No. 21-1271

IN THE
Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF PROFESSOR EVAN BERNICK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

HELEN E. WHITE
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006

ANTON METLITSKY
Counsel of Record
BRUCE PETTIG
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Evan Bernick is a constitutional law scholar committed to the view that "the meaning of the Constitution remains the same until it is properly changed, with an Article V amendment being the only proper method of revision." Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1, 3 (2018); *see also* Randy E. Barnett & Evan Bernick, *The Original Public Meaning of the Fourteenth Amendment: It's Letter & Spirit* (Harvard 2021). Professor Bernick seeks to aid the Court in its effort to determine the original public meaning of the constitution by offering expert research and analysis of Founding-era history related to the Elections Clause.

SUMMARY OF ARGUMENT

The original public meaning of the Elections Clause precludes Petitioners' atextual and ahistorical claim that state legislatures wield arbitrary power, unbound by their state constitutions, to enact legislation to regulate federal elections.

As colonial citizens, the Framers watched the King dissolve parliament and then refuse to call a new election in order to aggrandize his own power. The ratifying public was acutely aware that concentrated power over elections could threaten their entire experiment in republican government and regarded all

---

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

legislative power as inherently limited. The Constitution therefore assigned power over federal elections not to "States" generally, as states might choose to continue unilateral executive control over elections. Instead, the Framers assigned that power to the states' legislative processes, directing state "Legislatures" to "prescribe," through normal legislative processes specified and limited by state constitutions, the "time, place, and manner" of congressional elections.

This language first appeared in the Article of Confederation governing the selection of federal delegates. Under the Articles, nine (of thirteen) states' constitutions directly regulated the "manner" of selecting federal delegates. When adopting the Constitution, the Framers retained the same language and structure in the Elections Clause. The Framers, who were obviously intimately familiar with both their own state constitutions and the Articles—and who deliberately departed from the Articles at numerous points—would not have adopted the language of the Articles if they had wanted to radically change the practice. Nor was there was any suggestion at the convention that this language should bear a new and different meaning.

Unsurprisingly, as more states held constitutional conventions in the aftermath of the ratification of the federal Constitution, states continued to add and adopt constitutional provisions governing federal elections. By 1830, more than half the states had state constitutions that regulated federal elections—despite having no federal constitutional obligation to do so. This early historical evidence confirms the original understanding of the Elections Clause, and conclusively refutes Petitioners' theory. The judgment of

the North Carolina Supreme Court should be affirmed.

ARGUMENT

The Elections Clause provides that: "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. When state legislatures legislate, they do so as empowered and limited by their state constitutions. Yet according to Petitioners, the Framers' use of the word "Legislature" in the first portion of the Elections Clause was intended to free state legislatures of those ordinary constraints when they enact laws governing federal elections. Petitioners offer no persuasive textual account of that counterintuitive theory. And their theory is completely foreclosed by the Elections Clause's drafting history and early state practice. And if the text and history leave any doubt (and they do not), the meaning of the phrase has been liquidated through more than two hundred years of consistent state constitutional regulation of federal elections.

I. The Text and Original Understanding of the Elections Clause Show that It Does Not Delegate Authority over Elections to "Independent" Legislatures.

The text and historical evidence demonstrates the Founding generation understood state constitutions to constrain the legislatures they create—even when they regulate federal elections. State constitutionalism was the "heart and soul, legally, of the American

revolution" and ensured state legislatures operated only within the bounds of the authority constitutionally delegated to them by the people. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 19. Accordingly, in the decades after ratification, states across the country added layers of state constitutional protections for federal elections in keeping with the original understanding of the Elections Clause. This intricate quilt of overlapping powers and constraints thus secures federal elections from the kind of factional manipulation that might threaten the animating and exceptional idea of the American Experiment: rule by the people, through representatives chosen through free and fair elections.

A. The Framers Specified that Federal Election Rules Would Be Written by State "Legislatures" to Prohibit Unilateral, Unchecked Executive Control over Elections.

Common law and colonial practice shows that the Framers were acutely concerned about preventing electoral manipulation by any actor in the system. At common law, elections were called by executive writ of election. In England, where the writ originated, "[t]raditionally, the monarch called for the election of a new Parliament by issuing the writ." Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 Nw. U. L. Rev. 1181, 1202-03 (2013). To no one's surprise, this royal power was not always employed to democratic ends. King James II infamously cancelled

writs of election in a vain attempt to stall the Glorious Revolution, *see* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475, 559 (1995), and—better known to the Framers—King George III withheld the writ in colonial elections, *see* Clopton & Art, *supra*, at 1203 & nn.87-88.

Indeed, the founding generation was so wary of the writ's abuses that the Declaration of Independence specifically decried King George's actions on this score, charging that he "dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people," and "refused for a long time, after such dissolutions, to cause others to be elected." The Declaration of Independence ¶ 3 (1776).

