No. 21-1271

IN THE

Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, ET AL.,
Petitioners,

v.

REBECCA HARPER, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF *AMICI CURIAE* THOMAS GRIFFITH, JOHN DANFORTH, LARRY THOMPSON, BARBARA COMSTOCK, PETER KEISLER, STUART GERSON, *ET AL.* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici include Thomas Griffith, John Danforth, Larry Thompson, Barbara Comstock, Peter Keisler, Stuart Gerson, and others who have been Republican elected officials, worked in Republican federal administrations, or support conservative federal judicial principles. See Appendix A.[1] Reflecting their experience, *amici* have an interest in seeing federal election law consistently applied based on neutral principles. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

Never has any federal court struck down a state constitution provision because of the Elections or Electors Clause. *Never* has any federal court used either Clause to invalidate a state *statute's* conferral of jurisdiction or remedial authority on a state court. This *amici* brief shows that, even under the limits imposed by the Elections Clause per the concurrence in *Bush* v. *Gore*, 531 U.S. 98 (2000) ("*Bush* concurrence"), and the principal dissent in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ("*Arizona Redistricting* principal dissent"), this Court should affirm.[2]

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[1] All parties provided written consent to the filing of this brief by blanket consent. *Amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] This *amici* brief makes two joint assumptions: (1) the principal dissent in *Arizona Redistricting* sets forth a proper limit for

Parts I and II of this brief show that the Elections Clause does not state or imply that the category of state statutes governing federal elections is always superior to substantive or general constraints in state constitutions. And the Supremacy Clause rebuts any such categorical implication. The three exclusive categories of "supreme law" in the Supremacy Clause do not include *state* election statutes.

Rather, a general, substantive state constitutional constraint may apply to a state statute in federal election cases, at least where two limits are met: *first*, as in *Smiley* v. *Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), where, under the state constitution provision, the legislature has a significant role in prescribing the manner of federal elections; and *second*, where the state court's interpretation of the state constitution is not clear error. The *Bush* concurrence does not support more than a "clear error" limit. Any broader limitation would contradict both *Hildebrant*, *id.* at 568, and the deference properly owed to the state legislature's statutory empowerment of *state* courts to resolve state constitutional disputes concerning congressional redistricting.

Part I shows the first limit is met here. North Carolina's General Assembly has exercised multiple legislative roles, including prescribing North Carolina's state court jurisdiction and one-election remedial authority for congressional redistricting challenges and framing each state constitutional provision at issue. See *Gregory* v. *Ashcroft,* 501 U.S. 452, 471 (1991) (a

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when general, substantive state constitutional provisions apply in federal election cases; and (2) the *Bush* concurrence sets forth a proper limit in all federal election cases for a state supreme court's interpretations of state law.

state constitutional provision that the legislature frames and the people approve "reflects … the considered judgment of the state legislature that proposed it ….").

Part II shows that the second limit is met here because the decision below's construction of its state's constitutional provisions was not clear error. The North Carolina General Assembly prescribed that its state courts would resolve North Carolina constitutional challenges to North Carolina's redistricting statutes, and this Court should, at a minimum, give substantial deference to the decision below's reading of North Carolina's constitution and affirm.

Part III shows that petitioners' approach would ensure biennial repeats of the chaos-inducing federal court litigation that occurred in connection with the 2020 presidential election. The plaintiffs in those cases offered similar overreadings of the Electors Clause.

Part IV shows an additional reason to affirm. As *Shelby* v. *Holder*, 570 U.S. 529 (2013), held, the Tenth Amendment reserves state power over state *and* federal elections, including "[d]rawing lines for congressional districts" when Congress has not itself drawn the lines. *Id.* at 543.

Under the Tenth Amendment, the federal Constitution ratified in 1788 displaces a state power concerning federal elections only to the extent the federal Constitution does so "expressly or by necessary implication." *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2334 (2020) (Thomas, J., joined by Gorsuch, J., concurring) (quoting *U.S. Term Limits, Inc.* v. *Thornton,* 514 U.S. 779, 848 (1995) (Thomas, J., joined by Rehnquist C.J. and

O'Connor & Scalia J.J., dissenting) ("*Term Limits* dissent")). Especially when the people of the State constrain a state statute through the state constitution, a "plausible" reading of the federal Constitution that preserves the people's power prevails over one that displaces that power. *Term Limits* dissent, 514 U.S. at 844, 892. The reading of the Elections Clause and Supremacy Clause set forth in Part I and Part II is much more than plausible.

ARGUMENT

I. THE ELECTIONS AND SUPREMACY CLAUSES PERMIT APPLICATION OF SUBSTANTIVE STATE CONSTITUTIONAL PROVISIONS WHERE, AS HERE, THE LEGISLATURE STILL HAS A SIGNIFICANT, ALTHOUGH NOT EXCLUSIVE, ROLE.

Petitioners argue categorically that every state statute authorized by the Elections Clause is superior to every substantive state constitutional provision. Pet. Br. at 13, 22-24. But the Elections Clause expressly says only that the "Manner … shall be prescribed … by the Legislature." U.S. Const. art. I, § 4, cl. 1. The Clause says nothing about any impact of or on state constitutions.

The General Assembly "prescribed" congressional districts for 2022 and will do so again for 2024. See Part I.D, *infra*. These prescriptions satisfy the express language of the Elections Clause. The issue is whether the Elections Clause *implies* that the category of state legislative prescriptions for federal elections is always elevated above all substantive state constitutional provisions. That implication is contrary to text, precedent, and the dispositive history.

