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.

and

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

Petitioners,

—v.—

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

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTH CAROLINA, THE RUTHERFORD INSTITUTE, AND THE NISKANEN CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 1.7 million members, founded in 1920 and dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court as counsel or *amicus curiae* in numerous cases involving electoral democracy, including *Smith v. Allright*, 321 U.S. 649 (1944), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), and *Merrill v. Milligan*, No. 21-1086 (U.S. argued Oct. 4, 2022).

The American Civil Liberties Union of North Carolina ("ACLU of North Carolina") is a statewide affiliate of the national ACLU. The ACLU of North Carolina is a nonprofit, nonpartisan organization with around 30,000 members. Since 1965, the ACLU of North Carolina has been at the forefront of efforts to protect the federal and state constitutional and civil rights of North Carolinians, particularly those who have been historically marginalized. Among its core priorities is the protection of the right to vote.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in

[1] The parties have submitted blanket letters of consent to the filing of amicus curiae briefs. No counsel for any party has authored this brief in whole or in part, and no party or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Niskanen Center is a nonprofit, nonpartisan public policy think tank that advocates for the rule of law and free market solutions to promote growth and economic liberty. It is named for William A. Niskanen, who served on the Council of Economic Advisers to President Ronald Reagan and later became chairman of the Board of Directors of the Cato Institute.

INTRODUCTION AND SUMMARY OF ARGUMENT

Three years ago, in *Rucho v. Common Cause*, this Court invited state courts to apply state constitutional law to address the problem of partisan gerrymandering. State courts responded, hearing challenges to congressional maps enacted by state legislatures dominated by each of the major political parties—and in some cases, striking down such maps as partisan gerrymanders that violated state constitutional law.

The North Carolina Republican legislators whose map was found to violate the North Carolina

Constitution now ask the Court to rescind its invitation. But the Court was right to point to state constitutional checks in *Rucho*. There is no basis in the Constitution to abandon that federalist approach.

The legislators' unprecedented proposal is contrary to the Constitution's plain meaning. It asks the Court to eliminate virtually all state judicial review of state legislative enactments touching upon federal elections. It asks this Court to declare that when state legislatures make rules for federal elections, they operate outside the very charters that create them. And it claims that these radical results follow merely because the Elections Clause uses the word "legislature."

The legislators' theory finds no support in the Elections Clause's ordinary and original meaning. At the Founding, as today, the rules set down in legislatures' fundamental charters were understood to constrain them; that's the very point of a constitution, after all. No principle of American constitutional government is more basic. The idea of a legislature acting "independently" of the written charter that constitutes and limits it is contrary to our constitutional tradition, and dangerously close to the unlimited parliamentary supremacy that we rebelled against. Petitioners' theory ignores the Framers' express intent to cabin state legislatures' discretion. Just as the Framers' use of the word "Congress" does not mean that our federal legislature is above the U.S. Constitution, so, too, their use of the term "legislature" does not place state legislatures above their own state constitutions.

The petitioner legislators' theory also sharply contravenes important principles of federalism. At

its core, federalism protects states' ability to structure their own governments, including by defining the relationships between coordinate branches and the limits on state legislative authority. But the petitioners' theory would *require* federal courts to routinely intervene in state court proceedings concerning quintessentially state law issues. And they would do so in the context of political disputes (and, potentially, by applying nebulous standards regarding whether a given state constitutional provision is procedural or substantive, or general or specific). The costs to the federal courts' legitimacy and to basic principles of federalism would be severe.

In addition to abrogating *Rucho*'s assurance that state courts play an important role in limiting partisan gerrymandering, the proposed independent legislature theory would have strange and far-reaching consequences for other state election laws. State constitutions often have provisions that apply to electoral practices like mail-in voting, voter registration requirements, the use of ranked choice voting, or other reforms. The theory the legislators advance here would render a wide array of potential rules for federal elections unreviewable by state courts, freeing state legislatures to ignore their own constitutions in those areas as well. The sweeping practical consequences of petitioners' proposed rule also counsel against their radical new reading of the Constitution.

The conservative and common-sense approach in this case is also the correct one: State legislatures are subject to the state constitutions that charter them and define their powers. Nothing in the plain meaning of the Elections Clause or this Court's precedents alters that fundamental truth. Here, as

elsewhere, state legislatures must follow the rules that their own charters impose, with whatever terms the People of a given state have chosen.

ARGUMENT

I. STATE LAW REMEDIES FOR PARTISAN GERRYMANDERING ARE CONSISTENT WITH THIS COURT'S DECISIONS AND FEDERALISM PRINCIPLES.

Three years ago, this Court invited state courts to enforce state law as an important check on partisan gerrymandering. State courts have begun to do just that, offering important and workable solutions to that undemocratic practice in the absence of federal intervention. The petitioner legislators' call to short-circuit that process based on a radical and counterintuitive reading of the Elections Clause should be rejected.