The fear of executive exercise of authority over elections explains why the Framers specified that the responsible state authority is the "Legislature" (and only the Legislature). Had the Elections Clause merely devolved authority to regulate elections on "the State," many states may well have found it expedient to permit the governors to regulate the timing of elections through issuance of executive writs of election. Thus, the Framers ensured that federal elections could never be regulated through executive writ, and must instead be controlled by the state "Legislatures" "prescrib[ing]" "[r]egulations" through ordinary legislation. And the Framers gave executive writs an extremely limited scope—they were authorized only for purposes of calling elections to fill congressional *vacancies*, and even then left governors no discretion in determining whether to issue the writ. *See* U.S. Const. art. I, § 2, cl. 4 (directing that the writ "shall issue"); *id.* amend. XVII (same); *see Jackson v.*

Ogilvie, 426 F.2d 1333, 1336 (7th Cir. 1970) ("The language is mandatory."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("Mandatory words impose a duty ... *shall* is mandatory." (emphasis in original)). The Framers' distrust of executive authority fully explains why they specified that federal elections regulations should be enacted by state "Legislatures" through legislation.

But the Framers were also concerned with legislative abuses. Petitioners' theory that the Framers used the word "Legislature" in the Elections Clause to free state legislatures from state constitutional constraints cannot withstand historical scrutiny. The Founding generation viewed ALL state power as inherently limited, and thus carefully constructed republican constitutions that checked and balanced power. *See* Amar & Amar, *supra* at 19. These constitutions were designed to prevent what in the Founders' republicanism was regarded as among the primary constitutional evils—the exercise of *arbitrary* power, understood as power that serves no legitimate, public-oriented end of government. *See* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm. & Mary L. Rev. 1599, 1663-65 (2019).

Text cannot be understood without historical context. To be sure, Petitioners' theory makes no sense as a textual matter. Use of the word "Legislature" in the first portion of the Elections Clause no more implies independence from state constitutional constraints than the word "Congress" in the second portion of that clause implies independence from federal constitutional constraints. But it becomes downright

bizarre when one considers that the Founding generation regarded legislative power with suspicion, and that suspicion was integral to the Constitution's design. That is why they highlighted "the tendency of republican governments … to an aggrandizement of the legislative at the expense of the other departments." The Federalist No. 49 (James Madison) (Jacob E. Cooke ed., 1961). That is why they specifically guaranteed "to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. And that is why they imposed a number of novel restrictions on state governments that were responsive to perceived legislative abuses under the Articles. *See* Art. IV. Congress does not hide elephants in mouseholes; still less does the Constitution conceal stores of arbitrary power within carefully reticulated republican structures.

To the extent there were any doubt about the original understanding of the Elections Clause, however, that Clause's drafting history and early state practice definitively resolves it. As explained below, the Elections Clause's original public meaning is unambiguous, and entirely irreconcilable with Petitioners' theory.

B. The Elections Clause Used Language Materially Identical to the Elections Provision of the Articles of Confederation, Which Unambiguously Contemplated State Constitutional Restrictions.

The Articles of Confederation provided that "delegates shall be annually appointed in such manner as the legislature of each State shall direct," but "with a power reserved to each State to recall … and to send

others." Articles of Confederation, art. V. As shown below, state practice before and after the Articles' adoption shows that state legislatures writing election rules under Article V were bound by state constitutions. That is crucial here, because the language of Article V is materially identical to the language the Framers later adopted as the first portion of the Elections Clause. *Compare* Articles of Confederation, art. V (delegates chosen "in such manner as the legislature of each State shall direct"), *with* U.S. Const. art. I, § 4 (federal election rules "shall be prescribed in each State by the Legislature thereof"). The fact that state constitutions were understood to bind state legislatures in the exercise of authority under Article V is strong evidence that the Elections Clause's substantially similar language was understood the same way.

1. Under the Articles of Confederation, state constitutions were understood to bind state legislatures when they acted under Article V.

Only two state constitutions—Virginia and South Carolina—predated the Articles' drafting. And both of those state constitutions expressly regulated the "manner" of selecting the state's federal delegates. *See* Va. Const. of 1776 (requiring delegates be selected by "joint ballot of both Houses of Assembly"); S.C. Const. of 1776, art. XV (similar). Had the Framers or the ratifying public understood the Articles to nullify provisions in each of the two state constitutions in existence at the time, there would likely have been some evidence of that monumental shift. And yet there is none, and those state constitutional provisions continued to apply under the Articles. *See* Hayward H. Smith, *Revisiting the History of the Independent State*

Legislature Doctrine, 53 St. Mary's L.J. 445, 475-76 (2022).

As other states adopted constitutions in the aftermath of the Articles, they, too, included constitutional provisions regulating the selection of federal delegates. In the years between 1776 and the constitutional convention in 1787, Delaware, Georgia, New York, Massachusetts, Pennsylvania, Maryland, and New Hampshire all adopted constitutions that, like Virginia's and South Carolina's directly regulated the "manner" of selecting federal delegates. *Id.* at 476-80. Those constitutional provisions would be void if the Articles' assignment of power over the "manner" of selecting delegates to state "legislatures" displaced any state constitutional constraints on those legislatures. Yet, delegates even arrived for their federal service with credentials confirming they had been selected in manners consistent with their state constitutions. *Id.* at 479-80.

2. The first portion of the Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4. This simply imports the same language from Article V of the Articles of Confederation. *See* Smith, *supra*, at 480-84. Both under Article V and the Elections Clause, the "legislatures" in "each state" were tasked with primary responsibility for determining the "manner" of choosing federal representatives. *Compare* U.S. Const. art. I, § 4, *with* Articles of Confederation, art. V.

