No. 21-1271

IN THE

Supreme Court of the United States

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

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Restoring Integrity and Trust in Elections, Inc. ("RITE") respectfully submits this brief as *Amicus Curiae* in support of Petitioners and reversal. RITE is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. *See* https://riteusa.org. Recognizing that Article I, Section 4 of the United States Constitution vests primary authority over the "Times, Places and Manner of holding Elections for Senators and Representatives" in "each State . . . Legislature," RITE has a particular interest in ensuring that courts do not legislate election rules from the bench—especially mere months before an election. RITE also supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights, election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.

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[1] All parties have consented to the filing of this brief as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents a contest of power between a state legislature exercising delegated federal authority and a state court applying a state constitution. The North Carolina General Assembly drew a map of congressional districts for upcoming elections. But applying the state constitution, the North Carolina Supreme Court invalidated that map and replaced it with a judge-drawn one. In the state supreme court's view, the map drawn by the legislature was a product of partisan gerrymandering and thus violated a state constitutional guarantee that elections be "free." In the legislature's view, the court's imposition of a map of its own creation is unauthorized.

The text, structure, and history of the Constitution easily resolve this contest. The Elections Clause ("Clause") provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Thus, under the Clause, the legislature (not a state court) has the power to draw congressional maps. The Framers crafted this allocation of power to entrust the exercise of political judgment on the political matter of elections to the lawmaking branches, subject to the regulations of Congress and the federal Constitution.

The text is clear. By its plain terms, the Clause gives state legislatures—not state judges—the responsibility to prescribe the manner of holding congressional elections. The term "legislature" has

been well understood to mean a representative body that makes laws, not a judicial body that reviews them. And because congressional offices "aris[e] from the Constitution itself," it is the federal Constitution, not a state constitution, that gives the state legislature the power to regulate congressional elections. *Cook v. Gralike*, 531 U.S. 510, 522 (2001). Thus, a state constitution cannot be invoked to strike down—let alone to redraw—congressional districting maps or other laws that state legislatures adopt under the Elections Clause.

Context confirms this. The Framers took care to distinguish the state *legislature* from other governmental entities in many places throughout the Constitution. They also did not conflate the *legislature* with *the people* or *the state*. None of this was an accident, as the Constitution was precise when it distributed specific powers to particular branches of state government. The North Carolina Supreme Court's judgment (and respondents) paper over these distinctions.

History reinforces the primacy of state legislatures in regulating federal elections. Nothing in the Clause's history contemplated that state courts could nullify congressional districts adopted by state legislatures, much less draw districts of their own. Nor could state courts intervene on the supposed basis of a state constitutional provision. As Justice Story made clear, there is no "right to insert in[to] [a state] constitution a provision which controls or destroys a discretion[] . . . which must be exercised by the [state] Legislature in virtue of powers confided to it by the constitution of the United States." Journal of Debates and Proceedings in the Convention of Delegates,

Chosen to Revise the Constitution of Massachusetts, at 59-60 (1821). Early congressional and judicial precedents also affirm that view.

In the end, the issue here is "not one of policy but of power[.]" *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). One may dispute the ways in which the districts were drawn in this case. That is a matter of policy. But which branch of state government gets to set the rules for federal elections under and subject to the Constitution, that is a question of *power* the Elections Clause answers decisively: the legislature. The Court should reverse.

ARGUMENT

I. THE TEXT OF THE ELECTIONS CLAUSE DELEGATES POWER TO STATE LEGISLATURES, NOT STATE COURTS.

Construing a constitutional provision starts with its text. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. As this Court has said, "[t]he Constitution was written to be understood by the voters." *United States v. Sprague*, 282 U.S. 716, 731 (1931). Where the words are "plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text[.]" *McPherson*, 146 U.S. at 27.

The Clause's text is plain and clear. In the first place, the Clause's text clarifies that it is a direct delegation of federal authority to state legislatures.

Indeed, because federal offices "aris[e] from the Constitution itself," any "state authority to regulate election to those offices . . . had to be delegated to, rather than reserved by, the States." *Cook*, 531 U.S. at 522. Absent this delegation, no state entity would have power to regulate congressional elections.

