No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, *et al.*,
Petitioners,
v.
REBECCA HARPER, *et al.*,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF THE DISTRICT OF COLUMBIA, ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In our federalist system, the Constitution leaves to "States" the primary "power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (internal quotation marks omitted) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). In carrying out that critical constitutional duty, an array of state actors work together to enable citizens to cast votes and states to count them. Legislatures pass and Governors sign election laws, courts interpret those laws, officials implement them, and at times voters directly enact election provisions.

According to petitioners, however, this cooperative system of election administration that states have relied on for decades to administer elections is constitutionally suspect. Based on an ahistorical reading of the Constitution's Elections Clause, petitioners theorize that election rules pass constitutional muster only when explicitly enacted by state legislatures. Pet'rs Br. 4. Perhaps balking at the breadth of this proposed rule, petitioners' *amici* take a different view, suggesting that the Elections Clause establishes a clear-statement rule for state election laws, Arkansas Br. 11, or requires federal oversight of state court decisions to ensure a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). None of those approaches can be squared with either the history or present state of election administration, and each could result in insurmountable practical difficulties for states. Accordingly, the District of Columbia, and the States of Illinois, California, Colorado,

Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin ("*Amici* States") file this brief as *amici curiae* in support of respondents.

For *Amici* States, fundamental constitutional principles are at stake. The Constitution leaves to "States" the sovereign right "to structure themselves as they wish" and "conduct their affairs through a variety of branches, agencies, and elected and appointed officials." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022). In exercising that power when carrying out their constitutional duty to regulate elections, *Amici* States have long administered elections through various organs of state government.

Amici States' experience regulating elections reveals how unsound petitioners' theory is from a historical perspective and how problematic the theory would be for states in practice. For one, the theory ignores a lengthy history of states relying on *all* institutions of state government—not just state legislatures—to issue and implement election rules. For another, the theory would undermine states' role in our federalist system by second-guessing state court rulings on state law and potentially re-ordering which state entities can oversee elections. Finally, the theory could destabilize state election administration by subjecting commonplace state election rules to constitutional challenge and creating an untenable scheme under which state and federal elections—which are usually held on the same days in

the same polling places using the same ballots—would operate under different rules. Because clear and consistent rules are vital to election administration, this Court should reject petitioners' invitation to upend settled state practices.

SUMMARY OF ARGUMENT

1. Petitioners seek a novel rule requiring states to regulate the time, place, and manner of federal elections using only one arm of state government—their legislatures. That proposal suffers from multiple flaws, including that it cannot be squared with the historical record. Indeed, since the Founding, states have employed a wide variety of institutions of state government, including state constitutions, state courts, and state executive officials, to set and implement the rules governing federal elections. Petitioners' theory would call into question centuries of established practice among the states.

2. Petitioners' theory is divorced not only from how states have run elections in the past but also how states run elections now. Today, different components of state governments—legislatures, executives, courts, election administrators, and commissions, among other state entities—all perform crucial roles in elections. Petitioners' theory would thus raise constitutional questions about large swaths of state election law. But even the somewhat narrower theories advanced by petitioners' *amici* threaten enormously disruptive consequences: federalism will be undermined, single elections will be governed by different rules for state and federal races, federal-court lawsuits in an emergency posture will

multiply, and courts and parties alike will struggle to manage unworkable legal standards. The Elections Clause should not be read to impose such damaging consequences on states and voters.

ARGUMENT

I. State Constitutions, Courts, And Officials Have Historically Played An Integral Role In Regulating Federal Elections.

Under our federal system, each state is entitled to order "the structure of its government" in the manner of its choosing. *Gregory*, 501 U.S. at 460. Petitioners' central claim is that the Elections Clause displaces that "fundamental" authority, *id.*, when a state regulates federal elections, requiring states to act in this area only by state statute, and to permit their legislatures to operate independently of any constraints imposed by state constitutions. That view cannot be squared with the historical record.

Indeed, states have historically regulated the "Times, Places and Manner" of holding elections for federal offices, U.S. Const. art. I, § 4, by employing many different institutions of state government—including the regulation of elections by state constitutions, judicial review of state legislative enactments by state courts, and the implementation of those enactments by election officers. The states' "[l]ong settled and established practice" refutes petitioners' principal claim that only state legislatures may act in this area, and, at the least, has "great weight in a proper interpretation of constitutional provisions." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see also Smiley v.*

Holm, 285 U.S. 355, 369 (1932) (relying on "the established practice in the states" to reject a version of petitioners' theory). The states' practice of dividing power among institutions is also consistent with the bedrock idea underlying our system of government: that absolute power concentrated in a single branch "may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

A. To start, state constitutions provided rules for federal elections both before and after the Founding. Before the Constitution was ratified, the Articles of Confederation, much like the Constitution, gave state "legislatures" a role in regulating federal elections, providing that state delegates to Congress would be "appointed in such manner as the *legislature* of each State shall direct." Articles of Confederation of 1781, art. V (emphasis added).

But the Articles' reference to "legislatures" in this context did not deprive states of their authority to set conditions on legislative power via state constitutions, as all states understood. The constitutions of this era make that clear. As petitioners concede (at 31-32), ten state constitutions expressly limited their legislatures' ability to regulate the manner in which those legislatures selected delegates for Congress (by providing, for instance, that legislatures must select delegates by "joint ballot").[1] At least in the years just before the

[1] *See* Del. Const. of 1776, art. XI; Md. Const. of 1776, art. XXVII; N.C. Const. of 1776, art. XXXVII; Pa. Const. of 1776, § 11; Va. Const. of 1776, Delegates; Ga. Const. of 1777, art. XVI;

ratification of the Constitution, then, it was broadly understood that a simple reference to state "legislatures," standing alone, did not deprive states of their authority to employ all institutions of state government to accomplish their ends.