Understood in light of early state practice under the Articles, Petitioners' reading of the Elections

Clause requires us to imagine that the Framers of that Clause radically reshaped state constitutionalism in the federal electoral arena without altering the relevant language. That is implausible. If the Framers meant the first portion of the Elections Clause to be understood differently from Article V, they would not have used the same language. To the contrary, the Framers—as well as the state delegates called to ratify the Constitution—were undoubtedly aware of the prevailing state practice under the Articles. The fact that they chose to borrow Article V's language for the Elections Clause demonstrates that they understood the Elections Clause to allow state constitutional constraints on legislation, just as Article V indisputably did.

Certainly, the constitutional debates offer no support for the notion that this part of the Elections Clause marked some major departure from the Articles. *See* Smith, *supra*, at 480-84. That is hardly surprising given that Article V and the Elections Clause were each drafted by individuals who also framed state constitutions that regulated selection of federal delegates under the Articles. *See id.* at 482-83 (describing the involvement John Dickinson, Roger Sherman, James Madison, and Gouverneur Morris). The first part of the clause, therefore, was understood by the Framers and Founding-era public to simply continue the structure established under the Articles: State legislatures set the "manner" of selecting federal representatives, subject to the lawmaking process established and constrained by the state constitution.

3. The second portion of the Elections Clause was, of course, very different from the Articles, and indeed

was a constitutional sea change. That provision is thus not as directly relevant to the question presented here as the Elections Clause's first part. Nevertheless, that second portion likewise undermines Petitioner's argument.

The second portion granted Congress new power to "make or alter" states' time, place and manner "regulations." U.S. Const. art. I, § 4, cl. 1. That new power was necessary, Madison explained, because "[s]tate [l]egislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1007 (2021) (quoting 2 The Records of the Federal Convention of 1787, at 240-41 (Max Farrand ed., 1911)). In other words, corrupt state legislators might be so singularly focused on state interests that they would undermine national elections to get their way. *See id.* 1005-08 (detailing other Framers' similar views and related justification for this part of the clause). Some backstop, with the interest of the whole nation in mind, was therefore necessary to avoid localized legislative factions derailing the national government for their own gain. Cue Congress's power over federal elections.

In crafting the Elections Clause, the Framers were therefore chiefly concerned with the threat concentrated state power—*legislative* power emphatically included—over elections could pose to the national government. *See also supra* at 4-7 (describing the Framers' fears of abuses of executive writs of election). Petitioners' theory, though, is that while the

Framers expressly granted Congress broad new powers to check state legislatures' excesses in the writing of federal election rules, they at the same time silently freed those same state legislatures from existing state-level constraints on their powers over the selection of federal representatives. This theory is implausible, and should be rejected.

C. Post-Ratification State Practice Confirms that the Elections Clause Was Never Understood to Free State Legislatures from State Constitutional Strictures.

1. A survey of the flurry of state constitutions adopted in the wake of ratification confirms that Petitioners' reading stands at odds with the original public meaning of the Constitution.

For example, following his work drafting the Elections Clause, John Dickinson returned to Delaware and led that state's constitutional convention. *See* Smith, *supra*, at 484-85. There, Delaware adopted a constitutional provision specifying that congressional elections should occur in the same place and manner as state legislative elections. Del. Const. of 1792, art. VIII, § 2. Neither Dickinson nor Delaware were outliers. In the decade after ratification, Georgia (1789), Pennsylvania (1790), Kentucky (1792), and Tennessee (1796) each adopted state constitutions requiring "all elections" be "by ballot." Smith, *supra*, at 487-493. Over that same period, New Hampshire, (1792), Delaware (1792), Vermont (1793), Kentucky (1792 and 1799), and Tennessee (1796), all adopted constitutional provisions that—like the North Carolina provision at issue here—required "all elections" be "free."

Id. On Petitioners' view, each of these provisions would have been unconstitutional.

Expanding the time horizon, as Petitioners do (at 12), to 1830, only expands the body of evidence contrary to their position. Ohio (1803), Louisiana (1812), Indiana (1816), Alabama (1819) and New York (1821) all followed other states by adopting state constitutional provisions requiring "all elections" be "by ballot."[2] Illinois (1818) and Missouri (1820) each adopted constitutions requiring that "elections" be "free and equal." Mo. Const. of 1820, art. XIII, § 6 ("all elections shall be free and equal"); Ill. Const. of 1818, art. VIII, § 5 (declaring "[t]hat elections shall be free and equal").[3] Maryland's 1810 constitution expressly granted the "right of suffrage" "by ballot" in elections for "electors of the President and Vice-President of the United States, for [r]epresentatives of this [s]tate in the Congress of the United States [and specified state offices]." Md. Const. of 1810, art. XIV. And, in 1830, James Madison—a member of the Committee on Unfinished Parts that drafted the analogously-worded

---

[2] Ohio Const. of 1803, art. IV, § 2; La. Const. of 1812, art. VI, § 13; Ind. Const. of 1816, art. VI, § 6; Ala. Const. of 1819, art. III, § 7; N.Y. Const. of 1821, art. II, § 4.