A. *Text*: Textualism requires "the judicial interpreter to consider the entire text" of the Constitution, "in view of its structure and of the physical and logical relation of its many parts." A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167-68 (2012). The Supremacy Clause provides:

> [1] This *Constitution*, and [2] the *Laws of the United States* which shall be made in Pursuance thereof; and [3] all *Treaties* made, or which shall be made, *under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or Laws *of any State* to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

The Supremacy Clause carefully lists three *exclusive* categories of law that a state court must apply notwithstanding its state's constitution. These are the federal "Constitution," "the laws of the United States," and the "treaties made … under the authority of the United States." There is no category that elevates the statutes of any state over that state's constitution.

If both Article I and Article II of the federal Constitution had been meant to require state judges to elevate a *category* of state statutes for federal elections above numerous state constitution constraints—such as all substantive constraints—the federal Constitution would expressly set forth the supremacy of that category somewhere. But it does not. Accord Non-State Resp. Br. at 28. The "supreme law" in the Supremacy Clause omits any category for state election statutes. "One cannot read the Elections Clause as

treating implicitly what … [an]other constitutional provision[ ] regulate[s] explicitly." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013).

Petitioners effectively would rewrite the second category of the Supremacy Clause to be "the laws which shall be made in Pursuance thereof …" Doing so would improperly strike the limiting words "*of the United States*" after "the laws."[3]

It also would be wrong to contend that the approach of petitioners would merely give supremacy to the federal Constitution itself, rather than inventing a new category of supreme statutes. Under such an argument, the second express category in the Supremacy Clause—federal statutes—would be superfluous. If giving supremacy to statutes authorized by the federal Constitution constituted giving supremacy to the Constitution itself, there would be no reason for the second category of the Supremacy Clause—"the Laws *of the United States* which shall be made in Pursuance thereof." (Emphasis added). Cf. *Dalton* v. *Specter*, 511 U.S. 462, 472 (1994) ((a) federal executive branch actions contrary to federal "statutory authority" and (b) "constitutional violations" are "separate categories").

Comments by Joseph Story in 1820 could not rewrite the Supremacy Clause. Pet. Br. 27-28. As Justice Story wrote in *Commentaries On The Constitution* (1833), the Supremacy Clause left "beyond the reach of

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[3] The Supremacy Clause also negates the supposed "absurd[ity]" that, if Congress enacted "the exact same law" as the state legislature had, a state constitution could not invalidate the federal statute. Pet. Br. at 24. The difference is that only the federal statute would be one of "the laws of the United States."

judicial controversy," the "right" of state courts to "declare unconstitutional [state statutes] void" as "repugnant to the state constitution." *Id.* § 1836. His *Commentaries* did not suggest any exception for state statutes authorized by the Elections or Electors Clauses. Moreover, Justice Story "was not a member of the Founding generation" and this Court has rejected some of his positions as "more nationalist than the Constitution warrants." *Term Limits* dissent, 514 U.S. at 856-57 (citing examples).

B. *Precedent*: Unlike the categorical overreading of petitioners, the *Arizona Redistricting* principal dissent provides a sensible reading of the Elections Clause that is in harmony with the Supremacy Clause. The Elections Clause is satisfied when a state constitutional provision "impos[es] some constraints on the legislature" but leaves the legislature a significant "role in the legislative process." 576 U.S. at 841. Petitioners assert (at 11) that "the power to regulate federal elections lies with the state legislatures *exclusively*," but this contradicts the conclusion of the *Arizona Redistricting* principal dissent that "the state legislature *need not be exclusive* in congressional redistricting." *Id.* at 841-42 (emphasis added). For example, the Elections Clause was satisfied when a legislature prescribed congressional districts but, pursuant to general state constitution provisions, that law was subsequently rejected by the voters or vetoed by the governor for substantive reasons. See *id.* at 840-41 (discussing and approving *Hildebrant* and *Smiley*).

Smiley rejected arguments indistinguishable from those petitioners make. Petitioners contend that the Elections Clause precludes a state court from engaging in the same process of judicial review of state election

statutes for compliance with substantive provisions of the state constitution as the state court does in connection with other state statutes. But *Smiley* upheld the validity of a governor's veto of a redistricting statute enacted by the state legislature because "there is *nothing* in article 1, section 4, which *precludes* a state [constitution] from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor *as in other cases of the exercise of the lawmaking power*." 285 U.S. at 372-73 (emphasis added). Of course, governor's vetoes may be exercised for any reason—and usually the reason is substantive.

The general veto provision in the state constitution in *Smiley* and the referendum provision in *Hildebrant*, 241 U.S. at 566, did not mention elections. *See*, Ohio Const. art. II, § 1c (amended 1912) (applying to "any law" and a "section of any law"). The Court would have to overrule *Smiley* and *Hildebrant* for it to require a state constitutional provision to refer specifically to elections to be enforceable (or any so-called "clear statement" requirement). Such an overruling would improperly prevent state legislative leaders during future federal elections from relying, as Arizona Speaker Rusty Bowers did in 2020, on general provisions in a "state's constitution" to refuse to interfere with the popular vote. Ariz. House of Representatives, *Speaker Bowers Addresses Calls for the Legislature to Overturn 2020 Certified Election Results* (Dec. 4, 2020), https://www.azleg.gov/press/house/54LEG/2R/201204STATEMENT.pdf (relying on Ariz. Const. art. 4, Part 2, § 1(2), which requires signatures of "two-thirds of the members of each house" to call a special session).

