No. 21-1271

In the
Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*,
Respondents,

&

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

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

PARTIES TO THE PROCEEDING

This proceeding arises from two cases consolidated in the North Carolina Superior Court.

In the first of the two consolidated cases, Petitioners are Speaker of the North Carolina House of Representatives Timothy K. Moore; President Pro Tempore of the North Carolina Senate Philip E. Berger; Representative Destin Hall, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; Senator Warren Daniel, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; Senator Ralph Hise, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and Senator Paul Newton, in his official capacity as Co-Chair of the North Carolina Standing Committee on Redistricting and Elections. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are Rebecca Harper; Amy Clare Oseroff; Donald Rumph; John Anthony Balla; Richard R. Crews; Lily Nicole Quick; Gettys Cohen, Jr.; Shawn Rush; Jackson Thomas Dunn, Jr.; Mark S. Peters; Kathleen Barnes; Virginia Walters Brien; and David Dwight Brown. Respondents were plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are North Carolina State Board of Elections and Damon Circosta, in his official capacity as chair of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

In the second of the two consolidated cases, Petitioners are Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Representative Destin Hall, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; Senator Warren Daniel, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; Senator Ralph E. Hise, Jr., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and Senator Paul Newton, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are North Carolina League of Conservation Voters, Inc.; Henry M. Michaux, Jr.; Dandrielle Lewis; Timothy Chartier; Talia Fernos; Katherine Newhall; R. Jason Parsley; Edna Scott; Roberta Scott; Yvette Roberts; Jereann King Johnson; Reverend Reginald Wells; Yarbrough Williams, Jr.; Reverend Deloris L. Jerman; Viola Ryals Figueroa; and Cosmos George. These Respondents were plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are the State of North Carolina; the North Carolina Board of Elections; Damon Circosta, in his official capacity as Chairman of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as Secretary of the

North Carolina State Board of Elections; Stacy Eggers IV, in his official capacity as Member of the North Carolina State Board of Elections; Tommy Tucker, in his official capacity as Member of the North Carolina State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Additionally, the North Carolina Superior Court granted the motion of Common Cause to intervene in the consolidated proceedings below. Common Cause was intervenor-plaintiff in the North Carolina Superior Court intervenor-appellant in the North Carolina Supreme Court.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Denying Temporary Stay and Writ of Supersedeas (entered February 23, 2022).
- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Written Decision Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 14, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 4, 2022).

The following proceedings are also directly related to this case under Rule 14.1(b)(iii) of this Court:

- *Harper v. Hall*, No. 21A455 (U.S. Supreme Court)—Order Denying Application for Stay (entered March 7, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

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INTRODUCTION

The text of the Constitution directly answers the question presented in this case. The Elections Clause provides, in unambiguous language, that the manner of federal elections shall "be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. Yet in the decision below, the North Carolina Supreme Court invalidated the state legislature's duly enacted congressional map and decreed that the 2022 election and all upcoming congressional elections in the State *were not* to be held in the "Manner" "prescribed . . . by the Legislature thereof," *id.*, but rather in the manner prescribed *by the state's judicial branch*. It is obvious on the face of the Constitution that this result is irreconcilable with that document's allocation of authority over federal elections. As this Court recently explained, "[t]he Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho v. Common Cause*, 588 U.S. ---, 139 S. Ct. 2484, 2496 (2019). Their approach *did not* assign any role in this policymaking process to *state judges*, and the decisions by the courts below cannot stand.

In an order entered on February 4, the state supreme court invalidated the North Carolina General Assembly's congressional map and remanded to state trial court for remedial proceedings. And after Petitioners—North Carolina legislators, including the Speaker of the House of Representatives and the President Pro Tempore of the Senate—engaged in a good-faith effort to craft a congressional map that would be valid under the state supreme court's order, the state

trial court *rejected that map too*, in favor of its own, judicially crafted one. The North Carolina Supreme Court refused to stay this decision, thereby authorizing this judge-made map to govern the 2022 election cycle.

If a redistricting process more starkly contrary to the U.S. Constitution's Elections Clause exists, it is hard to imagine it. The Elections Clause "could have said that [federal election] rules are to be prescribed 'by each State,' which would have left it up to each State to decide which [state entity] should exercise that power." *Moore v. Harper*, 595 U.S. ---, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). Indeed, the earliest draft of the Clause, proposed in the Philadelphia convention as part of the Pinckney Plan, would have done just that. Crucially, however, the Committee of Detail deliberately changed the Constitution's language to specify that *state legislatures* were to exercise that power, not any other state entity and not the State as a whole. "[W]e must take that language seriously." *Id.*

The background availability of judicial review does not change the analysis. The Elections Clause's allocation of authority to state legislatures would be emptied of meaning if state courts could seize on vaguely-worded state-constitutional clauses to replace the legislature's chosen election regulations with their own. And in any event, while state legislatures are limited by their state constitutions when they exercise the power governed by those constitutions, when state legislatures regulate the times, places, and manner of Senate and congressional elections, they are exercising a power governed *by the federal* Constitution, not a state constitution, so only

federal constitutional limits apply. No one would suggest that when *Congress* enacts election regulations under Article I, Section 4, it is somehow subject to state-constitutional limits. The same conclusion must follow for state legislatures acting under the same provision.

History confirms what is apparent from the text. The actions of the courts below are entirely unprecedented in the Early Republic: no state court appears to have invalidated a state legislature's congressional map on substantive state-constitutional grounds during this period. Moreover, in the first four decades of practice under the Constitution, 21 out of 24 States refrained from imposing any substantive state-constitutional limits expressly governing federal elections. And when such a limit was proposed in Massachusetts's 1820 constitutional convention it was *voted down* after Justice Joseph Story objected that it was "plainly a violation of the [federal] [C]onstitution." JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 60 (1821). The three aberrant state provisions during this period that did purport to limit the legislature's Elections Clause power, in Delaware (1792), Maryland (1810), and Virginia (1830), are at most historical outliers that are incapable of overcoming the preponderance of historical evidence—not to mention the Elections Clause's plain text.

The state-law justification adopted by the courts below only compounds their constitutional violation. The North Carolina Supreme Court read abstract and broadly worded commands such as "[a]ll elections shall be free," N.C. CONST. art. I, § 10, to somehow

authorize the court to impose its own policy determinations and rules about the extent to which partisan considerations may affect redistricting. As this Court held in *Rucho*, "[j]udicial review of partisan gerrymandering" under constitutional provisions not expressly and concretely addressing the subject depends on questions that are "political, not legal," rendering the entire enterprise a quintessentially legislative one. *Rucho*, 139 S. Ct. at 2500, 2507 (cleaned up). If the Elections Clause means anything, it must mean at least this: *inherently legislative* decisions about the manner of federal elections in a State are committed to "the Legislature thereof."

The Constitution is a document of not just ends but means. It pursues the lofty goals of free and republican self-government, but it does not empower government officials to achieve these purposes in whatever way they think best. Instead, the Constitution carefully sets forth a detailed set of specific rights, specific procedures, and specific allocations of power. Here, those carefully drawn lines place the regulation of federal elections in the hands of state legislatures, Congress, and no one else. The solution to election regulations thought to be problematic is to persuade one of these entities to change them or, failing that, to amend the Constitution to adopt a different allocation of power—not to ignore the allocation that is clearly written down in the Constitution's text.

OPINIONS BELOW

The February 23, 2022 order of the North Carolina Supreme Court is reported at 868 S.E.2d 97 (Mem), and is reproduced at Pet.App.243a. The February 23, 2022 order of the North Carolina Superior Court is not reported, but it is reproduced at

Pet.App.269a. The February 14, 2022 written opinion of the North Carolina Supreme Court is reported at 868 S.E.2d 499, and is reproduced at Pet.App.1a. The February 4, 2022 order of the North Carolina Supreme Court is reported at 867 S.E.2d 554 (Mem), and is reproduced at Pet.App.224a. The December 8, 2021 order of the North Carolina Supreme Court is reported at 865 S.E.2d 301 (Mem), and is reproduced at Pet.App.247a. The December 3, 2021 order of the North Carolina Superior Court is not reported, but it is reproduced at Pet.App.253a.