[3] In addition, the schedules to state constitutions in Mississippi, Missouri, Alabama, Illinois, and Indiana outlined election procedures specifically for those states' first congressional elections. *See* Ind. Const. of 1816, art. XII, § 8; Miss. Const. of 1817, sched., § 7; Ill. Const. of 1818, sched., § 9; Ala. Const. of 1819, sched., § 7; Mo. Const. of 1820, sched., § 9. Those schedules were considered part of the original constitution of the state, *see e.g.*, *Wilmington Tr. Co. v. Baldwin*, 195 A. 287, 290 (Del. Super. Ct. 1937), thus demonstrating that the public understood that state constitutions could regulate federal elections.

Electors Clause—and sitting Chief Justice John Marshall voted to adopt the Virginia constitution, which expressly regulated the apportionment of congressional districts. *See* Smith, *supra*, at 485-87. Madison and Marshall's 1830 votes were especially significant because they were cast after objections from a minority of the delegation that this provision violated the Elections Clause. *See id.* at 486-87.

States were, of course, under no obligation to use their state constitutions to regulate federal elections. Yet, of the 21 states that adopted constitutions between 1789 and 1830, more than half (13) adopted state constitutional provisions that regulated federal elections, including several that were ratified with the help and guidance of the drafter of the Elections Clause.

2. Petitioners efforts to explain away the Respondents' robust state-practice evidence miss the mark.

a. Petitioners first erroneously claim that Respondents overstate the number of early state constitutions that regulate federal elections.[4] Despite

---

[4] *Amicus* Honest Elections Project (at 9-10) similarly tries to discredit the "all elections shall be free and equal" provisions by suggesting that these expansive provisions were understood to concern only voter qualifications. It offers no plausible support for that patently atextual claim. *Amicus* points to evidence that several states understood these provisions to prohibit unwarranted disenfranchisement. *See* HEP Br. at 9-10. But that does not mean they only implicate a state's voter qualifications rules. For example, the Framers were acutely aware that abuse of the power to set the "place" of holding elections could disenfranchise certain classes of persons. *See* Sweren-Becker & Waldman, *supra*, at 1013.

claiming to carry the textualist mantle, Petitioners assert that the many state constitutional provisions that regulate "*all* elections" somehow do not actually regulate "*all*" elections, but instead apply only to state elections. Pet. Br. 38-39; *see also* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 38 & n.168 (2020). Of course, Petitioners point to nothing in the text of any of these state constitutions that supports this counterintuitive reading of "all," which ordinarily means all and not just some.

Nor do they point to any evidence that anyone at the time understood the word "all" to have such an unusually cramped, technical meaning in this context. In requiring that "all elections" be "by ballot" in some states and "by voice" in others, those state constitutions were wading into the most charged election law topic of the day. *See* Smith, *supra*, at 490. Had those constitutional provisions been understood not to apply to federal elections, surely there would be some evidence of divergent practices in some holdout jurisdictions within those states. Yet, as Petitioners concede (at 37), no such evidence exists. Rather, "in the Early Republic, as today, the uniform practice was for state and federal elections to follow the same rules." Pet Br. 37. Under this reading of these state constitutions, *more than half* of all state constitutions adopted between 1787 and 1830 directly regulated federal elections—despite being under no obligation to do so.

Petitioners, moreover, have no answer to the several states—like Maryland and Virginia—that *expressly* regulated federal elections constitutionally. *See supra* at 13-14. Certainly, Petitioners make no

effort to explain their theory for how both James Madison and Chief Justice John Marshall so badly misunderstood the Elections Clause when they voted to adopt the Virginia Constitution. *See supra* at 13-14.

b. Faced with widespread state practice that undermines their position, Petitioners are left only with Joseph Story's anomalous comments at the 1820 Massachusetts convention—decades after the text was first framed and ratified. Pet. Br. 2, 15; *see also* Morley, *supra*, at 39-40. But Petitioners agree this Court has refused to "stake [its] interpretation" of the Constitution on outlier state practices or idiosyncratic individual views. Pet. Br. 38 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008)). Yet that is precisely what Petitioners ask this Court to do.

Story's comments are too little, too late to shed light on the original public meaning of the Elections Clause. Joseph Story, of course, was "not a member of the Founding generation." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting). "Rather than representing the views of the founding generation," Story's views thus "represent only his own understanding." *Id.* And, as Justice Thomas has explained, "in a range of cases concerning the federal/state relation"—like this one—this Court has found Story's views to be "more nationalist than the Constitution warrants." *Id.* His views therefore cannot displace those of the Founding-era public. *See, e.g.*, Honorable Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Res. L. Rev. 855, 864 (2020) ("Originalists . . . care about what people understood the words to mean at the time that the law was enacted because those people had the authority to make law.").

A look at the actual Framers' conduct at state constitutional conventions betrays Petitioners' cherry-picking. While relying heavily on Joseph Story's views from 1820, Petitioners never address John Dickinson's role in framing the Articles, the Elections Clause, and multiple state constitutions regulating the selection of federal representatives. *See supra* at 12-14. The Forrest Gump of these constitutional provisions is conspicuously absent from Petitioners' brief.