Petitioners' brief asserts (at 25 n.1, 39-40) that *Smiley* and *Hildebrant* are distinguishable because judicial review occurs after a statute becomes effective. That is not a principled distinction. To start, "an unconstitutional act is not a law …, it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby Cnty.*, 118 U.S. 425, 442 (1886); see also N.C. Const. art. XIV, § 4 (a law is "in force" only when it is "not in conflict with this Constitution").

Moreover, *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), favorably cited the Florida Supreme Court's decision, "[i]n *2015*, … [to] str[ike] down that State's congressional districting plan as a violation of the Fair District Amendment to the Florida Constitution." *Id.* at 2507 (emphasis added). That invalidated statutory plan applied to the "primary and general elections held in *2012* and thereafter." Fla. Stat. § 8.07 (2012) (emphasis added). Here, the North Carolina statute was to apply first to "nominating and electing" members of Congress "in 2022," 2021 N.C. Sess. Law 174, but the North Carolina Supreme Court invalidated that law in February 2022, three months *before* the May 17, 2022 nominating primary.

C. *History*: In *Smiley*, the dispositive history was that, when the federal Constitution was adopted in 1788, *two* state constitutions vested a governor with a *general* veto power that did *not* mention, and had *never* been exercised concerning, "elections." See 285 U.S. at 368-69. This history meant that applying a governor's general veto power to congressional redistricting was not "incongruous with the [Elections Clause's] grant of [state] legislative authority to regulate congressional elections." *Id.* at 368-69.

Here, the dispositive history is pre-1788 state court invalidations of state statutes based on substantive state constitutional provisions. *See* S. Prakash & J. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887, 933-40 (2003) (citing, *inter alia*, widely-publicized pre-1788 decisions of four state supreme courts and supportive public commentary of Madison, Hamilton, and future Justices Iredell, Wilson, and Ellsworth). This history is much stronger than the pre-1788 history of veto provisions for governors or referenda.

Just as a governor's or referendum's substantive veto of a legislative redistricting bill is compatible with the Elections Clause, so is a substantive state constitutional provision that constrains the legislature. As Justice Thomas has explained, in the 80 years before the Fourteenth Amendment:

> [T]he Federal Constitution did not bar state governments from abridging the freedom of speech or the freedom of the press, even when those freedoms were being exercised in connection *with congressional elections*. *It was the state constitutions* that [did].

Term Limits dissent, 514 U.S. at 883 (emphasis added).[4]

D. *Application*: The North Carolina General Assembly had and has significant prescriptive roles in redistricting that satisfy the principal dissent in *Arizona Redistricting*. First, the General Assembly enacted the redistricting statute in 2021.

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[4] The *Term Limits* majority opinion did not disagree with this point.

Second, the General Assembly prescribed that a specific North Carolina state court has original jurisdiction to decide the merits of "[a]ny action challenging the validity of *any* act of the General Assembly that apportions or redistricts State legislative or congressional districts." N.C.G.S. § 1-267.1(a) (emphasis added). This statute prescribes that only this state court process may judge whether any statute that "redistricts … congressional districts" is "invalid on the basis that the act violates the *North Carolina Constitution* or federal law." *Id.* § 1-267.1(c) (emphasis added). A related statute reiterates that the jurisdiction of the state courts extends to entering an "order or judgment declaring *unconstitutional* or otherwise invalid, in whole or in part and *for any reason, any* act … that apportions or redistricts State legislative or congressional districts." *Id.* § 120-2.3 (emphasis added).

Third, the General Assembly prescribed that, after any such state court order or judgment, the General Assembly must have at least two weeks for the "first" opportunity "to remedy any defects" in its "plan apportioning or redistricting state legislative or congressional districts." *Id.* § 120-2.4(a).

Fourth, the General Assembly prescribed significant limits on judicial relief. Only (a) after the General Assembly's remedial plan is again found deficient, (b) may the state court then "impose an *interim* districting plan for use in the next general election *only*," and (c) "that interim districting plan may differ from the districting plan enacted by the General Assembly *only* to the extent necessary to remedy any defects identified by the court." *Id.* § 120-2.4 (a1) (emphasis added). For the 2024 election cycle, it is the General Assembly that

retains redistricting power. This case is indistinguishable from *Smiley* and *Hildebrant*, where "the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan." *Arizona Redistricting* principal dissent, 576 U.S. at 841.

The prescriptive role played by the General Assembly here is at least as significant as the legislature's roles upheld as sufficient in *Smiley* and *Hildebrant*. The role of the General Assembly is also greater than the roles given the legislature under the Florida constitutional provision that the majority cited favorably in *Rucho*, 139 S. Ct. at 2507-08. That provision contains a very general standard: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or incumbent." Fla. Const. art. III, § 20(a). In Florida, as here, the state supreme court invalidated the legislature's congressional redistricting plan and the legislature did not cure the defects in a remedial plan, so thereafter the state courts drew their own plan. *The League of Women Voters of Fla.* v. *Petzner*, No. SC14-1905 (Fla. Sup. Ct. Dec. 2, 2015). But the Florida Supreme Court, unlike here, directed that the court's plan would apply for *three* election cycles "until the next decennial redistricting." *Id.* at 8, 83-84.