A. In *Rucho*, This Court Invited State Courts to Address the Partisan Gerrymandering Problem.

In *Rucho v. Common Cause*, this Court held that federal courts cannot adjudicate partisan gerrymandering claims because the *federal* Constitution does not provide "judicially manageable standards for deciding such claims." 139 S. Ct. 2484, 2491 (2019). The question was never whether partisan gerrymandering is constitutionally problematic, but instead whether "the solution lies with the *federal* judiciary." *Id.* at 2506 (emphasis added). Indeed, this Court has repeatedly acknowledged that partisan gerrymandering is deeply troubling—that a system where politicians draw

districts to entrench one side in power is "incompatible with democratic principles," and "leads to results that reasonably seem unjust." *Id.* As Justice Scalia noted in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in a democracy "a majority of individuals must have a majority say." *Id.* at 292; *see also id.* (acknowledging "the incompatibility of severe partisan gerrymanders with democratic principles"); *accord Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 787 & n.1 (2015).

And so, this Court in *Rucho* stressed that its ruling with respect to federal justiciability did not "condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. On the contrary, "[t]he States" were "actively addressing" partisan gerrymandering "on a number of fronts." *Id.*

The main alternative this Court identified to redress partisan gerrymandering was judicial review by state courts enforcing state law. *Rucho* pointed to a 2015 Florida Supreme Court decision striking down a congressional districting plan under Florida's constitution as its lead example of effective state action. 139 S. Ct. at 2507 (citing *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (2015)). The Court also cited anti-partisan-gerrymandering provisions in the state constitutions of Missouri, Iowa, and Delaware. *Id.* at 2507–08. The message was clear: Notwithstanding federal courts' limitations, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." 139 S. Ct. at 2507.

Rucho thus looked to our federalist system's promise to protect and promote democracy. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 221 (2011);

United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (discussing states' "role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). This Court has long respected the independent role of state courts within that system. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *accord Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also generally* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (describing the way constitutional decision-making by state courts shapes the development of constitutional law within our system of federalism). Accordingly, *Rucho* invited state courts to consider for themselves whether state law could address partisan gerrymandering.

There was nothing novel about the *Rucho* Court's invocation of state law limits. State courts have reviewed state legislation touching upon districting and elections for compliance with state constitutions for decades. *See, e.g.*, *Brown v. Saunders*, 166 S.E. 105, 111 (Va. 1932) (striking down malapportioned congressional districting plan under state constitution, noting similar practices by state courts in 18 other states); *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932) (similar); *see also Smiley v. Holm*, 285 U.S. 355, 367 (1932) (affirming Minnesota Supreme Court's ruling that districting plan was invalid where the governor had exercised veto power bestowed by state constitution). As the Virginia Supreme Court stated 90 years ago, "[w]hen a State legislature passes an apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be

determined by the court when properly raised." *Brown*, 166 S.E. at 107. That state courts apply state law to review state legislation is, in short, "[l]ong settled and established practice." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020); *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("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.").

B. State Courts Have Enforced State Constitutions to Police Partisan Gerrymandering, as *Rucho* Contemplated.

Since *Rucho*, state law and state courts have emerged as important constraints on partisan gerrymandering. During the current redistricting cycle, congressional maps enacted by both Democratic- and Republican-led legislatures have been challenged in state courts in at least ten states, based on an array of state constitutional and statutory provisions.

In a number of states, state courts have struck down maps as impermissible gerrymanders. For example, in New York, after the state's independent redistricting commission deadlocked, the Democratic-majority legislature enacted a map that a trial court later held "violated the [state] constitutional prohibition on partisan gerrymandering by packing [R]epublican voters into four districts while ensuring there were 'virtually zero competitive districts.'" *Harkenrider v. Hochul*, No. 60, --- N.E.3d ----, 2022 WL 1236822, at *3, *11 (N.Y. Apr. 27, 2022). The state courts then appointed a special master who ultimately

drew a new congressional map. *Id.* at *11; *see also Harkenrider v. Hochul*, No. E2022-0116CV, 2022 WL 1951609 (N.Y. Sup. Ct. May 20, 2022) (releasing special-master-drawn maps).