JURISDICTION

The North Carolina Supreme Court entered an order on February 4, 2022, and an accompanying written decision on February 14, 2022, striking down Petitioners' original Congressional maps, and on February 23, 2022, the North Carolina Supreme Court denied Petitioners a temporary stay of the remedial maps generated by the Special Masters. This Court has jurisdiction over these final orders under 28 U.S.C. § 1257(a). The petition for writ of certiorari was filed on March 17, 2022, and granted on June 30, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions are reproduced at Pet.App.310a.

STATEMENT

I. Respondents Challenge the General Assembly's New Congressional Map.

After each decennial census, "States must redistrict to account for any changes or shifts in

population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Beginning in mid-2021, the General Assembly undertook a transparent public process to draw new congressional districts in response to the 2020 U.S. census data. Even before receiving the census data, the General Assembly's redistricting committees established line-drawing criteria, including a prohibition on using partisan considerations to draw congressional districts. On November 4, 2021, after receiving the 2020 census data, the North Carolina General Assembly enacted a new map for congressional elections. *See* 2021 N.C. Sess. Laws 174.

Respondents filed suit to enjoin the General Assembly's congressional map, claiming that it violated the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses, and that the map was an unlawful partisan gerrymander. Respondents did not allege—because they could not allege—that the General Assembly adopted partisan-data criteria or announced a partisan purpose. Nor did they allege any violation of the United States Constitution.

Petitioners opposed Respondents' claims on multiple grounds, including on the basis of the Elections Clause, which they argued foreclosed Respondents' claims in their brief opposing a preliminary injunction. Pet.App.325a–27a. On December 3, 2021, a three-judge panel of the North Carolina Superior Court declined to preliminarily enjoin the challenged maps, based in part on the conclusion that "Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution," but "it is the federal constitution which provides the

North Carolina General Assembly with the power to establish such districts." Pet.App.266a.

Respondents then sought a preliminary injunction, or immediate discretionary review, from the North Carolina Supreme Court. Petitioners opposed the request, again raising the Elections Clause argument. Pet.App.321a–23a. The state supreme court granted a preliminary injunction, during the completion of proceedings in the trial court, without addressing the Elections Clause issue. Pet.App.247a–52a.

After further proceedings, the three-judge trial court held, on January 11, 2022, that Respondents' claims were non-justiciable under the political question doctrine; that Respondents lack standing; and that Respondents were unlikely to establish that the General Assembly's congressional map was made with discriminatory intent. The court therefore entered final judgment for Petitioners.

Respondents appealed.

II. The North Carolina Supreme Court Strikes Down the Legislature's Congressional Map.

On February 4, 2022, the North Carolina Supreme Court issued an order granting Respondents' request to enjoin the General Assembly's congressional map. The court stated that although the General Assembly "has the duty to reapportion North Carolina's congressional . . . districts," the "exercise of this power is subject to limitations imposed by other [state] constitutional provisions." Pet.App.227a. The court concluded that the General Assembly's congressional map was an unconstitutional partisan gerrymander under four different clauses of the North

Carolina Constitution, and the court "enjoin[ed] the use of these maps in any future elections, . . . including primaries scheduled to take place on 17 May 2022." Pet.App.228a. While Petitioners again argued that the Elections Clause foreclosed Respondents' requested relief, Pet.App.313a–15a, the court did not address the U.S. Constitution's Elections Clause in its February 4 order.

The court's order also set a deadline for parties and intervenors to submit remedial districting plans to the trial court and required the trial court to approve or adopt a compliant congressional districting plan no later than noon on February 23, 2022. The court further required that the "General Assembly . . . submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." Pet.App.230a–31a.

On February 14, 2022, the North Carolina Supreme Court supplemented its February 4 order with a written opinion. In that opinion, the North Carolina Supreme Court "disagree[d]" with the General Assembly's assertion that the federal Constitution's Elections Clause bars Respondents' claims against the congressional plan. Pet.App.121a. The court cited this Court's opinion in *Rucho* for the proposition that "state constitutions can provide standards and guidance for state courts to apply" in addressing partisan gerrymandering, *id.* (emphasis omitted), and claimed "a long line of decisions" by this Court confirms the more general proposition that "state courts may review state laws governing federal elections to

determine whether they comply with the state constitution," *id.*

III. The North Carolina Superior Court Nullifies and Replaces the General Assembly's Remedial Congressional Map.

In response to the North Carolina Supreme Court's February 4 order and February 14 opinion, the General Assembly developed a remedial congressional map, which it enacted on February 17. 2022 N.C. Sess. Laws 3. The General Assembly timely submitted its remedial map to the North Carolina Superior Court, with an explanation of its constitutionality. In enacting its remedial map, the General Assembly made clear that its original map would once again govern were this Court to reverse the North Carolina Supreme Court's decision invalidating it. *See* 2022 N.C. Sess. Laws 3, § 2 (providing that if this Court "reverses" the North Carolina Supreme Court decision "the prior version of G.S. 163-201(a) is again effective"); 2021 N.C. Sess. Laws 174, § 1 (establishing districts "[f]or purposes of nominating and electing members of the House of Representatives of the Congress of the United States in 2022 *and periodically thereafter*") (emphasis added).

On February 16, the North Carolina Superior Court appointed three Special Masters to assist in the remedial process. Those Special Masters, in turn, hired two political scientists, a mathematician, and a professor of neuroscience to "assist in evaluating the Remedial Plans." Pet.App.273a. The Special Masters and their team of assistants produced a proposed remedial congressional map for the court's consideration, as did the parties (including the General Assembly's enacted remedial map).

On February 23, the North Carolina Superior Court issued an order rejecting the General Assembly's remedial congressional map and adopting the map proposed by the Special Masters. Pet.App.269a. The court concluded, "based upon the analysis performed by the Special Masters and their advisors," that the General Assembly's remedial congressional map "is not satisfactorily within the statistical ranges set forth in the Supreme Court's full [February 14] opinion." Pet.App.280a. Instead, the court adopted the remedial plan proposed by the Special Masters. While Petitioners had presented their Elections Clause argument again on remand, in a February 21 brief objecting to the Plaintiffs' proposed plans, Pet.App.229a, the court did not address the Elections Clause issue. The Superior Court's order makes clear that its remedial map applies only to the 2022 congressional election cycle. Pet.App.293a.

At the same time, the North Carolina Superior Court denied Petitioners' motion to disqualify two of the Special Masters' assistants after these individuals were discovered to have engaged in substantive *ex parte* communications with Respondents' experts. *See* Legislative Defs.' Mot. to Disqualify, *North Carolina League of Conservation Voters v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct. Feb. 21, 2022), *available at* https://bit.ly/3dm5hBz.

On the same day that the North Carolina Superior Court issued its decision, Petitioners sought a stay or writ of supersedeas from the North Carolina Supreme Court. Petitioners once again argued, in their stay motion, that the trial court's actions violated the Elections Clause. Pet.App.317a–19a. The state supreme

court denied Petitioners' requests without analysis. Pet.App.243a–46a.

IV. Petitioners Seek a Stay from this Court.

Two days later, Petitioners sought a temporary stay pending a writ of certiorari (or, in the alternative, a grant of certiorari and a stay pending a merits decision) from this Court, which was denied. *Moore*, 142 S. Ct. 1089. Four Justices acknowledged the importance of the issue presented and expressed interest in granting certiorari upon timely filing of a petition. *Id.* (Kavanaugh, J., concurring in denial of application for stay); *id.* at 1089, 1091 (Alito, J., dissenting from the denial of application for stay).

On June 30, 2022, the Court granted certiorari.

SUMMARY OF THE ARGUMENT

I.A. The text of the Constitution assigns to state legislatures alone the authority to regulate the times, places, and manner of congressional elections—including the authority to draw congressional districts. Both the plain text and its drafting history demonstrate that this choice was deliberate. For while the Framers could have conferred this authority on each State as a whole—and initially considered doing so—they chose instead to specify a specific institution within each State as the repository of the power.