Finally, here the North Carolina General Assembly itself framed—in *a statute*—the state constitutional provisions at issue. See 1969 N.C. Sess. Law 1258. Nothing in the word "Legislature" precludes a denominated state legislature from prescribing a general, substantive law, that therefore applies to federal elections, simply because that law is made part of the State's constitution. A state constitutional provision that is framed by the state's legislature and approved

by its voters "reflects both *the considered judgment of the state legislature* that proposed it, and that of the citizens of [the State] who voted for it." *Gregory*, 501 U.S. at 471 (emphasis added). Surely, the North Carolina General Assembly's prescriptive roles in framing the constitution and enacting statutes specifying judicial review of congressional redistricting suffice under the Elections and Supremacy Clauses.[5]

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[5] The Massachusetts constitutional amendment proposed at an 1820-21 convention cited by petitioners (at 27-28) was completely different. The amendment was not framed by the legislature and proposed a *permanent* rule for districting, not statutorily-authorized jurisdictional and conditional remedial authority for only one election. The rejected legislative proposals regarding federal Senators in New York and Massachusetts cited by petitioners (at 33-35) are also inapposite. As explained by state senator James Duane—who soon became New York's first federal judge—the provision of the state constitution by its own terms did not apply because the prior office of delegate was "essentially different" from that of Senator, as the Confederation Congress was unicameral and the term for a delegate was one year versus six years for a Senator. 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 295, 297 (Merrill Jensen & Robert Becker eds., 1976); see N.Y. Const. art. XXX (1777) (addressing annual appointment of "Delegates" to Congress); Mass. Const. art. IV (1780) (same).

Petitioners' brief's reliance (at 41-42) on *Bush* v. *Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam), is also misplaced. *Palm Beach* "decline[d] at this time to review the federal questions asserted to be present." *Id.* at 78.

II. UNDER THE ELECTIONS CLAUSE, A FEDERAL COURT SHOULD NOT SET ASIDE A STATE COURT INTERPRETATION OF A STATE CONSTITUTION AT LEAST WHERE, AS HERE, THE STATE COURT DID NOT COMMIT CLEAR ERROR.

A. *Standard of Review*: Petitioners' brief alternatively asks this Court to apply essentially *de novo* review to the rulings below concerning justiciability and the merits *under state law*. Pet. Br. at 46-48. This contradicts the *Bush* concurrence, which adopted a standard that the Electors Clause was violated only when the state supreme court "impermissibly distorted [state election statutes] beyond what a fair reading required." 531 U.S. at 115; see *id.* at 119 ("No reasonable person would" adopt the Florida court's reading). Thus, the concurrence's standard was "still deferential." *Id.* at 114.

The standard also required examination not of "[i]solated sections of the" state's statutes, but also "the statutorily provided apportionment of responsibility among … various bodies," including state courts. *Id.* at 113-14. Every "court must be … deferential to those bodies expressly empowered by the legislature." *Id.* at 114.

Here, as Part I.D shows, North Carolina's General Assembly empowered *by statute its* Supreme Court to apply its Constitution to its congressional redistricting statutes. Denying substantial deference to *statutorily* empowered state courts would be akin to destroying the village to save it.

Contrary to petitioners' brief (at 41) it should not diminish the level of deference that federal law authorized the North Carolina General Assembly to empower its state's courts. Consider an arbitrator under the Labor Management Relations Act. It is *federal* law—a statute enacted under the Commerce Clause—that confers authority on a bargaining representative and employer to empower an arbitrator to resolve disputes concerning a collective bargaining agreement (CBA). *See Textile Workers Union of Am.* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957). This Court created a judge-made rule of a substantial deference to the labor arbitrator's interpretation of the CBA "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a [federal] judge." *United Paperworkers Int'l Union, AFL-CIO* v. *Misco, Inc.,* 484 U.S. 29, 37 (1987). Likewise, here the General Assembly empowered *North Carolina's* courts, in congressional redistricting cases, to interpret and apply North Carolina's Constitution.

Respect for this statutory empowerment means that, *at most*, the decision below could be reversed for violating the Elections Clause only if that decision's interpretation of the North Carolina Constitution was clear error. See *Hildebrant*, 241 U.S. at 568 (state supreme court's interpretation of its state's constitution "is *conclusive* on that subject") (emphasis added). Anything more would contradict the holding in *Rucho* that in redistricting cases, *this* "Court [should] act only in accord with especially clear standards." 139 S. Ct.

at 2498. No such standard remotely warrants reversal here.[6]

B. *Justiciability*: Petitioners' repeated reliance on *Rucho* conflates justiciability with the Elections Clause. Pet. Br. at 4, 46, 49. *Rucho*'s rejection of *federal* partisan gerrymandering claims was based *not* on the Elections Clause, but on Article III justiciability principles that apply only to federal courts. Neither *Rucho* nor the Elections Clause required the court below to adopt federal justiciability rules.

First, *Rucho* applied the political question limit on "*federal* courts" imposed by Article III, *not* the Elections Clause. 139 S. Ct. at 2493-94, 2507 (emphasis added). This Court has "recognized often that the constraints of Article III do not apply to state courts, and

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[6] Federal law supplies additional limits *after* election day. The Constitution empowers Congress to make "The Times … of holding Elections for Senators and Representatives," art. I, § 4, cl. 1, to "determine the Time of chusing the Electors," art. II, § 1, cl. 4, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" these enumerated powers, art. I, § 8, cl. 18. Federal statutes make a single day nationwide "the day for the election [of members of Congress]," 2 U.S.C. § 7, and require a single day nationwide on which, in each state, "[t]he electors … shall be appointed," 3 U.S.C. § 1. In each instance, Congress has enacted a solitary, extremely narrow exception. See 2 U.S.C. § 8(a) ("failure to elect at the time prescribed by law"); 3 U.S.C. § 2 ("an election … has failed to make a choice on the day prescribed by law"); see *Foster* v. *Love*, 522 U.S. 67, 71 n.3 (1997) (explaining narrowness of 2 U.S.C. § 8(a)). The import of these statutes is to bar, after election day, any branch of state government from applying a post-election day change in election law *retroactively* to a federal election dispute. See, *e.g.*, Amicus Brief, *Wood* v. *Raffensperger*, No. 2020CV342959 (Ga. Super. Ct. Dec. 4, 2020), http://kattentemple.com/wp-content/uploads/2020/12/2020-12-04-GEORGIA-AMICI-BRIEF.pdf.

accordingly the state courts are not bound by the limitations of a case or controversy or other rules of justiciability even when they address issues of federal law." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989); accord Non-State Resp. Br. at 54-55. Even more so, Article III justiciability limits do not apply to state courts when they address state constitutional claims.

