No. 21-1271

IN THE

Supreme Court of the United States

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

Petitioners,

v.

REBECCA HARPER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections.

INTRODUCTION & SUMMARY OF ARGUMENT

Some scholars, including those who claim to care about the Constitution's original public meaning, criticize what they call the "independent state legislature" doctrine. According to Vikram and Akhil Amar, the original meaning of state "legislature" was "an entity created and constrained by the state constitution." Amars, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 19 (2021). So "Article II was intended to vest ultimate control in … the people of the state," not in state legislatures. Amar, Bush v. Gore *and Article II: Pressured Judgment Makes Dubious Law*, 48 Fed. Law.

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[*] Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties consent to its filing.

27, 32 (2001). Hayward Smith even claims that the founders "*rejected* a decisive role for state legislatures." Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731, 783 (2001) (emphasis added). Like the Amars, Smith thinks the Constitution "intended … to empower the people of each state as much as, if not more than, the legislatures." *Id.*

The Amars and Smith are mistaken. What they call a "doctrine" is really the plain meaning of the Elections and Electors Clauses. The founders vested the power to regulate federal elections in the state "Legislature." U.S. Const., art. I, §4, cl. 1; art. II, §1, cl. 2. They knew how to vest powers in "each state as an entity," but they chose to vest this power in "a particular organ of state government" instead. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021). "By its plain terms," the Constitution dictates that "a legislature's power in this area … cannot be taken from them or modified even through their state constitutions." *Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020) (cleaned up). The contrary scholarship misreads the constitutional text, history, and precedent.

This Court enforces the Constitution regardless of predicted consequences, but the consequences here would be net positive. State legislatures will remain constrained by the federal constitution, state constitutional requirements concerning voter qualifications, and congressional supervision. Federal courts will provide the same modest check they already provide

in our constitutional system. And state courts and executives will be free to interpret and administer—but not rewrite—the legislature's written election code. Meanwhile, this Court will vindicate the founders' "structural allocation of primary authority over federal elections to the political branches—specifically, to representative legislative assemblies." Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 34 (2020). Vindicating that structural principle requires reversal here.

ARGUMENT

I. Scholarly critics of the founders' choice to empower state legislatures misread the text, history, and precedent.

"A discretionary power over elections must be vested somewhere," 1 Story, *Commentaries on the Constitution* §816 (4th ed. 1873), and the founders chose to vest it in state legislatures. Critics of the founders' choice have branded this principle the "independent state legislature" doctrine. But the elections clauses are not some judge-made "doctrine"; their exclusive delegation to state legislatures is right there in the constitutional text. *See DNC v. Wis. State Leg.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite). It is firmly rooted in our history. *See* Morley, 55 Ga. L. Rev. at 37-65. And it is grounded in "more than a century" of this Court's precedents. *Republican Party* of *Pa. v. Degraffenreid*, 141 S. Ct.

732, 733 (2021) (Thomas, J., dissenting from denial of certiorari) (citing *McPherson v. Blacker,* 146 U.S. 1, 25 (1892).

A. Text

Article I's Elections Clause and Article II's Electors Clause authorize the state "Legislature" to regulate the "Manner" of conducting congressional elections and appointing presidential electors. U.S. Const., art. I, §4, cl. 1; art. II, §1, cl. 2. The term "legislature" was not "of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). The legislature was "*the representative body* which ma[kes] the laws of the people." *Smiley v. Holm*, 285 U.S. 355, 365 (1932). Indeed, "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 828 (2015) (Roberts, C.J., dissenting). Thus the term should be interpreted "as referring solely and exclusively to the multimember body of representatives within each state generally." *Id.* at 134.