B. That textual choice has an obvious and unavoidable consequence: the power to regulate federal elections lies with state legislatures *exclusively*. To be sure, the availability of judicial review is a background assumption of the American constitutional system, and it follows that the courts are presumptively open to hear *federal constitutional* claims

against governmental acts taken under the *federal* Constitution and *state constitutional* claims against acts taken under the *state* constitution. But it simply does not follow that *state* constitutional limits may be enforced against acts governed by the *federal* Constitution.

The clear preponderance of the practice of the States in the first few decades of the Republic strongly confirms the plain meaning of the Elections Clause. The vast majority of States—21 out of 24, by 1830—did not impose any express state-constitutional restrictions on the regulation of federal elections. In two of those States, proposed state-constitutional restrictions were rejected—in Massachusetts, on the basis that such a limit would violate the Elections Clause. Finally, this Court's precedent is also consistent with the conclusion that States may not impose substantive state-constitutional limits on their legislatures' exercise of this authority.

II.A. The North Carolina legislature has not delegated its authority to regulate congressional elections to the state courts. Any delegation of this legislative power would be itself unconstitutional under the Elections Clause—particularly where the claimed recipient of the delegation is the judicial branch. And even if some amount of delegation was constitutionally allowed, the power exercised by the North Carolina courts here—the unmoored policy determination of deciding how much partisanship is permissible in redistricting—far exceeds the degree of acceptable delegation on any understanding. In any event, none of the state law provisions claimed to support a delegation to the state courts actually does so.

B. The North Carolina Supreme Court's actions below nullified the North Carolina General Assembly's regulations of the manner of holding federal elections in the State and replaced them with new regulations of the judiciary's design. Those actions are fundamentally irreconcilable with the Elections Clause.

ARGUMENT

I. The Elections Clause Allocates the Authority To Draw Congressional Districts to State Legislatures, Not State Courts.

A. The Elections Clause Assigns the Power To Regulate the Time, Place, and Manner of Congressional Elections Specifically to State Legislatures.

The Court's analysis in this case must begin with the Constitution's text, and it can end there as well. The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). The constitutional text thus directly answers the question of which organ, within a State's government, is authorized to regulate the time, place, and manner of congressional elections: "the Legislature thereof." *Id.* "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin*

State Legislature, 592 U.S. ---, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay).

The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). "[T]he Legislature" means now what it meant then: "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, *Legislature*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("[T]he body of men in a state or kingdom, invested with power to make and repeal laws."); *Legislature*, 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) ("The power that makes laws."); *Legislature*, 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (same); *Legislature*, NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763) ("[T]he Authority of making Laws, or Power which makes them.").

Nor can there be any doubt that state legislatures' authority to regulate the "manner" of elections encompasses the authority to draw congressional districts. This Court has squarely and repeatedly held that the state legislatures' power under the Elections Clause includes "districting the state for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 373 (1932). These precedents accord with the Constitution's text and history. At the Founding as today, the word "manner" meant the "[f]orm" or "method" of doing a thing, *Manner*, JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE, *supra*—a term that naturally covers the determination of the contours of the State's congressional districts. And from ratification onward, state

legislatures have drawn congressional districts in express reliance on this authority. *E.g.*, An Act for the Election of Representatives, ch. II, 1788 Va. Acts 4; An Act Directing the Times Places and Manner of Electing Representatives, ch. 12, 1789 N.Y. Laws 12.

The Constitution's drafting history confirms that the allocation of authority to regulate elections specifically to each State's legislature was a deliberate choice. "The Framers could have done it differently," *Chiafalo v. Washington*, 591 U.S. ---, 140 S. Ct. 2316, 2325 (2020), and in fact a different disposition of the authority was originally proposed in Philadelphia. The Virginia Plan proposed in convention on May 29, 1787, did not contain any provision for the regulation of the time, place, and manner of federal elections. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20–22 (1911). However, the alternative "Pinckney Plan" contained a progenitor of the Clause that read as follows: "Each State shall prescribe the time & manner of holding Elections by the People for the house of Delegates & the House of Delegates shall be the judges of the Elections returns & Qualifications of their members." *Id.* at vol. 3, p. 597. The earliest reference to the regulation of congressional elections thus would apparently have assigned that power to *each State as a whole*.

On July 24, the Convention voted to form a five-member "Committee of Detail," which it charged with drawing up a draft constitution consistent with the resolutions so far agreed to by the Convention as a whole (largely based on the Virginia plan). *Id.* at vol. 2, p. 106. The Convention also voted to refer the Pinkney Plan to the Committee of Detail. *Id.* It was here that the draft Elections Clause was changed to

allocate authority to each State's legislature, rather than to the State generally. The draft constitution reported by the Committee of Detail on August 6 provided that "The times and places and the manner of holding the elections of the members of each House shall be prescribed *by the Legislature of each State*; but their provisions concerning them may, at any time, be altered by the Legislature of the United States." *Id.* at 179 (emphasis added).

The documentary history strongly confirms that the change was a deliberate one. "[O]ur most important source of information about the inner workings of the Committee of Detail" comes from a markup of the Committee of Detail's draft constitution written in Edmund Randolph's handwriting. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 206 (2012). That document shows that an early draft from the Committee would have split the regulation of House and Senate elections into two clauses, and it indicates that the Committee made various revisions to both. For the Senate, it suggests that the Committee initially considered giving "[e]ach State" "discretion as to the time and manner of choosing [Senators]." WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787 317 (facsimile page III) (2d ed. 1900). Randolph, however, inserted language providing that "***the legislature of*** Each State" shall have "discretion as to the time and manner of choosing [Senators]." *Id.* (emphasis added to indicate Randolph's insertions); *see also* 2 FARRAND, *supra*, at 141.

For the House, Randolph's draft suggests that the Committee initially considered having the *place* of election "fixed by the national legislature" and the

manner restricted to voting "by ballot, unless 2/3 of the national legislature shall chose to vary the mode." MEIGS, *supra*, at 317 (facsimile page II). Randolph's draft reflects that the reference to the "national" legislature was then struck, along with the clause governing the manner of voting, such that the amended clause simply assigned authority to fix the place of elections to "the legislatures from time to time, or on their default by the national legislature." *Id.*; *see also* 2 FARRAND, *supra*, at 139. By the time of the next extant draft of the Committee's work—written in James Wilson's hand—both clauses had been consolidated into a single one worded similarly to the version ultimately reported by the Committee. *Id.* at 155.

Respondents advance a variety of arguments for reading the Elections Clause as nonetheless allowing state constitutions to impose substantive limits on the legislature's authority, and we discuss them in detail below. But the bottom line is this: none of these arguments produces the kind of "irresistible" evidence that would be needed to overcome the "plain and obvious import" of the Constitution's "clear and distinct" text. *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 338–39 (1816).

B. The Elections Clause Does Not Allow State Courts To Usurp the Authority It Assigns to State Legislatures.

1. The plain import of the Elections Clause's allocation of election-regulating authority to each State's legislature is that the legislature's possession of this authority is exclusive. The Constitution *deliberately specifies* how the authority of "each State" to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" is to be exercised:

through "Regulations" "prescribed . . . in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. That specification necessarily entails that no *other* state organ is authorized to exercise that power. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107–11 (2012) (*expressio unius est exclusion alterius*). For as this Court has explained, where a specific Constitutional provision "defines powers and . . . sets out just how those powers are to be exercised," those governed by the Constitution's restraints have no license to alter or depart from the "single, finely wrought and exhaustively considered, procedure" set forth in the document. *INS v. Chadha*, 462 U.S. 919, 945, 951 (1983).