Moreover, the Clause vests that authority exclusively in "the Legislature" of "each State," and not any other entity. U.S. Const. art. I, § 4, cl. 1; *see also Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from the denial of certiorari) ("the Federal Constitution, not state constitutions, gives *state legislatures* authority to regulate federal elections[.]") (emphasis added). As Justice Alito observed, the "Clause could have said that these rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). "But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously." *Id.*

As ordinarily understood, the term "Legislature" means a representative body, composed of elected members, that has the power to make laws. *See* 2 Samuel Johnson, A Dictionary of the English Language (1st ed. 1755) (defining "legislature" as "[t]he power that makes laws"); Thomas Sheridan, A General Dictionary of the English Language (1780) (same). Noah Webster's dictionary similarly defined

"legislature" as "the body of men in a state or kingdom, invested with power to make and repeal laws[,]" noting also that the "legislatures of most of the states in America, consist of two houses or branches[.]" 2 Noah Webster, An American Dictionary of the English Language (1828).

The basic understanding of the term "legislature" has been recognized by the Court. The word was "not [one] of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). "What it meant when adopted it still means for the purpose of interpretation": a "representative body which made the laws of the people." *Id.*; *see also Smiley v. Holm*, 285 U.S. 355, 365 (1932) (reaffirming *Hawke*'s understanding of "legislature"); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 828-29 (2015) (Roberts, C.J., dissenting).

The term "legislature" therefore does not encompass courts, executives, or any other organ of state government. In our tradition of separated powers, those entities lack the power to make the laws. Thus, by its clear terms, the Clause delegates to representative lawmaking state *legislatures* the power to prescribe the time, place, and manner of holding congressional elections (subject to congressional oversight), and forecloses a state *court* from usurping the legislature's lawmaking role in that regard.

Still more textual clues support that reading. The Clause identifies only one other governmental entity with the authority to regulate congressional elections: Congress. The Framers thus contemplated a backup in case the state legislature failed to prescribe rules

for federal elections or Congress determined that a nationwide rule was appropriate. And the particular body that they specified was the federal legislature. In other words, the Constitution envisions that the regulation of federal elections is a legislative activity under and subject to the federal Constitution, further underscoring that a state court has no authority to prescribe the time, place, and manner of holding those elections. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). The term "shall be prescribed" is likewise telling, since it connotes a prospective lawmaking task belonging to legislatures (a writing down of rules *beforehand*), as opposed to a retrospective interpretive task suited for the judiciary. The term "make or alter such Regulations" reinforces that notion, too, as a legislature (not a court) would be fit to perform that task.

Thus, the Elections Clause means what it says: the power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" rests exclusively in "the Legislature" of "each State," subject to congressional action and the federal Constitution. U.S. Const. art. I, § 4, cl. 1. Neither a state court nor a state constitutional provision can override a state legislature's regulations governing federal elections.

II. THE STRUCTURE OF THE CONSTITUTION REINFORCES THE CLAUSE'S PLAIN MEANING.

Context confirms that the Elections Clause delegates power to legislatures not courts. Many other provisions in the Constitution also identify the

state legislature as the specific governmental entity to carry out certain duties assigned to it. *See, e.g.*, U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by *the Legislature thereof*, for six Years) (emphasis added) (revised by U.S. Const. amend. XVII); *id.* § 8, cl. 17 ("[T]o exercise like Authority over all Places purchased by the Consent of the *Legislature of the State* in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]") (emphasis added); U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as *the Legislature thereof* may direct, a Number of Electors . . .") (emphasis added); U.S. Const. art. IV, § 3, cl. 1 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of *the Legislatures of the States* concerned as well as of the Congress.") (emphasis added); U.S. Const. amend. XVIII, § 3 (repealed); U.S. Const. amend. XX, § 6; U.S. Const. amend. XXII, § 2.

Numerous provisions also distinguish the state *legislature* from *the people* or *the State* more generally or other governmental entities such as state *courts*. *See, e.g.*, U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the *State Legislature*.") (emphasis added); *id.* § 3, cl. 2 ("[I]f [Senate] Vacancies happen by Resignation, or otherwise, during the Recess of the *Legislature of any State*, the

Executive thereof may make temporary Appointments until the next Meeting of the *Legislature*, which shall then fill such Vacancies") (emphasis added); U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in *each State* . . .") (emphasis added). U.S. Const. art. V ("[O]n the Application of the *Legislatures* of two thirds of the several States, [the Congress] shall call a Convention for proposing Amendments, which[] . . . when ratified by the *Legislatures* of three fourths of the several States, or by *Conventions* in three fourths thereof") (emphasis added); U.S. Const. art. VI, cl. 3 ("[T]he Members of the several State *Legislatures*, and all *executive* and *judicial* Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution") (emphasis added); U.S. Const. amend. XIV, § 2 ("But when the right to vote at any election for . . . the *Executive* and *Judicial* officers of a State, or the members of the *Legislature* thereof, is denied . . .") (emphasis added) (revised by U.S. Const. amends. XIX, XXVI).[2]