Founding-era sources confirm that the Constitution adopts this plain meaning of "legislature." The *Letters from a Federal Farmer*, which were published during the ratification debates, interpret "Legislature" in the Elections Clause to mean "institutional state legislatures." *See* Morley, 55 Ga. L. Rev. at 29. Chancellor Kent's *Commentaries on American Law* reach the same conclusion. *Id.* And

every state constitution from the era defined "legislature" as "a distinct multimember entity comprised of representatives with the authority to enact laws." Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 147, & n. 101 (2015). Cooley's 1890 treatise understood this specific reference to state legislatures as an *exclusive* grant of authority: "So far as the election of representatives in Congress and electors of president and vice president is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same." Morley, 55 Ga. L. Rev. at 9 (citing Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 754 n.1 (6th ed. 1890)).

This definition lines up with the Constitution's other uses of "legislature." Take Article V, for example. That provision empowers the "Legislature" of each state to ratify constitutional amendments. Yet that authority "transcends any limitations sought to be imposed by the people of a State." *Leser v. Garnett*, 258 U.S. 130, 137 (1922). Similarly, absent a convention, Article V allows States to ratify a constitutional amendment only by a vote of its institutional legislature—a public referendum will not do. *Hawke*, 53 U.S. at 225, 227. Indeed, "[t]he language of the article" was so "plain" that it "admits of no doubt in its interpretation." *Id.*

The Amars and Smith would read "legislature" to mean "the people," but their reading would render the word meaningless. The Constitution could have said—

as critics wish—that federal election rules "are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power." *Moore v. Harper,* 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from denial of stay). "But that is not what the Elections Clause says." *Id.* Instead, it vests that power in the state legislature. Critics of that decision cannot overcome the founders' intentional choice by rewriting "the constitutional term 'the Legislature' to mean 'the people.'" *Arizona State Leg.*, 576 U.S. at 825 (Roberts, C.J., dissenting).

The Constitution's Supremacy Clause does not help the critics. *Cf.* Amars 19. Because the Supremacy Clause makes the federal constitution supreme over contrary statutes, critics claim that the founders would have expected state constitutions to be supreme over contrary state laws regulating federal elections. But the problem with that view is that "States lack inherent power to regulate federal elections." Morley, 109 Nw. U. L. Rev. Online at 132. That power comes not from the States' residual sovereignty, but from "a direct grant of authority" in the federal constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). The elections clauses are "'express delegations of power' that confer upon state legislatures the power to 'provide a complete code' for federal elections." Morley, 109 Nw. U. L. Rev. Online at 132 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *Smiley*, 285 U.S. at 366). The Supremacy Clause makes this constitutional grant override contrary state constitutions, not the other way around.

The Articles of Confederation do not help the critics either. *Cf.* Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L. J. 445, 480-84 (2022). True, the States regulated federal elections, including with their state constitutions, under the Articles. But unlike the Constitution, the Articles had no supremacy clause. *See The Articles of Confederation*, Const. Ann., bit.ly/3pW6Bha (noting that while the Articles required States to "abide by the determinations of" congress, "the effect of that provision was limited"). Lacking such a clause, state law was king. So it was of course "understood that 'legislatures' were … subject to substantive regulations by state constitutions." Smith, 53 St. Mary's L. J. at 482. But the Supremacy Clause fundamentally altered that structure, making federal law under the new Constitution "supreme over competing sources of state law." Lawson, *Supremacy Clause*, in Heritage Guide to the Constitution (2d ed. 2014).

B. History

Critics also get the history wrong. Most glaring is the dog that didn't bark: No scholar has documented a robust, founding-era practice of state courts using state constitutions to nullify duly-enacted statutes regulating federal elections. *See Printz v. United States*, 521 U.S. 898, 918 (1997) (dismissing recent practice in favor of "almost two centuries of apparent … avoidance"). And scholars simply ignore the many times that "federal and state authorities" denied the existence of that authority. *See generally* Morley, 55 Ga. L. Rev. at 37-92.