The exclusive nature of the state legislatures' authority is also confirmed by the single textually enumerated qualification that the Constitution *does* include: Congress's power to "make or alter such Regulations" as the legislatures may prescribe. U.S. CONST. art. I, § 4, cl. 1. That qualification shows that the Framers considered the possibility that state legislatures might exercise their power in inappropriate ways and, in characteristic fashion, provided a check against any potential abuse: congressional review. Enforcing that allocation of power "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

Other provisions of the Constitution further confirm that the Elections Clause's reference to state legislatures excludes other state entities. The Framers took great care in identifying which state institutions were assigned particular roles by the federal

Constitution. Some provisions assign federal powers or duties to each State as a whole. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 16 (reserving certain powers over the militia "to the States respectively"). Other provisions, by contrast, vest federal constitutional duties specifically in the state executive, legislature, or judiciary. *See, e.g.*, *id.* art. I, § 2, cl. 4 (authorizing "the Executive Authority" of each State to "issue Writs of Election" to fill vacancies); *id.* art. V (giving state legislatures duties related to proposing and ratifying amendments); *id.* art. VI, cl. 2 (binding "the Judges in every State" to follow the federal Constitution, laws, and treaties). And the Guarantee Clause specifies with delicate precision that States may request federal intervention against domestic violence through "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." *Id.* art. IV, § 4. The Constitution thus demonstrates throughout that when the Framers allocated federal functions to a particular state institution, they meant exactly what they said.

The Constitution's allocation of authority to regulate elections to *legislatures* rather than *courts* accords with the founding generation's views of these two types of institutions. "[T]he Founders viewed value judgments and policy considerations to be the work of legislatures, not unelected judges." *United States v. Sineneng-Smith*, 590 U.S. ---, 140 S. Ct. 1575, 1584–85 (2020) (Thomas, J., concurring). That generation designed the legislative branch to function as "the grand depository of the democratic principle." 1 FARRAND, *supra*, at 48. And because of these democratic bona fides, "so far as regulations as to elections cannot be fixed by the constitution, they ought to be left to the state legislatures, they coming far nearest

to the people themselves." *Letters from The Federal Farmer No. 12*, *in* 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 294, 301 (1981). In that way, as John Jay explained to the New York ratification convention, the rules governing such elections are determined by "the will of the people." 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327 (1836).

By contrast, on the Founders' understanding, the judicial branch was the *least appropriate* repository of this power. For as Hamilton famously described, judges were to exercise "neither force nor will, but merely judgment." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (C. Rossiter ed., 1961). Thus it "was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 FARRAND, *supra*, at 97–98.

Hamilton implicitly demonstrated this point in Federalist 59. Hamilton argued that the power to regulate elections "must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (C. Rossiter ed., 1961); *accord* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 816 (1833). The absence from that list of any role for the judiciary reflects that delegating legislative power to the judiciary would be contrary to its role and, indeed, threaten its independence, as "there is no liberty if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961).

2. Respondents' contrary view of the role of state courts in regulating elections is principally based on the Founders' general acceptance of the doctrine of judicial review. Just as *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), established judicial review at the federal level, "state constitutions were understood as supreme over state legislatures at the Founding," and "state courts could—and did—enforce these state higher laws against state legislatures." Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 19. It follows, according to this theory, that when a state legislature enacts regulations of federal elections that violate "substantive state constitutional limitations," state courts have the authority to strike those regulations down. *Id.* at 20.

As an initial matter, this reading of the Elections Clause would empty that provision's assignment of election-regulating authority to *state legislatures* of all meaning. When a state legislature's election regulations are nullified by a state court on state-constitutional grounds, the practical result is that the State has *reallocated* a portion of the authority assigned specifically to its legislature by the federal Constitution and parceled it out instead to its courts. The Elections Clause's deliberate allocation of authority cannot be circumvented in this manner. "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a

fair election." *Republican Party of Pa. v. Boockvar*, 592 U.S. ---, 141 S. Ct. 1, 2 (2020) (Statement of Alito, J.).

Respondents' argument is also based on a fundamental structural mistake. Unlike ordinary state legislation, regulating elections to federal office is a power governed, defined, and limited by the federal Constitution. The offices of Senator and Representative "aris[e] from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 522 (2001). Indeed, because any state authority to regulate election to federal offices could not precede their very creation by the Constitution, the Court has held that such power "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc.*, 514 U.S. at 804; *cf.* 2 STORY, COMMENTARIES, *supra*, at § 626 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the Union."). And even if the Elections Clause is read as "impos[ing] a duty" to prescribe election regulations rather than "confer[ring] a power," *Bush*, 531 U.S. at 534 (Rehnquist, J., concurring), the enactment of those regulations remains a *federal* function governed and limited by the *federal* Constitution.

The structural implication of these basic principles is clear: *only the federal constitution* can limit the federal function of regulating federal elections. Of course, each State's constitution limits the governmental functions that *it* assigns—just as the *federal* Constitution limits the functions that *it* assigns. But when a state legislature regulates congressional elections, it is performing a function assigned to it *by the federal Constitution, not any state constitution*, so Respondents' reliance on background principles of

judicial review for compliance with substantive state law falls apart. As this Court explained long ago in the analogous context of the state legislatures' power under Article V, "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitation[ ] sought to be imposed by the people of a state." *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

Yes, the *federal* Constitution imposes limits on both the state legislatures' authority to regulate federal elections and Congress's authority to revise those regulations. Thus, where a state legislature's election regulations violate *some other* provision of the Constitution, such as the Equal Protection Clause, the Constitution itself authorizes the federal or state courts to intervene to secure enumerated constitutional rights. But it simply does not follow that *state* constitutions can limit a state legislature's exercise of this federal function. The governing principle on this point does not come from *Marbury*, it comes from *McCulloch*. *See McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316, 426 (1819).

Indeed, the analogy to the availability of federal judicial review "[w]hen *Congress* enacts an unconstitutional bill," Amar & Amar, *supra*, at 21, far from supporting Respondents' argument, refutes it. For while "the *federal* Congress is quite obviously not independent of the Federal Constitution" when exercising power vested in it by that document, it *is* obviously independent of any state constitutional limits. *Id*. *See McCulloch*, 17 U.S. (4 Wheat) at 426. So too, when "the Constitution imposes a duty or confers a power

on a particular branch of a State's government," *Bush*, 531 U.S. at 534 (Rehnquist, J., concurring), that branch's exercise of the power "cannot be controlled by" the "constitution and laws of the respective states." *Id.*

A contrary conclusion would lead to absurd results. Since Congress's authority under the Elections Clause is plainly not subject to state-constitutional restrictions, Respondents' theory would mean that after a state court struck down a state legislature's election regulations on state-constitutional grounds, Congress could enact *the exact same law* and apply it to the State. There is no reason to think the Founders designed such an anomalous system.

While the federal Constitution allocates the authority to regulate federal elections to state legislatures, it of course does not create *the state legislatures themselves*. Petitioners thus do not dispute that each State's constitution may properly govern such procedural questions as whether a bicameral vote is required to enact a law, whether the legislation is subject to gubernatorial veto, *see Smiley*, 285 U.S. at 367–68, and, perhaps in the extreme case, whether some lawmaking entity other than the ordinary institutional legislature has authority to legislate on the subject under "the State's prescriptions for lawmaking," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). But it does not follow that state constitutions may also impose *substantive* limits, enforceable by state courts *outside of* "the method which the state has prescribed for legislative enactment[ ]," *Smiley*, 285 U.S. at 367, on the legislature's exercise of the power assigned to it by the Elections Clause. For while that power may be

assigned to a lawmaking institution that is a creature of state law, when that institution exercises the power it is engaged in a *federal* function and is thus simply not subject to substantive state-law restrictions.

3.i. History confirms these conclusions. The specific actions of the courts below—invalidating and replacing the State's congressional maps on the basis of the state constitution's "free elections" clause (among others)—were unprecedented at the Founding. Many early state constitutions included similar "free" or "equal" elections guarantees. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 491 (2022). Yet state-court decisions declaring congressional maps unconstitutional on the basis of one of these provisions—or on the basis of *any* substantive state-constitutional restriction, for that matter—were virtually unheard of until the modern era.[1] Accordingly, there is no direct historical support for the decisions below during the Founding or Early Republic.

ii. The reason for the absence during the Early Republic of any state-court opinion invalidating a state legislature's congressional map is not hard to divine: *no State adopted* any state-constitutional

[1] The first such case Petitioners' research has uncovered was decided in 1932. *See Moran v. Bowley*, 179 N.E. 526, 531–32 (Ill. 1932). While a handful of earlier cases invalidated legislative regulations of federal elections, they either concerned (1) state-constitutional *procedural* requirements, such as provisions subjecting election regulations to revision by referenda, *see State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *State ex rel. Schrader v. Polley*, 127 N.W. 848 (S.D. 1910); or (2) state-constitutional regulations of voter qualifications, *see Owensboro v. Hickman*, 14 S.W. 688 (K.Y. 1890)—which, as noted *infra* at p. 36, are outside of the scope of the Elections Clause.

provision that purported to control congressional districting. It is not as though the idea had not occurred to the Founding generation: *all eleven* of the written state constitutions adopted after the Revolution and governing by the time of Ratification included provisions spelling out the rules governing *state* legislative districts.[2] Yet for the first 40 years of practice under the Constitution, *no State* appears to have imposed similar rules governing *congressional* districts. That silence—with respect to *federal* districts but not *state* ones—is highly probative. *Cf. Printz v. United States*, 521 U.S. 898, 907–08 (1997) ("[The] lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.").

