SUPREME COURT
OF THE UNITED STATES


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          IN THE SUPREME COURT OF THE UNITED STATES
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TIMOTHY K. MOORE, IN HIS OFFICIAL  )
CAPACITY AS SPEAKER OF THE          )
NORTH CAROLINA HOUSE OF             )
REPRESENTATIVES, ET AL.,            )
            Petitioners,            )
              v.                    ) No. 21-1271
REBECCA HARPER, ET AL.,             )
            Respondents.            )
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Pages: 1 through 192

Place: Washington, D.C.

Date: December 7, 2022

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13   Washington, D.C.

14   Wednesday, December 7, 2022

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16   The above-entitled matter came on for

17   oral argument before the Supreme Court of the

18   United States at 10:04 a.m.

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 1    APPEARANCES:

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 3    DAVID H. THOMPSON, ESQUIRE, Washington, D.C.; on

 4         behalf of the Petitioners.

 5    NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf

 6         of the Private Respondents.

 7    DONALD B. VERRILLI, JR., ESQUIRE, Washington, D.C.; on

 8         behalf of the State Respondents.

 9    GEN. ELIZABETH B. PRELOGAR, Solicitor General,

10         Department of Justice, Washington, D.C.; for the

11         United States, as amicus curiae, supporting the

12         Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 21-1271, Moore

5   versus Harper.

6   Mr. Thompson.

7   ORAL ARGUMENT OF DAVID H. THOMPSON

8   ON BEHALF OF THE PETITIONERS

9   MR. THOMPSON: Mr. Chief Justice, and

10   may it please the Court:

11   The Elections Clause requires state

12   legislatures specifically to perform the federal

13   function of prescribing regulations for federal

14   elections. States lack the authority to

15   restrict the legislatures' substantive

16   discretion when performing this federal

17   function.

18   As Alexander Hamilton wrote in

19   Federalist 78, the scope of legislative

20   authority is governed by the commission under

21   which it is exercised. Here, that commission is

22   contained in the United States Constitution, and

23   it is federal law alone that places substantive

24   restrictions on state legislatures performing

25   the tasks assigned them by the federal

1   Constitution. The most prominent discussion of

2   the Elections Clause in the early republic

3   occurred during Massachusetts' 1820

4   Constitutional Convention.

5   Joseph Story, then a sitting Justice

6   on this Court, explained that a proposed

7   constitutional amendment requiring

8   representatives to be elected in districts would

9   violate the Elections Clause because that clause

10   vested state legislatures "with an unlimited

11   discretion in the subject."

12   Justice Story's view was an echo of

13   Alexander Hamilton's father-in-law, Senator

14   Philip Schuyler, who took the exact same

15   position on behalf of the entire New York State

16   Senate just one month after the ratification of

17   the Constitution. And for the first 140 years

18   of the republic, there was not a single state

19   court that invalidated on substantive grounds

20   any congressional redistricting plan.

21   This Court's decision in Leser teaches

22   that the founders tasked state legislatures with

23   federal functions that transcend any substantive

24   limitation sought to be imposed by the people of

25   the state.

           1   And I welcome the Court's questions.

           2   JUSTICE THOMAS: Counsel, this case is

           3   from a state supreme court that interpreted and

           4   applied a state constitution. So it would be --

           5   help -- be helpful if you would take some time

           6   to explain what we're -- what exactly we are

           7   reviewing, what decision we're reviewing, and

           8   what is the basis of our jurisdiction.

           9   MR. THOMPSON: Yes, Your Honor. Thank

          10   you. So the Court is reviewing the decision --

          11   there was an order on February 4th of the North

          12   Carolina Supreme Court, and it was accompanied

          13   10 days later by a written opinion, and in that

          14   written opinion, there was a liability

          15   determination that the Elections Clause did not

          16   apply, and, importantly, there was also a

          17   remedial determination -- and we can see this at

          18   Petition Appendix 142 -- where it empowered, the

          19   North Carolina Supreme Court empowered, the

          20   lower state court to draw the maps if necessary.

          21   And so that is a final order of the North

          22   Carolina Supreme Court, and it passed on the

          23   relevant questions.

          24   In addition, there's a second final

          25   order, which is, on February 23rd, there was a

1   denial of a stay application, and that too is a

2   final order of this Court.

3   JUSTICE THOMAS: We don't normally

4   review state supreme courts' interpretations of

5   state constitutions, so what I'm looking for is

6   why -- for example, if this were a case about a

7   state legislator -- or legislative district, it

8   would be doubtful that you'd be here under the

9   state constitution. So I'm looking for an

10   explanation as to why this case is here and

11   what's the jurisdiction for this case. How does

12   it differ from a purely state case?

13   MR. THOMPSON: Well, Your Honor,

14   our -- our position on the merits is to take as

15   given state law as interpreted by the North

16   Carolina Supreme Court. We're not asking this

17   Court to second-guess or reassess. We say take

18   the North Carolina Supreme Court's decision on

19   face value and as fairly reflecting North

20   Carolina law, and when one does that, we see

21   that there's a violation of the Elections

22   Clause, and -- and that's why we're here.

23   CHIEF JUSTICE ROBERTS: You concede

24   that state legislative action under the

25   Elections Clause is subject to the governor's

1   veto, right?

2   MR. THOMPSON: Yes, Your Honor.

3   CHIEF JUSTICE ROBERTS: Well, the

4   governor is not part of the legislature. Why is

5   -- why -- why do you concede that point?

6   MR. THOMPSON: Well, Your Honor, first

7   of all, we're not here to relitigate Smiley.

8   We're prepared to accept all the Court's

9   precedents, number one.

10   Number two, I think the Arizona

11   dissent pointed out that Samuel Johnson defined

12   "legislature" by reference to Matthew Hale's

13   definition, where he said the three branches of

14   the legislature, the two Houses of Parliament

15   and the king, because it was understood at the

16   time of the founding New York and Massachusetts

17   had gubernatorial veto. So it was understood

18   that the governor had a role to play at the time

19   of the founding, and at least it's arguably

20   grounded in the text.

21   CHIEF JUSTICE ROBERTS: Well, given

22   Smiley, if your concession doesn't undermine

23   your position, doesn't Smiley? I mean, that's a

24   pretty significant exception. You have

25   otherwise a very categorical case, and it's sort

1   of, well, with this one exception. But vesting

2   the power to veto the actions of the legislature

3   significantly undermines the argument that it

4   can do whatever it wants.

5   MR. THOMPSON: Well, Your Honor,

6   that's a procedural limitation. And as we

7   understood Smiley, it was talking about defining

8   the legislative power. And, here, we have a

9   separate issue. We have trying to limit that

10   legislative power. So however the legislative

11   power is defined under Arizona, under Smiley, we

12   are not -- you know, we -- we can take those

13   precedents as given. But what can't happen is

14   there can't be a substantive limitation by some

15   in power.

16   CHIEF JUSTICE ROBERTS: Well, just

17   last -- and last question at least for a while:

18   Why do you say it's procedural? Let's say the

19   governor is opposed to the legislative action

20   with respect to the elections that the

21   legislature endorses. He's the opposite

22   political party, has a whole different view, and

23   says -- you know, gives a speech saying, you

24   know, it's wrong because of this, not because of

25   procedure.

1   That strikes me as saying, oh, you

2   know, they're supposed to have, you know, two

3   votes on it or whatever and they didn't or, you

4   know, it's a -- they need a committee report.

5   That sort of thing is procedure. Straight out

6   veto, we really don't know what it is.

7   MR. THOMPSON: We're proposing a

8   formalistic test for procedural, which is, is it

9   a step, a hoop that needs to be jumped through?

10   And if presentment is one of the hoops that the

11   state legislature needs to jump through, then,

12   under a formalistic approach that we're

13   suggesting, then that would be procedural, Your

14   Honor.

15   JUSTICE BARRETT: Is that -- I'm

16   sorry. Please finish.

17   MR. THOMPSON: I'm good.

18   JUSTICE BARRETT: I was just going to

19   ask, is your formalistic test just a way of

20   trying to deal with our precedent, or are you

21   rooting that in the Constitution itself?

22   Because you do have a problem with explaining

23   why these procedural limitations are okay but

24   substantive limitations are not.

25   MR. THOMPSON: Well, Your Honor, we --

 1   we certainly have tried to craft an argument

 2   that is consistent with all of the Court's

 3   precedents, but we think that it -- it's --

 4   there are good reasons why there would be a

 5   substantive limitation even if not a procedural

 6   limitation.

 7   We can see this in James Madison's

 8   remarks. I would refer the Court to the third

 9   volume of Elliot's Debates, page 367, where

10   James Madison laments partisan gerrymandering,

11   and he singles out one state, South Carolina,

12   for opprobrium for their partisan gerrymander.

13   And their partisan gerrymander was found right

14   in the state constitution.

15   And that's the rule that my friends on

16   the other side are advocating for. They're

17   saying you can have a partisan gerrymander, but

18   you have to put it in the state constitution.

19   JUSTICE BARRETT: So that's not so

20   much -- your argument then on this

21   procedural/substantive distinction is not

22   so much a matter of the text, that it's you're

23   pulling some things from the history and saying

24   that James Madison's comment supports this

25   procedural/substantive line?

1   MR. THOMPSON: Well, we -- we ground

2   it in precedent, Your Honor, and -- and text and

3   structure and history. So I'll take those one

4   at a time if I may.

5   JUSTICE BARRETT: Sure.

6   MR. THOMPSON: So the precedent would

7   be Smiley on the one hand seems to suggest that

8   procedural limitations can be circumscribed on

9   the legislature, and Palm Beach County, as we

10   read it, teaches that substantive limits cannot

11   be placed on a state legislature. So that's the

12   precedent.

13   In terms of the text, I think all of

14   us agree, Your Honor, that it's a law-making

15   function and so -- and the text shows that where

16   it says prescribe regulations, this is the --

17   the law-making function, and so it makes sense

18   the founders structurally would have said, okay,

19   there's a pre-existing entity, the state con- --

20   the state legislature, and we're going to have

21   that be bound by its procedures, but we're going

22   to have federal substantive limitations, and you

23   can see this with state courts. State courts --

24   JUSTICE JACKSON: But can I ask you a

25   question? Can I ask you a question, because

1   you -- you -- you suggest that there's this

2   thing called the legislature that the framers

3   were familiar with, and I'm trying to understand

4   why what counts as the legislature isn't a

5   creature of state constitutional law.

6   MR. THOMPSON: Well, Your Honor, I --

7   I think this Court in Arizona did say that the

8   states have a lot of flexibility in terms of

9   defining what state legislature means, but what

10   Arizona did not say is that there could be

11   substantive limitations.

12   JUSTICE JACKSON: But -- but -- well,

13   I don't understand how that's a different thing.

14   In other words, if the state constitution tells

15   us what the state legislature is and what it can

16   do and who gets on it and what the scope of

17   legislative authority is, then, when the state

18   supreme court is reviewing the actions of an

19   entity that calls itself the legislature, why

20   isn't it just looking to the state constitution

21   and doing exactly the kind of thing you say when

22   you -- when you admitted that this is really

23   about what authority the legislature has?

24   In other words, the authority comes

25   from the state constitution, doesn't it?

 1   MR. THOMPSON: No, Your Honor, it's a

 2   federal function, and we know that from Leser.

 3   So this Court in Leser held it's a federal

 4   function. When these duties are assigned to the

 5   states, that is a duty that is assigned by the

 6   federal --

 7   JUSTICE JACKSON: Yes, it's a duty.

 8   The duty is to make this legislative

 9   determination, that is, the determination about

10   elections.

11   My question is, where does the

12   entity's power come from to make any

13   determinations at all, right? I mean, yes, I

14   see that the federal Constitution is giving them

15   the right to make a particular determination,

16   but they're not giving just anybody in the state

17   that right. They're giving somebody called the

18   legislature, and, in order for us to have a

19   thing called the legislature, we have to look at

20   the state constitution to determine where

21   those -- you know, what that entity's powers

22   are, how they can be exercised.

23   Other than that, I don't really

24   understand how the legislature is authorized to

25   act at all.

1   MR. THOMPSON: Well, Your -- Your

2   Honor, we know that's not right because, in

3   Leser, the people of Maryland tried to prevent

4   women from voting, and the way they did that is

5   they put in their state constitution a

6   prohibition on adopting the Nineteenth

7   Amendment, and then it came to this Court and

8   this Court said that this is a federal function

9   and that substantive limit of the state

10   constitution was inapplicable. So that's what

11   we're dealing with here, is a federal function.

12   JUSTICE SOTOMAYOR: But that was

13   because it -- it violated the federal

14   Constitution, not because it violated the state

15   constitution. But let me go back to what I

16   don't fundamentally understand about this case.

17   The text of the Constitution of the

18   Elections Clause says the legislature in each

19   state shall prescribe the time, place, and

20   manner of elections.

21   We know that before the founding, at

22   the founding of the Constitution, decades after,

23   and even to today that state constitutions have

24   regulated time, place, and manner. We have the

25   voice votes. We have one constitution that set

 1   elections at the courthouse and not in the

 2   county where the legislature wanted it. We have

 3   laws about voice votes as opposed to ballot

 4   votes.

 5   It seems to me that if I'm a

 6   textualist and I read that the legislature in

 7   each state shall prescribe the time, place, and

 8   manner of elections that your argument would

 9   have to be that you can't regulate -- the state

10   constitution can't regulate that. But there is

11   no substantive limitation in the Constitution.

12   And the Tenth Amendment says the

13   powers not delegated to the United States by the

14   Constitution, nor prohibited by it to the

15   states, are reserved to the states respectively

16   or to the people. And if there's no substantive

17   limitation in the Elections Clause, I don't know

18   how we could read one in.

19   MR. THOMPSON: Your Honor, so I think

20   there are a few points there --

21   JUSTICE SOTOMAYOR: To reserve power

22   to the states to decide whether apportionment or

23   malapportionment should be prohibited. We've

24   already had a case, Growe, by Justice Scalia,

25   who said that that was perfectly okay for a

1   state constitution to prohibit malapportionment.

2   Under your theory, the state

3   constitution shouldn't have been permitted to do

4   that substantive thing. So explain it to me.

5   MR. THOMPSON: Yes. So let me start

6   with where Your Honor started, which was with

7   the history, and we read the history very

8   differently than my friends on the other side

9   because they point to 16 constitutions early in

10   the founding of the republic that they claim

11   regulate federal elections. Five of those

12   relate to transitional governments.

13   There was no state legislature. So it

14   would have been impossible for the state

15   legislature to adopt the first rules, and by

16   their own terms, they were schedules that faded

17   away once the state legislature had been

18   elected.

