyal, but I
20 should talk about that for a minute. You know,
21 to say that the partisan gerrymandering analysis
22 in that, I mean, it was a flea on the tail of a
23 dog. When you read that opinion, it was -- that
24 was a case about racial gerrymandering.
25 Ninety-nine percent of the opinion is about it.

1 The parties threw in this kind of offhand
2 argument in their opening brief that said, well,
3 there's also a problem here in that it violates
4 the Good of the Whole provision. And the -- and
5 then the -- the appellees, the respondents in
6 that case said, well, you haven't articulated
7 any standard to decide which of these two
8 competing maps better serves the good of the
9 whole. The -- the appellants said nothing in
10 the reply brief. The court said, well, you
11 haven't articulated any basis for deciding on
12 the difference between the two. And, of course,
13 the North Carolina Supreme Court recognized that
14 in this very case.

15 JUSTICE ALITO: Were there -- were
16 there prior decisions of the North Carolina
17 Supreme Court that step by step led to this
18 conclusion --

19 MR. VERRILLI: So --

20 JUSTICE ALITO: -- that the free
21 elections clause prohibits political
22 gerrymandering?

23 MR. VERRILLI: So I'm going to answer
24 Your Honor's question, but I do want to just
25 interject one more time that they have said that

1 this decision is a fair representation of North
2 Carolina law. They are not challenging it under
3 the standard I articulated or any other
4 standard. They have made a different argument,
5 which is that this is categorically a violation
6 of the -- of the Elections Clause for state
7 supreme courts to invoke -- to apply vague and
8 general provisions.

9 And so I'm happy to keep answering
10 Your Honor's questions, I am, but -- but I just
11 want to reinforce that that's -- they have
12 conceded that this is a fair interpretation of
13 North Carolina law.

14 JUSTICE ALITO: All right. And then
15 we get to the introductory statement that
16 Justice Gorsuch mentioned, and, boy, that seems
17 awfully close to what you said would be a
18 violation.

19 MR. VERRILLI: I don't --

20 JUSTICE ALITO: Well, you know, they
21 -- I mean, then there's a hundred pages, you
22 know, of elaboration, but, basically, at the
23 beginning, they say what they're doing, and,
24 basically, they're saying in no uncertain terms,
25 look, there's legislative malfunction here. The

1 legislature has adopted a -- a political
2 gerrymandering, and it's really hard to amend
3 the state constitution and we don't have a
4 referendum to correct it, so there's a big
5 problem in the state and we have to step in.

6 MR. VERRILLI: Well, but --

7 JUSTICE ALITO: That's awfully close
8 to what you just --

9 MR. VERRILLI: No, I -- I -- I -- I
10 disagree quite strongly with that, first, with
11 respect to the specific thing that they said in
12 this paragraph -- and I think we're talking
13 about the same paragraph -- and then with
14 respect to the way in which the opinion analyzes
15 it.

16 They -- they do say: Okay, we don't
17 have a referendum process. It's hard to amend
18 the Constitution. The reason it's hard to amend
19 the Constitution is because you've got -- you
20 have to get 60 percent of the legislature as the
21 first step. And the problem here, of course, is
22 the actions of the legislature.

23 And then the -- what -- what -- and I
24 think this is what Your Honor is referring to,
25 but there -- you know, there's a sentence here

1 which we haven't talked about, and what the
2 North Carolina Supreme Court says, "it is no
3 answer to say that responsibility for addressing
4 partisan gerrymandering is in the hands of the
5 people when they are represented by legislators
6 who are able to entrench themselves by
7 manipulating the very democratic process from
8 which they derive their constitutional
9 authority."

10 Now one can agree or disagree with
11 that as a premise for judicial intervention, but
12 that's essentially John Hart Ely's Democracy and
13 Distrust. And you may not think that that's an
14 appropriate way to think about how the federal
15 Constitution ought to be interpreted and
16 applied, but I don't see how one could say that
17 that is so far outside the bounds of reasonable
18 interpretive principles that the state court
19 here was acting as a legislature and not a
20 court. I just don't see how you could say that.

21 And then, of course, with respect to
22 the specific analysis beyond the free elections
23 clause, there's a very lengthy equal protection
24 clause analysis, which is rooted in substantial
25 precedent --

1 JUSTICE ALITO: Thank you.

2 MR. VERRILLI: -- and which --

3 JUSTICE ALITO: Thank you,

4 Mr. Verrilli.

5 MR. VERRILLI: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice

7 Sotomayor?

8 JUSTICE SOTOMAYOR: Mr. Verrilli, I --
9 I'm trying to organize an opinion if I were to
10 rule in your favor. And -- and you say some
11 things are within bounds, some things are not.
12 How would you write it, I mean, to answer some
13 of the questions my colleagues have raised and
14 to knock it down, okay?

15 I -- I guess, first, you would say
16 take Petitioners' broadest view, that the
17 legislature means state legislators, not state
18 courts, and so there can't be any judicial
19 review. That's easy to write and say there
20 obviously has to be judicial review because it's
21 part of the regulation process.