The same was true after the ratification of the Constitution. In the forty years after ratification, at least ten states incorporated provisions in their state constitutions governing the manner of holding federal elections. Two—Delaware and Maryland—expressly established rules governing such elections, with Delaware requiring that elections for members of Congress be held "at the same places" and "in the same manner" as elections for state representatives, and Maryland requiring that all elections, state and federal, be held "by ballot." Del. Const. of 1792, art. VIII, § 2; Md. Const. of 1776, art. XIV (1810). Another eight state constitutions stated that "all elections" must be held by ballot or, in one case, by voice vote.[2] And in 1830, Virginia adopted a new

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N.Y. Const. of 1777, art. XXX; S.C. Const. of 1778, art. XXII; Mass. Const. of 1780, ch. IV (annulled 1788); N.H. Const. of 1784, pt. II, Delegates to Congress (repealed 1792).

[2] Ga. Const. of 1789, art. IV, § 2; Pa. Const. of 1790, art. III, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art. IV, § 2; La. Const. of 1812, art. VI, § 13; Ala. Const. of 1819, art. III, § 7; N.Y. Const. of 1821, art. II, § 4. States continued to incorporate provisions of this nature in their constitutions throughout the 1800s and beyond. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 506-08 (2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y __ (forthcoming 2023) (manuscript at 37-40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138.

constitution expressly stating that its Members of Congress should be "apportioned as nearly as may be, amongst the several counties, cities, boroughs, and towns . . . according to their respective numbers"—*i.e.*, proportionally. Va. Const. of 1830, art. III, § 6. States, in other words, continued even after the Constitution's ratification to provide rules for the manner of holding federal elections not merely by state statute, but also by state constitution.

Petitioners' objections to this account (at 25-39) are without foundation. Petitioners repeatedly assert that only a handful of states expressly regulated the manner of holding federal elections in the early years of the Republic, *e.g.*, Pet'rs Br. 32, 38, but that claim depends entirely on petitioners' belief that the state constitutional provisions cited above (providing that "all" elections should be conducted in some manner or other) should be read to apply only to *state* elections, *see id.* at 39. But "'[a]ll' means 'all,'" *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019)—*i.e.*, *all* elections, federal and state. And, indeed, shortly after one of these provisions—Pennsylvania's—was added to that state's constitution, it was invoked in a floor contest over the election of a Member of Congress, with one of the Pennsylvania constitution's drafters explaining that the "constitution . . . prescribe[d] the manner that citizens shall vote," *i.e.*, "by ballot." 14 Annals of Cong. 850 (1804); *see* Smith, *supra*, at 488-89 (recounting this episode). As this Court has explained, then, the Elections Clause did not "endow the Legislature of the state with power to enact laws" unencumbered by state constitutions, *Smiley*, 285 U.S. at 368; indeed, the historical record reflects that states continually exercised their authority in this

area to control their legislatures through state constitutions.

B. State courts, too, have for centuries played an integral role in shaping the rules that govern federal elections, primarily by interpreting and applying the state constitutional provisions described above. State courts exercised judicial review over state statutes even before the 1788 ratification of the Constitution. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 (2003). And state courts continued to do so under the new Constitution, *id.* at 976, playing a profound role in shaping the legal order in the states.

Importantly, state courts exercised that authority in reviewing cases involving federal elections and the statutes that governed them. For instance, as petitioners' *amici* concede, Lawyers Democracy Fund Br. 10-11, several state courts struck down Civil War-era state laws regulating federal elections on the ground that they conflicted with state constitutions. *See, e.g.*, *In re Op. of Justs.*, 30 Conn. 591, 591-92 (1862); *Chase v. Miller*, 41 Pa. 403, 428-29 (1862); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 142-43 (1865).

And the Civil War cases were hardly outliers. In a range of nineteenth- and twentieth-century cases, state courts applied state constitutional provisions to review (and, in some cases, hold invalid) state laws regulating federal elections. *See* Weingartner, *supra*, at 40-43. After the advent of the modern two-party system in the late 1800s, for instance, state courts played an active role in reviewing the statutes passed by state legislatures regulating ballot access—

statutes that applied to federal and state elections alike. To take just one example, courts in at least seven states considered whether laws requiring candidates for office to pay fees to have their names placed on the ballot violated state constitutional provisions—often "free and equal" clauses of the kind the state courts applied here. State courts divided, with some courts striking down such laws and some upholding them.[3] But no court questioned its authority to review these statutes for compliance with state constitutional law in the first place.

Around the same time, state courts also applied state constitutional law to a range of other disputes regarding state statutes that regulated both federal and state elections. As just a few examples, state courts adjudicated cases challenging the constitutionality of laws limiting the placement of any candidate's name on a ballot to one party line,[4]

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[3] *Compare, e.g.*, *People ex rel. Breckton v. Bd. of Election Comm'rs of Chi.*, 221 Ill. 9, 23 (1906) (fee unconstitutional); *State ex rel. Adair v. Drexel*, 74 Neb. 776, 793 (1905) (same); *Ledgerwood v. Pitts*, 122 Tenn. 570, 611-12 (1909) (same); *Kelso v. Cook*, 184 Ind. 173, 202 (1916) (same), *with State ex rel. Thompson v. Scott*, 99 Minn. 145, 148 (1906) (fee constitutional); *State ex rel. Zent v. Nichols*, 50 Wash. 508, 520 (1908) (same); *Socialist Party v. Uhl*, 155 Cal. 776, 790 (1909) (same).