Second, the decision below derived justiciable standards in part from three state constitutional provisions—the free elections, popular sovereignty, and frequent recurrence provisions, *see* N.C. Const. art. I, §§ 2, 10, 35—that have no analog in the federal Constitution and thus could not be addressed by *Rucho*. And a fourth provision—North Carolina's differently-worded "freedom of speech" provision—is broader.[7] As Justice Scalia and Bryan Garner wrote, "there is no such thing as a prior judicial opinion interpreting precisely the same word or phrase, unless it is interpreting the very same document." READING LAW, *supra*, at 323.

Even as to a fifth provision, the North Carolina equal protection provision was *first* added when North Carolina's current Constitution was ratified in 1971. A state constitution provision that copies an earlier federal provision may well provide a different standard based on the "legal environment" of the case law that existed when the *state* constitution provision was later ratified. *State* v. *Walker*, 267 P.3d 210, 221 (Utah

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[7] The First Amendment says: "Congress shall make no law … abridging the freedom of speech." Section 14 of Article I of the North Carolina Constitution omits the limiting definite article: "Freedom of speech … shall never be restrained." N.C. Const. art. I, § 14.

2011) (Lee, J., concurring). That is the case here. 1971 was shortly after 1966, when this Court overruled a prior case and invalidated traditional poll taxes because "we have never been confined to historic notions of equality." *Harper* v. *Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("*Virginia Board*").

Third, even if the federal and state justiciability issues were identical, a state court has freedom to reach conclusions opposite from this Court in applying its state's constitution. See *Pruneyard Shopping Ctr.* v. *Robins,* 447 U.S. 74, 85 (1980) (Rehnquist, J., for the Court) (applying this principle to state constitution's free speech provision). Because the Elections Clause does not limit justiciability in a state court, this Court could review the justiciability ruling below only for compliance with "some *other* [federal] constitutional constraint." *Chiafalo*, 140 S. Ct. at 2324. This Court could review whether the Due Process Clause is violated when a state supreme court's justiciability decision so contradicts prior, clearly established *state* law as to be "indefensible." *Metrish* v. *Lancaster*, 569 U.S. 351, 360 (2013) (quotations and citation omitted). Not even petitioners argue that here.

C. *State Substantive Constitutional Interpretations*: The decision below provided at least a "fair reading," *Bush* concurrence, 531 U.S. at 115, for each of its independently sufficient interpretations of the North Carolina Constitution's free elections, equal protection, and free speech provisions.

The interpretation in the decision below of the free elections clause was based on the purpose of that clause, as reflected in its text and history. Pet. App.

91a-97a. In particular, "[t]he free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain 'electoral advantage'" by the "manipulation of districts." *Id.* at 91a-93a (citations omitted). The framers of the 1776 North Carolina Constitution publicly stated that it embodied the principles of the Glorious Revolution. *Id.* at 94a-95a. The North Carolina Constitution ratified in 1971 added "shall" to make the free election principles mandatory for all elections. *Id.* at 95a-96a. The decision below applied the purpose derived from constitutional text and history to rule that partisan gerrymandering violates the free elections clause. *Id.* at 96a-97a.

The decision below also followed an often-used approach in addressing North Carolina's equal protection and free speech clauses. It discerned the purpose of each clause from text and precedent and applied that purpose to invalidate partisan gerrymandering. Pet. App. 97a-106a.

The crux of the disagreement between the majority and dissent below was over whether it was dispositive under *North Carolina's* Constitution that partisan gerrymandering has a long tradition. E.g., Pet. App. 80a-90a, 93a, 117a; see *id.* at 145a-146a, 214a, 216a. The majority's ruling on this point has ample support.

First, a constitutional provision should be interpreted in light of "the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2132 (2022). Specifically, originalists consult the legal environment that existed when a state constitution provision was ratified. See *supra*, at 17-18. North Carolina's Constitution ratified in 1971 was the *first* to add the equal protection provision, Pet.

App. 97a-98a, to make the free elections provision mandatory by adding "shall," Pet. App. 95a, and to add "Freedom of speech," Pet. App. 212a-213a (dissent).

In 1971, this Court's precedents under the Fourteenth Amendment's equal protection clause and the First Amendment's free speech clause had *rejected*, in cases involving elections and political speech, the argument that a practice that was traditional was therefore constitutional. *Virginia Board* in 1966 had invalidated a traditional poll tax, holding: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality." 383 U.S. at 669. Likewise, this Court's then-recent First Amendment actual malice requirement for libel claims against public officials was based on "the values nurtured by the First and Fourteenth Amendment," without regard to "existing state-law standards." *Rosenblatt v. Baer*, 383 U.S. 75, 84-86 (1966); see *N.Y. Times v. Sullivan*, 376 U.S. 254, 276 (1964).