Start with the Massachusetts constitutional convention of 1820. When a delegate introduced a provision attempting to "limit" the state legislature's "exercise of … discretion" in redistricting, another delegate—Justice Story—explained that the convention had no "right to insert in [the state] constitution a provision which controls or destroys a discretion ... which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States." *Id.* at 39-40 (quoting *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts* 3 (Boston Daily Advertiser, rev. ed. 1853)). The amendment was subsequently defeated on that basis. *Id.*

The best the critics do is point to various "free and equal" provisions in early state constitutions, which did purport to regulate federal elections. *See* Smith, 53 St. Mary's L. J. at 491. But those early clauses are best understood to regulate voter qualifications under Article I, §2, not the manner of conducting congressional elections or appointing presidential electors. Unlike the elections clauses, the Voter Qualifications Clause contains no reference to state "legislatures." Instead, it gives "authority for determining elector qualifications to the states" themselves. Clegg, *Elector Qualifications*, in Heritage Guide.

"Free and equal" election clauses were explicitly linked to the Voter Qualifications Clause. When Pennsylvania's 1790 constitution provided that "elections shall be free and equal," Pa. Const. Art. IX, §5 (1790), James Wilson tied this clause to "the qualifications of

electors." Wilson, *The Legislative Department*, Lectures on Law (1791), bit.ly/3TkrZdD. The Pennsylvania supreme court later confirmed this reading. In *Patterson v. Barlow*, that court upheld a special voter registry law in Philadelphia. In doing so, it explained that the free and equal elections clause simply secures the right to vote to qualified voters. *See* 60 Pa. 54, 63 (1869) (explaining that making an election "unequal" means enacting "different rules as to different classes of persons claiming to vote").

Or consider Vermont. In Article VIII of its first constitution, Vermont explicitly tied the goal that "all elections ought to be free" to voter qualifications; the relevant provision guaranteed that "all freemen, having a sufficient, evident, common interest with, and attachment to the community" had the right to vote. Vt. Const. Art. VIII (1793). Just a few years later, the council of censors confirmed this meaning. Addressing the people of Vermont, the council explained that Article VIII barred the legislature from giving the state supreme court the power to "dis[en]-franchise a freeman for any evil practice which shall render him notoriously scandalous"—in other words, to disqualify qualified voters. *An Address of the Council of Censors to the People of Vermont* (1799-1800), in Records of the Council of Censors of the State of Vt. 156 (Gillies and Sanford, eds. 1991).

Tennessee is another good example. Article XI, §5 of its first constitution provided "[t]hat all Elections shall be free and equal." Tenn. Const. Art. XI, §5 (1796). This language was reaffirmed unchanged at the 1835 state constitutional convention. Tenn. Const.

Art. XI, §5 (1835). When it was amended in 1870, Tennessee confirmed that the right to "free and equal" elections was about voter qualifications:

> That elections shall be free and equal and the right of suffrage, as hereinafter established, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Tenn. Const. Art. I, §5 (1870). This Court read it the same way. *Baker v. Carr* read Tennessee's "free and equal" language to "provid[e] that no qualifications other than age, citizenship and specified residence requirements shall be attached to the right of suffrage." 369 U.S. 186, 272 (1962).

Delaware was the same way. Article I, §3 of its 1792 constitution provided that "All elections shall be free and equal." Del. Const. Art. 1, §3 (1792). This language built on and replaced similar language in Delaware's 1776 declaration of rights. Holland, *The Delaware State Constitution*, in The Oxford Commentaries on State Constitutions of the United States 36 (2011). The declaration provided that "all elections ought to be free and frequent and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right to suffrage." Del. 1776 Decl. of Rights, §6. Again, the "free and equal" language was tied to voter qualifications.

Michael Weingartner, in his recent article, makes a similar mistake by pointing to the voter-qualification regulations in Georgia's constitution. Weingartner writes that "State constitutions featured in some of the earliest contested House elections, and in each case, there was no doubt they controlled." Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y __, 56 (forthcoming 2022). In contesting his election against Anthony Wayne, for example, James Jackson successfully "argu[ed] that several voters had cast their ballots outside of their home counties in violation of the Georgia Constitution, which required that voters 'have resided six months within the county.'" *Id.* But, once again, Weingartner mistakes the source of that power. The referenced residency requirement came from a provision of the Georgia constitution that spelled out voter qualifications. *See* Ga. Const. of 1789, art. IV, §1 (providing that voters must be "citizens," be "inhabitants of this State," be "twenty-one years" old, have recently paid taxes, and have "resided six months within the county"). This provision plainly stemmed from *Georgia's* authority under the Voter Qualifications Clause, not the *Georgia legislature's* authority under the Elections Clause.