22 What comes after that?

23 MR. VERRILLI: So --

24 JUSTICE SOTOMAYOR: How --- how do we
25 deal with his distinction between procedural and

1 substantive? How do we deal with this question
2 of --

3 MR. VERRILLI: I think the Court could
4 write a very --

5 JUSTICE SOTOMAYOR: -- did this Court
6 -- why --

7 MR. VERRILLI: Sorry.

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

11 MR. VERRILLI: I think the Court could
12 write a very straightforward opinion, and I
13 think a good place to start would be the
14 following quote from Chief Justice Hughes's
15 unanimous opinion for the Court in *Smiley*, which
16 says: "The question then is whether the
17 provision of the federal Constitution, thus
18 regarded as determinative, invests a legislature
19 with a particular authority and imposes upon it
20 a corresponding duty, the definition of which
21 imports a function different from that of a
22 lawgiver" -- and then these are the key four
23 words -- "and thus renders inapplicable the
24 conditions which attach to the making of state
25 laws."

1 In Smiley, the Court answered that
2 question with an emphatic "no" with respect to
3 the governor. An emphatic "no" is equally
4 appropriate here. There is a limit to the -- to
5 the state court's ability to enforce state
6 constitutional provisions. That limit is the
7 standard that I articulated twice and I won't
8 articulate for a third time. And --

9 JUSTICE SOTOMAYOR: So we --

10 MR. VERRILLI: But -- and that - but
11 the -- but the --

12 JUSTICE SOTOMAYOR: You're -- you
13 think we should reach that question?

14 MR. VERRILLI: Well, but then I was
15 going to say, but the Petitioners have not -- if
16 the Court wants to save that for another day, it
17 can, but I guess we're comfortable with the
18 articulation of it. The key point for us is the
19 Petitioners have not made any argument under
20 that standard, and, therefore, there is -- in
21 fact, the opposite, they have conceded that this
22 is a faithful and fair interpretation of North
23 Carolina law and, therefore, there's no basis
24 for overturning the decision of the North
25 Carolina Supreme Court.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: Mr. Verrilli, I've
3 been thinking a good deal about this
4 constitutional analogue to the Rehnquist
5 principle, and your colloquy with Justice Alito
6 made me feel uneasy about it, and I think that
7 the reason is because it shows how very good
8 judges on very good courts can find it
9 incredibly easy to disagree with each other.

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

14 And I'll just -- you know, I think
15 that every single one of us on this bench has
16 written opinions at times, you know, saying that
17 other judges, whether it's other judges on this
18 Court or -- or lower court judges, you know,
19 have engaged in policymaking rather than in law.
20 And, I mean, it's just sort of one of the things
21 that judges say when they really disagree with
22 another opinion.

23 And -- and so how -- you know, if you
24 say acting as a legislature, not as a court,
25 acting as a policymaker, not as a court, I mean,

1 these really are things -- it's not just this
2 Court, it's every court -- these are things that
3 judges say to each other all the time. How is
4 this going to be a check that's used rarely --

5 MR. VERRILLI: Well --

6 JUSTICE KAGAN: -- rather than, like,
7 whenever you basically, you don't disagree
8 strongly.

9 MR. VERRILLI: So I -- I apologize for
10 putting it this way, but I think that's up to
11 this Court, because this Court's going to be
12 applying it. And I think the -- the phrase from
13 the Bush against Gore concurrence that I think
14 captures it pretty well is, does it
15 impermissibly distort beyond any fair reading
16 state law? That -- that is deferential, a very
17 deferential standard. It, I think, encompasses
18 the point that I made that you've got to respect
19 the state courts' modes of constitutional
20 interpretation.

21 And then -- and I -- but I do think
22 for all the reasons of federalism and state
23 sovereignty and -- and comparative institutional
24 competence, that, of course, it needs to be
25 applied very deferentially. There aren't going

1 to be very many cases that -- I would think that
2 would satisfy it. There will be some perhaps,
3 but there won't be very many.

4 And -- but I think that -- but,
5 anyway, that's the way I think it -- it would --
6 that's the way I think it would go.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 Justice Kavanaugh?

10 Justice Barrett?

11 JUSTICE BARRETT: Just quickly,
12 Mr. Verrilli. You got some questions about the
13 remedy. And, you know, the Chief Justice was
14 asking about special masters drawing the map,
15 and, you know, here, we had experts come in.
16 We've been talking primarily about the liability
17 question. You did get some questions about
18 remedy. Do you -- I just wanted to give you a
19 chance to say something about our jurisdiction,
20 whether we have jurisdiction to review --

21 MR. VERRILLI: You know, we --

22 JUSTICE BARRETT: -- the portion --

23 MR. VERRILLI: -- we don't think
24 there's a final judgment here yet. I mean, the
25 -- the question of the proper remedy is before

1 the three-judge court on remand. And the, you
2 know -- and the argument being -- that's at play
3 there is, should the court accept the
4 legislature's remedial plan or the alternative
5 remedial plan drawn by the court? And the
6 answer to that could matter to the way the Court
7 analyzes the issue.