State courts also struck down maps enacted by Democrats in Maryland, and by Republicans in North Carolina and Ohio, holding that they were unlawful partisan gerrymanders under state law. *See Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *43 (Md. Cir. Ct. Mar. 25, 2022) (2021 Maryland congressional plan held "an extreme gerrymander that subordinates constitutional criteria to political considerations"); *Adams v. DeWine*, 195 N.E.3d 74, 100 (Ohio 2022) (holding that Ohio's congressional plan was "infused with undue partisan bias" and "fail[ed] to honor the constitutional process set out in Article XIX" of the Ohio Constitution, without exercising remedial jurisdiction); *Harper v. Hall*, 868 S.E.2d 499, 509–510 (N.C. 2022) (upholding trial court finding that enacted maps "subordinated traditional neutral redistricting criteria in favor of extreme partisan advantage"). Challenges to congressional maps as unlawful partisan gerrymanders in Florida, Kentucky, New Mexico, and Utah are ongoing.[2]

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[2] *See Black Voters Matter v. Lee*, No. 2022-CA-000666 (Fla. App. Ct. May 13, 2022); *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022); *Republican Party of N.M. v. Oliver*, No. D-506-CV-2022-00041 (N.M. D. Ct. Jan. 21, 2022); *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022). In addition, and as discussed below, state law partisan gerrymandering challenges were also pursued in Kansas and New Jersey. *See Rivera v. Schwab*, 315 Kan. 877 (Kan. 2022); *Matter of Cong. Dists. by N.J. Redistricting Comm'n*, 249 N.J. 561 (2022).

These state courts each relied on the authority granted to them by their respective state constitutions to review state legislation, as well as substantive state constitutional and statutory provisions that prohibited excessive gerrymandering in the districting process.

In New York, for example, courts have jurisdiction to review apportionment challenges under both the state constitution and state statutory law. *See* N.Y. Const. art. III, § 5 ("An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe"); N.Y. Unconsol. Laws § 4221 (authorizing "any citizen" of the state to seek judicial review of a legislative act establishing electoral district). In striking down New York's congressional map, the New York Court of Appeals relied on the New York Constitution's express prohibition on partisan gerrymandering, N.Y. Const. art. III, § 4(c)(5) ("Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties"). *See Harkenrider*, 2022 WL 1236822, at *4–*13.

Similarly, the Supreme Court of Ohio rejected a legislatively-enacted congressional plan as a partisan gerrymander under the Ohio Constitution's prohibition on maps that "unduly favor[] or disfavor[] a political party or its incumbents," Ohio Const. art. XIX, § 1(c)(3)(a), among other provisions of state law. *See Adams*, 195 N.E.3d at 77–100; *see also Neiman v. LaRose*, Nos. 2022-0298 & 2022-0303, 2022 WL 2812895 (Ohio Jul. 19, 2022). In doing so, the Ohio court relied on an explicit jurisdiction-granting

provision in the state constitution to decide disputes over challenged congressional maps. *See* Ohio Const. art. XIX, § 3(A).

Other state courts have struck down congressional maps as partisan gerrymanders under state constitutional provisions that require free elections or neutral districting. For example, a Maryland court invalidated its state's congressional map, enacted by a Democratic-led legislature, as "an 'outlier,' an extreme gerrymander that subordinates constitutional criteria to political considerations," relying on a Maryland constitutional provision mandating compactness and "due regard" to "boundaries of political subdivisions," Md. Const. art. III, § 4, as well as the guarantees of free elections and equal protection in the Maryland Declaration of Rights, Arts. 7 & 24. *See Szeliga*, 2022 WL 2132194, at *43. Similarly, in this case, the North Carolina Supreme Court set aside its state's congressional map as an unlawful partisan gerrymander under North Carolina constitutional provisions guaranteeing free elections, equal protection and free speech and free assembly, drawing on powers of constitutional review that it has exercised for centuries and that were accorded to it by the North Carolina General Assembly itself. *Harper*, 868 S.E.2d at 510–11, 559–60 (citing N.C. Const. art. I, §§ 10, 12, 14, 19 and *Bayard v. Singleton*, 1 N.C. 5 (N.C. 1787)); *see* N.C. Gen. Stat. § 120-2.4 (2018) (state courts may identify "defects" with a districting plan enacted by the General Assembly and "impose an interim districting plan" if none is enacted by the General Assembly).

In other instances, state courts have declined to intervene. The New Jersey Supreme Court dismissed a gerrymandering challenge based on the procedural

due process guarantees of the New Jersey and U.S. constitutions to a congressional map enacted by a majority-Democratic legislature. *Matter of Cong. Dists. by N.J. Redistricting Comm'n*, 249 N.J. 561 (2022). The Kansas Supreme Court, meanwhile, held that provisions of the Kansas constitution similar to the federal equal protection clause did not provide a basis to strike down Kansas' congressional map as a partisan gerrymander favoring Republicans. *Rivera v. Schwab*, 315 Kan. 877, 906 (Kan. 2022).[3]

This is, in short, a story of federalism at work. State courts, vested with the power to exercise judicial review under state law, have stymied some of the worst partisan gerrymanders without federal judicial intervention.

