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 SUPREME COURT OF NORTH CAROLINA

BRIEF OF AMICI CURIAE SCHOLARS OF STATE CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici, identified in Appendix A, are 12 leading scholars and teachers of state constitutional law. Amici have a professional interest in ensuring that Elections Clause jurisprudence accounts for the realities of the nation's 50 state constitutions and the longstanding tradition of state constitutional regulation of congressional selection.

INTRODUCTION AND SUMMARY OF ARGUMENT

State constitutions are linchpins of the American federal system. From Independence to today, the people have relied on these foundational documents to establish and cabin state lawmaking authority, including in the context of congressional elections. Petitioners accept, as they must, that the Elections Clause does not entirely sweep aside state constitutions.

Instead, Petitioners posit that the Elections Clause impliedly establishes two tiers of state constitutional rules: some that bind state legislatures as they regulate congressional elections, and others that state legislatures may disregard. The Elections Clause, Petitioners suggest, subjects state legislatures to "procedural" constraints but not

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

"substantive" ones, or to "specific" constitutional provisions but not "vague" or "open-ended" ones.

Petitioners' invented state constitutional distinctions are unworkable and unfounded. The nation's 50 state constitutions contain innumerable provisions that do not fall neatly within Petitioners' newly minted categories. Inviting the federal judiciary to parse and sort unfamiliar state constitutional rules in politically charged and often expedited cases would reverse the usual roles of state and federal courts and diminish the people's control over their state constitutional systems. All relevant indicia of meaning—including a firmly established historical tradition of state constitutional governance of congressional selection—confirm that the Elections Clause does not turn federal judges into roving expositors of state constitutional law.

I. Consistent with this Court's longstanding precedents, Petitioners appear to accept that the Elections Clause does not completely untether state legislatures from their constitutions. Instead, Petitioners offer what amounts to a half-independent state legislature theory, leaving federal judges to pick and choose which state constitutional rules will apply to congressional election regulations. The ill-defined distinctions Petitioners propose—between procedural and substantive rules, and between specific and open-ended ones—are unmoored from the text of the Elections Clause and out of touch with the realities of state constitutions.

A. Hinging the Elections Clause analysis on whether a state constitutional rule is procedural or

substantive fails both conceptually and practically. State constitutions channel and constrain legislatures in myriad ways, all reflecting the people's judgments about how law is made. The precise form of these constraints should not make a federal constitutional difference. This is especially so because Petitioners never explicate the categories of procedure and substance. Many state constitutional rules might reasonably be labeled either way. For example, are the "single-subject" rules in dozens of state constitutions procedural rules that legislatures must follow when regulating congressional elections or substantive ones that they may flout? What about "original purpose" rules, or limitations on "special" laws, or state separation-of-powers doctrines? How to classify various state constitutional election and redistricting provisions is similarly uncertain. Are provisions that limit the frequency of redistricting procedural or substantive? What about provisions that require maps with certain characteristics to win supermajority approval? Questions like these will continually arise, and courts will struggle to provide principled, consistent answers.

B. Petitioners' proposed line between "specific" and "open-ended" rules fares no better. Given that open-ended constitutional provisions often embody fundamental societal commitments, they are the last provisions that legislatures should be allowed to flout. State courts are entirely capable of applying such provisions, and federal courts have no business overriding their state constitutional judgments. In any event, Petitioners again provide no standard for distinguishing specific constitutional rules from open-ended ones, and again uncertainties abound. Petitioners

offer "compactness" requirements as an example of provisions specific enough to provide judicially manageable standards, but why is that so? Operationalizing such requirements entails substantial judgment. What about restrictions on electoral districts that "favor or disfavor" an incumbent or party? Are they sufficiently specific? What about provisions that guarantee "the untrammeled exercise of the right of suffrage"? Or that require election laws to be "general and uniform"? Or that guarantee "secrecy" in voting? It cannot be that the Elections Clause, merely by using the word "Legislature," bars state courts from applying provisions of their own constitutions that a federal judge deems too open-ended.

II. History confirms that the Elections Clause does not release state legislatures from state constitutional constraints. "Legislature" most naturally refers to lawmaking institutions as they exist within their constitutional context. This understanding accords with state constitutional practice from Independence forward, and with the Framers' frequently voiced opposition to unchecked legislative power.

A. Congressional selection has never been off limits to state constitutional governance. The very first post-Independence state constitutions included provisions addressing the selection of delegates to the Continental Congress. No one questioned the propriety of these provisions even though the Articles of Confederation, like the Elections Clause, described congressional selection as a matter for "the legislature." Following the U.S. Constitution's adoption, state constitutions continued to include myriad provisions addressing congressional selection, and state

legislatures abided by them. The people who adopted these constitutions and the lawmakers who served under them did not understand the Elections Clause to carry the unstated negative implication that state legislatures could regulate congressional elections independent of their state constitutions and exclusive of other state actors.