8 Now I will say -- I take my -- the
9 argument of my friends on the other side to be
10 that the two issues of whether you could have a
11 remedial process at all and whether you can have
12 judicial review at all are so intimately bound
13 up that you -- you should address that issue,
14 and that's why I was focused on it.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: I just have one
18 question that goes back to this issue of
19 constitution being different than statute from
20 -- from the perspective of us trying to figure
21 out what to do here.

22 Justice Gorsuch asked, I thought, a
23 very clarifying question, and it sort of came up
24 again with Justice Kagan's remarks, which is
25 we're really trying to kind of sort of figure

1 out when and under what circumstances the state
2 legislature has usurped legislate -- legislative
3 power in some sense. And I think Justice Kagan
4 is correct that that's sort of in the eye of the
5 beholder. But, you know, what -- what is the
6 body of law that we would reference to answer
7 the very standard that you have articulated,
8 when it warps it? What -- what are we looking
9 at to determine how --

10 MR. VERRILLI: So --

11 JUSTICE JACKSON: -- far --

12 MR. VERRILLI: -- I think the standard
13 is drawn -- and I think Justice Alito in his
14 colloquy with Mr. Katyal went through the
15 various places where the Court applies that kind
16 of a standard, and the Bush against Gore
17 concurrence references most of those.

18 JUSTICE JACKSON: Mm-hmm.

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

22 JUSTICE JACKSON: But I guess I'm
23 asking, do you do -- isn't the baseline what the
24 state constitution says? We start there and
25 then --

1 MR. VERRILLI: Sure.

2 JUSTICE JACKSON: -- we say are you
3 doing something so far --

4 MR. VERRILLI: Yeah.

5 JUSTICE JACKSON: -- far beyond that?

6 MR. VERRILLI: Is it so far -- is it
7 so far out of bounds that you -- you can't reach
8 it.

9 JUSTICE JACKSON: And the reason we're
10 doing that is because we're worried about some
11 sort of separation-of-powers issue as between
12 the state legislature and the state courts?

13 MR. VERRILLI: Well, there is some --
14 I think there is some -- there is a federal
15 interest at play, I think, is the -- is the
16 answer because of the Elections Clause. There's
17 a federal interest at play. We think that the
18 federal interest -- the -- the -- that the
19 Elections Clause itself, as we've said, reflects
20 a judgment that the state -- that the -- that
21 you take state legislatures as you find them,
22 which means that they're subject to judicial
23 review under the state constitution because,
24 otherwise -- you know, if they make a law that's
25 unconstitutional under the state constitution,

1 in the words of Marbury, it's no law at all.

2 And so I think that --

3 JUSTICE JACKSON: And they're not
4 really a legislature, presumably --

5 MR. VERRILLI: Right.

6 JUSTICE JACKSON: -- because the
7 constitution tells them --

8 MR. VERRILLI: Well, that -- that --
9 that's the argument.

10 JUSTICE JACKSON: Yes.

11 MR. VERRILLI: And if I could, there's
12 just one last point I'd like to make about whose
13 ox is being gored here, which I think is quite
14 important.

15 Actually, there's a great deal of
16 sentiment in this country about the problems
17 with extreme partisan gerrymandering, and this
18 Court's opinion in Rucho acknowledged it. And
19 states have actually responded in nonpartisan
20 ways. I can think of four states, New York,
21 Florida, California, and Ohio, all of which are
22 in the control of one political party where,
23 presumably, the incentives would have been lined
24 up to maximize partisan advantage through the
25 redistricting process, but in all four of those

1 states, they amended their constitutions through
2 the work of the people to restrict partisan
3 gerrymandering, and those provisions have been
4 enforced. I mean, the provision was enforced in
5 New York, of course, just earlier this year.

6 And so I do think it is more than
7 whose ox is being gored. This is a really
8 important issue in this country, and I think it
9 would be an extraordinary thing to say, as my
10 friends on the other side are saying here, that
11 the Elections Clause requires that all of those
12 provisions and countless others be -- be
13 disabled with respect to congressional
14 elections. That would be an extraordinary thing
15 to do, and, before doing that, I would hope that
16 the Court would -- would see a case much, much
17 clearer than the one that the Petitioners have
18 presented. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 General Prelogar.

22 ORAL ARGUMENT OF GENERAL ELIZABETH B. PROLOGAR,
23 FOR THE UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE RESPONDENTS

25 GENERAL PRELOGAR: Mr. Chief Justice,

1 and may it please the Court:

2 Throughout our nation's history, state
3 legislatures enacting election laws have
4 operated within the bounds of their state
5 constitutions enforced by state judicial review.
6 This practice dates from the Articles of
7 Confederation, and the framers carried it
8 forward by using parallel language in the
9 Elections Clause to assign state legislatures a
10 duty to make laws.