The critics also misunderstand why, in 1789, New York's council of revision vetoed the legislature's bill providing the method of appointing U.S. Senators. Smith claims that the council rejected the bill as "inconsistent with the public good." Smith, 29 Fla. St. at 761. But the council's veto message makes clear that it believed the bill was "inconsistent with the

public good" precisely because it limited the state legislature's power in violation of the federal constitution:

> The Council object against the said bill becoming a Law of this State as inconsistent with the public good—
>
> 1st. Because the Constitution of the United States directs, that senators be chosen from each State, ***by the Legislature*** thereof. If by the Legislature is intended the members of the two Houses not acting in their legislative capacity, no law is necessary to prescribe the mode of election, concurrent resolutions extending in this case as well to the mode of election as to the choice of persons; and the bill, as far as it goes ***operates as a restriction upon the constitutional rights of the two Houses***. If the Legislature are only known in their legislative capacity the Senators can constitutionally be appointed by law only, and no considerations arising from inconvenience, will justify a deviation from the constitution of the United States.
>
> 2d. Because this bill, when two senators are to be chosen, enacts that in case of the disagreement of the two Houses, in the nomination, each House shall out of the nomination of the other choose one, and that such persons shall be the senators to represent this State; and thus by compelling each House to choose one of two persons,

> neither of whom may meet with their approbation, establishes a choice of senators by the separate act of each branch of the Legislature; in direct opposition to the Constitution of the United States, which in the third section of the first article declares that they shall be chosen ***by the Legislature***.

Council of Revision Proceedings (July 15, 1789), in 2 Messages from the Governors (1777-1822) 303 (Charles Lincoln, ed. 1909) (emphases added). Far from rebutting the principle of legislative exclusivity, this episode further confirms the founding generation's fealty to it.

C. Precedent

The critics have the biggest problem squaring their theory with this Court's precedents. In *Palm Beach County*, a unanimous Court confirmed that the Electors Clause is "a direct grant of authority" to the state "legislature." 531 U.S. at 76. And so while federal courts typically "defe[r] to a state court's interpretation" of state law, state courts can violate the Electors Clause if they apply state constitutions to "'circumscribe the legislative power.'" *Id.* at 76-77 (quoting *McPherson*, 146 U.S. at 25). These statements make little sense if, as the critics claim, state courts are free to invalidate legislatures' regulations of federal elections.

But this Court's unanimous opinion in *Palm Beach County* is not the only precedent that the critics would overrule; the critics also dismiss this Court's

1892 decision in *McPherson* as "cryptic language" and "ambiguous or contradictory dicta." Amar 32; Shapiro, *The Independent State Legislature Theory, Textualism, and State Law*, 91 U. Chi. L. Rev. __, 16 (forthcoming 2023). In *McPherson*, this Court considered whether the "state legislature … could divide authority to appoint [presidential] electors across each of the State's congressional districts." *Ariz. State Leg.,* 576 U.S. at 839-40 (Roberts, C.J., dissenting). This Court upheld the law, emphasizing that "the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in 'the Legislature' of the State." *Id.* "That power, the Court explained, 'can *neither be taken away nor abdicated*.'" *Id.* (quoting *McPherson*, 146 U.S. at 35; emphasis added). Indeed, the Court concluded that the Electors Clause "leaves it to the legislature exclusively to define the method of effecting the object." *McPherson*, 146 U.S. at 27. That "clause's grant of federal constitutional power specifically to the state legislature 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power,' including through the state constitution." Morley, 55 Ga. L. Rev. at 84 (quoting *McPherson*, 146 U.S. at 25). Other than Congress's power "to determine the time of choosing the electors and the day on which they are to give their votes," the state legislature's power is "exclusive." *McPherson*, 146 U.S. at 35.