Even stronger confirmation, however, is provided by the two States where substantive constitutional limits governing congressional districts were proposed, after 1788, *and defeated*. Such a limit was proposed in Pennsylvania's 1790 constitutional convention: on February 1, Albert Gallatin moved to include in the state constitution a provision setting the proportion and maximum number of representatives allocated to each congressional district. But the motion was withdrawn the following day without recorded

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[2] *See* DEL. CONST. arts. III & IV (1776); PA. CONST. § 17 (1776); N.J. CONST. art. III (1776); MD. CONST. arts. II, IV, V, & XIV (1776); VA. CONST. (1776); N.C. CONST. arts. II & III (1776); GA. CONST. arts. IV & V (1777); N.Y. CONST. arts. IV & XII (1777); S.C. CONST. arts. XII & XIII (1778); MA. CONST. pt. 2, ch.1, § 2, art. I & § 3, art. II (1780); N.H. CONST. pt. II, *Senate* & *House of Representatives* (1784).

debate.[3] And in Massachusetts, another attempt to impose a similar limit was rebuffed in the constitutional convention based on Justice Story's objection that it was "plainly a violation of the [federal] [C]onstitution." JOURNAL OF DEBATES AND PROCEEDINGS, *supra*, at 60.

From 1820 to 1821, Massachusetts held a convention for purposes of amending its state constitution. On November, 28, 1820, James T. Austin, a delegate from Boston, proposed a provision directing that Massachusetts's "Representatives . . . in the Congress of the United States" and "Electors of President and Vice President" shall "be chosen by the people in such convenient districts as the Legislature shall direct," and requiring "the Legislature of this Commonwealth . . . at their session next after every apportionment of Representatives . . . to provide by law by dividing the Commonwealth into Districts for the choice of not more than two Representatives or Electors in any one District." *Id.* at 58. Austin argued that this provision was appropriate because "[t]he Legislature are bound to exercise all their powers under the direction of the [state] constitution." *Id.*

Austin's proposal was immediately opposed by Justice Story, who argued that "it was contrary to the constitution of the United States." *Id.* at 59. While the Elections Clause allocates to state legislatures "an

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[3] THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS 373–74 (1825).

unlimited discretion" to decide "the *manner* of choosing Representatives," the proposed provision would "compel [congressional] representatives to be chosen in districts—In other words, to compel them to be chosen in a specific manner—excluding all others. Was not this plainly a violation of the constitution?" *Id.* at 59–60. Indeed, the proposal "assumes a control over the Legislature, which the constitution of the United States does not justify." *Id.* at 60.

Following Story, Daniel Webster likewise rose to oppose Austin's proposal. While he professed to raise questions of "*expediency*" rather than of "our *right* to make such a provision," his concerns echoed Story's. *Id.* Webster "thought it tended to no good consequence, to undertake to regulate or enforce rights and duties arising under the General Government by other means than the powers of that Government itself." *Id.*

> Whatsoever was enjoined on the Legislature, by the Constitution of the [United States] the Legislature was bound to perform—and he thought it would not be well by a provision of *this* Constitution, to regulate the *mode* in which the Legislature should exercise a power conferred on it by *another* Constitution.

Id. at 60–61. Austin offered a brief defense of his proposal—suggesting that it could perhaps be interpreted as "only advisory of the manner in which the Legislature shall exercise its discretion"—but this gambit was unavailing, and the proposal was rejected. *Id.* at 61.

For the first 40 years after ratification, then, the vast majority of States do not appear to have even

attempted setting state-constitutional limits on congressional districting; and the two States that *did* consider the idea *rejected it*. It was not until 1830 that a State actually adopted a constitutional rule governing federal districts: the provision in Virginia's 1830 Constitution that incorporated the notorious federal "three-fifths" rule in apportioning Virginia's congressional seats. VA. CONST. art. III, § 6 (1830). This provision does not support Respondents' interpretation of the Elections Clause for several reasons. As an initial matter, it was not adopted until more than four decades after Ratification—too late to undermine the meaning that is evident from the Clause's text and contemporary evidence. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ---, 142 S. Ct. 2111, 2137 (2022) ("[T]o the extent later history contradicts what the text says, the text controls.").

Moreover, the only recorded discussion of the constitutionality of this provision during the 1830 Virginia convention was one delegate's *objection*—similar to Justice Story's view a decade earlier in Massachusetts—that it was "improper[ ] to regulate by the State constitution, any of the powers or duties devolved on the Legislature by the Constitution of the United States." PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30 857 (1830). And while that argument ultimately did not prevail, the overall tenor of the debate indicates that the delegates were "less concerned with this constitutional question than with the underlying question of whether slaves would be accounted for in representation." Smith, *supra*, at 486 n.174. Indeed, the primary *defense* of the clause came from a fiery speech declaring that incorporating the three-fifth's rule into the state constitution would cement Virginia as "[a] bulwark of the great Southern

interest" against "the fanatical [abolitionist] spirit on this subject of negro slavery." PROCEEDINGS, *supra*, at 858.

Rather than supporting Respondents' view, Virginia's 1830 Constitution thus *vindicates* the Framers' decision to assign the power to regulate federal elections exclusively to state legislatures. While Respondents focus on the risk of state *legislatures* abusing that power, the Founders were aware that state political factions could just as surely seek to entrench their power by means of the State's *constitution*. *See* S.C. CONST. art. XIII (1778) (giving Charleston significant overrepresentation in the state house); 3 ELLIOT'S DEBATES, *supra*, at 366–67 (Madison noting Charleston's overrepresentation, with disapproval, in defending the Elections Clause). The Framers' solution to both problems was a "characteristic" one: ensuring that the elected lawmakers in the State could repeal and replace improper election regulations, or, failing that, ensuring that the elected representatives in Congress would serve as a final check on abuse. *Rucho*, 139 S. Ct. at 2496. Respondents' interpretation of the Elections Clause eliminates the first of these checks, and Virginia's 1830 constitution provides a striking illustration of the danger posed by that approach. For the practical effect of the pro-slavery delegates' incorporation of the three-fifth's clause in the State's constitution was to entrench their political power against future legislative change.

iii. Another important, contested issue under the Elections Clause that States confronted upon the ratification of the Constitution was the selection of voting rules governing each state legislature's appointment of U.S. Senators. Two competing voting rules

emerged: (1) appointment by "joint ballot," with both chambers meeting in joint session and each member of the lower and upper house casting a single vote; or (2) appointment by "concurrent resolution," with each chamber voting separately and possessing a veto on the other chamber's selection. Here too, in the first 40 years of practice under the new Constitution, *not a single State* imposed any state-constitutional provision limiting the state legislature's discretion in this matter. And here too, it is not as though the idea of constitutionalizing these voting rules had not occurred to the Founding generation—for prior to Ratification, many States *did just that*, when operating under the Articles of Confederation.