Petitioners similarly omit any discussion of James Madison's own 1830 vote to adopt a Virginia constitution that directly and expressly regulated congressional apportionment, despite an objection from another delegate based on the Petitioners' reading of the Elections Clause. *See* Smith, *supra*, at 486-87. Unlike Story, Madison was not only a member of the Founding generation—he was a member of the committee that drafted the analogously worded Electors Clause. *See supra* at 13-14. And, unlike Story, his vote was consistent with widespread state practice dating back to the Articles of Confederation. *See supra* at 8-14. And, finally, unlike Story, this Court has repeatedly held Madison's views on the structure of the national government to be highly instructive of the original public meaning—as he was both a chief architect of and campaigner for the Constitution. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2320, 2326 (2020); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

c. Petitioners also rely heavily on early practice relating to the appointment of Senators. *See* Pet. Br. 30-35; *see also* Morley, *supra*, at 61-65. But that reliance misunderstands the relationship between the

appointment of Senators and the meaning of the Elections Clause.

To start, Petitioners appear, at various points, to suggest that states were interpreting the Elections Clause when appointing Senators in the Founding Era and the fifty-year period following ratification. But until the ratification of the Seventeenth Amendment in 1913, the selection of Senators was expressly committed to the sole discretion of state legislatures by a separate, senate-specific federal constitutional provision. Until then, Senators were directly "*chosen* by the Legislature" of each state under Article I, Section 3. *See* U.S. Const. art. I, § 3, cl. 1. Early state practice concerning the method of choosing is thus interpreting this clause, not solely the Elections Clause.

Not only was the appointment of Senators additionally regulated by an entirely different Clause, but that Clause and the Elections Clause have entirely different structures, which makes sense of any difference in early understandings of the two. In particular, the Elections Clause requires state legislatures to write federal election rules through ordinary legislation, whereas the Senator-Appointment Clause required state legislatures to exercise a special federal function different from ordinary legislation—*i.e.*, to appoint senators themselves.

Specifically, the Elections Clause directs that state legislatures (and, if it so chooses, Congress) are to prescribe, make, or alter "Regulations." This language shows that the Framers envisioned legislatures and Congress acting in their usual lawmaking capacity, subject to all usual limitations thereon. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*

("*AIRC*"), 576 U.S. 787, 806-08 (2015); *id.* at 844 (Roberts, C.J., dissenting). As this Court has explained, "[p]rescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character," *i.e.*, "the making of laws." *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *see AIRC*, 576 U.S. at 806. These words together "place[] the intent of the whole provision"—to direct the exercise of *lawmaking* authority—"in a strong light." *Smiley*, 285 U.S. at 367; *see also* Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (forthcoming 2023), at 28.[5] By contrast, at the Founding, Senators, unlike the President and members of the House, were not elected via any sort of popular representative process. Instead, Article I, Section 3 empowers state legislatures to "cho[ose]" two Senators themselves. U.S. Const. art. I, § 3.

This difference in language, structure, and design makes all the difference in this case. It may make sense to suppose that when the federal constitution conscripts state legislatures for a uniquely federal function—*i.e.*, not to enact legislation but to appoint Senators—the ordinary state constitutional strictures that apply to ordinary legislation may not apply. But when a state legislature carries out its quintessential lawmaking function, it must do so "in accordance with the method which the State has prescribed for legislative enactments," *AIRC*, 576 U.S. at 807 (quoting

[5] Draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138.

Smiley, 285 U.S. at 367), including constitutional constraints on its authority. State legislatures "owe their existence to" constitutions, *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.P. 1795), and thus the distribution of legislative power "by a state among its governmental organs is commonly, if not always, a question for the state itself," *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).[6]

Petitioners do not (at 32-35) ever address these obvious variations in structure or language, but these differences render their heavy reliance on the early understanding of legislative appointment of Senators entirely irrelevant.[7] At the same time, these structural and linguistic differences explain the difference

---

[6] This is so whether "Legislature" is understood broadly to mean "the power that makes laws" or narrowly to refer to an institutional lawmaking body, *compare AIRC*, 576 U.S. at 813-14, *with id.* at 828 (Roberts, C.J., dissenting). Rejecting the independent state legislature theory does not entail rejecting the proposition that "'the Legislature' in the Elections Clause is the representative body which makes the laws of the people." *Id.* at 827 (Roberts, C.J., dissenting).

[7] Petitioners' passing reliance on Article V and the Republican Guarantee Clause is misplaced for the same reason. Pet. Br. 19, 23. Article V provides that constitutional amendments may be "*ratified* by the Legislatures of three fourths of the several States." U.S. Const. art. V (emphasis added). As this Court has explained more than once, "the ratifying function" stands in stark contrast to "the ordinary business of legislation," because it is an instance in which state legislatures are exercising their unique power to vote to amend federal constitutional law. *AIRC*, 576 U.S. at 806 (quoting *Hawke v. Smith*, 253 U.S. 221, 229 (1920)). The Republican Guarantee Clause, likewise, provides for the protection of states "against domestic Violence" "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." U.S. Const. art. IV, § 4. Making an

in early historical practice—as explained at length above, regardless how early states treated the appointment of Senators, they routinely adopted state constitutions that governed federal-election-related legislation. At the end of the day, there is simply no plausible way to reconcile Petitioners' theory with that early historical practice and understanding.