19   Then that leaves nine which say --

20   that have regulations relating to --

21   JUSTICE SOTOMAYOR: There were only

22   13.

23   MR. THOMPSON: Well, I -- I'm giving

24   them credit --

25   JUSTICE SOTOMAYOR: There were 13

1   colonies, counselor. If I got six of them doing

2   something that's contrary to what you're saying,

3   that seems like a fairly substantial majority to

4   me.

5   MR. THOMPSON: Well, Your Honor, I --

6   I'm going to get --

7   JUSTICE SOTOMAYOR: You can -- you can

8   try to knock them down one at a time, but you're

9   still with about six of them that can't be

10   disputed.

11   MR. THOMPSON: I'm going to knock them

12   all down with one, so it'll be 12 to 1 in my

13   favor by the time I'm done, Your Honor.

14   JUSTICE SOTOMAYOR: Yes. If you

15   rewrite history, it's very easy to do.

16   MR. THOMPSON: I'm not rewriting

17   history, Your Honor. What we're saying is that

18   when it says all elections, it's referring to

19   the offices that were created by that

20   constitution.

21   You can see that in Vermont. It says

22   all freeholders shall be eligible for office.

23   It's not talking about the presidency of the

24   United States because there's an age

25   qualification. It's talking about the --

 1   JUSTICE SOTOMAYOR: So why is it that

 2   in all of those states the legislatures

 3   understood that all elections meant that you

 4   were going to have paper elections, ballots, in

 5   both federal and congressional?

 6   MR. THOMPSON: I -- I think it is

 7   telling what those state legislatures

 8   understood, and if we look at Pennsylvania and

 9   Tennessee, they took those all elections shall

10   be by ballot and they promulgated two statutes

11   to implement -- to implement and regulate

12   their -- their elections laws.

13   For the state ones, they passed a law

14   saying all elections shall be by ballot for the

15   state races, and they cited back to those state

16   constitutional provisions. And then they passed

17   a separate law for the federal elections and

18   they did not cite back to that provision. Why

19   not? Because, presumably, they understood that

20   they were not bound by that, but they were

21   simply trying to harmonize --

22   JUSTICE SOTOMAYOR: That -- that is a

23   large step, counsel.

24   JUSTICE BARRETT: Mr. Thompson --

25   MR. THOMPSON: Yeah.

1   JUSTICE BARRETT: -- if I can just

2   piggyback quickly on Justice Sotomayor's

3   question. At the outset, Justice Sotomayor

4   said, you know, pointing to the Tenth Amendment

5   and other structural assumptions of the

6   Constitution, that we presume that states

7   possess power unless they've given it up.

8   So this is my question about the

9   Elections Clause. If it did not appear in the

10   Constitution, would the baseline assumption have

11   been that the states possess the power to

12   regulate elections for federal office anyway?

13   Because, if so, I don't see how it's a

14   delegation as suppose -- as opposed to a clause

15   that clips state authority perhaps by saying it

16   must be exercised by the legislature and by

17   giving Congress the power of override. But I

18   wouldn't describe that as a delegation if the

19   states had the baseline power to start.

20   MR. THOMPSON: Your Honor, in U.S.

21   Term Limits, this Court held -- the majority

22   held that it was a delegation of power from the

23   federal government.

24   We understand that there are members

25   of the Court who take the opposite view, who say

1   no, it was a reserved power and it was -- and

2   it's protected by the Tenth Amendment. And

3   nothing in our argument today depends upon the

4   resolution of that debate which we understand is

5   ongoing on the Court.

6   What we're saying is, regardless of

7   whether it was a delegated power or a reserved

8   power or maybe both, where they reserved it and

9   it was given to them, regardless of how one

10   resolves that, it is a federal function.

11   That's what Leser teaches. It's a

12   federal function. And if we go back to the

13   words of Alexander Hamilton, you look in for

14   purposes of judicial review of what's the

15   commission that this power is, and the

16   commission means mandate. That's how Samuel

17   Johnson defined "commission." And the mandate

18   comes from the federal Constitution.

19   Your Honor, I'd like to go back to

20   your question about structure. You know, you

21   had asked me where are we getting this

22   distinction between substance and procedure, and

23   I had mentioned precedent, and I had said there

24   was a lawmaking function in the text, and I was

25   getting to the structure.

1   The structure is -- is a familiar one.

2   We obviously see the founders, in cases like

3   Leser, taking that preexisting state legislature

4   and assigning a federal function to it, but we

5   also see it in state courts, state courts bound

6   by state procedures and yet having exclusive

7   federal question jurisdiction until 1875. So

8   this was a structure that was understood by the

9   founders to take an existing entity with

10   existing procedures but to empower it to

11   exercise federal authority, and -- and that's

12   what we see.

13   And that's what Joseph Story, in 1820,

14   when he rises and eloquently, you know, speaks

15   as to why there can't be a limit on the power,

16   it's because it's a federal function. And I

17   think Joseph Story's speech in 1820 is relevant

18   too with respect to what do all elections mean,

19   because the Massachusetts Constitution of 1780

20   had a provision that says all elections shall be

21   free.

22   JUSTICE JACKSON: Can I ask you a

23   question about it being a federal function? So

24   is it your argument that the state constitution

25   has no role to play, period?

1   MR. THOMPSON: In terms of imposing

2   substantive limits --

3   JUSTICE JACKSON: Mm-hmm.

4   MR. THOMPSON: -- on the exercise of

5   that federal function, that is our position.

6   JUSTICE JACKSON: So what are -- what

7   procedural limits can the state constitution

8   impose in this context?

9   MR. THOMPSON: Presentment would be a

10   -- a limitation. So Smiley teaches that if

11   there's -- if it requires presentment to the

12   governor so that the governor can veto it, then

13   that would be a -- a procedural limitation that

14   can be imposed by the state constitution.

15   JUSTICE KAGAN: Mr. Thompson, I mean,

16   why doesn't Smiley stand for maybe a broader but

17   simpler proposition, which is, when we under --

18   when we think about this word "legislature,"

19   we're thinking about it as embedded in a system

20   of constraints, and one of those constraints is

21   the governor, and another of those constraints

22   is the courts. And that's the normal way that

23   legislatures operate and act, is as subject, not

24   as absolute, but as subject to constraints. And

25   Smiley said we take that system as we find it.

1   We take the constraint of the governor as we

2   find it. Why not too then the constraint of the

3   courts?

4   MR. THOMPSON: We -- we agree, Your

5   Honor, the -- the constraint of the court

6   applying federal law. That's the teaching of

7   Palm Beach County as we read that case. There

8   was a vacatur of the Florida Supreme Court to

9   send it back after having cited --

10   JUSTICE KAGAN: But it would be

11   ordinary constraints, and the constraints can

12   come from the federal Constitution or the

13   constraints can come from the state

14   constitutions. State actors, state courts,

15   operate in both spheres and do both things, and

16   that's the ordinary operation of the courts.

17   And that's what Smiley says. It's the

18   legislature subject to the ordinary set of

19   constraints that operate on them.

20   MR. THOMPSON: We read Leser to teach

21   that when the ordinary constraint is federal law

22   that it's bound by federal law. That's the

23   ordinary constraint.

24   JUSTICE KAGAN: Well, if that's coming

25   from Leser, I mean -- so then you're going to

1   sort of our precedent, and I would think that

2   our precedent gives you a lot of problems, I

3   mean, if you really take every statement that

4   this Court has said about the matter at hand.

5   I'll just read you a few of them and they're --

6   they're pretty recent, you know?

7   Smiley is the one we've been talking

8   about, and that says, just as Congress is

9   subject to limitations in the federal

10   Constitution, when it makes laws -- and now I'm

11   quoting -- "there is no intimation of a purpose

12   to exclude a similar restriction imposed by

13   state constitutions upon state legislatures."

14   And then, in Arizona, we say nothing

15   in the Elections Clause instructs and this Court

16   has never held that a state legislature may

17   prescribe regulations on the time, place, and

18   manner of holding federal elections in defiance

19   of provisions of the state's constitution.

20   And on -- as to that point, the

21   dissent was right with the majority. So both of

22   them took issue with the proposition that

23   legislatures would exercise their authority

24   without the constitutional checks that a state

25   court provides.

    1   And then, in Rucho, three years ago,

    2   the Court assured everybody in a case very much

    3   like this one, it was a case about

    4   gerrymandering, and it says complaints about

    5   districting need not echo into a void because

    6   provisions in state statutes and state

    7   constitutions can provide standards and guidance

    8   for state courts to apply in addressing

    9   gerrymandering.

    10   So one, two, three, in all recent

    11   cases, we've said: Of course, state courts

    12   applying state constitutions typically constrain

    13   state legislatures when they redistrict, when

    14   they enact election laws.

    15   MR. THOMPSON: Let me start if I may

    16   with Arizona, Your Honor. In Arizona, the

    17   plaintiff was the Arizona state legislature.

    18   The Arizona state legislature did not make any

    19   complaints about the substantive restrictions in

    20   that referendum, and it's not clear it would

    21   have had Article III standing to complain about

    22   a constraint being placed on a different entity.

    23   So nothing in this Court's decision went to the

    24   substance that was in that --

    25   JUSTICE KAGAN: Yeah. I guess what

1   I'm saying is that in each of these three we

2   have very clear statements, and I appreciate the

3   fact that this issue was not the one before us

4   in each of those three, just as it wasn't in the

5   case that you mentioned to me that started off

6   my quoting other things. If you're going to

7   quote one at me, I'm going to quote three at

8   you.

9   (Laughter.)

10   JUSTICE KAGAN: And, you're right,

11   we're here for the first time dealing with this

12   issue. This is a novel challenge. So I'm not

13   saying that we, like, sat here as a Court and

14   addressed hundreds of pages of briefing on this

15   challenge. I'm saying that three times in not

16   so many years we've understood this to be an

17   established proposition of law.

18   MR. THOMPSON: So, Your Honor, let me

19   now address Rucho, the most recent, where this

20   Court said "we express no view" on these policy

21   proposals. And many of the policy proposals

22   that were identified in Rucho are ones that are

23   fully consistent with the line we are drawing.

24   The Rucho majority pointed to statutes in Iowa

25   and Delaware that pan -- that banned partisan

1   gerrymandering. The Rucho majority pointed to a

2   constitutional amendment in Missouri that

3   designated and created the office of a state

4   demographer to draw state lines.

5   And, essentially, that's what we have

6   here in North Carolina. Partisan gerrymandering

7   has now been banned at the state level for the

8   state races, and we're not here challenging

9   that, and that presumably will have a salutary

10   influence, if the actual legislature itself is

11   not gerrymandered, then when it comes to the

12   role of doing congressional races. And there

13   were referendum -- independent commissions were

14   referenced by the Rucho majority, and we're not

15   debating that.

16   And Congress -- and Congress just this

17   -- this session, the House of Representatives,

18   which has more at stake than the Senate in terms

19   of redistricting, passed a bill that would have

20   banned partisan gerrymandering in all 50 states.

21   And that's what the founders envisioned the

22   solution to this problem was, was a political

23   solution going to Congress.

24   JUSTICE KAVANAUGH: Your --

25   MR. THOMPSON: It's right there in the

1   text.

2   JUSTICE SOTOMAYOR: Counsel --

3   JUSTICE KAVANAUGH: Your -- go ahead.

4   JUSTICE SOTOMAYOR: -- you don't

5   dispute that there could be judicial review by

6   the state court of a federal constitutional

7   violation?

8   MR. THOMPSON: Correct, Your Honor.

9   JUSTICE SOTOMAYOR: You don't dispute

10   that federal courts and state courts can both

11   review a provision for violation to the federal

12   Constitution?

13   MR. THOMPSON: Correct, Your Honor.

14   JUSTICE THOMAS: But you are disputing

15   that the states can't review -- state courts

16   can't review a state legislative voting system

17   to find whether it complies with the state

18   constitution?

19   MR. THOMPSON: Well, it can for

20   procedural reasons, like in Smiley --

21   JUSTICE SOTOMAYOR: Right.

22   MR. THOMPSON: -- like -- there wasn't

23   presentment to the governor.

24   JUSTICE SOTOMAYOR: So let's go to the

25   -- your -- the substantive/procedural reasons

1   still -- distinction makes no sense to me

2   because the only thing the Constitution, as I

3   mentioned earlier, controls is the procedural

4   issues, time, place, and manner.

5   But take a line item veto provision,

6   for example. In more than 40 states, these

7   provisions empower governors to accept or reject

8   legislation by altering its content. If, for

9   example, a governor partially vetoes a bill to

10   appropriate funds to administer congressional

11   elections, is that a substantive constraint or a

12   procedural constraint? Just a yes or no.

13   MR. THOMPSON: It's procedural.

14   JUSTICE SOTOMAYOR: Oh.

15   MR. THOMPSON: It's a hoop that has to

16   be jumped through.

17   JUSTICE SOTOMAYOR: Okay. So the

18   governor vetoes a map drawn by the legislature

19   and decides it's constitutionally permitted.

20   Why is it substantive?

21   MR. THOMPSON: We're not saying.

22   We're saying, if a governor -- consistent with

23   Smiley, if a governor vetoes --

24   JUSTICE SOTOMAYOR: No, he -- the --

25   the constitutional provision permits him to --

1   to alter the contents.

2   MR. THOMPSON: Oh, to alter the

3   content. Well, that --

4   JUSTICE SOTOMAYOR: That's what I

5   said.

6   MR. THOMPSON: -- that's the key

7   distinction. If it's a hoop that has to be

8   jumped through in order for the -- the

9   legislature to get the code of elections it

10   wants, it's procedural. If it's a limit on

11   their substantive ability to get the code they

12   want, then --

13   JUSTICE SOTOMAYOR: It's a yes or no,

14   can the governor do this?

15   MR. THOMPSON: Can -- can the governor

16   change the substance?

17   JUSTICE SOTOMAYOR: Yes.

18   MR. THOMPSON: No.

19   JUSTICE SOTOMAYOR: No. So that

20   becomes substance instead of procedure. So your

21   first answer has now changed.

22   MR. THOMPSON: A veto is permissible.

23   Changing the substance is not.

24   JUSTICE SOTOMAYOR: What about a state

25   constitutional provision that precludes

1   legislators from acting during special sessions

2   on certain matters? Could a state court reject

3   the Congressional Election Bill if it is outside

4   the scope of a special session? Yes or no?

5   MR. THOMPSON: If it's outside the

6   scope of a special session, that is a --

7   JUSTICE SOTOMAYOR: All right.

8   MR. THOMPSON: -- substantive

9   limitation because they can't start the process.

10   JUSTICE SOTOMAYOR: It seems to me

11   it's procedural in its most common understanding

12   because it's a question of how you do things,

13   not what's in it.