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[2] *See also* U.S. Const. art. I, § 8, cl. 16 ("reserving to *the States* respectively, the Appointment of the Officers") (emphasis added); U.S. Const. amend. XIV, § 3 ("having previously taken an oath, . . . as a member of any State *legislature*, or as an *executive* or *judicial* officer of any State, to support the Constitution of the United States") (emphasis added); U.S. Const. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by *the people* thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State *legislatures*") (emphasis added); *id.* ("That the *legislature* of any State may empower the *executive* thereof to make temporary appointments until the

None of this can be chalked up to careless drafting. "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states." *Hawke*, 253 U.S. at 228. The Elections Clause thus must mean what it says: the state legislature—not a state court, not the people of a state—prescribes the rules for congressional elections.

This Court has held that the (related) Electors Clause "leaves it to the legislature *exclusively* to define the method of" selecting Presidential electors. *McPherson*, 146 U.S. at 27 (emphasis added); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). That Clause states that "[e]ach State shall appoint*, in such Manner as the Legislature thereof may direct*, a Number of Electors . . ." U.S. Const. art. II, § 1, cl. 2 (emphasis added). "[T]he insertion of those [italicized] words," the Court observed, "while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself." *McPherson*, 146 U.S. at 25. The legislature "possesses plenary authority to direct the *manner* of appointment"; the "whole subject is committed" to it. *Id.* at 25-26.

Under the Elections Clause, the "*Manner* of holding Elections for Senators and Representatives" is likewise committed to legislative discretion. Thus, neither "the State," any other organ or officer of the state government, nor "the people" exercising non-

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people fill the vacancies by election as the *legislature* may direct") (emphasis added).

legislative authority or enforcing a state constitutional provision may supplant the legislature's exercise of its delegated federal authority under the Elections Clause. Were the law otherwise, states or the people could override legislative enactments under the Elections Clause simply by adopting any of an array of substantive state constitutional provisions—including "free election" provisions or even provisions purporting to select congressional representatives directly. That result is irreconcilable with the text and structure of the Constitution, which vests the authority to prescribe the manner of congressional elections in state legislatures.

III. THE HISTORY OF THE ELECTIONS CLAUSE SHOWS THAT DISCRETION WAS ENTRUSTED TO LEGISLATURES NOT COURTS.

The history of the Elections Clause confirms what the plain text and structure require: that State legislatures have plenary authority, subject to congressional adjustment and the federal Constitution, to prescribe the time, place, and manner of federal congressional elections. The Clause's drafting history focuses on the *political* branches of government as the source of electoral regulation—never was it contemplated that state *courts* or *constitutions* could regulate, let alone override legislative activity, in this area. State constitutional and ratifying conventions also understood the Elections Clause to give state legislatures (not state courts or the people of the state) power to specify federal electoral rules. Congress did too when resolving electoral disputes that challenged (unsuccessfully) the primacy of the state legislatures.

Early judicial precedents reinforce as well the conclusion that the federal constitution (not a state constitution) gives a state legislature the power to regulate the manner of elections. The history thus makes clear that the Clause has always entrusted state legislatures—not state courts purporting to construe state constitutional provisions—with the power to prescribe rules for federal elections.

A. Federal Constitutional Convention records confirm the Clause's meaning.

The Clause's drafting history supports the conclusion that the Constitution vests the power to regulate federal elections in legislatures not courts. The earliest known iteration of the Clause stated that "[e]ach state shall prescribe the time and manner of holding elections." 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836); *see also Ariz. State Legislature*, 576 U.S. at 836 (Roberts, C.J., dissenting). The draft clause was then revised to (among other things) specify the particular unit of State government that would exercise that power: "The Times and Places and the Manner of holding the Elections (for) *of* the Members of each House *shall be prescribed by the Legislatures of each State*; but their Provisions concerning them may, at any Time, be altered and superseded by the Legislature of the United States." 2 Records of the Federal Convention of 1787, at 155 (Max Farrand ed. 1911) (emphasis added). The "insertion" of "the Legislatures" suggests that the Framers were deliberate in selecting that particular branch of government that would make rules for federal elections such as congressional redistricting. *Ariz. State Legislature*, 576 U.S. at 836 (Roberts, C.J., dissenting). While the draft clause

underwent subsequent revisions before assuming its present form, *see, e.g.*, 2 Records of the Federal Convention, *supra*, at 229, 567, it continued to identify the state legislature as the sole body (outside of Congress itself) with authority to regulate federal elections.