B. The notion that the Elections Clause aggrandizes state legislatures is also at odds with the Framers' hostility to unchecked legislative power. As state constitutions were refined in the run-up to the federal constitutional convention, a recurrent theme was the need to cabin legislative authority. State constitution-makers—many of whom were also leading figures in the drafting and ratification of the U.S. Constitution—established executive and judicial checks on legislatures and placed direct limits on the legislative power. The Framers lauded these state constitutional developments. Construing the Elections Clause to strip away hard-won restraints on state legislatures ignores this critical historical context.

State constitutions and the U.S. Constitution together provide the "double security" of "two distinct governments," both established by and accountable to the people. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Consistent with our "compound republic," *id.*, when state legislatures regulate congressional elections pursuant to the U.S. Constitution's Elections Clause, they must do so within the bounds of the constitutions that create them. The Elections Clause merely calls for state legislative action; it does not take the radical step of erasing state constitutional controls.

ARGUMENT

I. This Court Should Reject Petitioners' Call To Establish Two Tiers Of State Constitutional Provisions—One Tier That Applies To Congressional Elections And One That Does Not.

Petitioners appear to concede—though some of their amici do not—that the Elections Clause does not make state legislatures *entirely* independent from state constitutions and state judicial review. *See* Pet. Br. 24-25. They instead contend that state legislatures may be bound by *some* state constitutional provisions in *some* circumstances. But a half-independent state legislature theory is as indefensible as a fully independent one.

In essence, Petitioners ask this Court to construe the Elections Clause to create two tiers of state constitutional rules: one tier that binds state legislatures and another that legislatures may disregard. Yet they offer little guidance about the contours of each category. They suggest that "state-constitutional *procedural* requirements" may apply when states regulate congressional elections, but that "substantive state-constitutional restriction[s]" may not. Pet. Br. 24-25 & n.1. They also suggest that state courts may have "authority to enforce specific and judicially manageable [state constitutional] standards," but not "open-ended" or "vaguely-worded state-constitutional clauses." Pet. Br. 2, 46. Beyond noting a few examples of provisions they see as falling on either side of these lines, Petitioners do not explain how federal courts

should distinguish the procedural from the substantive or the specific from the open-ended.

Petitioners' failure to demarcate the line between applicable and inapplicable state constitutional rules is telling. It underscores that their notion of a half-independent legislature—like a fully independent one—is an invention. The Framers simply did not envision that they were assigning the federal judiciary to sort state constitutional rules into two buckets, some of which the Elections Clause silently places out of bounds for purposes of regulating congressional elections.

As detailed below, the nation's 50 state constitutions contain innumerable rules relevant to the regulation of congressional elections. Petitioners would repeatedly put federal courts in the position of having to classify these provisions as "substantive" or "procedural" or as "specific" or "open-ended"—whatever those undefined terms might mean. In many instances, a provision's status will not be apparent. As this Court has written, when confronted with "heated partisan issues" that "often produce[] ill will and distrust," "it is vital … that the Court act only in accord with especially clear standards." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498-99 (2019) (internal quotation marks omitted). Petitioners offer nothing of the kind. This Court should decline to enlist the federal courts in arbitrary and endless line-drawing about the proper bounds of state constitutional governance.

A. Petitioners' proposed line between procedural and substantive provisions is legally and practically untenable.

State constitutions include a wide array of rules that channel and constrain the exercise of lawmaking powers. Conceptually, it is not apparent why the form of these rules or the label attached to them should make a federal constitutional difference. Such rules all reflect judgments on the part of the people of each state about what constitutes law within their jurisdiction. As far as the Elections Clause is concerned, it should not matter whether a legislative body violates a state constitutional requirement that Petitioners would call procedural (e.g., a gubernatorial presentment rule), or one they would call substantive (e.g., a rule against partisan bias). In both instances, the legislature has equally failed to enact a constitutionally valid law.

Tying Elections Clause analysis to the "procedural" or "substantive" character of a state constitutional rule is especially inapt given the absence of any clear or coherent boundary between those categories. Consider some illustrative examples of the many questions federal courts are likely to face—questions without obvious or principled answers that will often arise in politically charged contexts where the judiciary's institutional credibility is on the line:

More than 40 state constitutions include versions of so-called "single-subject" rules, which (as the name suggests) require legislatures to limit bills to one

subject.[2] These provisions aim to curb logrolling and ensure adequate consideration of legislative proposals.[3] Single-subject rules structure the process of lawmaking, but they also require consideration of the substance of bills. If a state court rejects a congressional election regulation because it appears in a multi-subject bill, is the court permissibly applying a procedural rule, or improperly applying a substantive one?[4]

Federal courts will find no clear guidance on how to characterize such rules. Commentators have sometimes described single-subject rules as "procedural," *see, e.g.*, Williams, *supra* note 3, at 258, and sometimes as "substantive," *see, e.g.*, Boger, *supra* note 3, at 1251. Although litigation over single-subject rules is common, only a few state courts have ever described the provisions one way or another, and those courts have likewise reached divergent conclusions. *Compare Hoffman v. Reagan*, 429 P.3d 70, 72 (Ariz. 2018)

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[2] *See, e.g.*, Cal. Const. art. IV, § 9 ("A statute shall embrace but one subject, which shall be expressed in its title."); Ill. Const. art. IV, § 8(d) ("Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject.").