Critics also largely ignore this Court's decision in *Leser*. There, challengers questioned the validity of the Nineteenth Amendment's ratification "on the grounds that some state constitutions barred their

legislatures from ratifying such an amendment." Morley, 90 Fordham L. Rev. at 537-38. This Court rejected the challenge, holding that ratification is a "federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Leser*, 258 U.S. at 137. Again, that interpretation of Article V is crucial because, like the elections clauses, Article V singles out state "legislatures." Yet the critics relegate *Leser* to footnotes—if they mention it at all. *E.g.,* Shapiro n.58; Amars n.85; Smith, 29 Fla. St. U. L. Rev. at n.43; Smith, 53 St. Mary's L. J. at n.450.

While the critics cite *Smiley v. Holm*, that decision comes nowhere close to holding that state constitutions can override legislatures' substantive regulations of federal elections. In *Smiley*, this Court held that the governor of Minnesota could veto the legislature's congressional redistricting plan. 285 U.S. at 373. State legislatures enacting laws under the Elections Clause, this Court explained, can be forced to follow the "*manner* … in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-68 (emphasis added). But *Smiley* "never held that the term legislature should mean something other than a state's institutional, representative lawmaking body"; it held "only that when such an entity exercises authority under the Elections Clause, it must do so subject to the standard lawmaking process." Morley, 109 Nw. U. L. Rev. Online at 144-45. *Smiley* thus did not address "whether a state constitution may impose *substantive* limits on the *content* of measures." Morley, 55 Ga. L. Rev. at 78 (emphases added). To the contrary, *Smiley* acknowledged that

the Constitution's "comprehensive words" let state legislatures "provide a complete code for congressional elections." 285 U.S. at 366. So while *Smiley* means that state constitutions can impose enforceable *procedures* for enacting legislation that regulates federal elections, it says nothing about state constitutions regulating the *substance*. Morley, 55 Ga. L. Rev. at 25.

Smiley is also defensible on simpler grounds. Later in the opinion, *Smiley* contemplates that States can regulate federal elections through referenda approved by the people. *See* 285 U.S. at 371-72. The reason was not because the Constitution's reference to "legislature" really means "the people"; the reason was that state constitutions typically define referenda as "'*part of* the legislative power of the state.'" *Id.* at 372 (emphasis added). But the same could be said of gubernatorial vetoes. *Cf. La Abra Silver Min. Co. v. United States*, 175 U.S. 423, 453 (1899) (noting that the presidential veto "is legislative in its nature"); *State ex rel. Smiley v. Holm*, 184 Minn. 228, 235, 238 N.W. 494, 498 (1931) (entertaining the notion that "the veto power is a legislative power" under the Minnesota constitution). On this understanding of *Smiley*, the governor *was* acting as part of the legislature when he vetoed that body's election law. Yet that understanding does not help the critics here. No State considers its judiciary to be exercising legislative power when it interprets the state constitution (or its executive to be exercising legislative power when it administers state law).

II. Critics' fears that honoring the founders' choice will "wreak havoc" on elections are overblown.

Critics and respondents alike warn that enforcing the elections clauses as written "would wreak havoc upon elections nationwide." NC-League-BIO 35-36. They claim that a ruling for the petitioners would threaten "every state constitutional provision that touches congressional elections." *Id.* These sky-is-falling takes are not remotely realistic.

A. Honoring the founders' choice will not underempower other state actors.

Recognizing that "legislature" means the institutional legislature does not remove other state actors from the electoral process. It merely constrains state courts and executives from ignoring or invalidating clear laws passed by the legislature.

State courts and executives can still *interpret* the legislature's regulations of federal elections. Interpretation is not usurpation; it is a traditional exercise of judicial and executive power. "Under this approach, since a legislature adopts only the text of a statute, the Constitution requires election officials and courts to apply that text, even if they ordinarily would take into account extrinsic considerations like the state constitution." Morley, 90 Fordham L. Rev. at 505. In other words, nonlegislative actors can offer good-faith interpretations of ambiguous laws. But they cannot invoke state constitutions as a basis to strike down or willfully ignore clear laws.