In the face of that success, the petitioner legislators ask this Court to renege on the promise of *Rucho*. Their argument, if accepted, would threaten the traditional constitutional role of state courts in reviewing state legislation whenever such legislation touches on federal elections. Adopting those

[3] State courts are not the only state entities working to curb excessive partisan gerrymandering. States with strong independent commissions like California and Arizona are producing non-partisan congressional maps, and more states are enacting such commissions. Notably, however, state courts have also been called upon to adjudicate state law disputes regarding the performance of independent commissions. *E.g.*, *League of Women Voters of Mich. v. Indep. Citizens Redistricting Comm'n*, 971 N.W.2d 595 (Mich. 2022). And state courts have also drawn congressional maps in the 2020 cycle where the political branches (i.e., the legislature and the governor) have deadlocked and failed to produce any plan via the legislative process. *See Carter v. Chapman*, 270 A.3d 444, 450 (Pa. 2022), *cert. denied sub nom. Costello v. Ann Carter*, No. 21-1509, --- S. Ct. ----, 2022 WL 4651817 (U.S. 2022).

arguments risks "condemn[ing] complaints about districting to echo into a void"—exactly the result that *Rucho* disclaimed. 139 S. Ct. at 2507.

II. PETITIONERS' INDEPENDENT STATE LEGISLATURE THEORY IS CONTRARY TO THE CONSTITUTION'S PLAIN LANGUAGE AND THE FRAMERS' DESIGN.

Rucho's assurance that state court adjudication of state constitutional principles can help fix the problem of partisan gerrymandering accords with the Elections Clause's text, purpose, and design. This Court should reaffirm that promise, which rests on basic constitutional principles respecting federalism and checks and balances. There is no reason to believe that the Framers intended to upend those principles by using the word "legislature" in the Elections Clause.

Petitioner legislators' alternative proposal contravenes the Elections Clause's ordinary meaning and the Framer's design. They argue that the mere use of the word "legislature" in the Elections Clause means that when state legislatures enact laws that apply to federal elections, they do so as standalone entities, free from constraints the state constitution places on their lawmaking power. Under that theory, federal courts will be tasked with reordering the internal state-law-defined relations between the various branches of state government and overriding state constitutional rulings by state high courts, whenever a controversy touches upon state laws affecting federal elections. This disruptive theory would have sweeping effects beyond partisan gerrymandering, conferring an immunity from normal judicial review on a wide array of state

election rules that might otherwise violate the terms of a state's own constitution.

A. Petitioners' Theory Contravenes the Ordinary Meaning of the Elections Clause.

1. The ordinary meaning of the term "legislature" at the time of the Constitution's adoption was the lawmaking power of the state, as defined and circumscribed by the state constitution. Contemporaneous dictionaries consistently defined a legislature as "[t]he power that makes laws." S. Johnson, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792); *accord* T. Sheridan, 2 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (same); N. Webster, COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 174 (1806) (same).[4] And in America, as the Framers and their contemporaries understood it, all lawmaking power necessarily flows from the People, and is exercised only within the framework of the written constitutions that the People ordain and establish.[5] *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819).

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[4] *See also Ariz. State Legislature*, 576 U.S. at 813 (collecting these sources and others).

[5] All state governmental entities thus derive their powers from state constitutions. *E.g.*, *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (explaining that when "[t]he Framers split the atom of sovereignty" they created a system in which each "order[] of government" has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it"); *accord Cook v. Gralike*, 531 U.S 510, 519 (2001).

This conception of constitutional self-government expressly rejected the English system of parliamentary supremacy. Here, for example, is how Justice Paterson, presiding in an original jurisdiction trial in 1795, described to a jury the nature of "legislatures"—a Founding Father speaking to men who had lived through the ratification:

> [I]n England, the authority of the Parliament runs without limits, and rises above controul. … [T]he validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. … In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.
>
> What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. … [I]t is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. …
>
> What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. … The Constitution fixes limits to the exercise of legislative

> authority, and prescribes the orbit within which it must move.

Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308, 1 L. Ed. 391 (C.C.D. Pa. 1795).

Petitioners' suggestion of a "legislature" unbound by its own constitution is disturbingly close to the limitless authority exercised by Parliament. It would have been anathema to the founders. In our system, legislatures do not exercise lawmaking power outside of the constitutions from which they emanate, as this Court has repeatedly held. *See Smiley*, 285 U.S. at 367 (a legislature's "exercise of [lawmaking] authority must be in accordance with the method which the state has prescribed for legislative enactments").[6]

The North Carolina legislators' argument here is almost identical to the one advanced in *Smiley* almost a century ago, by legislators who argued that "[t]he provisions of the constitution of the state cannot take the power from the legislature of the state." Resp. Br. at 24, *Smiley v. Holm*, 285 U.S. 355 (1932) (No. 617). *Smiley* involved not only the gubernatorial veto of a redistricting plan, but also a state supreme court's adjudication of the subsequent dispute regarding the validity of the veto. 285 U.S. at 367. As *Smiley* shows, judicial enforcement is necessary to

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[6] *Accord McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (in Article II Electors Clause context, holding that "[t]he [State's] legislative power is the supreme authority, except as limited by the constitution of the State…."); *see also Chicago, B. & Q.R. Co. v. Otoe Cnty.*, 83 U.S. 667, 673 (1872) ("The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question.").

give meaning to *any* state constitutional boundary on legislative action, including both procedural and substantive rules that govern lawmaking.