[3] *See* Robert F. Williams, *The Law of American State Constitutions* 261-63 (2009); Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 Va. L. Rev. 1247, 1248-49 (2017).

[4] For an example of a recent state court elections case applying a single-subject rule, see *City of De Soto v. Parson*, 625 S.W.3d 412 (Mo. 2021), which held that a bill titled "relating to elections" violated the Missouri Constitution's single-subject rule because it contained provisions unrelated to "elections." *Id.* at 418.

(stating that litigation over Arizona's single-subject rule "does not challenge [a measure] substantively, but instead raises a procedural claim"), *with People v. Dunigan*, 650 N.E.2d 1026, 1035 (Ill. 1995) (describing Illinois' single-subject rule as "a substantive, rather than a procedural, requirement for the passage of bills"). Such state court rulings raise a further unanswered question: What weight, if any, should a state court's characterization of a provision as procedural or substantive (potentially in a context unrelated to the Elections Clause) carry in federal court?

There are numerous state constitutional provisions and doctrines along similar lines, each enmeshing lawmaking processes with potentially contested judgments about the substance of legislation. State constitutions commonly have "original-purpose" requirements that preclude lawmakers from amending legislation in a manner that alters its purpose as originally introduced.[5] State constitutions also commonly restrict or require certain protocols for "special" or "local" laws, which are often debated categories.[6] If state

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[5] *See, e.g.*, Mont. Const. art. V, § 11(1) ("A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose."); Pa. Const. art. III, § 1 (similar).

[6] *See, e.g.*, Ark. Const. amend. 14 ("The General Assembly shall not pass any local or special act."); Pa. Const. art. III, § 7 ("No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be effected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law."); *see also* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719 (2012).

legislation addressed election administration in specific counties or regions, could a state court grant relief on the ground that the legislature violated such constitutional constraints? What about state constitutional provisions that preclude legislatures from acting during special sessions on matters other than those specified when the session is called?[7] Could a state court reject congressional election legislation as outside a special session's scope? The list goes on.

Or consider state doctrines related to the separation of powers. Under Petitioners' theory, could state courts permissibly hold that the legislature impermissibly encroached upon the governor's power to execute election laws or the judiciary's power to resolve election-related disputes?[8] Relatedly, could state courts find that lawmakers had improperly delegated legislative authority to other actors?[9] Or would such structural safeguards be considered "substantive" for

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[7] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 3 ("In calling a special session, the governor shall specify the subjects to be considered, and at such special session no laws shall be enacted except such as relate to the subjects mentioned in the call."); Pa. Const. art. III, § 12 (similar).

[8] *See, e.g.*, *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018) (holding that the legislature usurped the governor's authority by placing election administration in the hands of a Board the governor would not control).

[9] *See, e.g.*, *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So.2d 763, 765 (Fla. 2005) (holding that a statute giving the Department of State "absolute discretion" to decide whether to allow congressional candidates to withdraw and be replaced on the ballot was "an unconstitutional violation of the separation of powers").

purposes of the Elections Clause and thus inapplicable?

Along similar lines, Petitioners place state constitutional provisions that authorize gubernatorial vetoes on the "procedural" side of the line. *See* Pet. Br. 24. Would they say the same about the line-item veto provisions that empower governors in more than 40 states not merely to accept or reject legislation but to alter its contents? *See, e.g.*, Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171 (1993). Does the Elections Clause preclude governors from partially vetoing bills that appropriate funds to administer congressional elections? What about legislative vetoes, which exist "in many different permutations" in about half of the states, but are often rejected by state courts? *See* Michael J. Berry, *The Modern Legislative Veto* 211 (2016). If a state statute establishes a legislative veto mechanism, and if a state court concludes that this veto mechanism violates state separation-of-powers principles, could the court prohibit the legislature from using the veto to block congressional election regulations?

And then there are the host of state constitutional rules and doctrines that speak directly to elections and redistricting. They pose further classification challenges. Again, consider some illustrative examples:

First, many state constitutions regulate the frequency of redistricting. *See* Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 Geo. L.J. 1247, 1249 (2007). Some expressly

state that congressional districts established after the decennial census must remain in place until the next census. *See, e.g.*, Conn. Const. art. III, § 6; N.Y. Const. art. III, § 4(e). Others tie redistricting to the census, which courts sometimes treat as an implicit restraint on mid-decade redistricting. *See, e.g.*, Colo. Const. art. V, § 44; *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1237-40 (Colo. 2003). Do these qualify as procedural limits on the timing of legislative action, or could lawmakers cast them as substantive restrictions that the Elections Clause allows them to ignore?

Second, several state constitutions require lawmakers to enact congressional redistricting legislation by supermajority vote in at least some circumstances. *See, e.g.*, N.Y. Const. art. III, § 4(b)(2)-(3); Wash. Const. art. II, § 43(7). In Ohio, if lawmakers act by majority rather than supermajority, they must adhere to certain requirements, and their plan remains in force for only two election cycles. Ohio Const. art. XIX, § 1(C)(3). Although these voting rules plainly involve process, lawmakers might argue that, because they are subject-matter specific and depart from the state's usual lawmaking practices, they are instead unenforceable substantive restraints.