D. Petitioners' Supposed Blockbuster Evidence Is Fraudulent.

Finally, Petitioners have fallen prey to the trap of bad history in such an egregious fashion that it casts doubt upon the overall rigor of their analysis. They point (at 2, 15) to a piece of what they believe is blockbuster evidence—the Pinckney Plan—which they assert shows that an early draft of the Constitution assigned power under the Elections Clause to "States" and that this was rejected in favor assigning power to the "Legislature[s] thereof." This, Petitioners claim, shows "the Committee of Detail deliberately changed the Constitution's language to specify that *state legislatures* were to exercise that power, not any other state entity and not the State as a whole." Pet. Br. 2 (emphasis in original). As shown below, the Pinckney Plan is fabricated.

To be clear: The Pinckney Plan would not matter even if it were real. All it purports to show is that the Framers reverted to the language of the Articles of Confederation. That is affirmative evidence *against*

"application" for protection is not a traditional lawmaking function—a point underscored by the fact that the Constitution delegates it to "the Executive" as a backstop in the event of the legislature's unavailability.

Petitioners' position: If the Framers purposefully altered the draft's language to adopt the Articles' language, the only plausible conclusion is that they also meant to adopt the prevailing understanding of that language. And that prevailing understanding forecloses Petitioners' reading for the reasons already explained. *See supra* at 7-10. Moreover, the Framers' not adopting the Pinckney Plan's language (were it real) is fully explained without regard to the "independence" of state legislatures from constitutional constraints—the Plan's language would have permitted states to empower governors to call regular elections by "writ of election," which the Framers explicitly sought to avoid. *See supra* 4-7. And, of course, the Pinckney Plan argument is unresponsive to the wealth of contrary early state practice described above. *See supra* at 8-14.

But the more fundamental problem is that the Pinckney Plan is a notorious fake. As one scholar recently put it, the plan is "the most intractable constitutional con in history." *See* Lynn Uzzell, *The Deep South's Constitutional Con*, 53 St. Mary's L.J. 711, 714 (2022). The "con" dates back to 1818, when John Quincy Adams asked Charles Pinckney for a copy of the draft constitution he submitted as Adams was compiling the records of the Constitutional Convention.[8] The "draft" he enclosed in response is what Petitioners now cite as the Pinckney Plan. But that "draft" has since repeatedly been found to be not an early draft of the Constitution, but an after-the-fact

[8] *See* Letter from Charles Pinckney to John Quincy Adams (Dec. 12, 1818), *in* 3 *The Writings of James Madison* 22 (Gaillard Hunt ed., 1902).

forgery concocted by Pinckney to enlarge his own perceived role in framing the Constitution by making his purported "early draft" closely resemble the final version.[9]

Madison was immediately suspicious of the document and especially dubious of its draft of the Elections Clause. When Madison saw the plan included in the papers for the Committee of Detail, he feared "considerable error had crept into the paper." [10] Pinckney notoriously opposed direct elections for members of the House. *See* S. Sidney Ulmer, *James Madison and the Pinckney Plan*, 9 S. Carolina L. Rev. 415, 428 (1957). Yet Pinckney's purported early draft proposed that "Each State" prescribe "the time & manner of holding *Elections by the People* for the house of Delegates." 3 The Records of the Federal Convention of 1787, at 597 (Max Farrand ed., 1911) (hereinafter, "Farrand, Records") (emphasis added). Obviously incredulous that such a vocal opponent of

---

[9] Although two historians claim to have recovered the original plan Charles Pinckney actually submitted to the convention, neither such copy includes the language Petitioners quote. *See* John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 Ann. Rep. Am. Hist. Ass'n 87, 117 (1903) (purporting to have recovered a portion of the Pinckney Plan); Andrew C. McLaughlin, *Sketch of Charles Pinckney's Plan for a Constitution, 1787*, 9 Am Hist. Rep. 735 (1904) (similar).

[10] James Madison, *Appendix 2, Note of Mr. Madison to the Plan of Charles Pinckney, May 29, 1787*, *in* The Papers of James Madison v, vi (Henry D. Gilpin ed., 1840); *see also* Letter from Jared Sparks to James Madison (May 5, 1830), *in* 3 The Records of the Federal Convention of 1787, at 482 (Max Farrand ed., 1911) (reporting that John Quincy Adams told him that Rufus King had questioned the Pinckney Plan before his death).

popular elections would have proposed them in an initial draft of the constitution, Madison pointed out this discrepancy on no less than five occasions in explaining why Pinckney's 1818 draft was a sham. *See* Ulmer, *supra*, at 428.

Petitioners (at 2, 15) quote and cite the Pinckney Plan as it appears in Max Farrand's The Records of the Federal Convention of 1787. But they failed to notice that Farrand himself noted when he published that volume that "it is established beyond all doubt that this draft does not represent Pinckney's original plan." 3 Farrand, Records, at 603-04. Farrand's disclaimer reflected over a century of historical consensus. Since the Founding Era, historians have consistently decried the Pinckney Plan as a "historical lie[]," [11] a "fraudulent document," [12] and a "so-called draft [that] has been so utterly discredited that no instructed person will use it as it stands as a basis for constitutional or historical reasoning." [13] Originalism requires original documents; the Pinckney Plan is not one.

* * *

The overwhelming weight of textual and historical evidence thus shows that the Founding generation actively sought to check state legislatures' power over federal elections, including through state constitutions. In the face of that evidence, Petitioners can rely only on a fraudulent document, atextual readings of

---

[11] Paul Leicester Ford, *Pinckney's Draft of a Constitution*, 60 The Nation, Jun. 14, 1895, at 458, 459.