The Articles of Confederation provided that "the legislature of each state" was to direct the "manner" in which congressional delegates would be appointed. ARTICLES OF CONFEDERATION art. V (1777). But the Articles "reserved to each *state*" the power "to recall its delegates . . . and to send others in their stead," *id.* (emphasis added), so unlike the later Elections Clause, the state legislatures' power was not exclusive. And in any event, the Articles of Confederation were, notoriously, not themselves supreme over State law, so they were incapable of limiting each State's authority to enact state-constitutional provisions governing their legislature's exercise of this power. *See* THE FEDERALIST No. 15, at 108 (C. Rossiter ed. 1961) (Alexander Hamilton). Accordingly, ten of the eleven States that enacted constitutions before 1788 imposed such restrictions: five States required that the

appointment be by joint ballot;[4] New Hampshire opted for separate votes by each house;[5] and New York imposed a hybrid approach combining separate nominations by each chamber and appointment of some delegates by joint ballot.[6] North Carolina, Pennsylvania, and Georgia specified simply that the choice of delegates would be "by ballot."[7]

Following Ratification, by contrast, the States uniformly abandoned this practice of constitutionalizing the voting rules governing federal appointments. In the first 50 years after 1788, *not a single State* imposed state-constitutional voting rules explicitly governing the selection of Senators. All 26 States admitted to the Union during this period either silently abandoned or simply declined to impose these types of provisions.[8] And in Massachusetts and New York,

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[4] DEL. CONST. art. XI (1776); MD. CONST. art. XXVII (1776); VA. CONST. *Delegates* (1776); S.C. CONST. art. XXII (1778); MA. CONST. pt. 2, ch. IV (1780).

[5] N.H. CONST. pt. II, *Delegates to Congress* (1784).

[6] N.Y. CONST. art. XXX (1777).

[7] N.C. CONST. art. XXXVII (1776); PA. CONST. § 11 (1776); GA. CONST. art. XVI (1777). Pennsylvania and Georgia both had unicameral legislatures during this period.

[8] Georgia, Pennsylvania, South Carolina, Delaware, New York, and Virginia adopted new, post-ratification constitutions eliminating the previous voting rules explicitly applying to the selection of federal delegates. *See* GA. CONST. (1789); PA. CONST. (1790); S.C. CONST. (1790); DEL. CONST. (1792); N.Y. CONST. (1821); VA. CONST. (1830). The constitutions of New Jersey (1776) and Connecticut (1818) in force during this period also did not include any such rules. Nor did the constitutions of the 13 States that joined the Union between 1788 and 1838. *See* KY. CONST. (1792); VT. CONST. (1793); TENN. CONST. (1796); OHIO CONST.

state lawmakers explicitly concluded that the rules governing their selection of Senators could not be controlled by the state constitution, based on the Elections Clause.

The Massachusetts legislature met in 1788 to consider whether to select its first U.S. Senators by joint ballot or concurrent resolution. As noted, Massachusetts's pre-Ratification constitution had required the joint ballot approach; and while many legislators advocated for continuing this approach, some of them explicitly based their arguments on the legislature's plenary authority under the Elections Clause. Given the Elections Clause's allocation of discretion over the issue, they explained, "any mode that the legislature might prescribe would be agreeably to the Federal Constitution, and therefore right." 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790 497 (Merrill Jensen & Robert A. Becker eds., 1976). They also bolstered their argument by explicitly equating each *state legislature*'s power under the Clause with *Congress*'s power: "It was said, too, by gentlemen on this side of the question" that whatever authority *Congress* "derived from the 4th section [of

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(1802); LA. CONST. (1812); IND. CONST. (1816); MISS. CONST. (1817); ILL. CONST. (1818); ALA. CONST. (1819); ME. CONST. (1820); MO. CONST. (1820); ARK. CONST. (1836); MICH. CONST. (1835). Maryland, North Carolina, Massachusetts, New Hampshire, and Rhode Island simply did not enact new constitutions between 1788 and 1838.

A 1795 amendment to Georgia's constitution provided that "All elections to be made by the general assembly, shall be by joint ballot," but unlike the routine pre-Ratification practice, it did not expressly apply to the appointment of Senators. GA. CONST. amends. of 1795, art. II; *see also* LA. CONST. art. VI, § 13 (1812).

Article I], . . . undoubtedly the same section gives the [state] legislature the same authority." *Id.* Ultimately, the Massachusetts legislature chose to appoint its Senators by concurrent resolution instead. But while the pro-joint-ballot legislators' preferred voting rule did not prevail, that very outcome suggests that their interpretation of the Elections Clause did—for selection by concurrent resolution was an explicit departure from the method prescribed in the 1780 Constitution.

Between 1788 and 1789, New York's lawmakers debated the same issue—and ultimately adopted the same interpretation of the Elections Clause. New York's pre-Ratification constitution, as noted, had adopted a hybrid approach to selecting federal delegates, with some delegates chosen through separate nominations by each chamber and the rest chosen in joint session. Beginning in 1788, several legislators advocated moving to a pure concurrent resolution approach, arguing that because "[t]he power of directing the mode of choosing senators, we derive from the constitution which the people have established for the government of the United States, not from the constitution of this state," the legislature's power to "prescribe the mode or manner in which the legislative body is to elect senators for the Congress . . . is a matter of pure discretion, independent of any rule in the state constitution." *Id.* at vol. 3, p. 287. Or as another New York lawmaker put the point, because "the constitution of the United States under which we now act, gives a discretion to the legislature . . . the constitution of the state is out of the question with respect to this business." *Id.* at 382.

While other legislators argued that the pre-Ratification rules continued to control, those in favor of abandoning them in favor of selection by concurrent resolution prevailed. *Id.* at 537. And while New York's Council of Revision ultimately vetoed the resulting act, it did so on the basis of an *even more* muscular interpretation of the authority vested in state legislatures by the U.S. Constitution, under which the Act either interfered with the legislature's authority to act by concurrent resolution (which would apply to the choice of "the mode of election" as well as "the choice of persons" itself) or its authority to act collectively as an institution "by law" (which the Act infringed by "establish[ing] a choice of Senators by the separate acts of each branch of the Legislature"). *Id.* at 539. The Council of Revision thus effectively left the state legislature to appoint New York's senators in whichever manner they saw fit, unconstrained by either the state constitution or state legislation. In the end, the legislature appointed its Senators by concurrent resolution—thus, again, explicitly departing from the voting rule prescribed by the State's pre-Ratification constitution. *Id.* at 542–51.

iv. Respondents' principal historical support for their view of the Elections Clause comes from two state-constitutional provisions adopted by Delaware and Maryland during this period that purported to require voting in congressional elections to take place "by ballot." The aberrant provisions in these two States clearly do not suffice to overcome the plain meaning of the constitution's text, as confirmed by the weight of the historical evidence discussed above.

Delaware's 1792 constitution provided that "[t]he representative, and when there shall be more than

one the representatives, of the people of this State in Congress, shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." DEL. CONST. art. VIII, § 2 (1792). The only regulation of the place or manner for state elections *actually prescribed* by the constitution, however, was the rule that "[a]ll elections of governor, senators, and representatives shall be by ballot." *Id.* art. IV, § 1. The provision thus left the state legislature with near-complete freedom to regulate congressional elections. Of course, the constitutional provision also required that whatever regulations the legislature adopted for federal elections it *also* had to apply to *state* elections. But that requirement can easily be understood as a restraint of the legislature's authority to regulate *state* elections—a restraint a state constitution *obviously* has authority to impose.

The example from Maryland is to much the same effect. In 1810, Maryland adopted a constitutional amendment doing away with property qualifications for the franchise. The bulk of the amendment concerns the *qualifications* for voting—a matter that is distinct from the regulation of the time, place, and manner of elections and that, with respect to congressional elections, clearly lies within the purview of the State to regulate as it sees fit. *See* U.S. CONST. art. I, § 2, cl. 1. But the 1810 amendment also incidentally provided that qualified voters "shall vote, *by ballot*," in each election, including "for electors of the President and Vice-President of the United States" and "for Representatives of this State in the Congress of the United States." MD. CONST. art. XIV (1810) (emphasis added). However, here too the practical restraint imposed on the legislature's authority was minimal, since in Maryland during this period, the state

constitution could be amended—and re-amended—simply through two successive majority votes in the General Assembly. MD. CONST. art. LIX (1776).

These minor restrictions should carry no evidentiary weight. Unlike in Massachusetts, there is no evidence that the lawmakers in Delaware or Maryland actually grappled with the Elections Clause, much less that they had some basis for concluding that their restrictions were consistent with it. *See Bruen*, 142 S. Ct. at 2155 ("Absent any evidence explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment, we fail to see how they inform the origins and continuing significance of the Amendment." (cleaned up)).