14   MR. THOMPSON: If you can't start the

15   process, then it's a substantive limitation.

16   JUSTICE SOTOMAYOR: Well, I -- it

17   seems that every answer you give is to get you

18   what you want, but it makes little sense. We

19   have more than one occasion said that we

20   describe the task in Mistretta of distinguishing

21   between substantive and procedural rules as a

22   logical morass that the Court is loathe to

23   enter.

24   MR. THOMPSON: And one --

25   JUSTICE SOTOMAYOR: And I simply --

1   I -- what I don't understand is the question

2   that Justice Jackson asked you, which is, if

3   judicial review is in the nature of ensuring

4   that someone's acting within their

5   constitutional limits, I don't see anything in

6   the words of the Constitution that take that

7   power away from the states.

8   MR. THOMPSON: It comes from the fact

9   that it's a federal function, and with respect

10   to the legal morass, that's when this Court has

11   taken a functionalist approach. We're adopting

12   a formalistic approach, and it's my friends on

13   the other side who are adopting a functionalist

14   test. You can see this on page 57 --

15   JUSTICE JACKSON: But, Mr. --

16   MR. THOMPSON: -- of the state

17   Respondents' brief.

18   JUSTICE JACKSON: -- Mr. Thompson,

19   just following up on what was just mentioned, I

20   guess what I don't understand is how you can cut

21   the state constitution out of the equation when

22   it is giving the state legislature the authority

23   to exercise legislative power. It's the state

24   constitution that is telling the legislature

25   when and under what circumstances it can

     1   actually act as the legislatures.

     2   Let me -- let me ask it this way.

     3   What if what is at issue is not any particular

     4   exercise of the state's legislature --

     5   legislative authority, such as its -- its

     6   ability to make time, place, and manner

     7   determinations, but whether the entity that is

     8   purporting to exercise that power qualifies as

     9   this particular state's legislature?

    10   So you can imagine that we have two

    11   different state entities who claim to be the

    12   legislature for the purpose of the Elections

    13   Clause, and both of them start acting as such.

    14   They set election dates. They have procedures.

    15   They issue competing maps and set -- set out

    16   different statements about when elections would

    17   be held.

    18   Would that dispute, the dispute over

    19   which entity is really the state's legislature,

    20   be decided by federal or state courts and which

    21   law would apply?

    22   MR. THOMPSON: It -- it's state law.

    23   I think that's a lot of what was happening in

    24   the Arizona, where the independent commissioning

    25   was saying we're the legislature --

1   JUSTICE JACKSON: I'm sorry, state's

2   substantive constitutional law, we look to the

3   state --

4   MR. THOMPSON: We're saying --

5   JUSTICE JACKSON: -- constitution to

6   decide --

7   MR. THOMPSON: Because it's a --

8   JUSTICE JACKSON: -- which entity?

9   MR. THOMPSON: Well, it's a procedural

10   issue as to who is the legislature. But we --

11   JUSTICE JACKSON: I'm sorry, why is

12   that a procedural issue? My question is we have

13   these two entities, both of which say we are the

14   "legislature" of the state for the purpose of

15   the Elections Clause, and there's a dispute

16   about that.

17   I think you're agreeing with me that

18   that would go to the state supreme court, and

19   I'm asking, wouldn't the state supreme court

20   look at the state constitution and -- and what

21   it says about who gets to act as the legislature

22   and what authority they have.

23   Wouldn't it be looking at the state

24   constitution to make that determination?

25   MR. THOMPSON: And that's what Arizona

1   teach --

2   JUSTICE JACKSON: I'm sorry, yes or

3   no? Did --

4   MR. THOMPSON: Arizona --

5   JUSTICE JACKSON: -- would it be

6   looking at the state constitution or the federal

7   Constitution?

8   MR. THOMPSON: Arizona teaches that

9   the states have the authority, wide latitude, to

10   define state legislature how they want. This is

11   a separate analytical question as --

12   JUSTICE JACKSON: Okay. But what I'm

13   trying to understand is why it's a different

14   analytical question --

15   MR. THOMPSON: Well, because the --

16   JUSTICE JACKSON: -- because, to the

17   extent that the state constitution tells us what

18   the legislature is and what the scope of its

19   authority, how it's supposed to act, what it's

20   supposed to do, if that's a state constitutional

21   issue, then what I don't understand is, why

22   aren't all of that entity's actions necessarily

23   involving the state constitution? It only gets

24   its authority from that document.

25   MR. THOMPSON: Because Leser teaches

1   exactly the opposite is true. In Leser, the

2   state constitution forbade Maryland from

3   ratifying the Nineteenth Amendment, and this

4   Court said it didn't apply that state

5   constitution.

6   JUSTICE JACKSON: No, but that's --

7   CHIEF JUSTICE ROBERTS: Counsel --

8   JUSTICE JACKSON: -- that's because --

9   that's because that particular issue was

10   delegated to someone else. I'm talking about

11   the authority of the state to act.

12   MR. THOMPSON: Well, Your Honor, under

13   U.S. Term Limits, the majority of this Court

14   said that the power to act in this place, in

15   this sphere, comes from the federal

16   Constitution.

17   Now what -- so the whole premise of

18   this line of inquiry is faulty, but what I'm

19   saying is that our position is, whether the Term

20   Limits majority or dissent was correct, it's a

21   federal function.

22   CHIEF JUSTICE ROBERTS: Counsel, you

23   make the point at -- at -- several points in

24   your brief about the nature of the state

25   limitation that the courts were interpreting, a

1   free election, a fair election. Is -- is that a

2   substantive argument or is that just sort of a

3   style point or -- I mean, if they had a more

4   precise articulation of what the limits were

5   that they were going to apply, whether it's

6   going to be a particular percentage of

7   gerrymandering, a -- a departure, or something

8   more substantive.

9   Is it the problem that they're just

10   interpreting something that gives them free

11   rein, or is that not a consideration?

12   MR. THOMPSON: Well, there are two

13   problems, Your Honor. And so, under our primary

14   theory, the problem is that there's a

15   substantive limit of any sort being imposed by

16   the state constitution on the state legislature.

17   But, under our backup liability

18   theory, the problem is that there is a lack of

19   judicially manageable and discoverable standards

20   and that as this Court said in Rucho, judicial

21   action must be governed by standard, by rule.

22   And when the state supreme court was

23   freed of standards and rules, it was no longer

24   acting as the judiciary. It was taking

25   legislative power, and its -- the result of its

1   work had the hallmarks of legislation, Your

2   Honor. So it's both problems.

3   JUSTICE ALITO: Mr. Thompson --

4   JUSTICE KAVANAUGH: Mr. Thompson -- go

5   ahead, go ahead.

6   JUSTICE ALITO: Mr. Thompson, even

7   under your primary theory, however, isn't it

8   inevitable that there will be questions about

9   the meaning of statutes enacted by the

10   legislature to govern elections?

11   So isn't it inevitable that the state

12   courts are going to have to interpret those

13   provisions, and isn't it inevitable that state

14   election officials in the Executive Branch are

15   going to have to make decisions about all sorts

16   of little things that come up concerning the

17   conduct of elections?

18   MR. THOMPSON: I'd like to make two

19   points about that, Your Honor. First of all,

20   our theory does not relate to the interpretation

21   of statutes. Chief Justice Rehnquist's

22   concurrence in Bush versus Gore was focused on

23   that issue, and that's a separate issue.

24   Under our primary theory, we take

25   state law however it's interpreted by the -- the

1   state supreme court as given. And so there

2   isn't a matter of having to -- I just want to be

3   clear we're not talking about statutes, point

4   one.

5   Point two, under our theory, because

6   this power has been vested in the state

7   legislature, that there are -- nondelegation

8   principles apply. And they -- they can delegate

9   this authority to local and state officials and

10   all 50 states have done that, but they just need

11   to accompany it by an intelligible principle.

12   JUSTICE ALITO: Well, if your theory

13   doesn't apply to statutes, what would happen if

14   all the provisions of the North Carolina

15   Constitution on which the state supreme court

16   relied were statutory? So there's a statute

17   that says elections in North Carolina shall be

18   free, and the North Carolina Supreme Court said,

19   well, what that means is that there can't be any

20   partisan gerrymandering, districting has to be

21   done under one of these methods that we set out.

22   That would be okay?

23   MR. THOMPSON: No, because that would

24   be a violation of -- there -- there would be no

25   standard. There would be no rule. And the

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 1    state courts would be seizing that power from

 2    the legislature.

 3              I'm just pointing out here, Your

 4    Honor, we're not coming to the Court --

 5              JUSTICE ALITO:  I -- I --

 6              MR. THOMPSON:  -- on a statute, but

 7    that statute would be permissible -- that

 8    statute would be permissible but not for this

 9    type of claim.  So, if there were some other

10    claim where they said, well, the election isn't

11    free because of, you know, there's not

12    one-person, one-vote, okay, well, that's a

13    judicially manageable standard.

14              JUSTICE KAVANAUGH:  Your position

15    seems to go further than Chief Justice

16    Rehnquist's position in Bush v. Gore, where he

17    seemed to acknowledge that state courts would

18    have a role interpreting state law and that

19    federal court review of that should be, in his

20    words, deferential and simply should be a check

21    to make sure that the state court had not

22    significantly departed from state law.  And he

23    drew on a body of precedent that has existed

24    previously.

25              And so I think the other side and the
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1   Solicitor General say that stands for a general

2   principle which they're okay with that there can

3   be some federal court review of state court

4   review of state law, deferential, so long as

5   there's no significant departure. That's a

6   general principle.

7   Why is that -- your position seems to

8   go further than that, and I'm -- where are you

9   getting that out of Chief Justice Rehnquist's

10   concurrence, or are you saying that was wrong?

11   MR. THOMPSON: No. No, Your Honor.

12   What we're saying is that we have a -- that that

13   was dealing with statutes. We're dealing with

14   constitutions, and we have a even more

15   deferential, a maximally deferential position.

16   We say just take whatever the state supreme

17   court says the law is, the substantive law is,

18   just take it at face value. Do not examine in

19   any way whether it is novel, a significant

20   departure, an impermissible distortion. Just

21   take it at face value, and then assess, did it

22   place a substantive limit on the state

23   legislature?

24   So we would defer entirely for

25   purposes of our liability arguments in this

1   Court to -- and assume that what the North

2   Carolina Supreme Court did here was correct.

3   JUSTICE KAVANAUGH: What do you think

4   is the best case supporting this

5   substance/procedure distinction?

6   MR. THOMPSON: I -- I -- I would say

7   Palm Beach County. I think the Florida Supreme

8   Court --

9   JUSTICE KAVANAUGH: Palm -- Palm Beach

10   County, I -- I thought, was simply saying that

11   there is a federal issue here, and we're going

12   to remand to the Florida Supreme Court so that

13   it can assess how to interpret its state law in

14   light of the fact that there is a federal issue.

15   I didn't -- correct me if I'm wrong, or tell me

16   what your position is, but I didn't see it doing

17   a whole lot more than that. It was a 9-0

18   opinion, I think, just recognizing there's a

19   federal issue.

20   MR. THOMPSON: Well, the -- the Court

21   cited to and quoted from McPherson versus

22   Blacker for the proposition that there could not

23   be any limit on the power of the state

24   legislature. Then it vacated the opinion of the

25   Florida Supreme Court, and it sent it back on

1   remand for the Florida Supreme Court to assess

2   and to clarify whether it was, in fact, using

3   the state constitution to operate as a

4   substantive limit. And the Florida Supreme

5   Court understood because their prior opinion had

6   gone on at some length --

7   JUSTICE KAVANAUGH: Did it say

8   substantive limit?

9   MR. THOMPSON: It -- it -- it said --

10   JUSTICE KAVANAUGH: I don't -- I don't

11   recall that.

12   MR. THOMPSON: It says, "operates as a

13   limitation upon the state in respect of any

14   attempt to circumscribe the legislative power."

15   JUSTICE KAVANAUGH: It didn't use the

16   word "substantive," though.

17   MR. THOMPSON: Well, any limit. So

18   maybe it's even more robust. But -- and would

19   sweep aside --

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   MR. THOMPSON: Thank you.

23   CHIEF JUSTICE ROBERTS: Just -- at

24   page 33 of your reply brief, sort of the last

25   gasp of briefing --

1   (Laughter.)

2   CHIEF JUSTICE ROBERTS: -- you have,

3   you suggest that there's a "narrower alternative

4   ground" to decide the case in your favor which

5   would allow some substantive state restrictions

6   to be enforced. Could --

7   MR. THOMPSON: Yes.

8   CHIEF JUSTICE ROBERTS: -- could you

9   articulate exactly what you think that is?

10   MR. THOMPSON: Yes. So, for example,

11   if the North Carolina Constitution had said

12   partisan gerrymandering is -- cannot be allowed

13   if there's an efficiency ratio of more than 7

14   percent, then that would be a judicially

15   discoverable and manageable standard. You could

16   -- I mean, we all know how to calculate the

17   efficiency ratio.

18   CHIEF JUSTICE ROBERTS: Well --

19   (Laughter.)

20   CHIEF JUSTICE ROBERTS: -- let's not

21   --

22   MR. THOMPSON: Okay.

23   CHIEF JUSTICE ROBERTS: I'm sorry. Go

24   ahead.

25   MR. THOMPSON: The neuroscientist who

1   drew these maps apparently knows how to -- to

2   draw the efficiency ratio.

3   But, in any event, so that would be an

4   example of a provision that would flunk our

5   primary test because it would be a substantive

6   limitation, but it would pass our backup test

7   because there was judicially discoverable and

8   manageable standards.

9   CHIEF JUSTICE ROBERTS: Thank you.

10   Justice Thomas?

11   Justice Alito, anything?

12   Justice Sotomayor?

13   JUSTICE SOTOMAYOR: I -- I take your

14   answer to mean that there are no judicially

15   enforceable standards to interpret the Freedom

16   of Speech, Freedom of Assembly, and Equal

17   Protection Clauses of the Constitution because

18   they, on their face, would appear to be as

19   unmanageable --

20   MR. THOMPSON: No --

21   JUSTICE SOTOMAYOR: -- or broad, and

22   yet we routinely let federal and state courts

23   review those provision -- acts --

24   MR. THOMPSON: No, Your Honor --

25   JUSTICE SOTOMAYOR: -- for compliance.

 1   MR. THOMPSON: -- that's not our

 2   position at all. Our position is you need to

 3   look at the type of claims. So take equal

 4   protection. That's sweeping and capacious

 5   language. And if it's the type of claim where

 6   you're looking to assess whether race is the

 7   predominant motive or whether there's a

 8   violation of one-person, one-vote, there are

 9   judicially discoverable and manageable

10   standards.