There is no reason to believe that the Framers departed from the ordinary understanding of how legislative power operates in our constitutional system in enacting the Elections Clause. Had they intended to elevate state legislatures above the very charters that create and define them, contravening the core principles of government that they had just fought to establish, there would be some evidence of that deeply counterintuitive intent. There is none.

2. Petitioners' proposed reading of the Elections Clause also thwarts the Framers' expressly stated purpose for the Clause, which was to ensure substantial checks on state legislatures.

At the Convention in Philadelphia and in the debates that followed, Madison expressed concern that state legislatures would faithlessly manipulate election rules to serve "their local conveniency or prejudices." *E.g.*, Records of the Federal Convention of 1787 in 2 THE FOUNDERS' CONSTITUTION 248–49 (worrying that state legislatures "would take care so to mold their regulations as to favor the candidates they wished to succeed"). Others, including James Wilson and John Jay, openly worried that States might simply fail to send members to Congress (as Rhode Island had only recently done at the Constitutional Convention). *See, e.g.*, 2 THE FOUNDERS' CONSTITUTION 250–251 (Wilson at the Pennsylvania ratifying convention), 260 (King at the Massachusetts convention), 268 (Jay at the New York convention), 271–273 (Iredell and Davie at the North Carolina Convention). The Framers accordingly

empowered Congress not only to "alter" existing state election rules, but also to "make" such rules from whole cloth if the states abdicated their responsibility or otherwise went astray. U.S. Const. art. I, § 4; *see* The Federalist No. 59 (Hamilton) (explaining that it would have been dangerous to "leave the existence of the Union entirely at their [i.e., the state legislatures'] mercy").

Constraining potentially destructive actions by state legislatures was therefore of preeminent importance to the Framers. To be sure, *one* structural mechanism they used to check state legislatures' worst impulses was empowering Congress to directly regulate federal elections. *See* Pet.'s Br. 18. But it is not the only one. The Framers believed in checks and balances as an essential method of guarding against mis-government, and one of the most foundational of those is that all state governmental entities are controlled by their founding charters. Petitioners offer no reason to believe that the Framers loudly announced the paramount need to rein in the state legislatures from mischief while silently cutting those same legislatures loose from the checks and balances supplied by their own state charters.

3. The legislators' arguments would also lead to absurd results that would do violence to the text of the Constitution. *Cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (explaining that courts must strive to "give some alternative meaning" to terms when literal interpretation "produces an absurd … result").

As noted already, the Elections Clause refers not only to state legislatures but to "the Congress," which "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. Yet petitioners do not suggest that the Elections Clause empowers an "Independent Congress" to promulgate federal election rules not subject to review by this Court or the lower federal courts. Indeed, this Court rejected that exact proposition in *Rucho*. *See* 139 S. Ct. at 2495 ("Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree."). And this Court in recent years has seen fit to review and, in some instances, strike down election-related rules promulgated by Congress that apply to federal elections. *See generally, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). *Cf. Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

Petitioners suggest that state legislatures are subject to the limitations imposed by the federal Constitution when they exercise ostensible Elections Clause powers. Pet.'s Br, 23. But *Smiley* squarely rejected the peculiar notion that a state legislature "act[s] ... under the power granted by" the Elections Clause" and not under state law when regulating federal elections. 285 U.S. at 364. And the suggestion that the Elections Clause was meant to transpose federal constraints onto the activities of state legislatures also fails on its own terms. Before the Fourteenth Amendment, the federal Constitution's substantive limitations on lawmaking did not bind the states *at all*. *See, e.g.*, *Barron v. City of Baltimore*, 32 U.S. 243, 251 (1833) (Bill of Rights was "not applicable to the legislation of the states"). Only by virtue of the Fourteenth Amendment's adoption, and its Due Process Clause's eventual incorporation of the Bill of

Rights, did that change. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 763–64 (2010) (discussing incorporation doctrine's development). When the Elections Clause was drafted and ratified, the Framers cannot have understood it to impose an otherwise inapplicable set of standards on the state legislatures' actions. Petitioners' reading would thus require the Court to conclude that the Framers affirmatively sought to place state legislatures above *any* constitutional constraints—state or federal.

The better reading of the Elections Clause—the one that respects both its ordinary and original meaning and basic tenets of constitutional government—is that state legislatures and Congress are empowered to set election rules, but must do so, as elsewhere, within the confines of the constitutions that respectively bring them into existence and define their lawmaking powers.