Nothing in the Clause's history suggests that state courts had any role to play. Indeed, the history shows that, although the debate about the Clause addressed whether *Congress* could "make or alter" the regulations prescribed by State Legislatures, no one doubted that it was the State's elected legislative branch that had primary responsibility for shaping electoral districts. Those who debated the scope of congressional regulation—including Federalists and Anti-Federalists alike—never noted or suggested that any source or branch of government *other than* the State Legislature or Congress could prescribe the time, place, or manner of federal elections. James Madison, for example, anticipated the very issue of partisan gerrymandering, observing that "State *Legislatures*" might "take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention, *supra*, at 239-41 (emphasis added). But the remedy that Madison and other Federalists proposed was to "giv[e] a controuling power to the Natl. *Legislature*"—not to any state or federal judiciary. *Id.*

For their part, the Anti-Federalists warned of "the dangers" of congressional control. 2 Herbert J. Storing, *The Complete Anti-Federalist* 2.9.51-54 (1981) (Brutus, no. 4 (Nov. 29, 1787)). But not once did they suggest lodging the power to prescribe the manner of federal elections in state courts or executives; in their

view, that power should remain solely with the state legislatures. *See id.* at 2.8.161-65. (Federal Farmer, no. 12 (Jan. 12, 1788)) ("regulations as to elections . . . ought to be left to the state legislatures, they coming far nearest to the people themselves"); *see also Ariz. State Legislature*, 576 U.S. at 836 (Roberts, C.J., dissenting) (citing Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 31 (2010)).

Other founding-era sources confirm the point. As Alexander Hamilton discussed in the Federalist Papers, the "*discretionary* power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were *only three ways* in which this power could have been reasonably modified and disposed: that it 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 last mode has, with reason, been preferred by the convention." The Federalist No. 59 (Alexander Hamilton) (emphasis added); *see also* 2 Debates on the Federal Constitution, *supra*, at 22-35 (statement of Mr. Strong) ("I know of but two bodies wherein [the power to regulate federal elections] can be lodged—*the legislatures of the several states, and the general Congress*") (emphasis in original).

Simply put, the federal electoral scheme as set forth in the Elections Clause did not contemplate a role for state courts. That the "discretionary power" over elections belonged to the political, representative organs of government is suggested, too, by the "parallel" between the state legislatures and the national legislature with the latter serving as a check on the former (all subject to the federal Constitution).

See Ariz. State Legislature, 576 U.S. at 836 (Roberts, C.J., dissenting); *see also* The Federalist No. 61 (Alexander Hamilton) ("No better answer can be given [as to why neither the federal constitution nor the New York constitution fixed a time for elections,] than that it was a matter which might *safely be entrusted to legislative discretion*[.]") (emphasis added). "[T]he Framers deliberately structured the Constitution to place ultimate responsibility for elections in the political branches of government." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 33 (2020).

B. State Convention records reflect the Clause's original meaning.

Records from early constitutional or ratifying conventions demonstrate that the States understood that the power to regulate federal elections resided in the legislative entity (and not any other entity) within state government. *See, e.g.*, 2 Debates on the Federal Constitution, *supra*, at 22-35 (statement of Mr. Parsons during the Massachusetts ratifying convention acknowledging that "the regulations introduced by the state legislatures will be the governing rule of elections, until Congress can agree upon alterations"). The Clause's one exception to congressional oversight—with respect to the "Places of chusing Senators"—further indicates that State delegates knew that the Framers entrusted the specific entity of the state legislature to issue electoral rules. During the ratifying convention in Virginia, Madison was asked by the chairman that although "Congress had an ultimate control over the time, place, and manner, of elections of representatives, and the

time and manner of that of senators, . . . why there was an exception as to the place of electing senators." 3 Debates on the Federal Constitution, *supra*, at 366-67.