11   JUSTICE SOTOMAYOR: Some of them were

12   created by the courts.

13   MR. THOMPSON: Yes, with judicially --

14   JUSTICE SOTOMAYOR: But the point --

15   and so what's different than what the court did

16   here in North Carolina, where it looked to the

17   meaning of -- to the meaning of the English Bill

18   of Rights of 1689, which apparently was the

19   basis for the state's constitution, and it said

20   that the meaning was to curb royal efforts to

21   manipulate parliamentary elections. It then

22   looked to other states that had read in the free

23   election clause and -- and other clauses of the

24   state constitution to find that political

25   gerrymandering violated this term.

1   How is that any different than what we

2   normally do in our review?

3   MR. THOMPSON: Nothing in the English

4   Bill of Rights told the North Carolina Supreme

5   Court whether an efficiency ratio of 6, 7, 8, 9,

6   10 percent --

7   JUSTICE SOTOMAYOR: But that --

8   MR. THOMPSON: -- was acceptable.

9   There is no judicial --

10   JUSTICE SOTOMAYOR: You -- you're not

11   answering my question. Absent the Election

12   Clause, is this term so unmanageable that you're

13   saying that the North Carolina court would not

14   have power to determine what free election

15   clause meant in their constitution?

16   MR. THOMPSON: They would be

17   exercising legislative power. It's just like

18   Rucho. This is the exact same issue that

19   divided this Court in Rucho, and for the same

20   reason it was a violation of Article III, namely

21   there were no judicials -- there were no

22   standards, there were no rules, and so it wasn't

23   a case or controversy, so too, here, it would be

24   an act of legislative power for a court to make

25   this determination.

1   CHIEF JUSTICE ROBERTS: Justice Kagan?

2   JUSTICE KAGAN: If I could,

3   Mr. Thompson, I'd like to step back a bit and

4   just, you know, think about consequences,

5   because this is a theory with big consequences.

6   It -- it would say that if a

7   legislature engages in the most extreme forms of

8   gerrymandering, there is no state constitutional

9   remedy for that, even if the courts think that

10   that's a violation of the constitution. It

11   would say that legislatures could enact all

12   manner of restrictions on voting, get rid of all

13   kinds of voter protections that the state

14   constitution, in fact, prohibits. It might

15   allow the legislatures to insert themselves, to

16   give themselves a role, in the certification of

17   elections and -- and -- and -- and -- and the

18   way election results are calculated.

19   So -- and, in all these ways, I think

20   what might strike a person is that this is a

21   proposal that gets rid of the normal checks and

22   balances on the way big governmental decisions

23   are made in this country. And -- and you might

24   think that it gets rid of all those checks and

25   balances at exactly the time when they are

1   needed most, because legislators, we all know,

2   have their own self interests. They want to get

3   re- elected. And so there are countless times

4   when they have incentives to suppress votes, to

5   dilute votes, to negate votes, to prevent voters

6   from having true access and true opportunity to

7   engage the political process.

8   And so I just thought, I mean, I would

9   give you a chance to respond to that because it

10   seems very much out of keeping with the way our

11   governmental system works and is meant to work.

12   And I think, if I could just connect it up to

13   the last question that I asked, it's why in all

14   these recent cases we have statements that say,

15   of course, when the legislature act -- acts,

16   it's subject to the normal constraints, I mean,

17   in this area of all areas I guess I would add.

18   MR. THOMPSON: Your Honor, so our --

19   our position is that checks and balances do

20   apply, but they come from the federal

21   Constitution and the panoply of federal laws

22   like the Voting Rights Act and other statutes

23   that are highly protective of voters. So there

24   is a check. There is a balance. And there's

25   also a political. So we've got the legal check

1   from federal law, and we've got the political

2   check that the founders envisioned of going to

3   Congress. And, as I mentioned, this very

4   Congress, this House of Representatives, voted

5   to ban partisan in gerrymandering in all 50

6   states.

7   JUSTICE KAGAN: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Gorsuch?

10   JUSTICE GORSUCH: And on that history

11   in terms of checks and balances, what sorts of

12   concerns might --- might the founders have had

13   if state constitutions were allowed to trump

14   over state legislatures?

15   MR. THOMPSON: I think there are two,

16   and we can learn them from James Madison and

17   Joseph Story. So James Madison, as I mentioned,

18   specifically singled out South Carolina as a

19   place that had taken its gerrymander and

20   entrenched it right into the constitution

21   itself, and, of course, Virginia in 1830 does

22   the same thing, where the slave owners try to

23   aggrandize their political power by putting a

24   partisan gerrymander right in the state

25   constitution, and there's nothing anyone in the

1   state can do to -- do about it short, of course,

2   of amending the constitution or coming to

3   Congress.

4   And the flip side of that is what

5   Joseph Story in Section 820 of his Commentaries

6   on the Constitution says, which is he calls it a

7   boon, a boon that the state legislatures have

8   this, what he said on -- on the floor of the

9   Massachusetts Convention, unlimited discretion.

10   The boon is because they have adaptability,

11   adaptability to what he said were local

12   politics, local convenience, and you don't have

13   that adaptability when it's in a state

14   constitution.

15   JUSTICE GORSUCH: Subject to federal

16   constitutional constraints and federal court

17   review and state court review of federal

18   constitutional claims.

19   MR. THOMPSON: Absolutely, Your Honor.

20   JUSTICE GORSUCH: And, historically,

21   at least as I've looked at it, you've got the

22   example of Virginia trying to constitutionalize

23   the 3/5 rule with respect to African Americans.

24   MR. THOMPSON: Yes, Your Honor,

25   exactly right.

1   JUSTICE GORSUCH: You've got the

2   example in Maryland of -- of trying to deny the

3   opportunity to adopt the Nineteenth Amendment to

4   the Constitution.

5   MR. THOMPSON: That's right, Your

6   Honor.

7   JUSTICE GORSUCH: And I believe,

8   during the Civil War, there were examples as

9   well of states that in their constitutions would

10   not have permitted absent soldiers from voting

11   in their home state elections but for the fact

12   that state legislatures refused to follow those

13   rules.

14   MR. THOMPSON: That's right, Your

15   Honor, and the Supreme Court of New Hampshire,

16   the Supreme Court of Vermont took this up and

17   said these state substantive limitations, they

18   do not apply because it's a federal function.

19   JUSTICE GORSUCH: So the political

20   saliency point, I think, you know, depends on

21   whose ox is being gored at what particular time.

22   I wanted to just make sure I

23   understood your colloquy with Justice Kavanaugh

24   and I believe the Chief Justice too, the

25   difference between this and the Bush versus Gore

1   circumstance that Chief Justice Rehnquist spoke

2   about in his concurrence. It seems to me there

3   are two types of problems. One is, is a state

4   court actually interpreting a statute or is it

5   going too far afield, to the point where someone

6   might say it's not following the statute?

7   MR. THOMPSON: Yes, that's one --

8   that's the Bush versus Gore concurrence problem.

9   JUSTICE GORSUCH: And then you have a

10   separate problem of when a state court does not

11   even try to interpret the law and just annuls

12   the law outright, and that's this case.

13   MR. THOMPSON: I -- I -- I actually

14   think differently.

15   JUSTICE GORSUCH: Or am I wrong about

16   that?

17   MR. THOMPSON: Yeah, I think,

18   respectfully, Your Honor, you are because, even

19   though we actually think that's an accurate

20   description of what happened here, that's not

21   our position in this Court. Our court is assume

22   that the North Carolina Supreme Court was

23   entirely right about what they did and that it

24   was --

25   JUSTICE GORSUCH: As a matter of state

1   law?

2   MR. THOMPSON: As a matter of state

3   law, but that it is then still impermissible

4   because it is imposing a substantive limitation

5   on the state legislature.

6   JUSTICE GORSUCH: Via this mélange of

7   state constitutional provisions?

8   MR. THOMPSON: Yes, Your Honor.

9   JUSTICE GORSUCH: Okay. All right. I

10   -- I -- I understand it now. Thank you.

11   MR. THOMPSON: Thank you.

12   CHIEF JUSTICE ROBERTS: Justice

13   Kavanaugh?

14   JUSTICE KAVANAUGH: In interpreting

15   the state statutes, can a state court rely

16   on canons of interpretation that say interpret

17   those state statutes in light of state

18   constitutional provisions?

19   MR. THOMPSON: Your Honor, so what

20   Chief Justice Rehnquist said in the Bush versus

21   Gore concurrence was he said look to the

22   novelty, look to see whether, when you look at

23   the text, you look at the canons of

24   construction, you look at any other sources, at

25   precedent, you look at all the panoply of

 1   different tools available to state court judges,

 2   and if it would be a surprise to someone that

 3   this is what the statute meant, he had a novelty

 4   test. And -- and so that would be the way you

 5   would do it.

 6   Of course, in this case, that's not --

 7   JUSTICE KAVANAUGH: Is that -- is that

 8   a yes to the question?

 9   MR. THOMPSON: Well, Your Honor, yes,

10   you would look at state canons of construction

11   in that very different context.

12   JUSTICE KAVANAUGH: Which could be

13   rooted in the state constitution?

14   MR. THOMPSON: I'm not an expert on

15   that, Your Honor. It's not implicated by --

16   this case -- you can rule in our favor in this

17   case and it will not determine the result of

18   that case.

19   JUSTICE KAVANAUGH: And then the

20   Conference of Chief Justices' brief makes the

21   point, I think, as do the other briefs, that

22   nearly all state constitutions regulate federal

23   elections in some way and that that is, as

24   earlier questions have pointed out, some of the

25   early state constitutions did that. What do we

57

1   do with that historical practice in thinking

2   about how to analyze this question?

3   MR. THOMPSON: In -- at the time of

4   the founding, the original 13 states, our view

5   properly understood was that there was only one

6   state that did it. It was Delaware. It was an

7   outlier. There was no debate whatsoever about

8   the Elections Clause. And it said that, you

9   know, voting will be by ballot.

10   JUSTICE KAVANAUGH: What about the

11   historical practice over time, which has

12   certainly developed in a way that state

13   constitutions do regulate federal elections?

14   What weight, if any, do we place on that?

15   Also, there are some federal statutes

16   as well that are cited by the other side. I

17   just want to make sure you've had a chance to

18   talk about those as well. So the --

19   MR. THOMPSON: Yeah.

20   JUSTICE KAVANAUGH: -- historical

21   practice in the states and those federal

22   statutes.

23   MR. THOMPSON: Your Honor, we think

24   the way to think about this is consistent with

25   the Court's opinion in Bruen last term where it

 1   looked very focused on the time of the founding,

 2   1791, obviously, we're looking for the public

 3   meaning of the Constitution. As that founding

 4   generation passes away, Adams and Jefferson die

 5   on the 50th anniversary of the Declaration of

 6   Independence, as we get out of the 1820s,

 7   there's very limited information you can get as

 8   to the original public meaning of the

 9   Constitution.

10   But -- so it can be a confirming --

11   that subsequent history as in Bruen can be a

12   confirming historical tradition that -- that --

13   but it can't undermine what the text and the

14   founding era history show to be the case.

15   JUSTICE KAVANAUGH: Thank you.

16   CHIEF JUSTICE ROBERTS: Justice

17   Barrett?

18   JUSTICE BARRETT: So could you -- I

19   want to follow up on Justice Kavanaugh's

20   question about Chief Justice Rehnquist's

21   concurrence in Bush versus Gore. So I

22   understand that that's not this case because

23   that was an interpretation of a statute and

24   we're talking about a state constitution. But I

25   take it that if we were talking about an

1   interpretation of a statute you would agree with

2   Chief Justice Rehnquist's approach?

3   MR. THOMPSON: Yes. Yes. Yes, we do

4   agree.

5   JUSTICE BARRETT: And on the theory

6   that at that point the state court would not be

7   acting as a court but would be acting more as a

8   legislature?

9   MR. THOMPSON: That -- that's right,

10   Your Honor. I do want to point out that if the

11   Court were to rule in our favor in this case, it

12   would not necessarily follow that it would have

13   to rule the same way as the Bush versus Gore

14   concurrence for this reason.

15   Statutes are always less problematic

16   under the Elections Clause because they can be

17   repealed. They can be rewritten by the state

18   legislature. So, by definition, a statutory --

19   an impermissible distortion of a statute, it can

20   be remedied by the state legislature.

21   Now it couldn't in Bush versus Gore.

22   There wasn't enough time. But the point is --

23   and we think the concurrence was correct, but I

24   just wanted to make the point that it does not

25   necessarily follow that if the Court rules in

 1   our favor in this case that that case would come

 2   out the -- the way the -- the concurrence did in

 3   Bush versus Gore.

 4   JUSTICE BARRETT: I have a question

 5   that follows up on that, but before I move to

 6   that, I just want to ask you quickly, so if

 7   we're asking about novelty, if we're asking

 8   about an egregious departure, or if we're asking

 9   about the distinction between substance and

10   procedure, those are kind of all notoriously

11   difficult lines to draw, you know, but in your

12   colloquy with Justice Sotomayor, you were

13   talking about the lack of judicially manageable

14   standards for, say, free and fair elections.

15   Why don't you think -- why do you

16   think that that's less judicially manageable

17   than, say, deciding whether something is

18   substance versus procedure or an egregious

19   departure, truly novel?

20   MR. THOMPSON: Well, just to be clear,

21   Your Honor, so in terms of figuring out whether

22   there has been an impermissible distortion of a

23   statute --

24   JUSTICE BARRETT: Mm-hmm.

25   MR. THOMPSON: -- that's where you

1   have to look to see whether it's novel.

2   JUSTICE BARRETT: Right. But I

3   thought you said you agreed with that approach.

4   MR. THOMPSON: I do. I'm just saying

5   that in this case where we're -- none of that is

6   implicated.

7   JUSTICE BARRETT: I understand that.

8   MR. THOMPSON: Yeah. Okay. And so I

9   -- I apologize.

10   JUSTICE BARRETT: Well, I guess I

11   think substance and -- substance and procedure,

12   as many of the questions --

13   MR. THOMPSON: Yes.

14   JUSTICE BARRETT: -- that you've

15   gotten indicate, are difficult to separate out.

16   And so I'm saying --

17   MR. THOMPSON: Yeah.

18   JUSTICE BARRETT: -- you're leaning

19   pretty hard on the lack of judicially manageable

20   standards for things like free and fair

21   elections. So I'm saying, why should we take

22   solace in a substance/procedure definition as

23   a -- as a more manageable line?

24   MR. THOMPSON: Well, thank you, Your

25   Honor. And I would point to the Court's

1   decision from 1946, Murphree, where it is

2   talking about the Rules Enabling Act and is

3   setting up the line between substance and

4   procedure.