Third, there are the litany of state constitutional provisions and doctrines that establish line-drawing criteria, such as compactness, contiguity, or political fairness. Petitioners might argue that these are substantive rules that legislatures need not follow, but that characterization is debatable. These provisions can be understood as merely channeling the lawmaking process rather than directing particular

redistricting outcomes. At least one federal appellate court described them that way in a related context. In *Brown v. Secretary of State of Florida*, lawmakers contended that the Florida Constitution's congressional redistricting criteria violated the Elections Clause because they were "substantive" rather than properly "procedural" time, place, or manner regulations. 668 F.3d 1271 (11th Cir. 2012). Rejecting this claim, the Eleventh Circuit saw no basis for the proposed substance-procedure distinction, and suggested that, even if such a line were appropriate, the provisions "seem more fairly characterized as procedural in nature" because "they deal strictly with the method of drawing district lines." *Id.* at 1281;[10] *cf.* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991).

Attempting to characterize state constitutional line-drawing criteria as substantive or procedural is made more complicated by the varied ways these provisions are drafted and applied. In some instances, provisions merely require lawmakers to *consider* (or avoid considering) certain factors as they redistrict—a formulation that emphasizes process rather than

[10] The court described the Florida Constitution's "minority and incumbency provisions" as "arguably closer to the substantive end of the spectrum" than the "[c]ontiguity, compactness, respect for political and geographic boundaries, and population equality" provisions, but concluded that even they were not "substantive" because they were not "designed to determine the outcome of elections." *Brown*, 668 F.3d at 1281.

results.[11] Similarly, political fairness provisions sometimes prohibit mapmakers from drawing lines "*with the intent* to favor or disfavor a political party or an incumbent," which again emphasizes process rather than substantive outcome.[12] And even when provisions require maps to adhere to certain criteria (e.g., compactness), litigants and courts may fault lawmakers for failing to make an adequate effort to comply—in other words, for a deficiency in their process (e.g., for inadequately explaining their rejection of alternative maps with more compact districts). Consequently, rather than distinguishing substantive rules from procedural ones on a provision-by-provision basis (which would be challenging enough), federal courts might find themselves parsing discrete applications of state constitutional rules.

It is no wonder that this Court has described the task of "distinguishing between substantive and procedural rules" as a "logical morass" that it is "loath to enter." *Mistretta v. United States*, 488 U.S. 361, 392 (1989). In the few doctrinal contexts that require such analysis, both federal and state courts have found the

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[11] *See, e.g.*, Cal. Const. art. XXI, § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map."); N.Y. Const. art. III, § 4(c)(5) (directing mapmakers to "consider the maintenance of cores of existing districts, of pre-existing political subdivisions, … and of communities of interest").

[12] Fla. Const. art. III, § 20(a) (emphasis added); *see also* N.Y. Const. art. III, § 4(c)(5) ("Districts shall not be drawn … *for the purpose* of favoring or disfavoring incumbents or other particular candidates or political parties." (emphasis added)).

inquiry vexing.[13] Part of the challenge is that the "line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). What a court deems "substantive" for one purpose might count as "procedural" for another. Many rules have properties and functions that could reasonably be described either way. In short, establishing a test under the Elections Clause that turns on whether state constitutional rules are procedural or substantive is a recipe for unending litigation and a doctrinal quagmire—all in a highly charged area where federal courts should tread lightly.

B. Petitioners' proposed line between specific and general provisions is equally problematic.

Petitioners also suggest a distinction between "specific" state constitutional provisions and "vague" or "open-ended" ones. According to Petitioners, the Elections Clause might permit state courts to apply "specific" provisions, at least when the legislature expressly vests the courts with that authority. Pet. Br. 46. But Petitioners maintain that, even when judicial review is legislatively authorized, a state court cannot

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[13] *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy …."); *Brown v. W. Ry.*, 338 U.S. 294, 296 (1949) (lamenting "the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure'"); *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 53 (Fla. 2000) ("The distinction between substantive and procedural law is neither simple nor certain …."); *Smiloff v. State*, 579 P.2d 28, 33 n.19 (Alaska 1978) (recognizing "that the line between substance and procedure is an elusive one").

grant relief under an "open-ended guarantee," as that would amount to an improper delegation of the legislature's Elections Clause responsibilities. *Id.* Again, there is no indication that the Framers ever contemplated the novel dichotomy that Petitioners propose, and trying to divide state constitutional provisions between the "specific" and the "open-ended" is unworkable.

Conceptually, constitutions often use open-ended provisions to express fundamental commitments and guarantees. Courts regularly invoke such provisions to keep government actors from overstepping the bounds of their authority. To identify these as the provisions that state legislatures are free to transgress and that state courts are powerless to enforce would subvert state democratic systems.