[4] *Compare, e.g.*, *Murphy v. Curry*, 137 Cal. 479, 486 (1902) (statute limiting candidates to one ballot line unconstitutional); *Hopper v. Britt*, 203 N.Y. 144, 158 (1911) (same), *with Todd v. Bd. of Election Comm'rs*, 104 Mich. 474, 487-488 (1895) (statute limiting candidates to one ballot line constitutional); *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 232 (1896) (same).

authorizing the use of voting machines,[5] requiring voters to register within certain periods of time,[6] and more. Again, these state courts reached different conclusions regarding the constitutionality of such laws, but they uniformly did so without questioning whether they could resolve the challenges in the first place.

Petitioners and their *amici* thus err in asserting that the North Carolina Supreme Court's opinion "resembles no state-court decision before 2018." Lawyers Democracy Fund Br. 6; *accord* Pet'rs Br. 25-26. They can make this claim only by describing the state court's opinion below in artificially narrow terms: by focusing on its invalidation of a congressional map based on North Carolina's "free and equal" provision. But petitioners offer no principled basis for limiting their proposed rule to that context, rather than to all cases in which state courts exercise judicial review over matters concerning federal elections. The result is that petitioners' rule, if adopted, would call into question state court opinions going back nearly two centuries and dramatically curtail the role that state courts

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[5] *Compare, e.g.*, *Nichols v. Minton*, 196 Mass. 410, 414 (1907) (statute allowing use of voting machines unconstitutional); *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 490 (1909) (same), *with City of Detroit v. Bd. of Inspectors*, 139 Mich. 548, 557 (1905) (statute allowing use of voting machines constitutional); *Lynch v. Malley*, 215 Ill. 574, 582 (1905) (same).

[6] *E.g.*, *Morris v. Powell*, 125 Ind. 281, 291 (1890) (statute requiring all voters to re-register after absence of six months or more unconstitutional); *Perkins v. Lucas*, 197 Ky. 1, 14 (1922) (statute setting one day for voter registration unconstitutional).

have historically played in ensuring that state legislatures stay within the limits of the state constitutions that created them, for election law no less than any other area.

C. Finally, state and local executive-branch officials oversaw and administered elections for federal office for centuries, including during and immediately after the Founding. State officers and agencies have done so both using their inherent powers as executives and employing powers expressly shared with them by state legislatures. In doing so, state officers have exercised substantial discretion, playing a significant role in regulating federal elections.

To begin, state and local elections officials played key roles regulating federal elections at the Founding. It was election officials, not state statutes, for instance, that determined the "Places," U.S. Const. art. I, § 4, where voters would cast ballots in at least seven of the first thirteen states.[7]

Local officials likewise exercised significant power over when and how federal elections were held in the early years of the Republic. Officials in at least eight states had the authority to determine exactly when the polls would open and close, and officials in at least

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[7] *E.g.*, Act of Feb. 13, 1787, ch. 14, § 4, 1787 N.Y. Laws 316, 317 (directing election officials to select "the place. . . where such election . . . next shall be held"); Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws 27 (directing election officials to "make choice of a place in each district, at which the elections shall be held"); *see* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1113-29 (2022) (canvassing historical sources).

four of those eight could "adjourn" elections, deciding at their discretion that polls would remain open until the following day.[8] And although some states chose to "specif[y]" by state statute "the procedures to be used at the polls in excruciating detail," others made the opposite choice, granting significant discretion to executive officials to decide not only where and when elections should be held, but also how—including, for instance, whether ballots would remain secret or not. Krass, *supra*, at 1127-29.

Petitioners' contention that the Elections Clause "does not allow a state legislature to delegate away the authority assigned to it," Pet'rs Br. 44-45, thus cannot be squared with the historical record. To the contrary, states have chosen, since the Founding, to make such delegations, consistent with their time-honored right to "structure themselves as they wish." *Berger*, 142 S. Ct. at 2197.

II. Petitioners' Theory Threatens States' Ability To Administer Federal Elections.

To conduct orderly, fair, and accurate elections, states rely on election rules implemented and interpreted by a variety of state institutions—including courts. Petitioners' argument that *only* state legislatures may regulate elections, however, would cast doubt on routine elements of election

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[8] *See, e.g.*, Act of Dec. 24, 1779, ch. 15, § 7, 1779 N.J. Acts 34, 37 (granting election officials "full Power . . . to close" polls when all voters had voted or "a reasonable time for that Purpose shall have been allowed"); Act of March 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443 (authorizing officials to "continue[] elections by adjournment, if necessary, from day to day, not exceeding five days"); *see* Krass, *supra*, at 127-32.

administration. Even the alternative proposals of petitioners' *amici* could upend settled practices—undermining federalism, mandating different rules for state and federal elections, and subjecting states and federal courts to increased, last-minute emergency litigation governed by murky standards. That outcome would hamper states' ability to predictably manage the sensitive task of casting and counting ballots in federal elections.