B. Petitioners' Theory Contravenes Important Principles of Federalism.

1. The Elections Clause must be read in harmony with the Constitution's federalist design, whereby "States retain autonomy to establish their own governmental processes." *Ariz. State Legislature*, 576 U.S. at 816–17 (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999) and The Federalist No. 43 (Madison)).[7] That autonomy extends to defining the

[7] This Court's decision in *Arizona State Legislature* confirms that state lawmaking on the time, place, and manner of congressional elections is conducted in whatever way the state constitution provides for the exercise of lawmaking power. *See* 576 U.S. at 808. But even if the result in *Arizona State*

role of state judges and the limits of state legislative power. *E.g.*, *Gregory*, 501 U.S. at 458–460. But embracing petitioners' independent legislature theory would severely undermine these principles.

Federalism principles ordinarily counsel federal courts against interposing themselves when state courts interpret state law. *E.g.*, *Younger*, 401 U.S. at 44. Nor may federal courts alter the internal rules that govern states' lawmaking processes. *E.g.*, The Federalist No. 43 (Madison) (the Constitution does not provide "pretext for alterations in the State governments, without the concurrence of the States themselves"); *see also Alden*, 527 U.S. at 752. Rather, in our system, "States retain broad autonomy in structuring their governments and pursuing legislative objectives." *Shelby Cnty.*, 570 U.S. at 543. And federalism principles apply with equal force in the Elections Clause context. *Ariz. State Legislature*, 576 U.S. at 816–17, *id.* at 859 (Scalia, J., dissenting) (stating view that legislature lacked standing to bring Elections Clause challenge because "[the Framers] would be all the more averse to unprecedented judicial meddling by federal courts with the branches of their state governments" (emphasis omitted)); *see also Growe v. Emison*, 507 U.S. 25, 33 (1993) (Scalia, J., for the Court) ("[T]he Court has required federal judges to defer consideration of disputes involving

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Legislature had been different, it would not matter. Whether or not a commission can supplant the legislature as the entity that conducts the redistricting process in the first instance (as the Court held it can consistent with the Elections Clause in *Arizona State Legislature*) the other aspects of the lawmaking process that might exist under the state constitution, such as the gubernatorial veto, or constitutional review by state courts, would still apply.

redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." (emphasis in original)).

Our system allows diverse state constitutions and statutes to define the scope of state legislative power, set the extent of state court judicial review, and arrange the balance between the coordinate branches of state government in different ways. That may mean that in one state a state court could conclude that certain controversies, such as partisan gerrymandering challenges, are nonjusticiable under their own state constitution—as the Kansas Supreme Court did earlier this year. *See Rivera*, 315 Kan. at 906. Another state court might conclude, based on a different set of state constitutional and statutory provisions, that judicial review is proper and a remedy for a violation of state law is required—as the Supreme Court of North Carolina did here, or as the Court of Appeals did in New York. *See Harper*, 868 S.E.2d; *see also Harkenrider*, 2022 WL 1236822, at *11.

But the petitioner legislators' theory, if accepted, would replace that system with a one-size-fits-all model of unprecedented legislative supremacy in which state court judicial review is heavily curtailed if not outright eliminated in the federal elections context. It would require federal judges to intervene in state court litigation on state law issues and to block state courts from adjudicating state constitutional claims involving state election rules, whenever they might touch on federal elections. It is difficult to imagine a proposed course that is less respectful of federalism, or more needlessly disruptive of the existing federal-state balance. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957)

(Frankfurter, J., concurring in result) ("It would make the deepest inroads upon our federal system for this Court [] to hold that it can determine the appropriate distribution of powers and their delegation within the … States."); *accord Ariz. State Legislature*, 576 U.S. at 854 (Scalia, J., dissenting) ("Disputes between governmental branches or departments regarding the allocation of political power" under state constitutions are not cognizable by federal courts).

The mere presence of the word "legislature" in the Elections Clause does not abrogate the Constitution's guiding structural principles. Nor does it merit the instantiation, hundreds of years after the ratification, of a new, invasive role for federal courts policing ordinary state court review of state laws.

2. If the Elections Clause truly granted state legislatures super-constitutional prerogatives as petitioners suggest, federal courts would be required to supervise state judges' activities in most any elections-related case. That new supervisory role would amount to the type of "unprecedented expansion of [federal] judicial power" that concerned this Court in *Rucho*. 139 S. Ct. at 2507. It would insert federal courts even more deeply "into one of the most intensely partisan aspects of American political life." *Id.* And the federal courts' supervision of their state counterparts "would be unlimited in scope and duration … recur[ring] over and over again around the country" with each change in the election laws, including but not limited to the decennial redistricting process. *Id.*

Nor would some more limited version of the petitioner legislators' theory solve the problem. Some have suggested a distinction between "general" and

"specific" provisions of state constitutions—such that state judicial review based on "specific" rules is permissible, but review based on "general" ones is not. *See* Amicus Br. of N.Y. Voters at 5–14 (arguing for a "clear statement rule" allowing state court review in some cases); *see also* Pet.'s Br. at 2 (suggesting the Elections Clause prevents state court judicial review on the basis of "vaguely-worded state-constitutional clauses"). But this purported "specific-general" distinction is not grounded anywhere in the text of the Elections Clause. And there are no clear guidelines for deciding when a particular substantive provision in a particular state constitution is sufficiently "specific" that state courts may use it as a basis to invalidate a legislatively enacted districting plan or other election rule. In *Rucho* this Court emphasized the need to remove federal courts from politically-tinged matters lacking "a limited and precise standard that is judicially discernible and manageable." 139 S. Ct. at 2502. Even the least expansive versions of petitioners' theory ask the Court to do the opposite.