Contrary to Petitioners' assertions, broadly worded provisions can indeed provide "judicially discernible standards." Pet. Br. 46. Huge swaths of this Court's own jurisprudence in the election-law context and beyond stand as illustrations. Much of federal constitutional doctrine governing elections derives from provisions like the First Amendment and the Fourteenth Amendment's Equal Protection Clause.[14] The North Carolina Supreme Court can hardly be

[14] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (construing the First Amendment to protect corporate election spending); *Bush v. Gore*, 531 U.S. 98 (2000) (construing the Equal Protection Clause to require a uniform statewide standard for tallying votes and remedying a violation by barring the further counting of ballots); *Reynolds v. Sims*, 377 U.S. 533 (1964) (construing the Equal Protection Clause to require equally populated state legislative districts).

faulted for applying analogous state constitutional provisions, along with the North Carolina Constitution's "free" elections guarantee. N.C. Const. art. I, § 10.

Moreover, in a range of contexts, this Court has built constitutional doctrine on broad structural principles derived from holistic readings of constitutional text and historical context.[15] Again, it is difficult to fault state courts for doing the same, especially in the area of elections. Compared to the federal constitution, state constitutions are replete with provisions that collectively embody foundational commitments to popular sovereignty, political equality, and majority rule. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021). It is entirely proper for state courts to develop doctrine that reflects the core democratic structure of their constitutions. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

It would stand federalism on its head to construe the Elections Clause as empowering federal courts to tell state courts that their state constitutional analysis is improperly grounded. As this Court has long appreciated, "[i]t is fundamental that state courts be left

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[15] *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1497-98 (2019) (concluding that, although "no constitutional provision explicitly grants" interstate sovereign immunity, the concept is implicitly "embed[ded] … within the constitutional design"); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (grounding anticommandeering doctrine in "the basic structure of government established under the Constitution").

free and unfettered by [federal courts] in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940); *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."). State courts are best positioned to know what standards are discernible in their own constitutions.

If that were not enough, the task of trying to distinguish "specific" state constitutional provisions from "vague" or "open-ended" ones would create enormous headaches for federal courts, which will often be unfamiliar with the relevant state constitutional text, history, precedent, and interpretive norms. For all their talk of discernible standards, Petitioners fail to offer any of their own. Just as they do not explain how to differentiate the procedural from the substantive, they also do not explain what makes a provision sufficiently specific as opposed to overly general.

Petitioners' few examples of permissible and impermissible state constitutional provisions expose the difficulty of the inquiry. Petitioners insist that free speech, equal protection, and "free" and "fair" elections guarantees are too vague—no matter that state courts around the country have long applied such provisions.[16] Do Petitioners really mean to place such

[16] In particular, state courts have a lengthy history with "free" elections provisions. *See, e.g.*, *Jackson v. Norris*, 195 A. 576, 588 (Md. 1937) (holding that free elections provision required giving voters a write-in opportunity); *Moran v. Bowley*, 179 N.E. 526, 531-32 (Ill. 1932) (holding that congressional

provisions entirely off limits to state courts in the context of congressional elections? Petitioners' concerns in this case seem to be less about the "open-ended" nature of the state constitutional provisions and more about *how* those provisions were applied. In Petitioners' view, the North Carolina Supreme Court gleaned from those provisions a "novel rule." Pet. Br. 47. In other words, Petitioners' apparent approach would again require federal courts—as with the procedure-versus-substance inquiry—to consider not just the generality or specificity of state constitutional provisions, but also state courts' particular applications of those provisions.

Meanwhile, Petitioners describe "contiguousness and compactness requirements" for electoral districts as "specific and judicially manageable standards." Pet. Br. 46. But requiring districts to be "compact" or "as compact as is reasonably possible" gives courts substantial room to make discretionary judgments. There are dozens of measures of compactness that courts might use, and then follow-on questions about "how much deviation from those criteria is constitutionally acceptable" and how to account for "competing criteria." *Rucho*, 139 S. Ct. at 2501 (explaining that partisan gerrymandering claims raise such questions). Courts have referred to compactness as an

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apportionment plan with substantially unequally populated districts violated "free and equal" elections provision); *Neelley v. Farr*, 158 P. 458, 467 (Colo. 1916) (holding that election was not "free and open" where private company exerted improper influence over voters); *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915) (holding that, "when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal").

"elusive notion" that "may often be in the eye of the judicial beholder." *Johnson v. Miller*, 864 F. Supp. 1354, 1389 (S.D. Ga. 1994), *aff'd and remanded*, 515 U.S. 900 (1995); *Fusilier v. Landry*, 963 F.3d 447, 457 n.8 (5th Cir. 2020).

It is not apparent why the Elections Clause would treat state court rulings grounded in compactness requirements as categorically different from rulings that rest on equal protection or free elections provisions. Even Petitioners may not really want that. They presumably do not think state courts should have carte blanche to invoke compactness requirements as a basis for rejecting partisan gerrymanders (even though such provisions often do have anti-gerrymandering aims). Again, the real issue for Petitioners is not the generality or specificity of constitutional provisions, but their applications in specific cases.