Second, petitioners and their *amici* have ignored Section 35 of Article I of the North Carolina Constitution. Section 35 provides: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." The decision below opined that this provision provided a rule of construction under which a historical practice did not automatically satisfy North Carolina's free elections, equal protection, and free speech provisions. Pet. App. 83a, 89a-90a, 117a. The majority quoted the preeminent treatise on North Carolina constitutional law, which states that "[a]ll generations are solemnly enjoined [by Section 35] to return *ad fontes* (to the sources) and [to] *rethink for themselves the fundamental principles of self-*

government that animated the revolutionary generation." *Id.* at 89a n.11, 117a (second brackets and second emphasis added) (quoting J. ORTH & P. NEWBY, THE NORTH CAROLINA CONSTITUTION (2d ed. 2013)).

When the federal constitution was ratified in 1788, North Carolina's was one of five state constitutions that had "frequent recurrence" provisions.[8] That is three more than had veto provisions. See *supra*, at 10. Just as veto provisions may be applied in federal election cases, so may "frequent recurrence" provisions.

D. *Remedy*: Petitioners contend that the North Carolina courts imposed a redistricting map "by fiat." Pet. Br. at 49. However, by *statute*, the General Assembly authorized, when a constitutional violation is found and the General Assembly does not fix the defects within the deadline the statute set, interim redistricting by a state court "for use in the next general election only" and "only to the extent necessary to remedy any defects identified by the court." N.C.G.S. § 120-2.4(a1).

This highly circumscribed statute is a valid exercise of the General Assembly's authority to prescribe the "Manner" of federal elections. See *McPherson* v. *Blacker*, 146 U.S. 1, 34-35 (1892) ("[I]t is, no doubt, competent for the legislature to authorize … the Supreme Court of the State … to appoint these [presidential] electors.") (quotations and citation omitted). Petitioners do *not* even ask this Court to address whether the remedy below went beyond the statutory limits. See Pet. Br. at 49a-50a.

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[8] Va. Const. § 15 (1776); Pa. Const. art. XIV (1776); N.C. Const. art. XXI (1776); Mass. Const. art. XVIII (1780); Vt. Const. ch. 1, art. XX (1786).

E. *Judicial Power, Not Delegation*: Petitioners argue that the decision below violates federal non-delegation principles because it is based on "fairness." Pet. Br. at 46-47. This is wrong. Even *assuming* that the Elections Clause imports federal non-delegation principles, under *Whitman* v. *American Trucking Assns.*, 531 U.S. 457 (2001)—which petitioners do not ask this Court to overrule—a standard of fairness, read in light of a law's purpose, is sufficient to avoid non-delegation concerns. *Id.* at 474-75 (citing cases). Indeed, *Whitman* cites as an example of a permissible law one that delegated authority to ensure that a corporate structure did not "unfairly or inequitably distribute voting power …." *Id.* at 474 (quoting *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946)). In addition, the non-delegation doctrine does not require a legislature to specify "how much [of a particular activity] was too much." *Id.* at 475. Here, the standards of the legislatively-framed North Carolina Constitution, as drawn from its text and history, and the legislatively-circumscribed remedy statute, are more than adequate under *Whitman*. *Supra*, at 18-21.

Independently, the decision below exercised traditional judicial powers, not legislative power. As *Rucho* exemplified, determining whether a claim is justiciable is an exercise of judicial power. It would set a dangerous precedent if the Elections Clause were misused to deprive state courts of *judicial* power in federal elections cases. It could embolden state legislatures to countermand state constitutional separation-of-powers precepts under which "courts of law" adjudicate contested federal elections. *E.g.*, Pa. Const. art. VII,

§ 13 ("The trial and determination of contested elections of electors of President and Vice-President … shall be by the courts of law, ….").

Another traditional court power is "equitable discretion," after finding a violation, to grant and craft "injunctive relief," unless a statute clearly limited this power. *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391-93 (2006). This Court exercised that traditional power in *Bush* v. *Gore* when, after finding an equal protection violation in the application of Florida statutes, the Court halted the recount for that election. *See* 531 U.S. at 110-11.

The remedy in this case—confined, as required by the state statute, both to a single election and "to the extent necessary"—was likewise a valid exercise of judicial power. As *Growe* v. *Emison*, 507 U.S. 25 (1993), held:

> The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.

Id. at 33 (internal quotations and citations omitted).

Finally, when a court holds that a statute is unconstitutional, it is exercising *judicial* review. Indeed, *Bush* v. *Gore* held that the "responsibility to resolve the … constitutional issues" raised by the application of a state statute in a presidential election belongs to "the judicial system." *Id.* at 111.

Nor do petitioners show an exercise of judicial review was really "legislative" by labelling the decision below

as "policymaking." Pet. Br. at 4, 12, 46. When a court interprets a constitutional provision to serve the purposes derived from its text and history, those purposes are not properly characterized as the court's "policies." Indeed, this Court's most famous First and Fourteenth Amendment election decisions contain sentences that, out of context, sound like policy. See *Citizens United* v. *FEC*, 558 U.S. 310, 360 (2010) ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."); *id.* at 349, 372; *Bush*, 531 U.S. at 109 ("The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections."); *id.* at 106-07.

The "policymaking" label is neither principled nor workable. It is, and would produce frequently, a game of I-know-it-when-I-see-it.

III. RESPECT FOR THE STATE LEGISLATURE'S EMPOWERMENT OF STATE COURTS WILL REDUCE IMPROPER FEDERAL DISTRICT COURT LITIGATION.