Others, seemingly including petitioners, *see* Pet.'s Br. 24, suggest that the "procedural" constraints on lawmaking from state constitutions (for example, the application of the gubernatorial veto) may apply consistent with the Elections Clause, but that "substantive" constraints on lawmaking (such as state constitutional districting rules requiring contiguity or compactness, or prohibitions on partisan favoritism) may not. This divide between "procedural" and "substantive" constitutional provisions also finds no support in the word "legislature," and would cause similar boundary-drawing problems. And in any case, petitioners offer no principled basis for treating

procedural and substantive constitutional constraints differently.

Petitioners' own argument undermines the basis for such a procedural-substantive distinction. They argue that the use of the term "legislature" in the Elections Clause means that state legislatures exercise purely federal powers when they make federal election rules. *E.g.*, Pet.'s Br. 2–3, 23. But if that were so, it is unclear how state constitutions could impose *any* constraints—procedural or otherwise—on the operations of such federal actors. *See, e.g.*, *McCulloch*, 17 U.S. at 435. And in any case, as a matter of text and ordinary meaning, the mere use of the term "legislature" does not imply the existence of an exotic constitutional hybrid that is bound by state law for procedural matters but only federal law (or no law at all) for substantive matters.

Still others suggest that the Elections Clause does not prohibit state judicial review as such, but that it prevents state judges from imposing remedies, at least in the districting context. *See* Baude & McConnell, "The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case," THE ATLANTIC (Oct. 11, 2022). That approach is more respectful of state constitutional government, but it would still improperly diminish the power of state courts to ensure effective remedies for violations of state law in certain circumstances. Courts generally must afford legislatures an opportunity to draw a new map where a constitutional defect is found, but what is a court to do where the legislature refuses to correct its own constitutional violations? *See Growe*, 507 U.S. at 37 (federal court erred in enjoining state court from enacting remedial congressional districts). And in any event, that approach would not change anything

about the correct result in this case, where the North Carolina General Assembly has itself authorized state courts to "impose an interim districting plan" when the legislature does not remedy the defects in its initially enacted plan. N.C. Gen. Stat. § 120-2.4 (2018).

The simplest and safest course is the one that accords with the Elections Clause's ordinary meaning and this Court's precedents: The Court should reaffirm that state lawmaking is subject to the constraints imposed by state constitutions, regardless of the subject matter. State court overreach can be reined in by the People and their legislatures via the political process. That is especially true in a state like North Carolina, where the State Supreme Court is itself an elected body accountable to the People.

To be sure, the Elections Clause might well be violated were a state court to entirely abandon its judicial role under the state constitution. In that case, the state court could not be said to have engaged in whatever judicial review of legislative action the state's fundamental charter authorizes. This Court's cases provide workable analogues from other contexts that could support such a standard for true outliers. *E.g.*, *United States v. Leon*, 468 U.S. 897, 923, 926 (1984) (describing exception to good faith rule where a magistrate has "abandoned his detached and neutral role" or "wholly abandoned his judicial role"). *Cf. Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886–87 (2009) (holding state court decision invalid based on appearance of corruption and explaining that, with sufficiently "extreme facts," "the probability of actual bias rises to an unconstitutional level"). Under such an approach, the Elections Clause would respect rather than undermine basic federalism

principles. But short of such extreme examples, federal courts should not intrude on state constitutional review of state laws and aggrandize a new and expansive role for themselves in the state lawmaking process, merely because the Constitution uses the term "legislature."

C. Petitioners' Theory Threatens to Open a Pandora's Box of Unreviewable State Election Rules.

Besides doing violence to the constitutional text and basic tenets of self-government and federalism, the practical consequences of embracing petitioners' novel theory would be disastrous.

1. Accepting the legislators' theory would immediately greenlight extreme partisan gerrymanders. That would be bad enough. Unchecked politicians in both Democratic- and Republican-controlled states would be free to eliminate competition to the maximum possible extent, a result that this Court has acknowledged is fundamentally contrary to democratic principles. *See supra* pp. 5-13.

Practical experience confirms that without some independent check, politicians will aggrandize their own partisans and punish their opponents. "The first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). New York illustrates the point: In 2014, the state's voters enacted an independent commission and other districting reforms by constitutional amendment. Under that provision, the commission drew a map and submitted it to the legislature.