11 Text, longstanding practice, and
12 precedent show that the Elections Clause did not
13 displace this ordinary check on state
14 law-making. Petitioners' contrary theory
15 rejects all of this history and would wreak
16 havoc in the administration of elections across
17 the nation. Their theory would invalidate
18 constitutional provisions in every single state,
19 many tracing back to the founding. That would
20 sow chaos on the ground as state and federal
21 elections would have to be administered under
22 divergent rules and federal courts, including
23 this Court, would be flooded with new claims,
24 often at the 11th hour, in the midst of hotly
25 contested elections.

1 The Court should adhere to the
2 consistent practice that has governed for more
3 than two centuries and should reject
4 Petitioners' atextual, ahistorical, and
5 destabilizing interpretation of the Elections
6 Clause.

7 JUSTICE THOMAS: General, I must say
8 it's -- I think it -- it seems a bit ironic that
9 you're on the other side of a federalism issue.
10 The -- do you agree with the highly deferential
11 standard that we've been discussing here?

12 GENERAL PRELOGAR: We do --

13 JUSTICE THOMAS: It would seem to take
14 you out of the equation or the national
15 government out of the equation.

16 GENERAL PRELOGAR: No, not at all.
17 Justice Thomas, we, of course, recognize that
18 Congress has its own check under the second half
19 of the Elections Clause, and that remains
20 constant no matter what the states are doing
21 through their state election laws.

22 But as well, with respect to this idea
23 of whether there is an outer federal
24 constitutional standard that could apply here,
25 we agree that that's so and the Court could

1 recognize that kind of constitutional claim.

2 Now we also agree that that would have
3 to be highly deferential, and I think that that
4 stems from the recognition that to state this
5 kind of claim under the Elections Clause you
6 would have to be identifying a situation where a
7 state court isn't actually engaged in the
8 process of judicial review.

9 We understand the Elections Clause to
10 pick up through the law-making function that
11 ordinary check and balance. And so, if a state
12 court is conducting judicial review and is
13 interpreting its state constitution, that --
14 that presents no fundamental conflict with the
15 Elections Clause itself.

16 So the standard would have to be
17 trying to identify those circumstances when a
18 state court isn't really functioning through the
19 process of ordinary judicial review, and we
20 think that that would be an extraordinary
21 situation that is unlikely to arise very often,
22 but there is an outside federal constitutional
23 check that could be applied in this context.

24 JUSTICE GORSUCH: General, just to --
25 oh, I'm sorry.

1 JUSTICE THOMAS: No. Just one last
2 point. It would seem that that would preclude
3 you, your involvement, if the Florida -- I'm --
4 I'm sorry, the North Carolina Supreme Court had
5 a decision or rendered a decision that was not
6 generous or less generous or actually
7 antagonistic to an interest that you would
8 normally defend.

9 GENERAL PRELOGAR: We agree that our
10 theory does not depend on the particular state
11 constitutional provision that's being enforced.
12 Of course, there are a panoply of federal laws
13 that apply in this context as well. And so, if
14 there was some state constitutional provision
15 like you were positing earlier that would be
16 fundamentally in conflict with the Voting Rights
17 Act, then, of course, under the Supremacy
18 Clause, that provision would have to yield.

19 JUSTICE GORSUCH: General, I should
20 have asked this question to Mr. Verrilli, so
21 apologies to both of you. Just what is the
22 status of the state court proceedings right now?

23 GENERAL PRELOGAR: So my understanding
24 is that the appeal of the remedial map --

25 JUSTICE GORSUCH: Yeah.

1 GENERAL PRELOGAR: -- is still
2 pending. And I -- I don't know when a decision
3 is expected. I thought I saw in the briefing
4 somewhere that it was expected by the end of
5 this year, but I don't believe it's arrived yet.

6 JUSTICE GORSUCH: Okay. That's
7 helpful. Thank you. And then I just wanted you
8 to address what I understood the other side's
9 argument to be -- and -- and I may be misstating
10 it, so forgive me, both of you -- that Chief
11 Justice Rehnquist's theory that there's some
12 outer bounds, and we can disagree over or argue
13 about whether or how far in the atmosphere it
14 should go, make sense because, to the extent, as
15 Justice Barrett was pointing out, the question
16 before us is whether the rule, the time, place,
17 and manner regulation has been prescribed by the
18 legislature.

19 And we can say, hey, ordinarily,
20 courts will interpret and apply the rules
21 prescribed by the legislature, and executive
22 agents will enforce the rules prescribed by the
23 legislature pursuant to their ordinary
24 obligations as executive officers. I get that.

25 But it's something different, I think

1 the argument goes from the other side, when a
2 state court says or any -- any institution says
3 we're not going to enforce the rules prescribed
4 by the legislature for whatever reason, in this
5 case it's because of the state constitution, but
6 it could be an executive officer who
7 contumaciously refuses to do so or whatever one
8 imagines.