[12] Clinton Rossiter, *1787: The Grand Convention* 331 n.* (1966).

[13] Jameson, *supra*, at 117.

state constitutions, the idiosyncratic views of cherry-picked individuals, and irrelevant state practice concerning an entirely separate constitutional provision. The text and historical context thus both preclude Petitioner's reading.

II. Subsequent Historical Practice Confirms that State Legislative Regulation of Elections Is Subject to State Constitutional Limits and Judicial Review.

1. Even assuming *arguendo* that the text and original understanding of the Elections Clause were ambiguous, longstanding historical practice conclusively refutes Petitioners' arguments. "Long settled and established practice may have great weight in a proper interpretation of constitutional provisions." *Chiafalo*, 140 S. Ct. at 2326 (quotation marks omitted); *see also, e.g.*, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 520 (2014). *See generally* William Baude, *Constitutional Liquidation*, 71 Stanford L. Rev. 1 (2019). That is because, as Madison explained, "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." The Federalist No. 37, at 236 (James Madison); *cf.* Baude, *supra*, at 36-43 (comparing liquidation to traditional understanding of stare decisis). Such "discussions and adjudications" offer evidence of original meaning, to be sure. More than that, however, courses of deliberate, constitutionally informed practice that have culminated in a settlement can fill gaps in ambiguous

text in a way that carries binding force. Baude, *supra*, at 54.

Over the past two centuries, states have consistently engaged in "discussions and adjudications"—among other things, through (i) state courts reviewing the constitutionality of state election laws and (ii) states adopting by referendum constitutional amendments governing elections. Congress, too, frequently weighed in while (i) evaluating constitutions of states seeking admission to the Union and (ii) judging the qualifications of its members (*i.e.*, adjudicating contested elections). This "long established practice" overwhelmingly confirms that the Elections Clause confers authority on state legislatures subject to state constitutional restraints and judicial review. *Chiafalo*, 140 S. Ct. at 2326.

i. *Judicial Review Under State Constitutional Provisions*. Dating back to the Civil War era, state courts have regularly reviewed—and sometimes struck down—state laws regulating federal elections. These include "laws relating to congressional redistricting, voter registration, absentee voting, secret ballots, and voting machines," Weingartner, *supra*, at 41 & nn.322-326, and more recently, laws concerning "Voter ID, felon disenfranchisement, … polling hours, … ballot access, and campaign finance," *id.* at 42-43 & nn.331-339. To take one example, in 1865, the Supreme Court of Michigan struck down state legislation allowing soldiers to cast out-of-state votes as inconsistent with the state constitution's requirement of in-person voting. *See People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (Mich. 1865). Everything about the case—from its existence to its disposition—is inconsistent with the idea that the Elections Clause

confers arbitrary power on state legislatures to regulate elections. The same is true of challenges to similar quintessential "manner" laws heard and decided in other states around the same time.[14]

For another example, in 1910, the South Dakota Supreme Court rejected an argument that the state's legislature could prescribe election regulations without abiding by South Dakota's constitutional referendum requirement. *State ex rel. Schrader v. Polley*, 127 N.W. 848, 849-52 (S.D. 1910). It explained that notwithstanding the use of the word "Legislature" in the Elections Clause, if the state constitution "has fixed limits, the Legislature cannot transcend them, but must act within the limits prescribed, and if it goes beyond them its action is to that extent absolutely void." Smith, *supra*, at 531 (quoting *Polley*, 127 N.W. 849-52). The inconsistency of this reasoning with Petitioners' theory is obvious. Here, and in dozens of similar cases, *see supra* at 26, state courts explicitly or implicitly rejected the notion that the federal Constitution displaces their power to review election laws.

Against this evidence, Petitioners marshal merely five state cases decided over the span of a century. Pet. Br. 42-43. Five cases cannot tip the historical scales, *see* Baude, *supra*, at 16, especially not where several are at best dubious support for Petitioners' theory. *See* Smith, *supra*, at 519-521 (discussing *In re Opinions of Justices*, 45 N.H. 595, 601 (1864)); *id.* at

---

[14] *See Bourland v. Hildreth*, 26 Cal. 161 (Cal. 1864); *Opinion of the Judges*, 30 Conn. 591 (Conn. 1862); *Morrison v. Springer*, 15 Iowa 304 (Iowa 1864); *Lehman v. McBride*, 15 Ohio St. 573 (Ohio 1863); *State ex rel. Chandler v. Main*, 16 Wis. 398 (Wis. 1863); Weingartner, *supra*, at 41 & nn.320-321 (citing the foregoing).