5   JUSTICE BARRETT: Which is, as a -- as

6   a former civil procedure teacher, I can tell you

7   is a hard line to draw and a hard line to teach

8   students in that context as well.

9   MR. THOMPSON: Well, and the Court

10   could take a functionalist or a formalistic

11   approach, but we're saying take a formalistic

12   approach. Say that if it is a hoop that needs

13   to be jumped through, then it is procedural.

14   And if it's an effort to limit the content --

15   and this is an easy case, that this is obviously

16   substantive, because there was a map and it was

17   thrown in the trash by the courts.

18   And so this isn't even close to the

19   line. But we think my friends on the other

20   side, they're trying to adopt and asking the

21   Court to adopt a functionalist approach.

22   They're saying -- they say on page 57 of the

23   state Respondents' brief that, yes, there is

24   something to this idea that the -- that there

25   are limits on the extent to which the state

1   constitution can control the state legislature.

2   The state legislature has to have "a central

3   role." That is a functionalist test if ever

4   there was one. And how do you define the

5   center, and how far from the center can you go?

6   And, oh, by the way, if this is in the center,

7   then the center is pretty much coterminous with

8   the circumference because, you know, we've been

9   --

10   JUSTICE BARRETT: Okay.

11   MR. THOMPSON: -- sidelined

12   completely.

13   JUSTICE BARRETT: I'm sorry to cut you

14   off. I just don't want to take too much of my

15   time. I just want to ask one last question.

16   You were pointing out that state

17   constitutions entrench norms and so they're more

18   problematic than statutes.

19   MR. THOMPSON: Yes.

20   JUSTICE BARRETT: But a lot of state

21   constitutions can be amended by simple

22   majorities in, say, the referendum process. And

23   so, you know, we know from Hildebrant that if a

24   districting is done by referendum, that's okay,

25   you know, that doesn't violate the Elect --

1   Elections Clause.

2   So why is it any different, say, if a

3   state constitution is amended and some

4   substantive provision is added by referendum,

5   but it would be problematic, why is that

6   problematic? When it can be changed by a simple

7   majority, why is that more entrenchment? And

8   why would we say that having it appear in the

9   Constitution is problematic when, if it appeared

10   through the referendum process and the

11   legislative process, it's not?

12   MR. THOMPSON: Well, respectfully,

13   Your Honor, if we're trying to get at the

14   original public meaning of the Constitution, I

15   think everyone had agreed in Arizona that these

16   referenda were unknown at the time of the

17   founding. And so James Madison --

18   JUSTICE BARRETT: But you're stuck

19   with Hildebrant. I thought you weren't trying

20   to get rid of it.

21   MR. THOMPSON: I'm not trying to get

22   rid of it, but if we're trying to say why

23   would -- why would the founders have objected

24   and been worried about partisan gerrymanders in

25   a state constitution, they would have been

1   worried about it because it was maximally

2   entrenching.

3   That's -- if the question is why would

4   they have drawn the line the way they drew the

5   line, that I'm saying they draw -- drew the line

6   is because Madison was worried about

7   entrenchment in the state constitution, and some

8   states may have this procedure, others don't.

9   But, typically, you know, if you want

10   to try to solidify something to the maximum

11   extent possible politically, you typically put

12   it into a constitution.

13   JUSTICE BARRETT: Thank you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Jackson?

16   JUSTICE JACKSON: Yes. Excuse me. Do

17   you agree with me that the Elections Clause

18   doesn't take any position as to who the entity

19   in the state is that qualifies as the

20   legislature?

21   MR. THOMPSON: We -- we think the

22   dissent in Arizona was correct and that the

23   legislature meant the legislature plus the

24   gubernatorial veto.

25   JUSTICE JACKSON: Legislature defined

1   by whom?

2   MR. THOMPSON: Well, I would point the

3   Court to Samuel Johnson's definition where he

4   said the three branches of the legislature --

5   JUSTICE JACKSON: So not the state

6   constitution? That doesn't -- I mean, I -- I

7   read the Elections Clause as essentially giving

8   the entity, whoever it is, that is the

9   legislature the power to make this decision but

10   not taking a position as to who the legislature

11   is.

12   MR. THOMPSON: And that is what the

13   Arizona majority said, and we're perfectly

14   content to abide by that.

15   JUSTICE JACKSON: Okay. So, if that's

16   true, if it is the state's constitution that

17   tells us who the legislature is and whether what

18   they're doing is a valid exercise of legislative

19   authority, then I guess what I don't understand

20   is why constitutional limits on the exercise of

21   that entity on its power don't still apply, even

22   in this context.

23   So, in other words, the Elections

24   Clause says you get the right to make this

25   decision, that you have that policy

1   determination. But the state constitution is

2   the thing that gives this particular entity its

3   authority to make any determinations and the

4   state constitution says things like, when you

5   make a determination about things in your

6   policymaking role, in the legislative power that

7   we're giving you, you have to make sure that,

8   you know, people are treated equally.

9   You have to -- whatever the

10   constitutional provisions are that we say --

11   that you're saying are so vague or whatnot, are

12   limitations on that entity's legislative

13   authority not just in this area but in every

14   area whenever they undertake to make a law.

15   And so I guess what I'm trying to

16   understand is why are you suggesting that in the

17   context of the Elections Clause, when this

18   entity would ordinarily be bound by all of the

19   limitations in the state constitution in its

20   legislative authority role, why suddenly in this

21   context do you say, no, no, no, all those other

22   constitutional provisions that would bind or

23   constrict legislative authority that the state

24   gives you because you're the state legislature,

25   right, why -- why do those evaporate in this

1   world?

2   I read it as though the state court is

3   essentially saying our constitution authorizes

4   you to be the legislature only insofar as you

5   act in accordance with our constitution's

6   tenets, and you haven't done that in this

7   instance.

8   Why am I wrong about sort of

9   conceptualizing it in that way?

10   MR. THOMPSON: Because it's a federal

11   function. And that's what Leser teaches. So

12   there was a constitutional prohibition on the

13   Maryland legislature allowing women to vote, and

14   the Maryland --

15   JUSTICE JACKSON: No, I'm asking --

16   can I just -- when you say "federal function," I

17   guess maybe that's where I'm getting hung up. I

18   -- I thought it was a -- a determination, a

19   delegation of, you know, policymaking power in

20   the sense of you get to make this decision.

21   But the authority for that body,

22   wherever it is, that's called the legislature,

23   comes from the state because -- you know,

24   that -- that was my example about we have two

25   different entities in the state fighting. Who's

1   the legislature, right? It's what the

2   constitution of the state says that gives you

3   the power, entity X, to be the one who is the

4   legislature making this elections decision.

5   If I'm right about that, then what is

6   being delegated from the federal Constitution is

7   not your power as a legislature, it is just

8   delegating to you the decision about time,

9   place, and manner, which is fine, but you have

10   to do that consistent with the authority that

11   you have as an entity to make legislative

12   decisions, and that comes from the state

13   constitution.

14   MR. THOMPSON: And U.S. Term Limits

15   says that is not right.

16   JUSTICE JACKSON: All right.

17   MR. THOMPSON: That the premise of

18   your question is not right.

19   JUSTICE JACKSON: All right. Thank

20   you.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   counsel.

23   Mr. Katyal.

24

25

1   ORAL ARGUMENT OF NEAL K. KATYAL

2   ON BEHALF OF THE PRIVATE RESPONDENTS

3   MR. KATYAL: Thank you, Mr. Chief

4   Justice, and may it please the Court:

5   For 233 years, states have not read

6   the Elections Clause the way you just heard.

7   There are two reasons to affirm. One is that

8   when enacting legislation, there's no such thing

9   as an independent state legislature. The other

10   is that North Carolina statutes authorized what

11   the North Carolina court did. I'll focus on the

12   first.

13   Petitioners' idea that state

14   legislatures created by state constitutions are

15   independent of them is wrong. It is rejected by

16   the Articles of Confederation, rejected by the

17   early state constitutions, rejected by the

18   founding practice, especially New York, where

19   judges vetoed federal election bills.

20   It's also rejected by this Court in

21   cases such as Smiley and Hildebrant. Just three

22   years ago in Rucho, this Court promised state

23   constitutions can provide standards for state

24   courts to apply and singled out for approval a

25   Florida court decision that used a state

 1   constitution to invalidate a federal map.

 2   To accept Petitioners' claim, you'd

 3   have to ignore the text, history, and structure

 4   of our federal Constitution as well as nearly

 5   every state constitution today.

 6   Petitioners say for two centuries

 7   nearly everyone has been reading the clause

 8   wrong. That's a lot of wrong and a lot of wrong

 9   past elections. Frankly, I'm not sure I've ever

10   come across a theory in this Court that would

11   invalidate more state constitutional clauses as

12   being federally unconstitutional, hundreds of

13   them from the founding to today.

14   It's worth taking a pause to think

15   about what Petitioners are saying. They claim

16   the word "legislature" means a species of state

17   law that has literally never existed. State

18   law-making unconstrained by a state

19   constitution, if the founders intended to create

20   that animal, surely someone would have said

21   something.

22   Finally, the blast radius from their

23   theory would sow elections chaos, forcing a

24   confusing two-track system with one set of rules

25   for federal elections and another for state

1   ones. Case after case would wind up in this

2   Court with a political party on either side of

3   the V. That would put this Court in a difficult

4   position instead of leaving it to the 50 states.

5   JUSTICE THOMAS: Mr. Katyal, would you

6   spend some time on discussing the source of the

7   state court's involvement in a federal election?

8   MR. KATYAL: Yeah, we --

9   JUSTICE THOMAS: I understand the

10   court is created under state constitution, but

11   this is a federal matter.

12   MR. KATYAL: Correct, and we for

13   reasons Justice Kavanaugh said, Your Honor,

14   think that Palm Beach basically says there is

15   some sort of federal issue here with respect to

16   Elections Clause, and we think, obviously, the

17   state court got it right and didn't violate the

18   Elections Clause, but we think that's the source

19   of authority here.

20   And, Justice Thomas, if I may, in two

21   decades of arguing before you, I've waited for

22   this precise case because it speaks to your

23   method of interpretation, which is history, and

24   the founding evidence here is overwhelming, and

25   I'd point you to four things.

 1   First, the Constitution uses the same

 2   word, legislatures, as the Articles of

 3   Confederation, and 10 state constitutions under

 4   the Articles regulated federal delegates.

 5   Second, after the Constitution was

 6   ratified, states kept regulating it. States

 7   like Delaware and Maryland and Mississippi

 8   expressly regulated federal elections, as did

 9   three quarters of the states.

10   Third, New York in 1792, this example

11   is really important, I think it's truly action

12   as opposed to the talk from Schuyler and Justice

13   Story. In 1792, the Council of Revision, which

14   has four people on it, three judges, one

15   governor, vetoed a federal elections bill for

16   the selection of delegates to the House of

17   Representatives. It was a time, place, manner

18   thing. Why did they -- why did they veto it?

19   They said because it is "repugnant to the state

20   constitution." That is very strong evidence.

21   That's exactly the example you used in Smiley to

22   build your decision there.

23   And lastly and most importantly, the

24   dog never barked. The Federalist Papers have

25   three different Federalist Papers on everything

1   he's been talking about about the Elections

2   Clause. Not a person said anything like that

3   they were trying to create this strange animal.

4   This isn't looking like into a crowd and trying

5   to pick out your friends. This is like looking

6   into the Lollapalooza crowd and picking

7   out everyone who speaks 15 languages. They --

8   JUSTICE GORSUCH: I don't know about

9   --

10   CHIEF JUSTICE ROBERTS: Okay. That --

11   JUSTICE GORSUCH: -- lollapalooza.

12   (Laughter.)

13   JUSTICE GORSUCH: But, while we're

14   looking at crowds, Mr. Katyal -- I'm sorry,

15   Chief. You want to go ahead?

16   CHIEF JUSTICE ROBERTS: No, no, Go

17   ahead. I'm still trying to sort the analogy

18   out.

19   JUSTICE GORSUCH: You want to touch

20   the lollapalooza, yeah, yeah.

21   (Laughter.)

22   JUSTICE GORSUCH: Right. That's --

23   that was a lollapalooza.

24   It is a small point, but, on Smiley,

25   on -- on the veto question, just narrowly on the

1   veto question, you know, Locke, Montesquieu, The

2   Federalist Papers treat that as a legislative

3   power and -- and a sharing of the legislative

4   power. And it's in Article I, which kind of

5   suggests it's -- the founders considered it a

6   legislative power. So I -- I guess I'm a little

7   less moved by -- by -- by that lollapalooza than

8   you are. Maybe you can help me out, though.

9   MR. KATYAL: Sure. Of course. And I

10   think it's reflective in the Chief Justice's

11   comments to my friend on the other side. There

12   is certainly something legislative there, but I

13   think that the overall point of Smiley is to say

14   -- and my friend says this in the reply brief at

15   page 6 -- you take legislatures as you find

16   them. He agrees with that proposition. That's

17   what Smiley did as well. The legislature as it

18   found -- as it was found in Minnesota in

19   Smiley was --

20   JUSTICE GORSUCH: And nobody here

21   thinks the North Carolina Supreme Court is

22   exercising a legislative function. We all agree

23   on that too, right?

24   MR. KATYAL: Correct. Correct.

25   JUSTICE GORSUCH: Okay. So that kind

1   of takes care of that argument --

2   MR. KATYAL: Well --

3   JUSTICE GORSUCH: -- I mean, doesn't

4   it?

5   MR. KATYAL: -- no, no, because I

6   think --

7   JUSTICE GORSUCH: What am I missing?

8   MR. KATYAL: -- underlying Smiley is

9   something more specific than that. It's

10   basically saying that the conditions on the

11   law-making power -- that's the language at page

12   365 -- apply, and, certainly, one condition on

13   the law-making power only in two states at the

14   founding but more at the time of Smiley was the

15   governor's veto.

16   JUSTICE GORSUCH: Yeah.

17   MR. KATYAL: But, here --

18   JUSTICE GORSUCH: And -- and that's

19   because, if we want to look at our friends in

20   the Federalist Papers and everywhere else, that

21   was considered sharing of -- there was no

22   absolute separation of powers. There was an

23   exception that --

24   MR. KATYAL: Right.

25   JUSTICE GORSUCH: -- that they had to

1   be mixed. You know -- you know your Federalist

2   41 and 47 and 51 better than I do, I'm sure.

3   But -- but that that was a legislative function

4   that was given to the President and there it is

5   in Article I.

6   MR. KATYAL: Not disagreeing with that

7   --

8   JUSTICE GORSUCH: Okay. All right.

9   MR. KATYAL: -- Justice Gorsuch. What

10   I am saying is that Smiley focused on two

11   things, the word "legislature" but also the word

12   "regulate."