Madison's reply was terse but telling: "[T]he reason of the exception was, that, if Congress could fix the place of choosing the senators, it might compel the state legislatures to elect them in a *different place from that of their usual sessions*, which would produce some inconvenience, and was not necessary for the object of regulating the elections." *Id.* (emphasis added). Indeed, at the time of the Founding, state legislatures elected senators. *See* U.S. Const. art. I, § 3, cl. 1. Thus, the exception shows that the Clause was calibrated to safeguard the ability of *state legislatures* (as a representative body that meets in regular sessions) to elect their senators, weighed against the national legislature's need to preserve itself. A construction that jams into the Clause other branches of government (such as courts) would make nonsense of that design.

Yet another source from a state convention confirms the original understanding that the Clause gives plenary power to the legislatures. During the Massachusetts Constitutional Convention of 1820, an amendment to the state constitution was offered that would have limited the State legislature's discretion in drawing congressional districts. In particular, a delegate (James Austin) proposed "that the Legislature of this Commonwealth shall be required next after every apportionment of Representatives by the Congress" to "provide by law for dividing the Commonwealth into districts for the choice of not more than two Representatives or Electors in any one

district, which law shall not be altered until after a new apportionment shall be made." Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts, *supra*, at 57.

The convention rejected the measure by nearly a hundred votes (137 in favor; 236 against). It did so after Justice Joseph Story (also a delegate) objected to it as "beyond the power of this convention to adopt" and "inconsistent with the constitution of the U. States." *Id.* at 58. Not deterred, Austin renewed his proposal the next day, arguing that "[t]he people" of the State possessing "the supreme power" have "a right to impose this restriction upon the Legislature" and could "instruct the Legislature in the manner of exercising their discretion." *Id.*

Justice Story objected again in no uncertain terms. Because the federal constitution delegated authority over federal elections to the State legislature, Story said, the state constitution could not limit that authority. "The question," he said, was "whether we have a right to insert in our constitution a provision which controls or destroys a discretion, which may be, nay which must be exercised by the Legislature in virtue of powers confided to it by the constitution of the United States." *Id.* at 59.

Story answered no: "Here an express provision [in the Elections Clause] was made for the *manner* of choosing Representatives by the State Legislatures." *Id.* The legislatures "have an unlimited discretion in the subject"—*e.g.*, they "may provide for an election in single districts, in districts sending more than one, or by a general ticket for the whole state." *Id.* Story thus

rejected, as "plainly a violation of the [federal] constitution," the proposal to "control the Legislature in the exercise of its legitimate powers[.]" *Id.* at 60. He explained that the proposal violated the Presidential Electors Clause (U.S. Const. art. II, § 1), too, which gave the Legislature "unlimited" discretion "as to the choice of Electors." The proposal, Story went on, "goes directly to destroy this freedom of choice" and "assumes a control over the Legislature, which the constitution of the United States does not justify." Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts, *supra*, at 60. Daniel Webster (another delegate) agreed with Story: "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 (emphasis in original). After this exchange, the proposal was defeated for good.[3]

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[3] While perhaps too obvious to note, each of the States that ratified the federal constitution had its own constitution recognizing its legislature as distinct from the judiciary—a fact that compels the conclusion that the States could not have possibly understood the phrase "shall be prescribed in each State by the Legislature thereof" in the Elections Clause to encompass the state judiciary. *See* Conn. Const. art. II (1818) ("[t]he powers of government shall be divided into three distinct departments"); Del. Const. art. II (1797) (legislature), VI (judiciary); Ga. Const. art. I (1789) (legislature); Md. Const. § 1 (1776) ("[that] the legislature consist of two distinct branches"), § 40 ("all [j]udges . . . shall hold their commissions during good behaviour"), § 56 ("the General Court . . . shall sit on the western and eastern shores[] for transacting and determining the business of the respective shores, at such times and places as the future [l]egislature of this

C. Congressional precedents confirm the primacy of state legislatures.

Congressional adjudications of early election disputes offer more historical proof for the precept Justice Story articulated. Resolutions of those disputes—involving a conflict between a state legislature and a state constitution—adhered to the Clause's plain meaning in favor of the former. For instance, in the immediate aftermath of the Civil War, exercising its authority as "the Judge of the Elections . . . of its own Members," U.S. Const. art. I, § 5, cl. 1, the House of Representatives had to decide which of two congressional candidates for Michigan's Fifth District was entitled to the seat: One candidate (Baldwin) would prevail if votes cast by soldiers *outside* the State were excluded, pursuant to the State's constitution that was ratified by a convention, which required that votes be cast *within* the State.