A. State constitutions, courts, executive officials, and others routinely set rules governing elections.

What was true historically is still true today: legislatures are far from the only source of contemporary election law in the states. Justifying their reputation as laboratories of democracy, states variously rely on their constitutions, courts, executives, local administrators, and citizens to set election rules. Petitioners' theory, in its strongest form, could cast doubt on each of these practices.

1. State constitutions contain crucial election rules.

"Core aspects" of election law, like "voter registration, absentee voting, vote counting, and victory thresholds," can stem from state constitutions, not simply state legislation. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* ("*AIRC*"), 576 U.S. 787, 823 (2015) (footnotes omitted); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (explaining that "state constitutions can provide standards and guidance" for addressing election issues including partisan gerrymandering). Stripping state constitutions of their election-law functions, as

petitioners propose, would thus threaten to create serious difficulties for states. For example, state constitutions often include fundamental election rules, like those establishing that votes must be cast by ballot, *e.g.*, Ind. Const. art. II, § 13; Md. Const. art. I, § 1, identifying who is eligible to vote, *e.g.*, N.J. Const. art. II, § 3; Tex. Const. art. VI, § 1, and restricting how voters can participate in the electoral process, *e.g.*, La. Const. art. XI, § 2 (banning proxy voting); Wyo. Const. art. VI, § 12 (prohibiting those who fail to register from voting). These provisions also include extremely specific election rules that leave legislatures little discretion, like those creating a nonpartisan primary system, Cal. Const. art. II, § 5, or specifying who may vote absentee, Pa. Const. art. VII, § 14. Put simply, state constitutions often resemble statutes in regulating elections at a granular level. *See* Weingartner, *supra*, at 36-40 (cataloguing detailed state constitutional provisions regulating elections).

These constitutional provisions, which apply to both state and federal elections, can bind state legislatures in the context of federal elections. Legislatures are themselves "the creature of the [state] Constitution, and the powers of the creature cannot under any circumstances rise above those of its creator." *Allen v. Scott*, 135 N.E. 683, 685 (Ohio 1922); *see also, e.g.*, *Coleman v. State ex rel. Race*, 159 So. 504, 507 (Fla. 1935); *City of Providence v. Moulton*, 160 A. 75, 77 (R.I. 1932). The notion that state constitutions cannot limit legislatures thus makes little sense. Indeed, state legislatures themselves often have a hand in establishing and amending constitutions. *See, e.g.*, S.C. Const. art. XVI, § 1. That

other actors may be involved in adopting such provisions makes no difference. As this Court recently recognized, state constitutional provisions adopted in processes that do not involve the legislature alone—like conventions or initiatives—remain valid under the Elections Clause. *AIRC*, 576 U.S. at 822-24.

2. State courts referee disputes over election law.

State courts are integral to the states' election apparatus. They review legislative acts for their constitutionality, construe laws whose meaning is disputed, and participate in redistricting as required by state law. Petitioners would jettison many, if not all, of these longstanding functions of state judiciaries. At the very least, petitioners and their *amici* would subject state judges to second-guessing by federal courts, undermining state sovereignty and disregarding the vital role state judges play in resolving state-law disputes.

State courts routinely review state election statutes for their compatibility with state constitutions. Through this judicial-review function, state courts enforce the boundaries of permissible election regulation set by the people in the state's foundational document. *See, e.g.*, *McLinko v. Dep't of State*, 279 A.3d 539, 565 (Pa. 2022) (reviewing universal vote-by-mail statute); *City of Memphis v. Hargett*, 414 S.W.3d 88, 101 (Tenn. 2013) (reviewing voter identification law); *Walsh v. Katz*, 953 N.E.2d 753, 759-60 (N.Y. 2011) (reviewing residency requirement); *Favorito v. Handel*, 684 S.E.2d 257, 262 (Ga. 2009) (reviewing adoption of an electronic voting

system). This judicial-review function, which is standard fare for the state courts, is at risk under any form of petitioners' theory. *See* Pet'rs Br. 49.

Because state constitutions and even statutes sometimes lack the specificity required to neatly address every election-related issue, their meaning is frequently contested. State courts thus also play an indispensable role as the final arbiter of what state election law means. *See, e.g.*, *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 918, 926 (Tex. 2020) (per curiam) (Blacklock, J., concurring) ("In an ideal world, we would look no further than the Election Code. As recent events vividly demonstrate, however, we do not live in an ideal world."); *State Election Bd. v. McClure*, 189 N.E.2d 711, 713 (Ind. 1963) ("Since the Indiana Election Code is not certain and specific . . . , it is incumbent upon the judiciary to interpret the statute."). By settling the meaning of broadly worded or disputed provisions, state courts provide clear and uniform rules for other branches, voters, and election workers to follow.

In the statutory context, state courts have resolved issues like whether COVID-19 qualifies as a "disability" entitling a voter to vote by mail, *In re State of Texas*, 602 S.W.3d 549, 550 (Tex. 2020), and whether a provision closing the polls at 6:00 p.m. refers to eastern or central time, *McClure*, 189 N.E.2d at 713. Regarding state constitutional provisions, state courts play a similar role, applying and interpreting constitutional provisions using state-specific interpretive methods. *See, e.g.*, *In re Interrogatories on Sen. Bill 21-247 Submitted by Colo.*

Gen. Assembly, 488 P.3d 1008 (Colo. 2021) (interpreting new amendments to Colorado's Constitution governing redistricting); *In re Sen. Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 614 (Fla. 2012) (similar under Florida Constitution). In doing so, state courts give specific meanings to broadly worded—but important—constitutional guarantees, just as this Court "deduce[s]" specific rules from the Federal Constitution's "great outlines." *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819); *see* Conf. of Chief Justices Br. 17 (explaining how state and federal courts "have long crafted extensive and complex legal doctrines from . . . general language without . . . acting as legislators"). It is unclear, under petitioners' theory, to what extent state courts retain the authority to say what the law is.