In 2020, challengers repeatedly went to the *lower* federal courts to bypass or overrule a state supreme court decision. They always relied on an absolutist misreading of the Electors Clause. Their federal cases concerning Arizona, Georgia, Michigan, Wisconsin, and New Mexico (where there was a 10.8% margin)

persisted even after the electors voted on December 14, 2020.[9]

If this Court adopts petitioners' similar overreading of the Elections Clause, waves of federal court election litigation would become endemic. Indeed, petitioners' *amici* promise that "issues about a *state legislature's* Elections Clause *enactments* [are] particularly well suited for federal court resolution." Br. of Amici Republican Nat'l Comm., et al., at 16-17 (emphasis added). To borrow Justice Scalia's phrase, "this wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

All this federal court litigation has defied and would defy numerous state *statutes*. These state statutes specify a *state court* forum for resolving election disputes, who may be plaintiffs, the deadline for filing challenges, and proof requirements.[10] There are no federal statutes specifying such rules. By respecting a state legislature's empowerment of its courts, this Court will enable early dismissal of improper lower

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[9] See, *e.g.*, *Trump* v. *Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. Dec. 24, 2020), *expedited consideration denied*, No. 20-883 (U.S. Jan. 11, 2021); *Trump* v. *Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. Jan. 5, 2021) (denying Dec. 30 motion for injunctive relief); *King* v. *Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020), *expedited consideration denied*, No. 20-815 (U.S. Jan. 11, 2021) (denying Dec. 18 motion); Letter from Counsel, No. 20-815, *et al.* (U.S. Dec. 30, 2020) (renewing request for consolidation and expedited consideration of four federal cases); *In re Bowyer*, No. 20-858 (U.S. Mar. 1, 2021) (denying Dec. 15, 2020 Petition for Extraordinary Writ of Mandamus); Order, *Donald J. Trump For President, Inc.* v. *Oliver*, No. 20-cv-1289 MVL (D.N.M. Dec. 15, 2020) (D.E. 3) (denying *ex parte* relief).

[10] E.g. A.R.S. §§ 16-672 to 673, 16-675 to 677.

court federal litigation about state election statutes. See *R.R. Comm'n* v. *Pullman Co.*, 312 U.S. 496, 501 (1941) (abstention reflects "scrupulous regard for the rightful independence of the state governments") (quotations omitted).

As the experience in 2020 illustrated, this kind of *federal* litigation has imposed heavy costs on our nation. First, when federal courts, including this Court in *Texas* v. *Pennsylvania*, properly rejected federal cases without reaching the merits, unfortunately the former President misused this to bolster efforts to have legislatures overturn the election. See, *e.g.*, Donald J. Trump, *Tweets*, The Am. Presidency Project (Dec. 12, 2020), https://www.presidency.ucsb.edu/documents/tweets-december-12-2020 ("We've not gotten any court to judge this (the vote) on its merit," and "Never even given our day in Court!"). In fact, the former President and his allies had lost numerous *state* supreme court decisions on the merits. See, *e.g.*, *Ward* v. *Jackson*, No. CV-20-0343, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (unanimously rejecting claims of "misconduct," "illegal votes," and "fraud"), *cert. denied*, 141 S. Ct. 1381 (2021); Order, *Law* v. *Whitmer*, No. 82178 (Nev. Dec. 8, 2020) (D.E. 20-44711) (unanimously affirming detailed trial court rejection of election contest); *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020) (rejecting statutory claims because "[i]t would be improper for this Court to judicially rewrite the statute by imposing [observer] distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so"), *cert. denied sub nom. Donald J. Trump for President, Inc.* v. *Degraffenreid*, 141 S. Ct. 1451 (2021); *In re Canvass of Absentee And Mail-In Ballots Of Nov. 3, 2020 Gen. Election*, No. 31 EAP

2020 (Pa. Nov. 18, 2020) (rejecting statutory claims seeking to disqualify signed mail-in or absentee ballots timely received by November 3, 2022); see also *Trump* v. *Biden*, 951 N.W.2d 568, 571-72 (Wis. Dec. 14, 2020) (rejecting challenge concerning indefinitely confined voters as "wholly without merit"), *cert. denied*, 141 S. Ct. 1387 (2021).

Second, a federal judge recently found that President Trump used "certain lawsuits not to obtain legal relief, but to disrupt or delay the January 6 congressional proceedings through the courts." Order Regarding Privilege of Remaining Documents, *Eastman* v. *Thompson*, No. 8:22-cv-00099-DOC-DFM, at 15-16 & n.68 (C.D. Cal. Oct. 19, 2022) (citing Dec. 24-31, 2020 emails). Indeed, on and after December 14, proponents of "alternate" electors claimed that they were justified because there were pending cases. See R. Goodman, *Timeline: False Alternate Slate of Electors Scheme, Donald Trump and His Close Associates*, Just Security, at ¶¶ 21-24, 36, (July 18, 2022), https://www.justsecurity.org/81939/timeline-false-alternate-slate-of-electors-scheme-donald-trump-and-his-close-associates/. These were mostly *federal* cases. *Supra*, at 24-25.

Finally, on December 27, 2020, the slate of the former President's electors in *Arizona* filed a lawsuit in federal district court in *Texas* seeking a declaration that Vice President Pence had the "exclusive authority and sole discretion" to award another term to the former President. *Gohmert* v. *Pence*, 510 F. Supp. 3d 435, 439 (E.D. Tex. 2021) (quoting complaint), *aff'd*, 832 F. App'x 349 (5th Cir. 2021). They cited the Electors Clause in arguing that the interpretation of "state

laws for the appointment of electors" presents "federal" questions. Application For Administrative Stay and Interim Relief, *Gohmert* v. *Pence*, No. 20A115, at 40-41, 54 (U.S. Jan. 6, 2021), *app. denied*, 141 S. Ct. 972 (Jan. 7, 2021). This Court should reject the current, similar attempts to federalize state election statutes.