9 But, here, by definition, I think
10 we're in agreement that the rules prescribed by
11 the legislature are not going to be applied in
12 this case. So I think that's the argument as I
13 understand it. I just wanted to give you a
14 chance to address it because I haven't heard
15 anybody address it yet.

16 GENERAL PRELOGAR: Sure, and I
17 appreciate the opportunity to do so. So I think
18 that the premise of the question was focused
19 on the legislature's power under the Elections
20 Clause to set the time, place, and manner of
21 federal elections. And if I'm understanding the
22 question correctly, our view is not that it
23 would transgress the legislature's power to
24 depart from its law when that's the ordinary
25 practice of judicial review. It might be the

1 case that the legislature's work has to yield to
2 a state constitutional provision because however
3 they prescribe the time, place, and manner of
4 elections could violate equal protection, for
5 example, under the state constitution as well as
6 the federal if it violates one person/one vote.

7 So sometimes state courts through the
8 ordinary process of judicial review and
9 constitutional adjudication are, of course,
10 setting aside what the legislature has done with
11 respect to its manner regulations.

12 JUSTICE GORSUCH: And by definition
13 invoking some higher authority under state law
14 to not enforce the rules about time, place, and
15 manner prescribed by the legislature, right?

16 GENERAL PRELOGAR: Correct, and our
17 theory is that that's consistent with the
18 Elections Clause under this Court's precedent
19 because the framers vested the state legislature
20 with their law-making power, and that has always
21 been understood to be subject to state
22 constitutional constraints.

23 There is no category of state law that
24 has previously existed that detaches the state
25 legislature from the state constitution and

1 allows it free rein to have whatever laws it
2 wants without that state constitutional check.
3 And we think that the text and the history and
4 precedent forcefully reinforce this idea that
5 the framers would have understood that when they
6 were giving this law-making power it carried
7 with it those ordinary checks and balances.

8 JUSTICE KAGAN: And when Mr. Thompson
9 says, well, it should be subject to the
10 constraint of federal review but not of -- of
11 state constitutional review, what do you think
12 of that distinction?

13 GENERAL PRELOGAR: I think this Court
14 has rejected that distinction already in cases
15 like Smiley and Hildebrant, and they rejected
16 exactly the theory that my friend has proposed
17 about looking at the federal function.

18 In Smiley, the Court said that's not
19 what you look at. You look at the specific
20 function that's been assigned. And when it's a
21 law-making function, that carries with it the
22 ordinary checks and balances that apply to state
23 law, including those applied by the state
24 constitution.

25 That was the very distinction the

1 Court draw -- drew with Hawke versus Smith and
2 the separate ratification function. That's a
3 different question. And cases like Leser that
4 he's repeatedly relied on are looking at a
5 different function under the Constitution.

6 But, with law-making, the relevant
7 fact is that the framers would have understood
8 that that comes with it judicial review and
9 state constitutional constraints, both
10 substantive and procedural.

11 JUSTICE JACKSON: Because the
12 law-making authority of the entity in question
13 comes from the state constitution, right? I
14 mean, if it's a law-making function that we're
15 tapping into, it's the state constitution that
16 gives that entity its law-making power and tells
17 it when and under what circumstances and how it
18 can act as the legislature, right?

19 GENERAL PRELOGAR: Exactly. And this
20 is blackletter law, Justice Jackson. A law that
21 violates the Constitution is no valid law at
22 all. And North Carolina, like in many other
23 places, it's void ab initio. That is the kind
24 of constraint that goes into and -- and
25 describes the conditions that attach to the

1 making of law in the first place.

2 JUSTICE JACKSON: So, in effect --

3 CHIEF JUSTICE ROBERTS: Well --

4 JUSTICE JACKSON: -- it's as though
5 the state court is saying you are not "the
6 legislature" for the purpose of the Elections
7 Clause.

8 GENERAL PRELOGAR: Within the meaning
9 of the Elections Clause --

10 JUSTICE JACKSON: Yes.

11 GENERAL PRELOGAR: -- yes, because
12 that's a law-making role, we think that the --
13 that the framers would have understood that it's
14 carrying with it that constraint. And that
15 traces directly from the Articles of
16 Confederation because they similarly prescribed
17 this kind of function on state legislatures to
18 provide for the manner of selecting delegates to
19 the Continental Congress, and virtually every
20 state constitution in the relevant period, 10
21 out of 11, had substantive constraints that
22 hemmed in the legislature in how they carried
23 out that function --

24 CHIEF JUSTICE ROBERTS: Well, it's not
25 -- it's not --

1 GENERAL PRELOGAR: -- and that was a
2 familiar practice.

3 CHIEF JUSTICE ROBERTS: -- it's not
4 really that easy, is it, because the reason we
5 have a case is because the power does not simply
6 come from the state constitution, but the power
7 comes from the federal Constitution, which
8 authorizes the legislature to carry it into
9 effect. So the reason there is a case is
10 because of the concern that the state
11 constitutional provision or, in analogous cases,
12 the statutes conflict with the federal
13 Constitution, which authorizes the legislature,
14 which -- a concept that was known to the framers
15 to undertake this responsibility. So I think
16 whichever way you think about in terms of how it
17 should come out, I think you have to address the
18 fact that there is that tension, a -- a tension
19 that we address on a regular basis between the
20 state power and the federal power.