Beyond these functions, state courts are sometimes responsible for the important role at issue in this very case—redistricting. *See* Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. Rev. 719, 751 (2021) ("In roughly half the states, judges play important roles in redistricting . . . that operate wholly outside the context of dispute resolution."). In some states, state constitutions direct courts to draft remedial maps when legislatures draw invalid ones. *See* Ark. Const. art. VIII, § 5; Fla. Const. art. III, § 16. In other states, judges serve as tiebreakers when other institutions cannot agree on a map. *See, e.g.*, Miss. Const. art. XIII, § 254. This Court long ago endorsed state courts' redistricting role, explaining that "[t]he 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." *Scott v. Germano*, 381 U.S. 407, 409 (1965). Petitioners' narrow view of the permissible role of state judges does not square with this well-established function. *See* Pet'rs Br. 20.

3. Election administrators set and implement rules necessary to conduct elections.

Election laws are not self-implementing. An array of election administrators—including governors, secretaries of state, state agencies, and local officials—work to conduct orderly elections. *See Democratic Nat'l Comm. v. Wis. State Legislature* ("*DNC*"), 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring in denial of application to vacate stay) (explaining the importance of elections administrators). Given the on-the-ground contingencies that elections often entail, legislatures share considerable authority with election administrators, who put election laws into practice. *See, e.g.*, Nev. Rev. Stat. § 293.247 (giving secretary of state power to "provide interpretations and take other actions necessary for the effective administration of . . . elections"); Or. Rev. Stat. § 246.150 (giving secretary of state power to "adopt rules" to achieve "correctness, impartiality and efficiency in administration of the election laws"). A rule that puts election regulation solely in the hands of the legislature, with no ability for delegation to state and local administrators, would upset these existing (and necessary) arrangements.

In exercising their authority, election administrators routinely clarify and implement

election rules. For example, officials often interpret election codes and fill in statutory gaps. *See, e.g.*, *George v. Hargett*, 879 F.3d 711, 716 (6th Cir. 2018) (officials prescribed method of vote-counting based on their interpretation of state law). They promulgate rules, issue guidance, or take other actions that significantly affect elections. *See*, *e.g.*, Ariz. Rev. Stat. § 16-452(B) (requiring the secretary of state to issue an "official instructions and procedures manual"); Tex. Elec. Code § 31.004(a) (directing secretary of state to "advise all election authorities with regard to the application, operation, and interpretation of this code"); Cal. Gov't Code § 12172.5(d) (giving secretary of state authority to "adopt regulations"). Some of these administrative actions do not occur strictly in the confines of election law; for example, officials make decisions that indirectly affect elections, like issuing public health and safety rules. *See, e.g.*, *Libertarian Party of Pa. v. Wolf*, Civ. A. No. 20-2299, 2020 U.S. Dist. Lexis 124200, at *22-24 (E.D. Pa. July 14, 2020) (describing how the governor's generally applicable stay-at-home orders affected political parties' ability to gather signatures and qualify for the ballot), *aff'd*, 813 F. App'x 834 (3d Cir. 2020); *Stringer v. Whitley*, 942 F.3d 715, 719 (5th Cir. 2019) (describing Texas Department of Public Safety's online driver license renewal system that asked voter registration questions).

States differ in how they divide power among various elections administrators. Some states concentrate their authority in their secretaries of state. *E.g.*, Tex. Elec. Code § 31.004(a). Others diffuse power across local boards and officials. *E.g.*, *Zignego v. Wis. Election Comm'n*, 957 N.W.2d 208,

212-13 (Wis. 2021) (describing how Wisconsin distributes power between a "state election agency" and "a small army of local election officials"). This "variation" in election administration "reflects our constitutional system of federalism." *DNC*, 141 S. Ct. at 32 (Kavanaugh, J., concurring). Under petitioners' extreme theory, this variation too could be under threat.

4. Voters establish election rules through direct democracy.

Voters themselves exercise power over elections in direct ways that bypass legislatures. Petitioners' theory, in its strongest form, could jeopardize these methods of direct democracy. In many states, voters can adopt election rules through ballot initiatives. *See AIRC*, 576 U.S. at 822 (cataloguing examples); *see also, e.g.*, *Op. of Justs.*, 162 A.3d 188, 206-07 (Me. 2017) (describing how Maine adopted rank-choice voting by initiative); *Santa Clara Cnty. Local Transp. Auth. v. Guardino*, 902 P.2d 225, 253 (Cal. 1995) (en banc) (explaining that, in California, "the initiative is the constitutional power of the electors 'to propose statutes'" (quoting Cal. Const. art. II, § 8(a))). Through such initiatives, several states have created independent redistricting commissions. *See Rucho*, 139 S. Ct. at 2507 (noting recent examples). Voters may also hold a veto power over election regulations through statewide referenda. *E.g.*, S.J. Res. 48, 58th Leg., 2d Sess. (Okla. 2022) (ballot initiative proposing constitutional amendment requiring voter identification); Cal. Proposition 14 (2010) (constitutional amendment proposed by Legislature and approved by voters creating nonpartisan blanket

primary system); *see generally* Neb. Const. art. 3, § 1 (establishing "the power of referendum").