Nor is it evident that these "by ballot" voting provisions were actually understood as formally preventing later state legislatures from adopting a different voting rule for congressional elections. Petitioners are aware of no evidence of any Delaware or Maryland court ever invalidating state legislation on the basis of these provisions. Indeed, there is no evidence that these States even considered a different method of voting in congressional elections. Instead, it appears that in the Early Republic, as today, the uniform practice was for state and federal elections to follow the same rules.

Moreover, James Austin's defense of his proposal in Massachusetts suggests that to the extent the delegates who enacted these provisions in Delaware and Maryland were aware of the Elections Clause problem at all, they may have viewed these "by ballot" provisions as non-binding—"only advisory of the manner in which the Legislature shall exercise its discretion."

JOURNAL OF DEBATES AND PROCEEDINGS, *supra,* at 61. Alternatively, they could have viewed these state-constitutional provisions as setting default rules that would validly apply to Congressional elections until altered by the state legislature through the ordinary lawmaking process.

In all events, the fact that a few outlier States imposed state-constitutional restrictions on their legislature's Elections Clause authority is hardly the type of "irresistible" post-enactment evidence that could overcome the "plain and obvious import" of the Constitution's text, *Hunter's Lessee*, 1 Wheat. (14 U.S.) at 338–39—not to mention the preponderance of other historical evidence confirming that plain and obvious import, *see District of Columbia v. Heller*, 554 U.S. 570, 632 (2008) (refusing to "stake our interpretation of the Second Amendment" on a handful of outlier historical laws). Taken all together, 21 of the 24 States admitted by 1830 did not impose any substantive state-constitutional limits expressly governing federal elections. 19 States do not appear to have even considered adopting such restrictions, and Massachusetts and Pennsylvania affirmatively rejected them. The overwhelming weight of evidence is thus consistent with the plain meaning of the text.

v. Respondents have attempted to paint a very different picture of early-Republic history—one in which state-constitutional restrictions on federal elections were more widespread. That version of history relies on the provisions in eight additional state constitutions—from Georgia (1789), Pennsylvania (1790), Kentucky (1792), Tennessee (1796), Ohio (1803), Louisiana (1812), Alabama (1819), and New York (1821)—providing generally that "all elections shall

be by ballot." *E.g.*, PA. CONST. art. III, § 2 (1790); *see* Smith, *supra*, at 488–89, 508. None of these provisions specifically mentions federal elections, and they are best read as applying merely to all *state* elections, for the state offices that those constitutions themselves established. As this Court has explained, "limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument." *Barron v. City of Baltimore*, 7 Pet. (32 U.S.) 243, 247 (1833); *see also State v. Williams*, 49 Miss. 640, 681 (1873) (Simrall, J., concurring) (interpreting state constitutional provision requiring "[a]ll general elections" to be biennial to refer only to "State offices"). And even if these "all elections" clauses *could* plausibly be read as applying to federal elections, they certainly do not do so unambiguously. So, like the aberrant examples in Delaware, Maryland, and Virginia, these provisions are far too inconclusive to overcome the weight of the contrary historical evidence and the plain meaning of the Elections Clause's text.

4. This Court's precedent is in accord with the Constitution's text and original meaning: the power to regulate federal elections lies with State legislatures alone, and the Clause *does not* allow the state courts, or any other organ of state government, to second-guess the legislature's determinations.

That is the plain holding of this Court's decision in *Smiley*. There, Minnesota's Governor rendered the legislature's chosen districting plan "a nullity" by "return[ing] it without his approval." 285 U.S. at 361–62. This Court held that this nullification of the state legislature's congressional map would plainly violate the Elections Clause *unless* "the Governor of the state,

through the veto power, shall have a part in the making of state laws." *Id.* at 368. And the Court thus held that the Governor's veto was consistent with the Elections Clause *only because* it concluded that the veto power, "as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority." *Id.* at 400.

The Court reaffirmed this principle over a century later in *Arizona Independent Redistricting Commission*. While the majority and dissenting opinions in that case disagreed over the question whether the "legislature," under the Elections Clause, is limited to a specific legislative body or "the State's lawmaking processes" more generally, *all* Justices agreed at a minimum that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." 576 U.S at 808, 824, 841; *cf. id.* at 827–29 (Roberts, C.J., dissenting). Whether the majority was right to adopt the non-institutional understanding of "Legislature," or to conclude that a State's lawmaking prescriptions may permissibly be extended to encompass an independent commission established by ballot initiative, are questions that are not relevant here. For the one thing that is clear is that a "State's prescriptions for lawmaking," *id.* at 808 (majority), *do not* include the adjudication of cases or controversies in the state courts.[9]

The Court's interpretation of the Presidential Electors Clause provides further confirmation. That

[9] To the extent the Court were to find that some portion of the *Arizona* opinion is contrary to Petitioners' position in this case, and that the case is not distinguishable, the Court should overrule it.

provision authorizes each State to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 2. In *McPherson v. Blacker*, a group of prospective electors in Michigan challenged the state legislature's decision to appoint Michigan's electors through district-by-district election, rather than statewide. 146 U.S. 1, 24 (1892). This Court rejected their challenge, holding that the Presidential Electors Clause confers "plenary power to the state legislatures in the matter of the appointment of electors," *id.* at 35—and further reasoning that this authority "cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States," *id.* (quoting S. Rep. No. 43-395 (1874)).

The Court reaffirmed this principle in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam). There, the Florida Supreme Court—based in part on principles derived from the state constitution—had interpreted the State's "elections statutes . . . to require manual recounts of ballots, and the certification of the recount results, for votes cast in the quadrennial Presidential election held on November 7, 2000." *Id.* at 73. This Court explained that while it generally "defers to a state court's interpretation of a state statute," "in the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, *but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution*." *Id.* at 76 (emphasis added). And the Court cited *McPherson* for the proposition that the Constitution's specific reference to state legislatures "operat[es] as a limitation upon the State in respect of

any attempt to circumscribe the legislative power." *Id.* (quoting *McPherson*, 146 U.S. at 25). Because it was unclear whether the state court's opinion was predicated on viewing "the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl.2," this Court—without noted dissent—remanded for clarification of that issue. *Id.* at 78.

In the subsequent *Bush v. Gore* proceeding, Chief Justice Rehnquist's concurrence, joined by Justices Scalia and Thomas, again embraced this interpretation of the Electors Clause. Because that provision "imposes a duty or confers a power on a particular branch of a State's government," "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance" and "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." 531 U.S. at 112–13 (Rehnquist, C.J., concurring). That result, the Chief Justice explained, "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Id.* at 115.

Other courts have also long recognized these principles. In *State ex rel. Beeson v. Marsh*, for example, the Nebraska Supreme Court interpreted the Presidential Electors Clause as giving "plenary power to the state legislatures in the matter of the appointment of electors," and held that the Nebraska Constitution "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States." 34 N.W.2d 279, 246 (Neb. 1948); *see also Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. Ct. App. 1944); *Parsons v. Ryan*, 60

P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601 (1864), *called into doubt in part on other grounds*, *In re Opinion of the Justices*, 113 A. 293, 298–99 (N.H. 1921).

Finally, Congress endorsed the same principle in a series of cases beginning in the second half of the Nineteenth Century. Most notably, in *Baldwin v. Trowbridge*, Congress voted to seat a Representative elected from Michigan in part by absentee ballots from soldiers serving outside the State during the Civil War. The Michigan legislature had authorized the absentee voting, but a provision in the state constitution had been interpreted to bar the practice. The House Committee on Elections recommended seating the Member, reasoning that the state legislature's authority to regulate congressional elections could not be limited by the state constitution or "transferred to another department of government," since "the people of Michigan had no power to enlarge or restrict the language of the constitution of the United States." H.R. Rep. No. 39-13, at 3 (1866). The full house overwhelmingly voted to adopt the recommendation. CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

Congress continued to endorse the principle in a series of decisions throughout the century.[10] Indeed, by 1890 this understanding of the Elections Clause was so widely accepted that it was endorsed by Thomas Cooley's eminent constitutional law treatise, which explained that "[s]o far as the election of

[10] *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions,* 55 GA. L. REV. 1, 55–65 (2020).

representatives in Congress and electors of president and vice-president is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution." THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 754 (6th ed. 1890).