Beyond Petitioners' examples, state constitutions have heaps of provisions relevant to congressional elections that are not easily categorized as "specific" or "open-ended." With respect to gerrymandering in particular, several state constitutions have anti-favoritism provisions. *See, e.g.*, Mich. Const. art. IV, § 6(13)(e) ("[D]istricts shall not favor or disfavor an incumbent elected official or candidate."). In *Rucho*, this Court cited approvingly the Florida Supreme Court's application of one such provision. *See* 139 S. Ct. at 2507 (citing *League of Women Voters v. Detzner*, 172 So.3d 363 (Fla. 2015)). But in terms of the operational guidance they give to courts, such provisions are scarcely more specific than provisions requiring elections to be "free and equal." Constitutional language, moreover, varies in its particulars state by

state. Would a provision giving all qualified inhabitants of the state an "equal right to be elected into office" (N.H. Const. pt. 1, art. 11) offer a sufficiently specific basis for a state court to reject a partisan gerrymander? Petitioners offer no clear answers.

Controversies over partisan gerrymandering are just the tip of the iceberg. Consider a state constitutional provision declaring that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage," Ark. Const. art. III, § 2; or a provision barring any "hindrance or impediment to the right of a qualified voter to exercise the elective franchise," Neb. Const. art. I, § 22; or a provision requiring "[l]aws governing voter registration and conduct of elections [to] be general and uniform," Ill. Const. art. III, § 4; or a provision conferring a right "[t]o equal access to the elections system without discrimination," Nev. Const. art. 2, § 1A(9); or a provision guaranteeing "[a]n absolutely secret ballot," Idaho Const. art. VI, § 1. State courts routinely apply such provisions to a wide range of state election laws, from registration requirements,[17] to voter ID rules,[18] to

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[17] *Compare N.H. Democratic Party v. Sec'y of State*, 262 A.3d 366, 379-81 (N.H. 2021) (holding that a confusing statutory registration scheme violated the state constitution's right-to-vote guarantee), *with Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 330-41 (Mass. 2018) (upholding a registration law against such a challenge).

[18] *Compare Mont. Democratic Party v. Jacobson*, __ P.3d __, 2022 WL 4362513, at *8-10 (Mont. Sept. 21, 2022) (affirming a preliminary injunction against a stringent voter ID law under the state constitution's right-to-vote guarantee), *with Gentges v. State Election Bd.*, 419 P.3d 224, 228-31 (Okla. 2018) (concluding

mail-in voting,[19] to ranked-choice voting systems.[20] Under Petitioners' approach to the Elections Clause, are state constitutional provisions like these specific enough to permit state judicial review? Would it depend on the particulars of the law being challenged or the legal theory being offered?

Construing the Elections Clause to require federal courts to assess the specificity or generality of state constitutional provisions will invite endless litigation over questions like these. Federal courts will repeatedly find themselves at the center of pitched partisan battles, without clear and coherent principles to guide them. Surely the Framers' use of the word "Legislature" in Article I, § 4, was not meant to invite such unprecedented federal judicial oversight of state constitutional governance.

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that a voter ID law did not violate the state constitution's right-to-vote guarantees).

[19] *Compare Albence v. Higgin*, No. 342, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022) (holding that a vote-by-mail expansion violated the state constitution), *with McLinko v. Dep't of State*, 279 A.3d 539, 573-76 (Pa. 2022) (considering and rejecting a state constitutional challenge to universal mail-in voting).

[20] *Compare Dove v. Oglesby*, 244 P. 798, 800 (Okla. 1926) (holding that a system requiring primary voters to rank multiple candidates "materially interfered" with "the free exercise of the right of suffrage" under the state constitution), *with Kohlhaas v. State*, __ P.3d __, 2022 WL 12222442, at *24-25 (Alaska Oct. 21, 2022) (rejecting a claim that Alaska's ranked-choice voting system unlawfully burdened state constitutional voting rights).

II. History Confirms That The Elections Clause Does Not Displace State Constitutions And Courts.

Reading the Elections Clause in its proper historical context confirms that it does not give state legislatures license to flout their state constitutions and does not sideline other state actors. Early practice makes plain that congressional selection has always been subject to state constitutional governance. There was no original understanding that the Elections Clause elevated state legislatures above the constitutions that created them and the checks and balances established by the people of each state. It would be atextual, ahistorical, and illogical to construe the Elections Clause to have those unstated negative implications.

A. Both before and after the Constitution's adoption, state constitutions addressed congressional elections.

From the time of the Continental Congress to today, it has been the norm for state constitutions to regulate congressional selection. Long prevailing practice thus makes clear that the Elections Clause does not give state legislative bodies carte blanche to act without state constitutional constraints and exclusive of other state-level actors.

The Framers did not draft the Elections Clause on a blank slate. They worked against the backdrop of the Articles of Confederation and Revolution-era state constitutions. The text of the Elections Clause tracks in relevant part Article V of the Articles of

Confederation, which addressed congressional selection. It stated that "delegates [to Congress] shall be annually appointed in such manner as *the legislature of each State* shall direct." Articles of Confederation of 1777, art. V, para. 1 (emphasis added).