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[s]tate shall direct and appoint") (emphasis added); Mass. Const. ch. I, § I, art. I (1780) ("Department of Legislation"), ch. III, art. I ("All judicial officers . . . shall hold their offices during good behavior . . . "[p]rovided, nevertheless, [t]he governor, with consent of the council, may remove them upon the address of both houses of the legislature") (emphasis added); N.H. Const. pt. II at 15 (1783) (legislature), pt. II at 26 (judiciary); N.J. Const. art. II (1776) (legislature), art. XII (judiciary); N.Y. Const. § 2 (1777) (legislature), § 25 (judiciary); N.C. Const. § IV (1776) ("That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other"); Pa. Const. art. I (1790) (legislature), art. V (judiciary); S.C. Const. § II (1778) (legislature), § XXVII (judiciary); R.I. Const. § V (1790) ("That the legislative, executive and judiciary powers of government, should be separate and distinct"); Va. Const. § III (1776) ("The Legislative, Executive, and Judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other").

See H.R. Rep. No. 39-13, at 2-3 (1866). But another candidate (Trowbridge) would be entitled to the seat if those absentee military votes were lawfully counted, pursuant to an act of the State Legislature that permitted such votes. *Id.*

The House ruled in favor of Trowbridge. The House Elections Committee defending that result relied on the Elections Clause, stating that the power to prescribe the time, place, and manner of election was "conferred upon the *legislature*." *Id.* (emphasis in original). The term "legislature," the Committee ruled, did not denote a state "convention authorized to prescribe fundamental law" but rather "the legislature *eo nomine*, as known in the political history of the country"—that is, a representative body. *Id.* at 2; *see also Ariz. State Legislature*, 576 U.S. at 838-39 (Roberts, C.J, dissenting) (discussing *Baldwin v. Trowbridge*); Morley, *supra*, at 48-50 (canvassing floor statements that the legislature's power over federal elections could not be controlled by the state constitution).

Other examples abound. Just a few years after *Baldwin*, the House confronted another set of contested congressional elections in 1872—this time in West Virginia. *See* H.R. Rep. No. 43-7 (1874). A state convention proposing a new constitution required that elections take place on a certain date (in August), but the state legislature provided for a different date (in October). *Id.* at 1-2. Responding to this uncertainty, the state held two elections. *Id.* But the results differed, and so the state submitted those results to the House to decide whether the *legislature* or the *convention* had the authority to prescribe the time of elections. *Id.*

The House once again sided with the legislature. *Id.* at 3. While the majority report for the House Election Committee appeared to avoid the conflict by finding that the state convention's schedule did not actually govern federal elections, a concurring report addressed the conflict, reasoning that the Elections Clause "expressly committed to the legislature of each State the power to prescribe the time of holding congressional elections" and that a state constitutional convention had "no authority" to prescribe a time (let alone one that differed from the legislature's required schedule). *Id.* at 11-12.[4]

D. Early judicial precedents affirm the Clause's delegation of authority to legislatures.

The earliest available judicial opinions also reflect this original understanding of the Clause. In *In re Opinions of Justices*, the New Hampshire Supreme Court ruled that soldiers could cast absentee ballots pursuant to a law enacted by the state legislature, even if the state constitution prohibited it. 45 N.H.

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[4] *See also* Morley, *supra*, at 60-61 (discussing an 1878 electoral dispute in Iowa in which the House Election Committee stated that "the time of electing members of Congress cannot be prescribed by the *constitution* of a State"); *id.* at 62-64 (discussing an 1865 electoral dispute in New Jersey in which the Senate Judiciary Committee stated that "[t]he constitution of New Jersey does not prescribe the manner of choosing United States senators; as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature[.]"); *id.* at 61-62 (discussing an 1887 electoral dispute in West Virginia in which the Senate recognized the legislature's election even though it violated the state constitution).

595, 599 (1864) (responding to a state senate request for an opinion as to a bill's constitutionality). Federal elections were "governed wholly by the Constitution of the United States as the paramount law," the court said, "and the Constitution of this State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States." *Id.*

Similarly in *Opinion of Judges*, the Vermont Supreme Court also upheld a law permitting soldier absentee voting, reasoning that "[v]oting for representatives to congress, and for electors, has never been understood by our legislature as affected by the provisions of our constitution." 37 Vt. 665, 677-78 (1864) (responding to the governor's request for an opinion as to the law's constitutionality).