13   JUSTICE GORSUCH: All right.

14   MR. KATYAL: And together they create

15   a law-making system, and what Smiley says is

16   you're then subject to the constraints of that

17   law-making system, one of which was judicial

18   review, well-established at the founding, far

19   more established than the veto.

20   JUSTICE GORSUCH: All right. Now

21   we're off on another tangent. Go for it.

22   MR. KATYAL: So far more established

23   than the veto. And so, you know, seven

24   different states had judicial review at the

25   founding. If the method of Smiley -- the method

1   of Smiley is to say, look, the founders knew

2   about the veto because it was in two states, did

3   they textually exclude it in the language? The

4   answer was no.

5   JUSTICE JACKSON: Mr. Katyal, I don't

6   -- I don't hear your friend on the other side

7   really questioning now at least whether there is

8   judicial review. I understood his primary

9   argument to be, you know, even though the

10   states, we agree, he says, can come in and look

11   at this, what they have to be doing is applying

12   federal law.

13   And so that's the part that I keep

14   getting hung up on. Can you -- can you help? I

15   mean, we have said at certain times here in the

16   questioning today that various entities are

17   exercising legislative power or not, or maybe

18   the Court is exercising legislative power. I

19   thought we told -- we -- we were able to tell

20   when something is a legislative power by

21   reference to the state's constitution, that they

22   tell us when legislative power is being

23   exercised at all, validly or whatever. Am I

24   wrong about thinking about it in this way?

25   MR. KATYAL: You're absolutely right,

1   Justice Jackson. So two points. One, we can't

2   figure out what Petitioners' theory honestly is.

3   What they just told you is the opposite of what

4   they started with on page 1 of their brief,

5   where they said state courts have no role. They

6   said legislature means legislature. But then

7   you get caveat after caveat. It includes

8   governor. It includes referenda. It includes

9   independent commissions in the reply brief they

10   say. Then they say, well, but state courts

11   can't do it, but maybe they can for federal

12   review, maybe they can if it's procedural or

13   non-abstract. I mean, the one thing we know,

14   they're not making a textual argument anymore.

15   Now, with respect to this federal

16   function argument you were asking about, Smiley

17   dead rejects it. That's exactly what the

18   Minnesota Supreme Court said below. They

19   actually called it a federal agency. And what

20   this Court did unanimously reversed and it said

21   no because, here, you are acting "as a

22   law-making body," which is what I was saying to

23   Justice Gorsuch from page 364.

24   It's the exact opposite of his example

25   of -- of the Leser case. Leser is about Article

 1   V. It's about a totally different text. The

 2   text of Article V is application of the state

 3   legislatures. The whole point of Smiley,

 4   Justice Jackson, is to say this is different

 5   because it's a law-making system not just

 6   because of the word "legislature" but also

 7   because of the word "regulation." There is no

 8   regulation that has ever existed that has been

 9   exogenous to the state constitution. It's

 10   literally a species that never existed.

 11   JUSTICE ALITO: Mr. Katyal, can I ask

 12   you some questions about the boundaries of your

 13   argument. So suppose a state constitution says

 14   that congressional districts will be determined

 15   by the state supreme court exercising

 16   legislative power. Is that consistent with the

 17   Elections Clause?

 18   MR. KATYAL: We don't think it would

 19   be, Your Honor. So we think, in general, there

 20   may be some redefinition of the legislature that

 21   Arizonans -- the Arizona decision might permit.

 22   That isn't what we are arguing here. We're

 23   talking about ordinary checks and balances like

 24   judicial review, and so --

 25   JUSTICE ALITO: All right. Suppose

1   that the state constitution says that the

2   legislature can adopt congressional maps, but in

3   that instance, the state supreme court shall sit

4   as a Council of Revision to determine whether

5   the maps are fair.

6   MR. KATYAL: Yes.

7   JUSTICE ALITO: Is that okay?

8   MR. KATYAL: We do think that the

9   history there would suggest it is. Nothing in

10   our argument, of course, depends on it. Again,

11   ordinary judicial review, that is all we think

12   you should reach in this case. Not that, but

13   the New York example is exactly that.

14   JUSTICE ALITO: Well, that's not

15   really judicial review. That is because they're

16   not --

17   MR. KATYAL: Correct.

18   JUSTICE ALITO: -- reviewing it for

19   anything. So --

20   MR. KATYAL: Right.

21   JUSTICE ALITO: -- what was your

22   answer there? That is okay or that is not okay?

23   MR. KATYAL: Nothing in our position

24   depends on it, Your Honor, but the historical

25   test, which is what he's using, New York in

1   1792, did exactly that.

2   JUSTICE ALITO: Well, I'm not sure I

3   understand your argument, but, okay, on to

4   another example. Suppose the state supreme

5   court says the essence of our state constitution

6   is fairness and we don't think that the map

7   adopted by the legislature is fair. Is that

8   okay?

9   MR. KATYAL: The constitution says

10   that the map adopted by the legislature is or

11   the state court says that?

12   JUSTICE ALITO: The state constitution

13   -- the state supreme court says that the essence

14   of our state constitution is fairness. It

15   doesn't point to a particular provision in the

16   state constitution. It just says the essence of

17   our state constitution is fairness to all of our

18   citizens, and the map adopted by the legislature

19   is not fair.

20   MR. KATYAL: Yes, Your Honor, we think

21   that would -- again, nothing turns on that here,

22   but the answer to your question is yes, we think

23   that would be constitutional, and the reason why

24   is because there's a trident of safeguards that

25   would prevent any sort of abuse. The first one,

1   the safeguard, is in the state process itself.

2   As Judge Sutton's work explains, state courts

3   have all sorts of mechanisms to restrain them,

4   including popular accountability and, as Justice

5   Barrett pointed out a moment ago, a much easier

6   amendment process.

7   JUSTICE ALITO: Well, that's a little

8   bit -- that's a little bit off the point. As

9   far as popular accountability is concerned, we

10   have seen examples of state -- many state

11   supreme courts are elected. And some states

12   allow partisan elections. So there's been a lot

13   of talk about the impact of this decision on

14   democracy. Do you think that it furthers

15   democracy to transfer the political controversy

16   about districting from the legislature to

17   elected supreme courts where the candidates are

18   permitted by state law to campaign on the issue

19   of districting?

20   MR. KATYAL: Yes, Your Honor, we do,

21   and the reasons for that are threefold. Number

22   one, there are any number of checks on that

23   process, including, as Justice Barrett says, the

24   amendment process and other things that Judge

25   Sutton warns about.

1   Second, the founders laced into the

2   Elections Clause itself a specific remedy for

3   your concern, which is that Congress can come in

4   and supplant -- any particular state court

5   decision they don't like, they can say this

6   North Carolina map should be reinstated, they

7   could supplant all the state constitutions.

8   JUSTICE ALITO: But can't you say the

9   same thing about allowing the legislature to

10   do -- which is popularly elected, to do the --

11   to make the map? Congress can always come in.

12   MR. KATYAL: Sure, and that's exactly

13   what Smiley and -- and -- Smiley rejected, this

14   idea that there's only -- that that's the one

15   remedy, in Wesberry as well. They said that's

16   just indicia of the fact that the founders

17   distrusted state legislatures and wanted checks

18   and balances. Here, of course, we're only

19   seeking ordinary ones.

20   And, third, with respect to your

21   question of the catastrophic consequences, we

22   think, for reasons Justice Kagan said, that cuts

23   entirely the other way. I mean, the blast

24   theory by their -- by their theory -- blast

25   radius by their theory starts at the size extra

1   large. It starts with invalidating 50 different

2   state constitutions today. Elections clauses

3   are in 27. All states have equal protection

4   clauses, speech clauses, assembly clauses.

5   Thirty of them guarantee the right to a secret

6   ballot. There's vote -- five of them, voter ID

7   --

8   JUSTICE ALITO: What about the -- what

9   about the approach set out by Justice -- by

10   former Chief Justice Rehnquist? Does that -- is

11   that also a lollapalooza? Does that have a --

12   MR. KATYAL: No.

13   JUSTICE ALITO: -- huge blast radius?

14   MR. KATYAL: No, Your Honor, as long

15   as we understand, as Justice Kavanaugh said a

16   moment ago, that that is about statutes. And,

17   here --

18   JUSTICE ALITO: Well, as applied --

19   how about if it's applied to a state

20   constitution --

21   MR. KATYAL: Right.

22   JUSTICE ALITO: -- as well?

23   MR. KATYAL: So, for 233 years, this

24   Court has never second-guessed a state court

25   interpretation of its own constitution in any

 1   context. Forget about the election --

 2   JUSTICE ALITO: Oh, I don't think --

 3   is that true?

 4   MR. KATYAL: I --

 5   JUSTICE ALITO: We have to decide

 6   whether there is an adequate and independent

 7   state ground, right, for --

 8   MR. KATYAL: Right.

 9   JUSTICE ALITO: -- a rule that's --

10   that a state court invokes?

11   MR. KATYAL: You certainly do decide

12   it. I don't think you've ever second-guessed it

13   and said they've gotten it wrong. My friends

14   from the --

15   JUSTICE ALITO: We've never said that

16   one is inadequate?

17   MR. KATYAL: I don't think you've ever

18   said a constitutional provision is, Your Honor.

19   JUSTICE ALITO: Well, have we ever

20   said that a state law is inadequate --

21   MR. KATYAL: Yes.

22   JUSTICE ALITO: -- or rule?

23   MR. KATYAL: So that's -- and that's

24   the distinction I was drawing, referring to

25   Justice Kavanaugh. With respect to -- with

1   respect to a statute, there's one set of

2   standards, but with a constitution, there does

3   have to be a sky-high standard. So we don't

4   doubt, Justice Alito, if the state constitution

5   said, for example, that absentee balloting is

6   required, and some judge came in -- or a state

7   statute even, some judge came in and said the

8   state supreme court said, you know, we don't

9   like absentee voting, we like -- voting is a

10   civic thing, you've got to do it in person

11   for policy reasons --

12   JUSTICE ALITO: All right. Thank you.

13   MR. KATYAL: -- then --

14   JUSTICE ALITO: Thank you, Mr. Katyal.

15   I have a few more questions, but I'll wait for

16   the next period.

17   CHIEF JUSTICE ROBERTS: Thank you.

18   Mr. Katyal, you quote in your brief,

19   and we heard it this morning as well, the

20   language from Rucho that say -- says provisions

21   in state constitutions can provide standards and

22   guidance for state courts to apply in

23   redistricting. Do you think the phrase "fair

24   and free elections" is providing standards and

25   guidelines?

1   MR. KATYAL: I -- I do. Let me say

2   two things about that. Number one, Your

3   Honor --

4   CHIEF JUSTICE ROBERTS: Just before

5   you -- I'll let you get in, but providing

6   standards and guidelines in the context of an

7   opinion that emphasized how unmanageable and

8   indeterminate the various proposals were --

9   MR. KATYAL: You said --

10   CHIEF JUSTICE ROBERTS: -- with

11   respect to partisan gerrymandering --

12   MR. KATYAL: Right. But you said that

13   about the federal -- the federal review. And I

14   think it's very different at the state level for

15   two reasons. One is, of course, states don't

16   have the same type of non-justiciability

17   concerns. And, second, you anchored it in

18   really a political legitimacy point about this

19   Court at page 2507. You said we can't -- we're

20   one Supreme Court. These cases are inherently

21   political. Everything is going to wind up here

22   and be seen and through a -- you know, seen by

23   the outsiders through a political lens.

24   I think that point cuts the other way

25   with respect to this case because, if you left

1   it to the decentralized 50 state systems with

2   their own traditions -- and this is something

3   that Judge Sutton's work talks about -- yes, you

4   can have an abstract clause. Many state

5   constitutions do. And for the most important of

6   reasons, that suggests actually -- you know,

7   that -- those are sometimes the most fundamental

8   provisions to the state. That's what the state

9   constitutional law scholars' brief explains. So

10   the idea that you could just nullify those by

11   saying they're too abstract is really

12   problematic.

13   And the other thing I'd say is, when

14   you use that language, he just chalked it up to

15   you saying that's about the congressional

16   proposals and that -- he said it was about it --

17   that the words that "we express no view" apply

18   to that language that you just read. That's

19   just a flat misreading of the case. You used

20   that language I said, then there was some talk

21   about congressional proposals and the U.S.

22   Congress, that's what you said you expressed no

23   view on.

24   CHIEF JUSTICE ROBERTS: Just --

25   MR. KATYAL: Five Justices -- sorry.

1   CHIEF JUSTICE ROBERTS: Yeah. And

2 just to be clear, when you say "you," you mean

3 the Court, right?

4   MR. KATYAL: Exactly.

5   CHIEF JUSTICE ROBERTS: Thank you.

6   MR. KATYAL: Yes.

7   (Laughter.)

8   CHIEF JUSTICE ROBERTS: When -- at

9 page -- near the end of your brief, at page 49,

10 you say that this Court "always has jurisdiction

11 to intervene in rare cases where state courts

12 act lawlessly to obstruct federal rights." And

13 you look to Chief Justice Rehnquist's opinion as

14 saying that the standards would be reviewable

15 when the -- they significantly depart from

16 well-established meaning of state law.

17   When you're falling back in that

18 situation, do you bump into Mr. Thompson when

19 he's falling back the other way?

20   (Laughter.)

21   MR. KATYAL: Ha. No, because he

22 actually just disclaimed it. He said, I'm not

23 second-guessing the North Carolina state

24 legislature. So the separate opinion that was

25 written in this case earlier, all those

1   arguments, I take it, are now off the table

2   about the North Carolina court going too far or

3   misreading its own constitution.

4   For us, Mr. Chief Justice, because

5   this Court has never really confronted the

6   situation of saying a state court got it wrong

7   on its own constitution, we think that standard

8   has to be sky high. It is the, you know,

9   ultimate affront to sovereignty of a state to

10   say its own state court got things wrong.

11   And we'd say the corollary is it's an

12   equal affront to say a state can't even have

13   these clauses in its constitution, that they're

14   unenforceable. You know, things like the free

15   elections clause have been around since 1776 in

16   North Carolina. They predate the Declaration of

17   Independence.

18   CHIEF JUSTICE ROBERTS: Thank you,

19   counsel.

20   Justice Thomas -- Thomas, anything

21   further?

22   JUSTICE THOMAS: Actually, I don't,

23   but I've been waiting 30 years to ask him a

24   question.

25   (Laughter.)

1   JUSTICE GORSUCH: That was pretty

2   funny.