Article V—the Elections Clause's immediate predecessor—did not seek to give state legislative bodies unchecked power over the manner of delegate appointment. The evidence on that score is overwhelming. The Continental Congress adopted the Articles just after a flurry of state constitution-making in 1776 and 1777. The majority of those pre-Articles constitutions specified how the state would choose its congressional delegates. Delaware's Constitution, for example, provided for delegates to "be chosen annually … by joint ballot of both houses in the general assembly." Del. Const. of 1776, art. 11. Georgia, Maryland, North Carolina, Pennsylvania, and Virginia likewise required their general assemblies to choose delegates either "by ballot" or by "joint ballot" of the assembly's two constituent houses.[21] New York's Constitution established a more elaborate mode of selection: The state senate and assembly were each required to "openly nominate as many persons as shall be equal to the whole number of Delegates to be appointed." N.Y. Const. of 1777, art. XXX. The two bodies then had to "meet together" and identify "those persons named in both lists." *Id*. Such individuals became delegates, and the remaining delegates were chosen from among the other listed individuals "by

[21] Ga. Const. of 1777, art. XVI; Md. Const. of 1776, art. XXVII; N.C. Const. of 1776, art. XXXVII; Pa. Const. of 1776, § 11; Va. Const. of 1776, para. 10.

the joint ballot of the senators and members of the assembly." *Id.*

No one at the time thought that the Articles of Confederation repudiated these state constitutional provisions by calling for delegates to be appointed "in such manner as the legislature of each State shall direct." Articles of Confederation of 1777, art. V, para. 1. State legislators did not regard Article V as an invitation to disregard their constitutions and independently select delegates in some other manner.

Consistent with this understanding, the three states that adopted new constitutions between late 1777 and 1787—South Carolina, Massachusetts, and New Hampshire—all included provisions addressing the manner of delegate selection.[22] In other words, these states likewise did not read Article V to override state constitutional governance and leave delegate selection to an "independent" legislature.

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[22] S.C. Const. of 1778, art. XXII (requiring congressional delegates to "be chosen annually by the senate and house of representatives jointly, by ballot, in the house of representatives"); Mass. Const. of 1780, ch. IV (requiring delegates to "be elected by the joint ballot of the senate and house of representatives assembled together in one room" at "some time in the month of June"); N.H. Const. of 1784, pt. 2, Delegates to Congress, para 1 (requiring delegates to "be elected by the senate and house of representatives in their separate branches" "some time between the first Wednesday of June, and the first Wednesday of September"). For further discussion of these constitutions, 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 Sup. Ct. Rev. 1, 23 (2022).

The U.S. Constitution's drafters and ratifiers were intimately familiar with these state constitutional provisions, and they raised no concerns. By using the same relevant phrasing in the Elections Clause as they had in the Articles of Confederation, the Framers thus preserved the accepted role of state constitutions. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 484 (1997) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change." (quoting *Pierce v. Underwood*, 487 U.S. 552, 567 (1988))).

The notion that the Elections Clause surreptitiously untethered legislatures from state constitutional limits is especially implausible given that the Constitution's federal structure disfavors implied limits on state constitutional governance. Under the Tenth Amendment, powers not "prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 870 (1995) (Thomas, J., dissenting) (noting the Court's "reluctance to read constitutional provisions to preclude state power by negative implication"). Even ardent nationalists like Alexander Hamilton disclaimed the "alienation of State power by implication." The Federalist No. 82, at 492 (Alexander Hamilton).

Post-ratification developments underscore that the Elections Clause did not remove congressional elections from state constitutional limits. The earliest state constitutions adopted after the Constitution's ratification continued to regulate congressional elections. The Georgia Constitution of 1789,

Pennsylvania Constitution of 1790, and Kentucky Constitution of 1792 all required voting in "*[a]ll elections*" to be "by ballot," rather than by voice vote. Ga. Const. of 1789, art. IV, § 2;[23] Ky. Const. of 1792, art. III;[24] Pa. Const. of 1790, art. III, § 2 (emphasis added). The Pennsylvania and Kentucky Constitutions additionally shielded voters from arrest while attending elections.[25] No one appears to have questioned the applicability of these constitutional provisions to congressional elections, and there is no indication that state legislatures sought to ignore or circumvent them. The Delaware Constitution of 1792 was even more specific in providing for congressional representatives to "be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." Del. Const. of 1792, art. VIII, § 2.

This pattern of state constitutional regulation continued when the first new states were added to the union. Among other things, several state constitutions from this era restricted certain corrupt electoral practices. The Vermont Constitution of 1793, for example, declared that "[a]ll elections … shall be free and voluntary; and any elector who shall receive any

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[23] Georgia changed course and made voice voting the default in its 1798 Constitution. *See* Ga. Const. of 1798, art. IV, § 2.

[24] In 1799, Kentucky, like Georgia, switched to voice voting. *See* Ky. Const. of 1799, art. VI, § 16.