Likewise in *In re Plurality Elections*, the Rhode Island Supreme Court held that, on the basis of the Elections Clause, a law enacted by the state legislature (allowing plurality voting for certain elections) prevailed over the state constitution (requiring majority voting). *See* 8 A. 881 (R.I. 1887). The state constitution, the court ruled, could not "impose a restraint upon the power of prescribing the manner of holding [congressional] elections which is given to the legislature by the constitution of the United States without restraint[.]" *Id.* at 882.

Only in the late nineteenth century did this Court enter the field. In *McPherson*, as discussed, the Court construed the related Electors Clause as vesting power to direct the manner of selecting presidential electors "exclusively" in the state legislatures. 146 U.S. at 27; *see supra* at 10-11. To be sure, in the early

twentieth century, the Court held that a challenge to the validity of a referendum disapproving a state redistricting law was non-justiciable, since the challenge arose under the Guaranty Clause. *See Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916). But *Hildebrant* did not address a challenge directly made under the Elections Clause that other decisions have considered justiciable. Later, consistent with the Constitution's plain text, the Court held that a referendum could not restrict a state legislature from ratifying a constitutional amendment that sought to prohibit the sale of alcohol (U.S. Const. amend. XVIII), since the ratification power was expressly given to the legislature by the federal constitution. *See Hawke*, 253 U.S. at 227-28. Nor, as this Court held just two years later, could a state constitution prohibit a state legislature's power to ratify the Nineteenth Amendment, which extended the right to vote to women. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922).

The Court's more recent Elections Clause precedents have focused on "the State's prescriptions for lawmaking[.]" *Ariz. State Legislature*, 576 U.S. at 808, 824; *id.* at 841 (Roberts, C.J., dissenting); *cf. id.* at 827-29 (Roberts, C.J., dissenting). In *Smiley*, the Court held that a governor's veto could restrict the state legislature's redistricting authority. *See* 285 U.S. at 372-73. And more recently, this Court held that the Elections Clause permits the State of Arizona's use of a commission to adopt congressional districts. *See Ariz. State Legislature*, 576 U.S. at 793. Thus, even under those precedents, any congressional redistricting law (or other law regulating federal elections) adopted under the State's prescriptions for

lawmaking is subject only to the federal Constitution, and may not be invalidated under state constitutions or laws. *See, e.g.*, *McPherson*, 146 U.S. at 27; *Smiley*, 285 U.S. at 372-73.

Respondents' contrary position is untenable. Under respondents' logic—that a state constitution restricts a state legislature's actions under the Elections Clause despite the federal Constitution's delegation of authority—it would appear that *Hawke* and *Leser* were wrongly decided and that the amendments at issue (including extending the franchise to women) should have been blocked. Seeking to sidestep that clearly incorrect result, respondents either disregard those precedents or appear to make the following move: When a state legislature acts pursuant to the federal constitution in certain respects—to direct the manner of federal electoral appointments, ratify federal amendments, consent to federal land purchases—the legislature is *not* restricted by the state constitution. But when a state legislature prescribes the manner of federal elections—authority that is likewise given to it by the federal constitution—the state constitution imposes limits. *See, e.g.*, Br. in Opp. of N.C. League of Conservation Voters, Inc. at 34 n.5. But why one power is treated differently from the rest when the federal constitution delegates it in the same way is not adequately explained. *See Ariz. State Legislature*, 576 U.S. at 833-34 (Roberts, C.J., dissenting). Respondents simply cannot explain why the Constitution would take legislatures as it finds them in Article V, but not in Articles I and II. In the end, the argument appears calibrated to produce the politically convenient result respondents here desire.

However the Court's precedents are read together (or overruled, if necessary), one thing is clear: "Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions." *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay). The North Carolina Supreme Court invalidated a map drawn by the state legislature and replaced it with one of the judiciary's own creation—all on the supposed basis of a state constitutional provision that abstractly guarantees "free elections" and to remedy the purported problem of partisan gerrymandering that this Court has said is not for the judiciary to resolve. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019) (solutions to partisan gerrymandering "pose[] basic questions that are political, not legal").

In more modest times, the Chief Justice of the North Carolina Supreme Court had understood that the power to direct the manner of selecting presidential electors was "given to the state legislature subject to no restriction from the state constitution," Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. Pa. L. Rev. 737, 741 (1917), a conclusion that applies with equal force to the Elections Clause, *see supra* at 10-11. The North Carolina Supreme Court of today disregards that basic teaching entirely.