This Court has already approved these methods, explaining that the "Elections Clause . . . is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands." *AIRC*, 576 U.S. at 816; *see also Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (approving state's use of referendum on redistricting plan). Petitioners ask this Court to overrule that precedent in a footnote bereft of any stare decisis analysis. Pet'rs Br. 40 n.9. This Court should reject petitioners' invitation. Notably, this settled precedent illustrates why petitioners' central thesis—that only state legislatures may regulate the time, place, and manner of federal elections—cannot be right.

B. Petitioners' theory undermines state sovereignty and could upend existing election administration.

Petitioners' primary theory takes no account of the myriad state election practices that do not involve the legislature, and, if adopted, could seriously disrupt existing election practices. Even the alternative theories suggested by petitioners' *amici*—which include clear-statement rules for election-related constitutional provisions, Arkansas Br. 11, or federal-court intervention to ensure a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (citation omitted)—would create confusion, call existing precedent into question, and inundate states with election-related litigation.

To begin, even a weakened version of petitioners' theory would undermine state sovereignty, with

federal courts routinely interfering with the functioning of state courts and state election law. For another thing, petitioners' approach could call into question longstanding rules governing elections. Perhaps most problematically, last-minute federal court decisions second-guessing state law could leave states with differing rules for state and federal elections occurring at the same time with little forewarning, placing them in an untenable position. And states would certainly face increased emergency litigation, forcing them to guess which state constitutional provisions and court decisions might be invalidated under the Elections Clause. Those practical problems counsel against the novel rules petitioners and their *amici* suggest.

1. Petitioners' theory would upset states' role in our federalist system.

Any version of petitioners' theory would intrude on state sovereignty. In our federalist system, states have long had the authority to adopt constitutions, establish governments, and enact laws. In doing so, "States retain broad autonomy in structuring their governments." *Shelby County*, 570 U.S. at 543. And when a state enacts laws or crafts a constitution, applying that law is generally the job of state courts. *See, e.g.*, *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("[W]e may not second-guess the Arizona Supreme Court's characterization of state law."); *DNC*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (allowing a state court's "modification of election rules" and citing "the authority of *state courts* to apply their *own constitutions* to election regulations") (emphasis added)).

Although regulation of federal elections is a federal power delegated to the states, "the Framers recognized that state power and identity were essential parts of the federal balance," so "the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province," like federal elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring). Accordingly, the Elections Clause takes state legislatures as it finds them, subject to state constitutions. *See AIRC*, 576 U.S. at 817-18 (rejecting notion that state legislatures can regulate elections "in defiance of provisions of the State's constitution"). Indeed, legislatures have no existence at all outside of the constitutions by which the people create, empower, and limit them. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (Patterson, J., riding circuit). Several states do not vest their legislative power solely in a legislature. *See, e.g.*, *AIRC*, 576 U.S. at 795-96, 814 (discussing Arizona); Or. Const. art. IV, § 1 (dividing "legislative power" between the Legislative Assembly and the people wielding the power of initiative and referendum). Out of respect for the differing ways states allocate the legislative power, this Court has "resist[ed] reading the Elections Clause to single out federal elections as the one area in which States may not" allocate power as they choose. *AIRC*, 576 U.S. at 817.

Petitioners' theory is hard to square with these federalist principles. Any theory reallocating power within state governments usurps states' authority to order themselves and "define[] [themselves] as a sovereign"—even if confined to the context of election

law. *Id.* (internal quotation marks omitted) (quoting *Gregory*, 501 U.S. at 460). This Court has never interpreted the Elections Clause "to justify disregard of the established practice in the states," *Smiley*, 285 U.S. at 369, or "to diminish a State's authority to determine its own lawmaking processes," *AIRC*, 576 U.S. at 824. Nor should it do so here.

Petitioners' theory presents additional federalism problems by requiring federal courts to superintend state institutions, potentially reviewing any election-related actions that are not directly issued by legislatures. At the very least, a ruling for petitioners would put federal courts in the business of second-guessing state courts' interpretation of state law. Yet this Court has long recognized that it should not "undertake to say" that a state court "had misunderstood" state law "and therefore erect itself into a tribunal which should correct such misunderstanding." *Elmendorf v. Taylor*, 23 U.S. 152, 159-60 (1825). The Elections Clause does not upend that settled principle. Indeed, "this Court has consistently rejected" a "vision of election administration" that gives a "green light to federal courts to rewrite dozens of state election laws around the country." *DNC*, 141 S. Ct. at 35 (Kavanaugh, J., concurring). It should reject that outcome here as well.

2. Petitioners' theory could destabilize elections.

The real-world consequences of petitioners' theory are potentially far-reaching, casting doubt on key election rules and threatening to place states in the untenable position of conducting simultaneous state

and federal elections with conflicting rules. States could also face multiplying federal-court litigation and be forced to defend against amorphous claims regarding whether their constitutions are "clear" or their state-court interpretations "fair." Put simply, petitioners' theory risks severe disruption if put into practice.

a. Petitioners' theory could deprive states of key rules and actors needed to administer elections.