530 (discussing *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887)); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (rejecting argument, likely on the merits, that elector ballot eligibility law was "discriminatory, unfair, illegal, or unconstitutional").

ii. *State Ballot Initiatives*. For more than a century, virtually all states have utilized ballot initiatives to adopt constitutional provisions regulating federal elections. State constitutional amendments adopted through popular referenda touch on many aspects of federal election regulation, "including registration, primaries, ballots, voting machines, absentee voting, voter ID, and election integrity," substantive voting rights, and redistricting commissions. Weingartner, *supra*, at 39-40 & nn.309-318; *see also AIRC*, 576 U.S. at 822 (describing examples of initiatives in California, Ohio, and Oregon). In many instances, state legislatures have endorsed such amendments by drafting and referring them for popular approval. *See* Weingartner, *supra*, at 45-46 & nn.351-374. There is thus no question that state constitutional limits on federal election regulations have long had "the acquiescence" both "of the people at large" and their state representatives. Baude, *supra*, at 19 (quoting Letter from James Madison to Lafayette (Nov. 1826), *reprinted in* 3 Letters and Other Writings of James Madison 542 (Philadelphia, J.B. Lippincott & Co. 1865)).

iii. *Congressional Approval*. Congress, which possesses "ultimate" authority to regulate elections of its members, *see* The Federalist No. 59, at 362, has also long acted consistent with the understanding that state election laws are subject to state constitutions.

In reviewing state constitutional provisions for purposes of determining admission to the Union, Congress has never rejected a provision regulating federal elections. *See* Weingartner, *supra*, at 53-55 & nn.417-424. In exercising its power to judge the qualifications of its members, *see* U.S. Const. art. I, § 5, cl. 5, the House has consistently accepted arguments to seat or not seat representatives based on state constitutional provisions. *See id.* at 55-59.[15] And, in exercising its own power under the Elections Clause, Congress has assumed the applicability of state constitutional restrictions: After the Civil War, Congress debated extensively whether to make state constitutional "by ballot" voting requirements—already enshrined in many antebellum constitutions, *see* Smith, *supra*, at 489-90—a condition of readmission to the Union. No one at the time suggested that such requirements would have violated the Elections Clause. *See* Weingartner, *supra*, at 52-53.

2. Petitioners purport to justify disregarding two hundred years of post-Founding history by focusing on judicial review under so-called "substantive" constitutional provisions that they describe as "abstract broadly worded commands," such as the "free" and "equal" election guarantees at issue in this case. *See* Pet. Br. 3-4. In their account, cases arising under

---

[15] The comparatively few cases in which the independent state legislature theory was invoked are "equivocal at best as to Congress's views." Weingartner, *supra*, at 60. For example, Petitioner's one contrary example, the *Baldwin v. Trowbridge* case, Pet. Br. 43, is not to the contrary. *See* Smith, *supra*, at 523-25 (examining *Trowbridge* "was not as strong an endorsement of the [Independent State Legislature] Doctrine as has been commonly thought," and "[i]n one important respect, … actually undercuts the" notion that the doctrine was the prevailing view).

what they deem similar provisions are the only relevant evidence in this case. But Petitioners offer no historical support for the substantive/procedural distinction that they frame in (ironically) highly abstract terms. In other words, they do not explain why "substantive" regulations, Pet. Br. 3, were originally understood to offend the Elections Clause while other constitutional provisions were not, or provide guidance as to how to tell the difference. Nor do they ground their specific concerns about state judicial interpretation of "abstract broadly worded commands" in text or history.

Certainly, the Elections Clause itself makes no such distinction between substance and procedure or abstractness or concreteness. *See supra* Part I.A. Textually, "Legislature" either denotes an entity that is constitutionally created, defined, and limited, or one that is not. In conceding that "each State's constitution may properly govern such … questions as whether a bicameral vote is required to enact a law [and] whether the legislation is subject to gubernatorial veto," Pet. Br. 24, Petitioners effectively concede that the latter position is unsupportable. The concession is fatal.

In fact, there is historical evidence of judicial, popular, and Congressional acceptance of constitutional provisions similar to the North Carolina provisions at issue here. To give an example of each: In *Morrison v. Lamarre*, the Supreme Court of Rhode Island considered and rejected an argument that a law regulating voting machines violated a state constitutional requirement that "[a]ll free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the

whole; and the burdens of the state ought to be fairly distributed among its citizens." 65 A.2d 217, 223 (R.I. 1949) (quoting R.I. Const. art. I, § 2 (1843)). In 2014, Illinois adopted by popular ballot initiative a constitutional amendment prohibiting discrimination in elections: "No person shall be denied the right to register to vote or to cast a ballot in an election based on race, color, ethnicity, status as a member of a language minority, national origin, religion, sex, sexual orientation, or income." Ill. Const. art. III, § 8. And Congress admitted Arkansas and Illinois to the Union with constitutional provisions guaranteeing substantive rights like those at issue here. Arkansas's 1836 constitution provided that "all elections shall be free and equal." Ark. Const. art. II, § 5 (1836). And Illinois' 1818 constitution provided that "elections shall be free and equal." Ill. Const. art. VIII, § 5 (1818). None of these developments would make any sense if state legislatures were understood to be somehow bounded by "procedural" restrictions but unbounded by "substantive" constitutional restrictions on election regulations.

For the foregoing reasons, even if the Court concludes that the text and original understanding of the Elections Clause are ambiguous, Petitioners' construction should be rejected based on "[l]ong settled and established practice." *Chiafalo*, 140 S. Ct. at 2326.

CONCLUSION

The Court should affirm the decision of the North Carolina Supreme Court.

Respectfully submitted.

HELEN WHITE
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006

ANTON METLITSKY
Counsel of Record
BRUCE PETTIG
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

October 26, 2022