IV. FEDERALISM AND THE TENTH AMENDMENT PROTECT IN FEDERAL ELECTION CASES THE POWER OF A STATE'S PEOPLE TO CONSTRAIN THAT STATE'S LEGISLATURE.

Shelby v. *Holder* held that "the framers of the Constitution intended the States to keep for themselves, *as provided in the Tenth Amendment*, the power to regulate elections." 570 U.S. at 543 (emphasis added) (quotations and citations omitted). This state power extends to federal elections, including "[d]rawing lines for congressional districts," unless Congress has drawn the lines. *Id.*[11]

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states

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[11] Petitioners cite *Cook* v. *Gralike*, 531 U.S. 510 (2001). Pet. Br. at 22. However, in *Cook* "the parties conceded the validity of this premise" that the states have no power to regulate congressional elections except for the authority that the Constitution expressly delegates. 531 U.S. at 530 (Thomas, J., concurring). Likewise, statements about the Elections Clause in *Term Limits* were dicta because its holding was, per *Cook,* that a state law setting term limits on congressional incumbents "violated the Qualification Clauses." *Id.* at 513. In all events, *Shelby County* applied the Tenth Amendment to state authority over both federal and state elections.

respectively, or to the people." Petitioners contend that the Tenth Amendment is inapplicable here, because "any state authority to regulate election to federal offices could not precede their very creation by the Constitution." Pet. Br. 22. But the Tenth Amendment says "are reserved," not "are preserved." The present tense of "reserve" applies both to things that previously existed and things that did not. *Term Limits* dissent, 514 U.S. at 851-852. Thus, when used in law, Nathan Bailey's *A Universal Etymological English Dictionary* (20th ed. 1760), defines "reserve" as "to keep *or provide*; as when a Man lets his land, and reserves a Rent to be paid to himself." *Id.* (emphasis added). This use of "reserves" applies whether or not the owner has received rent before.

The power of a State's people to constrain that State's legislature through state constitutional provisions—including general and substantive provisions—is protected by the Tenth Amendment. This power is neither a "power[] … delegated to the United States by the Constitution, nor prohibited by it to the States …." U.S. Const. amend. X. Likewise, the Constitution protects state court power to make dispositive interpretations of state law because "the Constitution of the United States … recognizes and preserves the autonomy and independence of the States—independence in their legislative *and independence in their judicial departments*." *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938) (emphasis added) (internal quotations and citation omitted).

The Tenth Amendment supports a rule of construction under which the Elections and Supremacy Clauses displace a state power only to the extent the

federal provisions do so "expressly or by necessary implication." *Chiafalo,* 140 S. Ct. at 2334 (Thomas, J., joined by Gorsuch, J., concurring) (quotations and citations omitted); *id.* at 2334 ("Put simply, nothing in the text or structure of [the Electors Clause in] Article II and the Twelfth Amendment contradicts the fundamental distribution of power preserved by the Tenth Amendment."). In particular, given the "list of *express* prohibitions" in art. I, § 10, this Court has properly exhibited "reluctance to read [other federal] constitutional provisions to preclude state power by *negative implication*." *Term Limits* dissent, 514 U.S. at 870 (emphasis added); *id.* at 871 ("[O]ne should not lightly read [federal] provisions … as implicit deprivations of state power."). Rather, if provisions in the Constitution ratified in 1788 may "plausibly" be read in two ways, the reading that prevails is the one that limits a state's powers less. *Id.* at 884, 892.

This principle applies with particular force to a proposed interpretation of the Constitution that would nullify the application of a state constitutional constraint framed by the state's legislature *and* ratified by its people. See *id.* at 884 (Tenth Amendment protections are, if anything, greater for a state constitutional constraint "imposed by the people themselves"). As Parts I and II demonstrate, a more-than-plausible reading of the Elections and Supremacy Clauses is that they are satisfied where, as here, the state's legislature has exercised significant prescriptive roles and the state supreme court's interpretation of state law is not clear error.

The Tenth Amendment "divides power among sovereigns … precisely so that we may resist the temptation to concentrate power in one location as an expedient

solution to the crisis of the day." *New York* v. *United States*, 505 U.S. 144, 187 (1992). The Tenth Amendment, along with the federalist structure of the Constitution, properly makes it more difficult for *anyone* to use litigation, rather than votes, to obtain the presidency or control of Congress by decentralizing authority over such matters. In 2020, former President Trump would have had to convince at least three different state supreme courts of his position in order to obtain a second term by litigation. Likely, that is why he and his allies made the unprecedented, and properly rejected, request that this Court use its original jurisdiction to overturn the results in four states. See *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (Mem).

Likewise, looking at congressional elections starting in 1994, the average margin of the majority party in the House has been 32 seats. See *Party Divisions of the House of Representative, 1789 to Present*, History, Art & Archives: U.S. House of Representatives, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Oct. 20, 2022). To counsel's knowledge, a state court's use of any state constitutional provision has never determined control of the House *or* Senate.

Ultimately, the caution of *Rucho* supports affirmance here:

> The expansion of [federal] judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration …. Consideration of the impact of today's

> ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

139 S. Ct. at 2507.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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Appendix A

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Stanley Twardy, United States Attorney for the District of Connecticut, 1985-1991.

Richard Bernstein, Appointed by the United States Supreme Court to argue in *Carmell* v. *Texas*, 529 U.S. 513, 515 (2000); *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 725 (2016).