Elections require "clear and settled" "rules of the road." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). But petitioners' theory could upend many of those settled rules. For instance, many states prescribe in their state constitutions exactly how citizens should register to vote and cast ballots. *See AIRC*, 576 U.S. at 823. Under petitioners' primary theory, however, states can set these rules only by statute, not by constitutional provision. If that theory prevails, states could face fundamental questions regarding how people should register and vote. State may also be forced to wrestle with "zombie requirements"—"statutes struck down by a state court" that "would suddenly be live" under petitioners' view. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. Rev. 1052, 1058 (2021). And it is little consolation that legislatures could reenact rules previously established by other branches or scrap unwanted "zombie" laws because "legislatures are often slow to respond and tepid when they do." *DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurring).

Petitioners' theory, taken to its extreme, could also hamstring election administrators, who supply many crucial details regarding the manner of elections. For example, by statute, "[f]orty-eight states and one territory require local officials to designate polling locations." Nat'l Conference of State Legislatures, *Polling Places* (Oct. 20, 2020), https://tinyurl.com/38c7cvn9. In selecting polling places, these officials thus choose the "Places" of elections. U.S. Const. art. I, § 4, cl. 1. Yet under petitioners' theory, "the Elections Clause surely does not allow a state legislature to delegate away the authority assigned to it by the federal Constitution." Pet'rs Br. 44-45. It is not clear, in petitioners' view, whether this applies to even seemingly routine determinations while carrying out federal elections, such as choosing polling place locations. Petitioners' theory could thus require that legislatures pass statutes establishing the thousands of polling places required for American elections every cycle. *See* U.S. Election Assistance Commission, *Election Administration and Voting Survey 2020 Comprehensive Report* 19 (Aug. 16, 2021), https://tinyurl.com/b6jk77tm (reporting that states established 176,933 precincts and 132,556 polling places for the 2020 election). But that is hardly practical, and petitioners offer no answer to the necessity of delegating *some* election-related details.

Under petitioners' legislature-only theory, the problems for election administrators would be even worse when it comes to emergencies, which require quick action by officials operating in scenarios not contemplated by election codes. Consider the perennial emergency caused by hurricanes, which

often require moving voting locations or extending deadlines. *See, e.g.*, Fla. Exec. Order No. 19-262 (Nov. 29, 2019), https://tinyurl.com/5bj3se7c (Florida governor suspending election statutes, moving polling places, and changing early voting rules); *Wise v. Circosta*, 978 F.3d 93, 97 n.2 (4th Cir. 2020) (en banc) (noting that the North Carolina State Board of Elections "regularly extends its absentee ballot receipt deadlines in response to the hurricanes that befall us in the autumn"). Under petitioners' extreme reading of the Elections Clause, thousands—possibly millions—of voters could be deprived of an opportunity to vote when hurricanes, wildfires, or other natural disasters and unforeseen contingencies make it impossible to vote at the time or place prescribed by statute.

b. Petitioners' theory could require different rules for federal and state elections.

Petitioners' theory might also result in some state election laws being valid and mandatory for federal elections but *invalid* for simultaneous state elections. That is a problem because state and federal elections often occur at the same times and places using the same ballots. Disparate rules are likely because the Elections Clause refers only to *congressional* elections and thus does not affect states' regulation of elections for *state* offices. *AIRC*, 576 U.S. at 819.

Consider, for example, the factual context of this case—a state constitutional challenge to a state election statute enacted by the legislature. Under petitioners' theory, the Elections Clause would foreclose that challenge as applied to federal elections, requiring the state statute to be given

effect. But the *very same* statute may, per the state constitution, be *invalid* as applied to state elections, which typically occur at the same locations on the same day. *E.g.*, N.C. Gen. Stat. § 163-1(a), (c); Tex. Elec. Code § 43.001. Because state constitutions and election laws usually do not differentiate between state and federal elections, this would create novel problems. *See, e.g.*, Va. Const. art. 2, § 1 (listing "the qualifications of voters" in "elections by the people"); Ariz. Const. art. 7, § 7 (setting plurality of votes as victory threshold "[i]n all elections held by the people"); *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 490 (Pa. 2006) (describing a provision of the Pennsylvania Constitution that "does not differentiate between elections for federal and state office").

Applying two sets of rules for elections may well be practically impossible. Consider state practices regarding ballots. States usually craft one, unified ballot for both federal and state offices. *E.g.*, Minn. Stat. Ann. § 204D.11(1); *Crafts v. Quinn*, 482 A.2d 825, 831 (Me. 1984). But claims under petitioners' theory could force states to use separate ballots for federal and state offices, if, for example, a state court held that a certain statutory ballot requirement violated a state constitutional provision (and thus could not be applied in state elections) but the Elections Clause nonetheless mandated that the statute be given effect in federal elections. For election administrators, that could mean double the printing and counting, additional voter education, increased risk of error and fraud, confusion, and significant costs. *See Kuznik*, 902 A.2d at 506-07 (listing similar problems with court order resulting in

electronic voting systems for federal but not state elections). Further, in states where election regulations apply universally to state and federal elections—whether mandated by statute or state constitution—court orders to use separate ballots could make it impossible to comply with valid state laws. *See id.* at 491 ("Many provisions of the Code could not be fulfilled if we were to affirm the dual system that [a court] ordered.").