Similarly, respondents' claims that they could not "successfully hold federal elections" if the legislature is the only body allowed to regulate federal elections is unserious. State-BIO 31. State and local officials can still adopt and carry out rules or procedures affecting federal elections, but "only if the legislature has authorized them to do so." Morley, 90 Fordham L. Rev. at 509. Officials "may not take it upon themselves to suspend or ignore state law." *Id.* The notion that the executive can enforce and administer, but not rewrite, acts of the legislature is already the law in all fifty States.

Nor will state legislatures operate without meaningful checks. As mentioned, given the different wording of the Voter Qualifications Clause, state constitutions can still constrain how the legislature regulates the qualifications for voting. State legislatures also must honor *federal* law, including the Due Process Clause, which both state and federal courts can enforce. Indeed, "many state constitutions' election-related provisions simply reiterate protections already established under the U.S. Constitution," the latter of which "remain in force." Morley, 55 Ga. L. Rev. at 91. The Constitution also contemplates that Congress, not the courts, will be the main check on state legislatures. The Elections Clause empowers Congress to "make or alter" the state legislatures' regulations of congressional elections. U.S. Const., art. I, §4, cl. 1. And though the Electors Clause gives Congress less power over presidential elections, the Constitution still lets Congress dictate "the Time" when electors are chosen and "the Day" when they must vote. U.S. Const., art. II, §1, cl. 4. These many

checks guard against alarmist concerns about rogue state legislatures changing the election rules late in the game.

B. Honoring the founders' choice will not overempower federal courts.

Some critics find it ironic that federal courts would enforce the election clauses when "the key point of Article II's election language (and the companion language of Article I) was to empower states." Amars 18. They also contend that federal courts lack an immersive understanding of individual states' "legal culture, precedent, and constitutions," which would "detract from their ability to interpret … particular state laws." Shapiro 54. Neither point is persuasive.

The elections clauses do not "empower states"; they empower state *legislatures*. So there is nothing ironic about enforcing those clauses against state *courts* and state *executives* who violate them. Once that question-begging assumption is cleared away, the notion that federal courts have "the institutional function of checking the state court's construction of state election legislation to ensure that federal constitutional ground rules (here, those of Article II) are followed is unexceptional." Tribe, Erog v. Hsub *and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 193 (2001). Indeed, the "federal judiciary ... must ensure compliance with Article II and every other provision of the federal Constitution that in some way constrains the process for choosing presidential electors." *Id.* at 188. Nor is this duty particularly novel or complicated. This

Court can and does review state courts' interpretations of state law under other provisions of the Constitution. *E.g., Bouie v. City of Columbia,* 378 U.S. 347 (1964) (Due Process Clause); Morley, 90 Fordham L. Rev. at 520-23 (collecting other examples).

And federal courts will play only a modest, net-beneficial role. Much election-related litigation would still be decided in state courts. Morley, 90 Fordham L. Rev. at 514. In cases where "the scope of an election official's authority under state law is unclear," federal courts can abstain and "allow the state judiciary to resolve the issue" first. *Id.*; *see R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). And for those cases properly in federal court, unelected federal judges—further removed from political considerations than their state counterparts—might be better situated to neutrally evaluate election-related issues. Morley, 90 Fordham L. Rev. at 513. Federal judges can also strengthen election integrity by serving as a check on state judges who are tempted to stray from pre-existing rules during contested partisan elections. *Id.* at 527. In this way, federal courts can bolster the "predictability consistency, and stability" of election law. *Id.*

Indeed, this Court would go a long way toward restoring confidence in our elections by resolving, once and for all, "who has authority to set or change" the rules governing federal elections. *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from denial of certiorari). When nonlegislative officials try to nullify or ignore the legislature's written election code, the Constitution has a clear answer: the written election

code prevails. The state court here did not honor that principle.

CONCLUSION

For these reasons and more, this Court should reverse the decision below.

Respectfully submitted,

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