3   MR. KATYAL: That was good.

4   CHIEF JUSTICE ROBERTS: Drum roll.

5   JUSTICE THOMAS: You said that the --

6   this Court doesn't normally second-guess state

7   court interpretations of their own constitution.

8   Would you say that in the case of Baker v. Carr?

9   MR. KATYAL: Yeah, I don't think it

10   was -- I think you can declare it

11   unconstitutional, any number of things like

12   that. But to say that they just got their own

13   constitution wrong is -- just as a matter of

14   interpretation, that is, as a --

15   JUSTICE THOMAS: But it was purely an

16   interpretation of their own constitution and --

17   MR. KATYAL: And a violation of

18   federal law, right? So --

19   JUSTICE THOMAS: Well, yeah, I mean,

20   but that's just a way -- I mean, you can

21   raise -- you -- it's -- in the end, it was

22   invalidating their interpretation of their

23   redistricting principles.

24   MR. KATYAL: And -- and, Justice

25   Thomas, our only point to you, and it's the same

1   point picking up on Justice Kavanaugh's question

2   to my friend, at page 78 of Bush versus Palm

3   Beach Canvassing Board, you said that -- the

4   Court said that -- that sovereignty is at --

5   JUSTICE THOMAS: Well, I was there

6   too, yeah.

7   MR. KATYAL: Sovereignty was at its

8   apex when you're talking about state

9   constitutions and interpretations by state

10   courts.

11   JUSTICE THOMAS: Let me ask you this

12   just as -- it may be a bit unfair. If the state

13   legislature had been very, very generous to

14   minority voters in their redistricting and the

15   state supreme court said under their state

16   constitution that this was -- violated their own

17   state constitution of North Carolina, would you

18   be making the same argument?

19   MR. KATYAL: So the -- if -- yes, I

20   mean, if there is --

21   JUSTICE THOMAS: You just -- Justice

22   Gorsuch said it seems as though it depends on

23   whose ox is being gored. So I'm changing which

24   ox is being gored.

25   MR. KATYAL: Yeah. No, we don't think

1   anything turns on the substance of the

2   individual decisions here.

3   JUSTICE THOMAS: But you would still

4   be there --

5   MR. KATYAL: Our point --

6   JUSTICE THOMAS: -- making the same

7   argument?

8   MR. KATYAL: -- our point to you,

9   Justice Thomas, is that this Court has never

10   second-guessed state court interpretations of

11   their own constitution. And so, if there's a

12   general clause and it happens to benefit or hurt

13   --

14   JUSTICE THOMAS: Yeah.

15   MR. KATYAL: -- minority voters, as

16   Judge Sutton says, that's a process the states

17   deal with. And as I was saying to Justice

18   Alito, there's a special safeguard here, which

19   is the second half of the Elections Clause,

20   which allows Congress to supplant whatever that

21   errant state court decision is.

22   JUSTICE THOMAS: So when is it --

23   again, I'd like you to just tell me, what is the

24   source of the authority for the State of North

25   Carolina Supreme Court to be involved in a

1   federal election? I understand that there's no

2   disagreement about a state legislator. But this

3   is a federal election, and it's similar to the

4   problem we had with the presidential election in

5   Bush v. Gore.

6   MR. KATYAL: It's just like Smiley,

7   Your Honor. It's the exact same thing. So

8   there is a federal issue. The North Carolina

9   court is interpreting the elections clauses and

10   powers, and -- and the question is whether or

11   not they have misread it or not. And so I think

12   that's the source of the -- of the substantive

13   -- alleged substantive violation here.

14   I think you're absolutely right, the

15   spirit of your question, for 233 years, this

16   Court's never gotten involved and said, hey,

17   we're going to, you know, rove and say the North

18   Carolina court got it wrong or their provision

19   was too abstract for enforcement or anything

20   like that. Rather, this Court has always stayed

21   on the sidelines, let the state process unfold,

22   subject to that other part of the trident check,

23   Congress in the second half of the Elections

24   Clause.

25   CHIEF JUSTICE ROBERTS: Justice Alito?

1   JUSTICE ALITO: I was asking some

2   questions earlier about instances in which it is

3   necessary for a federal court in applying

4   federal law to delve into the meaning of state

5   law. And while federal courts generally take

6   state law to be whatever the state supreme court

7   says it is, there are instances where that is

8   not the rule, and I mentioned one.

9   Put aside for a moment your

10   distinction between a state constitution and a

11   state statute. Whether -- whether a rule

12   invoked by the state supreme court is an

13   adequate rule, in deciding whether there is an

14   adequate and independent state ground for a --

15   for a rule that the -- the state supreme court

16   applies, right, that's an instance of that?

17   MR. KATYAL: Correct.

18   JUSTICE ALITO: All right. How about

19   the Contract Clause, whether the -- was there a

20   violation of the Contract Clause? Doesn't the

21   Court have to determine whether there really was

22   a contract under the law of the state at the

23   time when the contract in question was formed?

24   MR. KATYAL: Right. We don't doubt

25   that. It's just under a very deferential

 1   standard review. We're not disagreeing.

 2   JUSTICE ALITO: What about the Takings

 3   Clause, was there a taking of property?

 4   Property is defined by state law, but what -- if

 5   the state supreme court says this thing is not

 6   property, does that answer the federal question?

 7   MR. KATYAL: Again, not -- not -- you

 8   know, yes, we think all of those are examples of

 9   this Court looks into it. Here, of course,

10   we're talking about state constitutions being

11   interpreted by state courts, so it's a little

12   different than these scenarios, but yes.

13   JUSTICE ALITO: All right. What about

14   if there's -- along the same lines, what if

15   there is a claim that there was a deprivation of

16   property? Once again, property is primarily

17   defined by state law, but does the state supreme

18   court have free rein to say, no, there was no

19   deprivation because there was no property?

20   MR. KATYAL: So the state court does

21   under its own processes depending on the text

22   and the history in that state, which differs

23   from state to state for reasons Judge Sutton

24   says, and this is the same answer I'd given to

25   Justice Thomas. We don't doubt that there is

 1   some review by this Court in the most -- in

 2   extreme circumstances. It's just that the

 3   standard is incredibly high.

 4   What my friend is saying is, well,

 5   because it's a federal function, it's somehow

 6   immunized from state court review altogether.

 7   And that's just not -- there's no conflict

 8   between federal and state schemes. It's like,

 9   for example, Spending Clause litigate --

10   legislation, like the Clean Air Act or Clean

11   Water Act, which require the passage of state

12   laws to enforce, but nobody says they're exempt

13   from the state constitution.

14   JUSTICE ALITO: Well, but you -- I

15   mean, you say the standard is incredibly high,

16   but does it go up to the stratosphere or, you

17   know, into outer space? When you say that it

18   would be okay for a state to set up the state

19   supreme court as the Council of Revision or that

20   it would be okay for the supreme court -- a

21   state supreme court simply to say the essence of

22   our constitution is fairness, you would say that

23   that can be done. So that sounds like no

24   standard at all.

25   MR. KATYAL: Again, Your Honor, we're

1   saying ordinary checks and balances, that's all

2   you have to do here, but, yes, we think there

3   are other checks that deal with that, those

4   precise problems. If there is in a clause

5   that's abstract and being misinterpreted, both

6   the state process itself as well as Congress can

7   come in and supplant that.

8   So their -- you know, those

9   accusations -- this is Judge Griffith's brief --

10   are made all the time about even decisions by

11   this Court. He points to Citizens United and

12   Heller as examples. And what this Court has --

13   what he says is there's a special check here

14   because you have Congress being able to come in

15   --

16   JUSTICE ALITO: But Congress can -- I

17   don't know why that's an answer because Congress

18   can come in anytime, under any circumstances, no

19   matter what we say the Elections Clause means.

20   Congress can always come in and --

21   MR. KATYAL: Right.

22   JUSTICE ALITO: -- establish the

23   manner of conducting congressional elections.

24   MR. KATYAL: But what this Court said

25   is that what that clause reflects is a distrust

1   of state legislatures. That's what you said in

2   Hildebrant and in Smiley, and there -- excuse

3   me, in Smiley and Wesberry, and in those cases,

4   you rejected that precise argument. And so it

5   is a check on judicial adventurism to the extent

6   you're worried about it.

7   JUSTICE ALITO: What is the check on

8   -- last question. What is the check on an

9   appointed state supreme court? Suppose a state

10   supreme court, the justices of the state supreme

11   court had the same protection against removal

12   and all of the other protections that federal

13   court --

14   MR. KATYAL: Yeah.

15   JUSTICE ALITO: -- federal courts do.

16   What is the check on them?

17   MR. KATYAL: So it is the amendment

18   process, which, as Justice Barrett -- Justice

19   Barrett said, I think, boomerangs on them when

20   you try to exempt state statute -- statutes

21   because amendment processes are often easier.

22   Judge Sutton's book talks about that. And you

23   have the congressional check.

24   And my last point to you, Justice

25   Alito, is, what's the check on the other side?

1   All he's giving you is federal constitutional

2   review, which is, you know, only a few clauses

3   of the Constitution, as Rucho says, many of

4   them nonjusticiable.

5   So the states have regulated this for

6   233 years in a particular way. The blast radius

7   from his theory can extend to state statutes. I

8   understand he's disclaiming them, but the next

9   petitioner won't, the theory's going to apply

10   and may even reach delegations to state

11   officials, which would be a -- you know, a

12   dramatic change, as the Ben Ginsberg amicus

13   brief explains.

14   JUSTICE ALITO: Thank you.

15   CHIEF JUSTICE ROBERTS: Justice

16   Sotomayor?

17   JUSTICE SOTOMAYOR: Counselor, could

18   you deal with the examples, the historical

19   examples your colleague spoke about as

20   supporting his position, Virginia's 3/5 rule,

21   Maryland's Nineteenth Amendment rule? I think

22   your brief does an adequate job on the Story

23   issue, but --

24   MR. KATYAL: So -- so the Maryland one

25   is just about the amendment process, and that's

1   Leser, and that's just a totally different text

2   and so on and certainly doesn't bear on the

3   original meaning of the Elections Clause.

4   With respect to Virginia, it

5   absolutely cuts the other way. That's the

6   1830s.

7   JUSTICE SOTOMAYOR: That's what I

8   thought.

9   MR. KATYAL: So it's not the Bruen,

10   you know, time period of the founding, and we

11   have provision after provision even before the

12   founding with the Articles of Confederation

13   which I think blow apart their historical

14   theory.

15   But, with respect to Virginia, yeah,

16   one person said this would violate the Elections

17   Clause and, you know what happened, James

18   Madison and the Chief Justice of this Supreme

19   Court, John Marshall, did -- voted for the bill

20   even after that objection. So, if anything, it

21   cuts the other way. But I am not aware of a

22   decision by this Court that invalidates early

23   state constitutional provisions as being

24   federally unconstitutional in the way that this

25   theory does.

 1   JUSTICE SOTOMAYOR: And you don't take

 2   quarrel with the fact that a state could

 3   interpret a state constitution in a way that

 4   violates the federal Constitution? That's what

 5   they're arguing here.

 6   MR. KATYAL: Right. No, we don't

 7   doubt that. It's just under, as we were talking

 8   about, that stratospheric standard of review

 9   because it's never -- to my knowledge, it's

10   never really happened by this Court. And I

11   think Bush versus Palm Beach Canvassing Board

12   says it's got to be the highest standard, higher

13   than Chief Justice Rehnquist's opinion in Bush

14   versus Gore.

15   JUSTICE SOTOMAYOR: Well, I -- I

16   thought of those cases as basically saying that

17   there was a due -- federal due process problem

18   if an interpretation violates due process in

19   some way.

20   MR. KATYAL: Correct. There's a

21   novelty concern, particularly in the criminal

22   context, about adequate and independent state

23   grounds, picking up on Justice Alito's point.

24   Novelty I don't think applies quite here because

25   we're not talking about fair warning in the same

1 way as the federal context.

2   JUSTICE SOTOMAYOR: Exactly, but I

3 always thought of those cases, those extremes

4 being rooted in the federal Constitution's due

5 process.

6   MR. KATYAL: It can be in that

7 context. Here, I think it's rooted in the

8 Elections Clause itself, which was my answer to

9 Justice Thomas.

10   JUSTICE SOTOMAYOR: Okay.

11   CHIEF JUSTICE ROBERTS: Justice Kagan?

12   JUSTICE KAGAN: If I could go over

13 some of the ground that you've been asked about

14 about the Rehnquist concurrence and make sure I

15 understand your position and the issues that are

16 in front of us and so forth.

17   So, as I understand it, the -- the one

18 area of agreement I found between you and

19 Mr. Thompson is you also think that the

20 Rehnquist concurrence is about statutes, not

21 about Constitution --

22   MR. KATYAL: Correct.

23   JUSTICE KAGAN: -- as in this case.

24 So your view, as Mr. Thompson's view, is that

25 the Rehnquist concurrence by its terms isn't

1   implicated here?

2   MR. KATYAL: Correct.

3   JUSTICE KAGAN: But you say there, you

4   say you have no doubt that there's a kind of

5   corollary for the constitutional side of things.

6   MR. KATYAL: Yes.

7   JUSTICE KAGAN: So does that mean it's

8   not just like there may be a corollary? You

9   think that there is a corollary?

10   MR. KATYAL: Yeah, I think the

11   Elections Clause at some point could be violated

12   in the -- like the example of absentee voting

13   that I gave you a moment ago.

14   JUSTICE KAGAN: Yeah, but you say so

15   it's sky high, it's stratospheric, it's

16   whatever. So, when you look at the Rehnquist

17   concurrence, and it was only a concurrence, so

18   it didn't really have to pick a single standard,

19   there were actually a lot of different standards

20   floating around in the Rehnquist concurrence,

21   and some of them sound easier to satisfy than

22   others. You know, like, one is like not a fair

23   reading, which doesn't sound all that difficult.

24   One is absurd, which sounds a lot more

25   difficult. But you're saying even more than the

1   highest --

2   MR. KATYAL: I mean --

3   JUSTICE KAGAN: -- statement in the

4   Rehnquist opinion --

5   MR. KATYAL: Well, I think absurd --

6   JUSTICE KAGAN: -- because the

7   Constitution is different?

8   MR. KATYAL: Right, I think absurd,

9   inconceivable is what he uses at one place, or

10   no basis. The Conference of Chief Justices, all

11   50 Chief Justices are before you saying at page

12   19 of their brief the standard is no plausibly

13   defensible basis for the state court's

14   determination. I think all of these, regardless

15   of the words that are used here, Justice Kagan,

16   I think --

17   JUSTICE KAGAN: But you're saying it

18   should be higher on the constitutional side than

19   on the statute.