21 GENERAL PRELOGAR: Of course, I
22 acknowledge that that makes this a case, Mr.
23 Chief Justice, but I think using all of the
24 traditional tools here, both with respect to
25 text, history, precedent, each of those counsels

1 forcefully against drawing this kind of
2 substance/procedure distinction.

3 I don't see how you get there on the
4 text alone because, once the Court has
5 understood and explained in numerous cases that
6 this is a law-making function, as Justice Kagan
7 explained when she read aloud from this Court's
8 cases, that has been understood to mean that all
9 of the ordinary constraints on law-making
10 attach. And this is one of the most fundamental
11 and ordinary constraints on law-making.

12 And then there's the history, the
13 Articles of Confederation.

14 CHIEF JUSTICE ROBERTS: Well, if I can
15 -- I don't mean to -- well, I guess I do mean to
16 interrupt, but the way you phrased it is
17 exactly, I guess, where the argument this
18 morning has mostly gone. You say the ordinary
19 restraints, and I think that's what Chief
20 Justice Rehnquist was trying to get at. That's
21 what you -- whatever standard you want to say,
22 whether it's ordinary or, you know, once in a
23 blue moon, you're saying that that is the
24 question, is what the state is doing, which has
25 the impact on the federal constitutional

1 authority given to the legislature, ordinary or
2 outrageous, however you want to -- to say it.

3 So you do accept the proposition that
4 there is a role for this Court in particular to
5 assess whether or not -- how that conflict is
6 worked out in a particular case?

7 GENERAL PRELOGAR: I do acknowledge
8 that, but I would emphasize in trying to think
9 about this both from a legal standpoint and if I
10 could from a practical standpoint that I would
11 think the Court would want to make clear that
12 this is a very deferential standard. It is not
13 the ordinary case where the Court is
14 second-guessing a state court's interpretation
15 of its own state law.

16 Usually, the Court treats the state
17 courts as conclusive expositors of state law
18 because they have way more institutional
19 competence in their own methodologies, which, of
20 course, may differ from the methodologies this
21 Court would deploy with respect to the federal
22 Constitution, and they have a lot more
23 familiarity with the content of their state law.

24 So I think, to situate this kind of
25 test within this Court's broader doctrine in

1 this area, it would be necessary to recognize
2 that this is not just about thinking that the
3 state court might have gotten it wrong or -- or
4 even very wrong but rather trying to identify
5 the narrow circumstances where the Court can't
6 properly be understood to be conducting judicial
7 review in the first place.

8 It's not acting like a court, because
9 that is the kind of thing that would then seize
10 the legislatures' policymaking power and be
11 understood to transgress the Elections Clause.

12 And just a quick note on the practical
13 point. Any I think lesser rule in this context
14 would invite constant challenges brought in
15 federal courts seeking to relitigate these state
16 law issues often in the midst of these elections
17 as they're unfolding on the ground, and I think
18 it would be important to try to put a check on
19 that type of second bite at the apple that
20 litigants would otherwise try to obtain.

21 JUSTICE ALITO: May I ask you a couple
22 of questions about your interpretation of two
23 federal statutory provisions that you cite, 28
24 U.S.C. 2(a)(C) and 2(a). And 2(a)(C) refers to
25 the law of each state, and then it speaks about

1 the law thereof.

2 Does that -- when it speaks about the
3 law of such state, is it talking just about
4 state law, or is it also talking about
5 provisions of federal law that are applicable in
6 that state and for that matter in every other
7 state in the country? For example -- okay.
8 Yeah.

9 GENERAL PRELOGAR: Go ahead.

10 JUSTICE ALITO: No.

11 GENERAL PRELOGAR: I was going to say
12 we --

13 JUSTICE ALITO: You first.

14 GENERAL PRELOGAR: -- we understand
15 that provision to reflect Congress's recognition
16 that a state can be apportioned in accordance
17 with its law and I would say also in accordance
18 with federal law as it would need to comply with
19 federal law in multiple different ways,
20 including through the involvement of different
21 actors. And so the Court has already concluded
22 in cases like Branch versus Smith that that
23 would include court-drawn remedial maps, for
24 example. That's apportionment --

25 JUSTICE ALITO: Okay. So these --

1 GENERAL PRELOGAR: -- by law.

2 JUSTICE ALITO: -- I mean, these --
3 these provisions talk about districts prescribed
4 by the law of such state, but included within
5 that are federal constitutional constraints, the
6 federal equal protection clause, one person/one
7 vote, the Voting Rights Act, right, that is the
8 law of the state?