Taking it upon itself to redraw congressional districts, the state judiciary carried out a political act entrusted to state legislatures. The Elections Clause prohibits such a power grab.

E. State Constitutions guaranteeing "free elections" address voter qualifications and are consistent with the Clause's original meaning.

History teaches another related lesson and confirms that state constitutional provisions like the one the North Carolina Supreme Court invoked have a vital role to play even for federal elections, even though they cannot be wielded to invalidate a legislature's enactments under the Elections Clause. As a matter of original meaning, the state constitutional provision that the North Carolina Supreme Court relied on to restrict the General Assembly's redistricting efforts—the provision that "[a]ll elections shall be free" (N.C. Const. art. I, § 10)—does not even pertain to the *time, place, and manner* of voting but rather to voter *qualifications* for both state and federal elections. That distinction matters, as it has long been recognized that voter qualifications for federal elections (unlike time, place, and manner regulations) could be set by state constitutions, subject to the requirement of the federal Constitution. *See* U.S. Const. art. I, § 2; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'") (quoting The Federalist No. 60 (Alexander Hamilton)).

The presence of state constitutional provisions guaranteeing "free" elections thus does nothing to detract from the view that legislatures (not state constitutions) have traditionally regulated the

manner of elections. Nor does the view that legislatures have traditionally regulated the manner of elections detract from the presence of such provisions, since they remain effective to regulate voter qualifications for both state and federal elections.

A few illustrations from early state constitutions suffice to make the point. Like the North Carolina Constitution, the Pennsylvania Constitution of 1790 provides that "elections shall be free and equal." Pa. Const. art. IX, § V (1790). James Wilson—a delegate to the federal Convention who later served as a United States Supreme Court Justice—tied this provision directly with the Qualifications Clause of federal constitution. In particular, Wilson stated that the "doctrine" that electors "shall have the qualifications requisite for electors of the most numerous branch of the state legislature" is "in every free country, a doctrine of the first magnitude" that has been "secured by an explicit declaration" in the Pennsylvania Constitution that "elections shall be free and equal." James Wilson, *The Legislative Department, Lectures on Law* (1791), in 2 *The Works of James Wilson* (Robert Green McCloskey ed., 1967).

Vermont's first constitution expressly links "free" elections with qualifications. The document provides that "all elections ought to be free and without corruption, and that all freemen, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." Vt. Const. art. VIII (1793). Early commentary confirms that "free" elections were bound up with the "right of suffrage." *An Address of the*

Council of Censors to the People of Vermont (Council of Censors 1799-1800), in *Records of the Council of Censors of the State of Vermont*, at 156 (Paul S. Gillies and D. Gregory Sanford eds., 1991) (describing a law that "empowered" the supreme court to "disenfranchise a freeman for any evil practice which shall render him notoriously scandalous" as "against the letter and spirit of the eighth article of the bill of rights," which "the framers and adopters of the constitution" had "contemplated to preserve inviolate the right of suffrage to every freeman, unless he should in fact forfeit that right").

Tennessee's constitution evinces the same principle. An early constitutional provision guarantees "[t]hat Elections shall be free and equal." Tenn. Const. art. XI, § 5 (1796). It was later amended to provide that "elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction." Tenn. Const. art. I, § 5 (1870).

Delaware's constitution was like the rest. A provision from 1792 states: "All elections shall be free and equal." Del. Const. art. I, § 3 (1792). The genesis of this provision was section 6 of Delaware's 1776 Declaration of Rights: "[A]ll elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage." Del. Decl. of Rights § 6 (1776).

As these historical examples make clear, "free" election provisions regulated (at most) voter qualifications. Thus, as originally understood, "free" election provisions applied to *each State*'s determination of the "[q]ualifications" for voters in federal elections, U.S. Const. art. I, § 2, cl. 1, not to the "*Legislature['s]*" power to "prescribe[]" the "Times, Places and Manner of holding" those elections, *id.* § 4, cl. 1. Those provisions were never meant (nor, until recently, were they ever deployed) to invalidate legislatively drawn districts. That understanding underscores the only valid reading of the Elections Clause: State legislatures are responsible for drawing federal districts. State judges have no business doing so.

CONCLUSION

For the foregoing reasons, the *Amicus* respectfully requests that the Court reverse the judgment of the North Carolina Supreme Court.

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