And dual ballots are only the beginning. Imagine, for example, rulings that might require polling places to remain open on different dates and times for state and federal elections. *Cf. In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987) (holding that a court, pursuant to delegated authority, could order polls closed due to flooding and resume the election two weeks later). Or imagine a ruling making citizens eligible to vote in one election but not the other, when states are otherwise permitted to use a single ballot containing state and federal candidates. *Cf. Cmty. Success Initiative v. Moore*, No. 19 CVS 15941, 2020 WL 10540948, at *6 (N.C. Super. Ct. Sept. 4, 2020) (holding that felon disenfranchisement law violated state constitution). Or imagine a ruling that mandates counting late-mailed or late-received ballots, but only for state candidates. *Cf. Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020) (holding that the state constitution required extension of deadline for mail-in ballots), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). Such regimes would not only frustrate state election administrators, but could confuse or disenfranchise voters and introduce a higher risk of error in tabulating votes. And given the

emergency nature of much election litigation, it is highly unlikely that state legislatures could reliably intervene to rectify the disparities.

c. Petitioners' theory would subject states to increased, thorny litigation in the federal courts.

Petitioners' theory would threaten to "bring on a massive and destabilizing new crush of litigation" against states in federal courts. Joshua Perry & William Tong, *Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence*, 53 Conn. L. Rev. Online 1, 19 (2021). This Court has previously refused to recognize claims under the Constitution that would give federal courts "an extraordinary and unprecedented role" in elections. *Rucho*, 139 S. Ct. at 2507. Yet, were any form of petitioners' theory adopted, the Court would be recognizing a new claim under the federal Constitution. And it is impossible to estimate just how many new lawsuits states and the federal courts would face. This Court's own docket may well grow because any constitutional challenges to redistricting—which would include claims under petitioners' theory—are directly appealable. *See* 28 U.S.C. §§ 2284(a), 1253.

The volume of potential federal litigation is concerning—and so is its character. All claims under petitioners' theory involve elections, and thus "the most intensely partisan aspects of American political life" that federal courts generally seek to avoid. *Rucho*, 139 S. Ct. at 2507. Often, election-related claims will arise in an emergency posture and seek time-sensitive relief. Such litigation is taxing for

states and can result in consequential judgments without time and briefing for full deliberation. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining problems with preliminary injunction proceedings); *Merrill v. Milligan*, 142 S. Ct. 879, 887 (2022) (mem.) (Kagan, J., dissenting) ("serious and sustained consideration" is "impossible to give 'on a short fuse'" (quoting *Does v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring))). Emergency cases could also strain federal resources.

Moreover, the remedies for successful claims could upend elections, with injunctions altering election rules and courts overturning election results. Such orders cause voter confusion while dampening "confidence in the fairness of the election." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Although this Court has cautioned against altering election rules near an election, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam), it also has not "fully spell[ed] out all of [*Purcell*'s] contours," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (per curiam) (considering *Purcell* but nonetheless ordering district court to enter an injunction). And state supreme courts—whose decisions would suddenly be subject to additional federal review— are not bound by *Purcell* at all in adjudicating state constitutional challenges to state election laws, increasing the likelihood of claims arising close to elections. In short, petitioners seek "an unprecedented expansion of judicial power" over precisely the type of cases federal courts disfavor. *Rucho*, 139 S. Ct. at 2507.

d. There is no workable standard to implement petitioners' theory.

In addition to spawning new federal litigation, petitioners' theory would leave courts and parties searching for a workable standard to implement new Elections Clause claims. For example, petitioners suggest that the North Carolina Supreme Court exceeded its authority under the Elections Clause by engaging in "policymaking." Pet'rs Br. 46. But they do not explain the difference between "policymaking" and construing law. At other times, petitioners suggest that, consistent with the Elections Clause, state courts cannot identify "novel rule[s]" based on interpretions of "open-ended guarantees" in state constitutions. Pet'rs Br. 46-47. But they provide no principle to determine when a rule is "novel" or a guarantee "open-ended." That standard is plainly not tenable.

Trying to fill the gap left by petitioners, some *amici* propose their own standards. These proposals suggest that state courts may apply only "clear text," Arkansas Br. 11, or that federal courts should scrutinize state courts' decisions to determine if they offer a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)). These proposals, too, suffer from fundamental flaws.

To start, clarity is often in the eye of the beholder. "Difficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators" to craft straightforward language. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021). And that is doubly true of constitutional provisions, which are often

written capaciously. Accordingly, "[r]easonable minds often disagree about how" election law provisions "may reasonably be construed." *In re State of Texas*, 602 S.W.3d at 563 n.8 (Guzman, J., concurring) (quoting *Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019)) (interpretive dispute over election code). Imposing a clear-statement rule and abrogating longstanding constitutional or statutory provisions that do not meet this newly minted test could wipe decades of state-law precedent off the books. In an area like election law, where settled rules are particularly important, the Court should reject such a drastic move.

Even a "fair reading" approach would mire federal courts in complex disputes better left to state courts in the first instance. Reviewing state courts' interpretations for "fairness" would require considering state-specific precedent, history, and practices. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . ."). And it is difficult to say when an interpretation of a novel or expansive state-law provision is "fair." *See, e.g.*, *Fay v. Merrill*, 256 A.3d 622, 650 (Conn. 2021) (stating that challenge to change to absentee ballot requirements presented state constitutional issue of first impression among all states). This is especially true for state constitutional provisions, which are often more broadly worded than statutes. Federal review of state courts' interpretations of those provisions will often come down to subjective disagreements. But "[i]f federal courts are to 'inject [themselves] into the most

heated partisan issues,'" "they must be armed with a standard that can reliably differentiate" between permissible and impermissible interpretations. *Rucho*, 139 S. Ct. at 2499 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment)). Neither petitioners nor their *amici* identify such a standard.

CONCLUSION

This Court should affirm the judgment of the North Carolina Supreme Court.

Respectfully submitted,

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