9 GENERAL PRELOGAR: I would say yes,
10 those are the present laws.

11 JUSTICE ALITO: And, if that's true,
12 why isn't the Election Clause the law of the
13 state?

14 GENERAL PRELOGAR: We think the
15 Election Clause is the law of the state, but
16 there's no incompatibility with that law --

17 JUSTICE ALITO: Okay. But then that
18 --

19 GENERAL PRELOGAR: -- and with the
20 recognition --

21 JUSTICE ALITO: Yeah.

22 GENERAL PRELOGAR: -- that when state
23 legislatures are doing law-making, just as with
24 the --

25 JUSTICE ALITO: Right. Okay.

1 GENERAL PRELOGAR: -- the governor's
2 veto you can have state constitutional checks.

3 JUSTICE ALITO: No, I understand -- I
4 understand all that. I'm just talking to --
5 trying to see whether these statutes add
6 anything, and in light of your answer, it
7 doesn't seem to me they add anything because
8 we're still back to the question of the
9 interpretation of the federal Constitution,
10 right?

11 GENERAL PRELOGAR: I agree there's a
12 federal constitutional question here. We think
13 that these statutes add for purposes of this
14 case just additional confirmation from Congress
15 that it recognized that other organs of the
16 state government, including courts, could play a
17 role in the process.

18 JUSTICE ALITO: I don't think that's
19 really responsive to my question. If the law
20 thereof includes the Equal Protection Clause in
21 the U.S. Constitution and it includes the Voting
22 Rights Act, then it includes also the Elections
23 Clause, and I understood you to agree with that.
24 So we're back to these -- these statutes are not
25 an alternative way to decide the case. It takes

1 us back to the Election Clause constitutional
2 question, right?

3 GENERAL PRELOGAR: That's right, we
4 haven't asked --

5 JUSTICE ALITO: Okay. Thanks.

6 GENERAL PRELOGAR: -- the Court to
7 resolve this case on the basis of these
8 statutes.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?
12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: In fairness to
14 Petitioner, I think that what they're trying to
15 say when they draw this procedural/substantive
16 line or this other line of open-ended or
17 specific constitutional provisions, that they're
18 trying to articulate, maybe inarticulately, but
19 articulate that we have to reach the question of
20 how -- when does the federal constitutional
21 provision spring up, meaning at what point has a
22 court acted not as in judicial review but in
23 legislating, and so how would -- and I think Mr.
24 Verrilli gave us a line. What's your line? How
25 would you articulate it?

1 GENERAL PRELOGAR: So I'm happy to
2 give you a line. I'll just say that I don't
3 actually understand them to -- to try to
4 conflate those two arguments. I think that they
5 are trying to make a sweeping argument here that
6 even if the court is acting like a court and
7 faithfully engaged in the process of judicial
8 review, they would nevertheless invalidate any
9 number of constitutional provisions around the
10 states and say those are unenforceable through
11 that limited process of review.

12 JUSTICE SOTOMAYOR: I -- I agree with
13 you, that's what they're trying to say.

14 GENERAL PRELOGAR: Yes. So -- but
15 just to try to be responsive to your question
16 about a standard, we think that there are
17 obviously multiple formulations that have been
18 offered and are available to the Court, but we
19 think the closest analogue to try to track this
20 problem I've described of when a court is not
21 faithfully engaged in judicial review is to
22 borrow from the adequate and independent state
23 grounds context and specifically the civil
24 rights cases, where the Court has said that if
25 the state court decision is so lacking in any

1 basis and has no fair or substantial support and
2 can only be understood as an effort to frustrate
3 federal rights, then the Court can look past
4 that decision.

5 And, again, we think that this is a
6 high bar. It's not testing for exactly the same
7 thing because, in that context, novelty might be
8 important, for example, if you're surprising a
9 civil rights plaintiff to try to deny a federal
10 forum. Here, we don't think that novelty would
11 carry much weight in the analysis.

12 But we do think that formulation of
13 lacking any fair or substantial support with
14 deference shown to the state's own methodologies
15 and its constitutional interpretation is trying
16 to get at the same idea of when the court is
17 actually abdicating its judicial role and
18 instead claiming raw policymaking power.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: On your side of the
21 podium, we have one vote in favor of a gap
22 between constitutional and statutory questions
23 and one vote saying it's the -- it's the same,
24 so you get to decide.

25 (Laughter.)

1 GENERAL PRELOGAR: I love casting a
2 deciding vote. We don't think that there is
3 a --

4 JUSTICE KAGAN: Just on your side of
5 the podium.

6 GENERAL PRELOGAR: Sadly, yes. I
7 think that it wouldn't make sense to deploy a
8 different standard or formulation with respect
9 to statutory and constitutional questions
10 because, again, you'd be testing for the same
11 thing, when is this not the court acting like a
12 court when it has gone off the rails and it's
13 just doing policy under the guise of statutory
14 interpretation or constitutional interpretation.

15 But I agree with Mr. Verrilli that I
16 think, in application, this could often come out
17 differently in the sense that usually in
18 statutory interpretation you have a text before
19 you and it might be more evident whether this is
20 just a stark departure from the legislature's
21 work.