II. The State Court Decisions Below Invalidating Petitioners' Map and Imposing a Map of Their Own Making Violates the Elections Clause.

The actions of the North Carolina courts in this case fundamentally transgress the Constitution's specific allocation of authority over the manner of holding congressional elections to state legislatures.

A. Only the General Assembly Has Authority To Draw Congressional Districts.

In North Carolina, the General Assembly is the "Legislature," established by the people of the State. The North Carolina Constitution provides that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1 (emphasis added). And it makes clear, too, that the state judiciary *is not* the "Legislature" in North Carolina, nor any part of it, by declaring that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6.

Nor can North Carolina's courts claim to benefit from any sort of *delegation* from the General Assembly. As an initial matter, the Elections Clause surely does not allow a state legislature to delegate away the

authority assigned to it by the federal Constitution. It has long been understood, at least as a formal matter, that Article I, Section 1's vesting of federal legislative power in Congress does not leave that body free "to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *accord Adams v. North Carolina Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978). Article I, Section 4's allocation of "lawmaking" power over the manner of federal elections in state legislatures, *Smiley*, 285 U.S. at 366, must similarly be understood as the power "to make Laws, and not to make Legislators." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 276 (4th ed. 1698).

To be sure, this Court's precedents have enabled Congress to vest those tasked with executing its laws with substantial implementing discretion. *See Gundy v. United States*, 588 U.S. ---, 139 S. Ct. 2116, 2123 (2019). But even if some amount of implementing discretion may be "delegated" under the Elections Clause as well, that would not validate the actions of the courts below, for multiple reasons.

First, this Court has never held that Congress can delegate quintessentially legislative power *to courts*, as opposed to executive officials. To the contrary, the landmark decision in *Wayman v. Southard* makes clear that "Congress can[not] delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative"—and it upheld Congress's authorization of judicial rules regulating the practice and procedure of the federal courts only because the courts already possessed inherent power to regulate

their own practice. 10 Wheat. (23 U.S.) 1, 42–43 (1825).[11]

Second, the unfettered policymaking engaged in by the North Carolina courts here plainly exceeds the limits of permissible delegation on any understanding. It is one thing for a State to effectively delegate to the state courts the authority to enforce specific and judicially manageable standards, such as contiguousness and compactness requirements. It is quite another for the court to seize the authority to find, hidden within the folds of an open-ended guarantee of "free" or "fair" elections, rules governing the degree of "permissible partisanship" in redistricting—a matter that this Court has held to be "an unmoored determination" that depends on "basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500–01 (quotation marks omitted). Nor do the state-constitutional guarantees of equal protection or free speech and assembly provide any judicially discernable standards—for these provisions "make no reference to elections at all." *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). If the Elections Clause places *any* limits on what matters may be parceled out to entities in a State other than the legislature, then it cannot allow a State's courts to do what was done in this case: discover somewhere within an open-ended guarantee of "fairness" in

[11] *Mistretta v. United States* accordingly upheld the Sentencing Reform Act's delegation of policymaking authority to the United States Sentencing Commission, an entity purportedly "located" in the judicial branch, only because the Commission "is not a court, [and] does not exercise judicial power," so Congress had not "combined legislative and judicial power within the Judicial Branch." 488 U.S. 361, 393, 394 (1989).

elections a novel rule requiring partisan criteria to be taken explicitly into account when drawing congressional districts.

Finally, even setting all of these points aside, Respondents' delegation argument *still* fails because none of the three provisions Respondents have identified as supposedly effecting the delegation does any such thing.

The first statute in question provides that "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel." N.C. GEN. STAT. § 1-267.1(a). The second provides that an "order or judgment declaring unconstitutional or otherwise invalid . . . any act of the General Assembly that apportions or redistricts State legislative or congressional districts" must be based on specific factual findings and legal conclusions and may "impose an interim districting plan . . . only to the extent necessary to remedy any defects identified by the court," *id.* §§ 120-2.3, 120-2.4(a1). Nothing in these statutes purports to delegate the legislature's substantive power to regulate congressional elections. To the contrary, these statutes plainly do no more than govern the *procedure* that applies in whatever districting challenges may be authorized by other, substantive provisions of law. That falls far short of the type of clear language that would be needed to effect so momentous a delegation of power as the one claimed here. *See West Virginia v. EPA*, 597 U.S. ---, 142 S. Ct. 2587, 2607–09 (2022).

Indeed, these procedural rules do not even *imply* that state courts must have been delegated this power. Respondents assume that these Acts' reference to a lawsuit "declaring unconstitutional" the legislature's "congressional districts" must refer to a lawsuit brought on *state constitutional* grounds, such as the one below. But state courts are open to hear *federal* constitutional challenges to congressional districts, *see generally Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990), and as noted above, such challenges may be brought consistent with the Elections Clause. These statutes are best read as merely laying out the procedures that govern such a *federal* constitutional challenge brought in state court.

Nor, finally, did the General Assembly delegate its Elections Clause authority to the judiciary when it enacted the 1971 state constitution, including the free elections clause and general provisions vesting the state courts with jurisdiction. Again, nothing in the state constitution even purports to effect such a delegation. Indeed, while the constitution does impose contiguousness and compactness requirements on *state*-legislative districts, it *does not* impose such limits on *congressional* districts—implicitly reflecting the impropriety of any state-court interference with the legislature's authority to draw congressional maps. *See* N.C. CONST. art. II, §§ 3 & 5. And in any event, while the 1971 Constitution was *proposed* by the General Assembly, it was not effective until it was ratified by the voters. 1969 N.C. Sess. Laws 1483, ch. 1258, sec. 2. It is thus simply not an example of a direct delegation of power enacted by the legislature itself.

B. The State-Court Decisions Below Unconstitutionally Usurped the General Assembly's Authority To Regulate Congressional Elections.

Accordingly, the General Assembly is the only entity with the authority to draw North Carolina's congressional districts. Yet the courts below exercised *precisely* that power, in direct contravention of the federal Elections Clause. They did so in two ways. First, the North Carolina Supreme Court's February 4, 2022 Order striking down the General Assembly's original congressional map on state-law grounds directly seizes the power to regulate the manner of congressional elections. And second, having rendered the General Assembly's original congressional map "a nullity," *Smiley*, 285 U.S. at 362, the State courts then compounded the constitutional error by creating, and imposing by fiat, *a new* congressional map.

These acts demonstrate with remarkable clarity this Court's teaching that crafting congressional districts "involves lawmaking in its essential features and most important aspect," *id.* at 366, and "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500. Rather than setting forth a determinate legal standard, the state supreme court remanded to the trial court to conduct the quintessentially political task of applying "some combination" of various partisanship metrics—including "mean-median difference analysis," "partisan symmetry analysis," and others—yet the supreme court *refused to specify which* of these "set of metrics" should actually be used to "demonstrate or disprove the existence of an unconstitutional partisan gerrymander." Pet.App.110a. On remand, the trial court below

proceeded by appointing three "Special Masters" who, in turn, hired political scientists and mathematicians to "assist in evaluating" the parties' remedial plans under this open-ended set of metrics. Pet.App.247a–48a, 273a. This cadre of extra-constitutional officers then proceeded to reject the General Assembly's plan (again) and craft *their own* plan, Pet.App.262a–63a; 271a–72a, after having repeated, *ex parte* contacts with the experts *for the plaintiffs*, Pet.App.296a–99a.

The Elections Clause does not permit the North Carolina courts to nullify the General Assembly's chosen "Regulations" of the "Manner of holding Elections," U.S. CONST. art. I, § 4, cl. 1. And even if it did, the state courts below plainly had no authority to go on to *replace* the legislature's congressional map with a new map of their own, discretionary design.

CONCLUSION

The Court should reverse the decisions of the North Carolina Supreme Court and state trial court invalidating the General Assembly's November 4, 2022, congressional map and replacing it with their own, judicially designed map.

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