[25] *See* Pa. Const. of 1790, art. III, § 3 ("Electors shall, in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance on elections, and in going to and returning from them."); Ky. Const. of 1792, art. III (same).

gift or reward for his vote, in meat, drink, moneys, or otherwise, shall forfeit his right to elect at that time." Vt. Const. of 1793, ch. II, § 34. Similar language appeared in the Tennessee Constitution of 1796 and the Ohio Constitution of 1802. *See* Tenn. Const. of 1796, art. IX, § 3; Ohio Const. of 1802, art. VII, § 2. In line with earlier constitutions, the Tennessee and Ohio constitutions also provided that "[a]ll elections shall be by ballot" and shielded electors from arrest. Tenn. Const. of 1796, art. III, §§ 2, 3; Ohio Const. of 1802, art. IV, §§ 2, 3.

In the early nineteenth century, new states continued to include such election provisions in their constitutions. They also began specifying rules for their first post-statehood congressional elections. These states, in other words, did not wait for their legislatures to convene and decide how to regulate congressional elections. Instead, their constitutions established the time, place, and manner of the initial election, without any state legislative involvement at all. For example, under the Indiana Constitution of 1816, the president of the constitutional convention was directed to "issue writs of election, directed to the several sheriffs of the several counties, requiring them to cause an election to be held for … Representative to the Congress of the United States [as well as various state offices] … at the respective election districts in each county, on the first Monday in August next," to "be conducted in the manner prescribed by the existing election laws of the Indiana Territory." Ind. Const. of 1816, art. XII, § 8. Similar provisions

appeared again and again.[26] The repeated (and apparently uncontroversial) use of such provisions to conduct congressional elections in new states refutes the idea that the Elections Clause was meant to sideline state constitutions.

B. The Founders appreciated the importance of state constitutional checks and did not seek to aggrandize state legislatures.

This mountain of historical evidence that the Elections Clause did not override state constitutional governance of congressional elections reflects a simple reality: Those who drafted and ratified the U.S. Constitution had no desire to aggrandize state legislatures in the way Petitioners and their amici posit. The founding generation was hostile to unchecked legislative power at both the state and federal levels. A central lesson they gleaned from their experiences with state governance between 1776 and 1787 was the need for legislative bodies to be constrained by constitutional law and by other institutions, including courts. They did not abruptly abandon those principles when it came to state regulation of congressional elections.

As state constitutions were made and remade in the Founding era, the trend was away from legislative supremacy. Immediately after Independence, the first

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[26] *See*, *e.g.*, Miss. Const. of 1817, Schedule, § 7; Ill. Const. of 1818, Schedule, § 9; Ala. Const. of 1819, Schedule, § 7; Mo. Const. of 1820, Schedule, §§ 9, 10; Mich. Const. of 1835, Schedule, § 6; Ark. Const. of 1836, Schedule, § 7.

state constitution-makers were preoccupied with limiting executive overreach to avoid the sort of abuses they had experienced at the hands of colonial governors. Quickly, however, they came to recognize "that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature." Gordon S. Wood, *Creation of the American Republic, 1776-1787* 432 (1998). The earliest state constitutions, particularly Pennsylvania's, were vociferously criticized for concentrating too much power in their legislative bodies. *See, e.g.*, *id.* at 450; Williams, *supra*, at 43-55.

"[G]rowing mistrust of the legislative assemblies" pushed the authors of later state constitutions—and, ultimately, the drafters of the federal Constitution—to focus on cabining legislative authority. Wood, *supra*, at 456. They pushed back against what James Madison identified as "a tendency in our governments to throw all power in to the Legislative vortex." 2 Max Farrand, *The Records of the Federal Convention of 1787* 35 (rev. ed. 1937) (statement of Madison, July 17, 1787). By the late 1770s, state constitutions began elevating the judiciary and the executive as "necessary check[s] on legislative encroachments upon the rights guaranteed by the constitutions and upon the prerogatives of the other branches." Williams, *supra*, at 64.

Most relevant here, these state systems came to accept judicial review as a key governance mechanism, and state courts began stepping in "to impose restraints on what the legislatures were enacting as law." Wood, *supra*, at 454-55. Lauding this development, Hamilton described "the courts of justice … as

the bulwarks of a limited Constitution against legislative encroachments." The Federalist No. 78, at 469 (Alexander Hamilton). He specifically praised state courts for acting to defend state constitutional guarantees, writing that their efforts "commanded the esteem and applause of all the virtuous and disinterested." *Id.* at 470.

Judicial review helped to ensure that "the intention of the people," as expressed in their constitution, would prevail over a conflicting "intention of their agents." The Federalist No. 78, at 467 (Alexander Hamilton). In Hamilton's words, it was a principle "of great importance in all the American constitutions" that "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid." *Id.*

Accordingly, when the Elections Clause directs state legislatures to regulate congressional elections, it is calling for constitutionally grounded lawmaking. It does not license legislative bodies to shrug off their constitutional constraints and act "independently" of the people who created them.[27] For the founding generation, state constitutional checks on legislative power were indispensable, and congressional elections were no exception. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-

[27] *Cf. U.S. Term Limits*, 514 U.S. at 862 (Thomas, J., dissenting) (explaining that the Elections Clause "simply imposes a duty" on states and does not place any special constraints on state constitutional governance or empower state legislatures to act beyond state constitutional bounds).

18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

CONCLUSION

The decision below should be affirmed.

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