22 In the context of constitutional
23 adjudication and contrast, there are often broad
24 provisions, as there are under the federal
25 Constitution, and I think that federal courts

1 should not be in the business of saying that the
2 state courts aren't giving those, for example,
3 just a fair reading looking at their text alone
4 because there is often a lot of additional
5 methodology that has to go into properly
6 interpreting those provisions and distilling
7 them into principles and concrete cases.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: No.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Just finally, to be
15 clear, in -- in answer, in response to Justice
16 Sotomayor, the reason you see the counsel on the
17 other side as making a sweeping argument that
18 doesn't really require us to employ a test to
19 determine when a court is acting as a court is
20 because they have conceded that this is a court
21 acting as a court, but even still they say its
22 decision needs to be cut out because it's based
23 on state constitutional law and not federal
24 constitutional law. Am I understanding?

25 GENERAL PRELOGAR: That's -- that's

1 exactly right. So they have said multiple times
2 today that they are not asking this Court to
3 delve into the ins and outs of the North
4 Carolina Supreme Court's decision here, that
5 they -- they said they take it at faith -- face
6 value --

7 JUSTICE JACKSON: Right.

8 GENERAL PRELOGAR: -- as an accurate
9 understanding of North Carolina law. And
10 they're instead making far more sweeping
11 arguments that would take off the table 233
12 years of history in this country, state
13 constitutional provisions that have applied
14 under the Articles of Confederation, in the
15 early decades of the republic, and still today,
16 and we think that that would be a distortion of
17 the meaning of the Elections Clause, and it
18 would have enormous and drastic practical
19 consequences.

20 JUSTICE JACKSON: So we can rule here
21 today without adopting any particular test, like
22 Mr. Verrilli's or anything else?

23 GENERAL PRELOGAR: Yes, we agree that
24 it wouldn't be necessary in this case to
25 articulate that standard because we don't think

1 that they're pressing that kind of claim in this
2 case.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Mr. Thompson.

6 REBUTTAL ARGUMENT OF DAVID H. THOMPSON

7 ON BEHALF OF THE PETITIONERS

8 MR. THOMPSON: Thank you, Mr. Chief
9 Justice. Just a few quick points.

10 Number one, on what I meant -- the
11 extent to which we are accepting what the North
12 Carolina Supreme Court's ruling was here as a
13 valid and fair expression of state law, we are
14 doing that for purposes of the two tests that we
15 articulated in our brief. Number one, there
16 can't be any substantive restraint on the state
17 legislature, and number two, it lacked a
18 judicially discoverable and manageable standard.

19 But make no mistake, would this Court
20 say, well, we want to adopt a third standard, we
21 want to take the Bush versus Gore standard and
22 we want to apply it to state constitutions, I
23 would make two points.

24 Number one, the test for a state
25 constitution should be easier to meet than a

1 statute because, for purposes of the Elections
2 Clause, it's far more problematic when a state
3 legislature has its hands tied by a state
4 constitution than when it's tied by a state
5 legislature -- an impermissible distortion of a
6 statute which they can just go back and rewrite.

7 And the second point I would make is,
8 under that standard, and we've heard a
9 multiplicity of standards, but under any of the
10 standards, we think what the North Carolina
11 Supreme Court here did would run afoul of all of
12 those standards because it was not grounded in
13 the text, it was not grounded in the history,
14 and it was not grounded in precedent.

15 Now I would also like to address the
16 suggestion that there will be an increase in
17 cases if the Court were to adopt our standard as
18 opposed to their standard. It's very important
19 to understand that my friends on the other side
20 are articulating two trip wires. They have now
21 articulated two ways in which the Elections
22 Clause could be violated. One is their panoply
23 of stratospheric tests for running --
24 impermissibly distorting state law.

25 But the second way, which they've

1 never disclaimed, it's in their briefs on page
2 57, is they acknowledge that if the legislature,
3 state legislature is deprived a central role, a
4 central role, then that would be a separate way
5 to violate the Elections Clause, and they never
6 tell this Court how that functionalist test is
7 going to be interpreted, how it's going to be
8 applied, and there will be far more litigation
9 under the -- the standards and the tests that my
10 friends on the other side are asking this Court
11 to apply.

12 Now I'd also like to point out that
13 they've said that there would be two sets of
14 rules, rules for federal elections and rules for
15 state elections, if we prevail. From the
16 founding of the republic, states have had the
17 opportunity to have two different sets of
18 elections code and they've consistently declined
19 that invitation, and there's no reason to think
20 that they would do so in this context.

21 And, finally, there was discussion
22 about history and the Articles of Confederation,
23 and, respectfully, their discussion of the
24 Articles of Confederation ignores the
25 fundamental structural change that occurred when

1 the Articles of Confederation were replaced with
2 the Elections Clause, and so we think that is
3 not relevant.

4 I yield back the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel, all counsel. The case is submitted.

7 (Whereupon, at 12:57 p.m., the case
8 was submitted.)

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