Harkenrider, 2022 WL 1236822, at *2–*3. However, the legislature voted the map down, and then, when the commission deadlocked on another draft, enacted its own map. *Id.* The New York Court of Appeals held that the legislatively-enacted maps were "drawn to discourage competition," and characterized them as an effort to "nullify" voters' successful anti-gerrymandering revisions to the New York Constitution. *Id.* at *9–*10. As noted above, other state courts have similarly enforced state constitutional prohibitions on partisan gerrymandering to strike down maps adopted by both Democratic- and Republic-led legislatures.

The harm from rampant partisan gerrymandering would be significant. Districts that are drawn with algorithmic precision to eliminate competition and ensure the election of entrenched politicians are not what the Framers intended. They saw elections as an important check on legislators, and wanted members of the House of Representatives in particular to face the prospect of defeat frequently, lest they forget the source of their authority. *See* The Federalist No. 57 (Madison) (explaining that members of the House must have "an habitual recollection of their dependence on the people.").

2. Partisan gerrymandering is just the tip of the iceberg. Petitioners' theory would essentially immunize from ordinary state constitutional review all manner of election rules and reforms from across the political spectrum, from mail voting changes, to paper ballot requirements, to the adoption of instant runoff voting and proportional representation. If petitioners are right, then the adoption of any of these laws would also be unchallengeable in state court.

Take mail and absentee voting. The majority of states now have no-excuse mail ballot voting, and a number of states have changed their mail and absentee ballot laws in recent years. Indeed, some expansions of mail ballot voting have been challenged under various state constitutional provisions that restrict the manner of voting. Case in point: the Delaware Supreme Court recently struck down a mail ballot statute passed by the legislature, holding that the new law was inconsistent with the state constitution. *Albence v. Higgin*, No. 342, 2022, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022); *see also McLinko v. Dep't of State*, 270 A.3d 1243, 1260 (Pa. Commw. Ct. 2022) (similar), *rev'd*, 279 A.3d 539, 543 (Pa. 2022). A New York court also recently struck down elements of New York's absentee ballot process pursuant to the New York Constitution in a suit brought by state Republicans. Decision and Order, *Amedure v. State of New York*, Index. No. 2022-2145, NYSCEF Dkt. No. 140 (Sup. Ct. Saratoga Cnty. Oct. 21, 2022).

But if petitioners' theory is correct, then the Elections Clause empowers state legislatures in places like Delaware and New York to override the state judiciary's interpretation of the state constitution in order to expand voting by mail, at least for federal elections. And the same rule would also insulate from state constitutional review the establishment or expansion of early voting before Election Day, online voting, or other measures. *See, e.g.*, *Lyons v. Sec'y of Commonwealth*, 192 N.E.3d 1078, 1089 (Mass. 2022) (early voting statute consistent with state constitution); *Lamone v. Capozzi*, 912 A.2d 674, 687 (Md. 2006) (early voting statute violated state constitution).

Or consider the adoption of reforms such as same-day or automatic voter registration. Such schemes have been challenged in state courts as inconsistent with state constitutional rules governing voter registration; for example, the Delaware Supreme Court just struck down a legislatively-enacted same-day registration scheme as inconsistent with the state constitution. *See Albence*, 2022 WL 5333790, at *1; *see also, e.g.*, *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979, 988 (Ohio 2008) (discussing provision of Ohio Constitution requiring that a voter have "been registered to vote for thirty days"). But again, under petitioners' theory, state legislatures may alter those and other voter registration rules for purposes of federal elections without regard to the requirements of state constitutions.

Next consider the adoption of ranked choice voting and other alternative voting methods. Maine and Alaska have adopted those methods for use in their elections, including elections for Congress. And ranked choice voting has also been the subject of state court constitutional litigation. For example, in Maine the State Supreme Court initially issued an advisory opinion concluding that ranked choice voting violated plurality vote provisions in the state constitution, *Opinion of the Justices*, 162 A.3d 188, 209–212 (Me. 2017), but later allowed ranked choice elections to go forward after changes were made to the law, *Jones v. Sec'y of State*, 238 A.3d 982, 984 (Me. 2020). *See also Kohlhaas v. State of Alaska*, --- P.3d ----, 2022 WL 12222442 (Alaska Oct. 21, 2022) (reviewing and upholding ranked choice system under state constitution); Pildes & Parsons, *The Legality of Ranked-Choice Voting*, 109 Cal. L. Rev. 1773, 1776 (2021) (cataloguing various plurality vote state

constitutional provisions). Under petitioner legislators' theory, the legislature's decision to enact ranked choice voting, or any other form of voting, for Congress would not be subject to state constitutional limitations.

This Court should not open the Pandora's Box of legislatures unmoored from their own state charters. The predictable result of petitioner legislators' radical proposal will be a dramatic ramp-up in partisan gerrymandering—but the unpredictable results could be even more deleterious.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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