20   MR. KATYAL: Correct.

21   JUSTICE KAGAN: And why is that?

22   MR. KATYAL: Because we are -- it is

23   the apex, as Palm Beach Canvassing Board says,

24   of a state's sovereignty, as a state's

25   constitution. And to say that their own high

1   court got it wrong is really a very grave thing.

2   I -- I still am not sure that that's ever

3   happened in any context from this Court.

4   JUSTICE KAGAN: And -- and whatever

5   the exact wording of the standard is that you

6   think applies on the constitutional side, would

7   that be implicated in this case?

8   MR. KATYAL: Oh, no, not at all,

9   because he just disclaimed it anyway in his

10   argument today. And he said, we're not asking

11   you to second-guess the North Carolina

12   constitution.

13   But, if you adopt his view about

14   abstract clauses or things like that, I don't

15   know what is abstract and what isn't abstract.

16   I mean, you know, you could imagine even the

17   most concrete provision, polls shall close -- be

18   open until 8 p.m., that sounds very concrete,

19   but, as the amici briefs say, like the Ben

20   Ginsberg brief, what about a hurricane or a

21   plumbing leak or a terrorist attack. Every

22   clause is going to have open-ended stuff in

23   them, and you're opening Pandora's Box if you

24   side with any version, and he's got nine

25   different versions.

1   JUSTICE KAGAN: Right. I -- I was

2   asking a somewhat different thing. I -- I was

3   just asking whether this decision in this case

4   can remotely be understood to run into the

5   constitution -- the constitutional corollary of

6   the Rehnquist principle.

7   MR. KATYAL: Miles away from it, which

8   is why I think he's disclaiming it. I mean,

9   that was thorough judicial interpretation for

10   reasons our brief explains.

11   CHIEF JUSTICE ROBERTS: Justice

12   Gorsuch?

13   JUSTICE GORSUCH: First, just a -- a

14   point of clarification, Mr. Katyal. You -- you

15   take the position that Virginia correctly

16   understood the Constitution when it adopted the

17   3/5 requirement --

18   MR. KATYAL: So --

19   JUSTICE GORSUCH: -- for purposes of

20   calculating African American persons in its

21   constitution?

22   MR. KATYAL: No, Your Honor. So

23   there -- there's several different provisions

24   being debated in 1830. One is the 3/5

25   provision. We're not talking about 3/5. We're

 1   talking about the regulation of federal

 2   districts, which is what the Elections --

 3   JUSTICE GORSUCH: But --

 4   MR. KATYAL: -- Clause violation was

 5   about.

 6   JUSTICE GORSUCH: But you're saying

 7   what Virginia did at that time was consistent

 8   with a proper understanding of the Elections

 9   Clause.

10   MR. KATYAL: Well, the Elections

11   Clause, yes.

12   JUSTICE GORSUCH: Yeah. That's what

13   I'm asking.

14   MR. KATYAL: Yes.

15   JUSTICE GORSUCH: Okay. So you are

16   defending that.

17   MR. KATYAL: Not the 3/5 --

18   JUSTICE GORSUCH: I guess I'm

19   surprised by that given that when the Elections

20   Clause issue was raised in that debate as I

21   understand it from the briefs before us, the

22   Convention attendees and others basically said,

23   yeah, that might be so, but who cares, we have

24   to protect our -- our property interests in

25   slavery.

1   MR. KATYAL: Yeah. So that's a

2   different provision, Justice Gorsuch, so that's

3   why I'm saying, you know, it's a nice smear of

4   what happened in 1830 that has been levied by my

5   friend on the other side. But the Elections

6   Clause --

7   JUSTICE GORSUCH: You'd agree that

8   they were not attending to the Elections Clause,

9   they were attending to their perceptions of what

10   their property rights were?

11   MR. KATYAL: No. This was about the

12   districting, and that's what was at issue in the

13   Elections Clause. And they --

14   JUSTICE GORSUCH: What would -- what

15   would -- fine. If -- if you don't answer that,

16   maybe you can get at it this way. What would

17   prevent a state before the Civil War from

18   adopting what you say didn't happen and would

19   never have happened, a 3/5 rule in their state

20   constitutions?

21   MR. KATYAL: So the state

22   constitutions, they could adopt that rule and

23   whatever that is, and it may be consistent with

24   the federal rule at the time, you know, pre the

25   Civil War.

1   JUSTICE GORSUCH: So you would defend

2   that as -- as consistent with an appropriate

3   understanding of the Elections Clause?

4   MR. KATYAL: No, I'm saying it has

5   nothing to do with it, with what we're talking

6   about here.

7   JUSTICE GORSUCH: I'm asking you would

8   a state prior to the Civil War --

9   MR. KATYAL: No --

10   JUSTICE GORSUCH: -- be able through

11   its Elections Clause --

12   MR. KATYAL: No --

13   JUSTICE GORSUCH: On what ground?

14   MR. KATYAL: No position on that.

15   We're only talking --

16   JUSTICE GORSUCH: No position on that?

17   MR. KATYAL: -- about ordinary checks

18   and balances, Justice Gorsuch, and --

19   JUSTICE GORSUCH: No position on that

20   at all?

21   MR. KATYAL: -- Justice Gorsuch, where

22   we're --

23   JUSTICE GORSUCH: All right. How

24   about -- how about a state then that puts a

25   political gerrymander into its state

1   constitution?

2   MR. KATYAL: Yeah, so --

3   JUSTICE GORSUCH: And this Court as

4   a -- as a federal matter, as you know, has said

5   we abstain from dealing with those things under

6   Rucho. So a state could do that too, right?

7   MR. KATYAL: Oh, I don't -- well, I

8   think there'll be any number of state violations

9   that may be at issue there if that happens.

10   JUSTICE GORSUCH: It's in the state

11   constitutions.

12   MR. KATYAL: Still, state

13   constitutions often have --

14   JUSTICE GORSUCH: Let's just say it's

15   as a matter of state law pristine. Then what?

16   MR. KATYAL: Yeah. So then I -- I

17   don't think that it would necessarily -- it

18   would state a federal Elections Clause violation

19   at that point.

20   JUSTICE GORSUCH: Yeah.

21   MR. KATYAL: Again, nothing in here

22   turns on it. We're talking about ordinary

23   judicial review, checks and balances akin to --

24   JUSTICE GORSUCH: I understand -- I --

25   MR. KATYAL: -- what the Chief Justice

1   was talking about --

2   JUSTICE GORSUCH: -- I understand the

3   mantra, okay? Let me ask you to turn back to

4   the question about, you know, if we -- if you

5   think the Rehnquist view is appropriate on

6   constitutional grounds, what do we do with this

7   opinion?

8   At least some -- some of the amici

9   tell us that we've never had a state court

10   strike down a state law with respect to federal

11   congressional districting on political

12   gerrymandering grounds until the last several

13   years. So, if we're talking about 200 years'

14   worth of history, this one's pretty new too,

15   right?

16   MR. KATYAL: Not exactly. So I'd say

17   a couple of things about that. First --

18   JUSTICE GORSUCH: Just really quickly,

19   because I don't want -- I don't want to expend

20   too much time. When -- when was the first one

21   of these in -- in your understanding, political

22   --

23   MR. KATYAL: 1854, Massachusetts, the

24   Warren decision.

25   JUSTICE GORSUCH: All right. Besides

1   that.

2   MR. KATYAL: Yeah. And so then a lot

3   in 1932, but that's just for maps, so --

4   JUSTICE GORSUCH: And then -- and then

5   it's 2015, right, or not?

6   MR. KATYAL: No, I don't think that's

7   right. So, first of all --

8   JUSTICE GORSUCH: Okay. All right.

9   MR. KATYAL: -- outside of maps,

10   states --

11   JUSTICE GORSUCH: Fine. All right.

12   Let's put that aside. Let's put that aside.

13   MR. KATYAL: Okay.

14   JUSTICE GORSUCH: Put that aside.

15   What do we do with the fact that in

16   this opinion that we have before us, the North

17   Carolina Supreme Court said it had to do

18   something because the legislature would not act.

19   The only way that -- that partisan

20   gerrymandering can be addressed is through the

21   courts.

22   About five, seven years ago, it -- it

23   refused a political gerrymandering claim itself

24   under the open-ended Good of the Whole Clause.

25   And now it's come back and cited a -- a mΘlange

1   of -- of open-ended other provisions that it's

2   now accepting.

3   So I understand the standard is sky

4   high, but at least given some contestable

5   history, and I understand you contest it, but

6   put that there. You've got -- you've got this

7   novelty within North Carolina and switching

8   positions with North Carolina, let me add one

9   more and then I'll -- I'll shut up.

10   We have a very lengthy opinion from

11   the North Carolina Supreme Court. It addresses

12   the elections -- federal Elections Clause issue

13   in three paragraphs on page 122 of the Petition

14   Appendix.

15   At the very least, all of these

16   interesting and important issues, and able

17   counsel on both sides, were not available to

18   that court then. What should we do in that

19   circumstance?

20   MR. KATYAL: Well, certainly, with

21   respect to that federal issue, we think it only

22   honestly needed three paragraphs because, in

23   those three paragraphs, they talk about all of

24   the things we just talked about, obviously not

25   the detail, and I'd love to give you more

1   detail, Justice Gorsuch.

2   But, you know, then you said, well,

3   the -- the decision was based -- the decision

4   talked about it being hard for the legislature

5   to act. And I understand that was the basis of

6   a separate opinion by this Court.

7   I think that point actually

8   underscores the caution this Court should have

9   when reviewing state court decisions because

10   that's not what the North Carolina Supreme Court

11   actually said at those pages at 8A.

12   JUSTICE GORSUCH: That's at page 8 --

13   MR. KATYAL: Yes, page 8A. I

14   understand.

15   JUSTICE GORSUCH: -- that -- that the

16   only way that partisan --

17   MR. KATYAL: Exactly.

18   JUSTICE GORSUCH: -- gerrymandering

19   can be addressed --

20   MR. KATYAL: And it's not saying that

21   it's too difficult to -- for the legislature to

22   act. They're making a point about like --

23   JUSTICE GORSUCH: Oh, no.

24   MR. KATYAL: -- John Hart Ely --

25   JUSTICE GORSUCH: That they can't do

1   that. Right. No, I understand that.

2   MR. KATYAL: -- they're making a John

3   Hart Ely point about how the legislature has

4   been captured. It's the same point the Chief

5   Justice made at oral argument in Rucho. And

6   it's -- and they're basically saying -- and this

7   is page 88 to 90 of the opinion -- that because

8   there's a process defect, there's a special role

9   for this Court in North Carolina, and they trace

10   it back to 1787 North Carolina Supreme Court in

11   Bayard, which said the exact same thing, that we

12   were worried about legislative self-dealing --

13   JUSTICE GORSUCH: All right.

14   MR. KATYAL: -- and installing

15   themselves.

16   JUSTICE GORSUCH: Got it.

17   MR. KATYAL: So it's the heart of the

18   tradition.

19   CHIEF JUSTICE ROBERTS: Justice

20   Kavanaugh?

21   JUSTICE KAVANAUGH: I just wanted to

22   follow up on your discussion with Justice Kagan

23   on pages 48 to 50 of your brief and pages 26 to

24   28 of the Solicitor General's brief on the -- on

25   the Rehnquist concurrence there.

1   And you -- I think you said state

2   court -- a check to prevent state court judicial

3   adventurism I think was your phrase or to ensure

4   that state courts don't manipulate state law to

5   frustrate federal rights.

6   And, as Justice Alito pointed out,

7   there are civil rights due process cases, Treaty

8   Clause, Contract Clause, adequate and

9   independent state ground we had a few weeks ago,

10   that kind of issue.

11   And I -- I read Justice Ginsburg's

12   dissent in Bush v. Gore to actually accept the

13   principle or at least not dispute the principle,

14   although she, of course, vigorously disputed the

15   application of that principle in that case.

16   Then I go to your brief on 48 to 50,

17   and I thought you said it's an unremarkable

18   proposition. I didn't see in your brief a

19   distinct standard between statutes and

20   constitutions. I don't think that's there in 48

21   to 50.

22   And I guess following up on Justice

23   Kagan's, why would we use -- we're going to have

24   to work on the adjectives and adverbs if we --

25   MR. KATYAL: Yeah.

1   JUSTICE KAVANAUGH: -- follow

2   something like that, but why would we say, you

3   know, significant departure for statutes and

4   plainly indefensible for constitutional

5   interpretations --

6   MR. KATYAL: Right.

7   JUSTICE KAVANAUGH: -- is that going

8   to really help the cause at all?

9   MR. KATYAL: Right. So I do think

10   it's in our brief. We quote the language from

11   Bush versus Palm Beach Canvassing Board and

12   about -- about constitutions and state

13   constitutions being at the apex, Justice

14   Kavanaugh. And the reason for that is twofold.

15   Number one, there's very serious

16   federal --

17   JUSTICE KAVANAUGH: But -- but -- keep

18   going.

19   MR. KATYAL: -- there's very serious

20   federalism concerns generally. All those

21   contexts you gave me before about adequate,

22   independent, those are actually reviewing

23   procedural rules, state statutes and the like.

24   Reviewing state constitutions, again, the apex

25   of state sovereignty. I think federalism is

1   generally different.

2   And then B, in this unique context,

3   where Congress already has a backup check and

4   can supplant any state court decision it doesn't

5   want by name or supplant -- supplant state

6   courts altogether in the second half of the

7   Elections Clause, whatever the standard is for

8   Bush versus Gore or something like that, to the

9   extent you might think there was a

10   constitutional issue, it's going to be even

11   higher here because the Framers put Congress in

12   and how to check specifically for this problem.

13   JUSTICE KAVANAUGH: Okay. I

14   understand the apex, but just to be clear,

15   you're not saying no federal judicial review

16   when the state court has interpreted the state

17   constitution in a case of this nature, correct?

18   MR. KATYAL: We -- we -- if the -- no,

19   we think it should be under the highest standard

20   of review --

21   JUSTICE KAVANAUGH: Right.

22   MR. KATYAL: -- if it's a state

23   constitution, yes.

24   JUSTICE KAVANAUGH: And I'll repeat

25   the question then. You're not saying no

1   judicial review -- federal judicial review of

2   state court interpretation of state

3   constitutions in this area, correct?

4   MR. KATYAL: Right, we're not saying

5   that. It's just under a high -- sky-high

6   standard.

7   JUSTICE KAVANAUGH: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Barrett?

10   JUSTICE BARRETT: My question picks up

11   on Justice Kavanaugh's. So, in terms of what

12   the federal content is to this state question,

13   I'll tell you one way that I've been thinking

14   about it and you can tell me if it's consistent

15   or inconsistent with your view.

16   Just as, say, in the due process

17   context we say property is a state law question,

18   but there's some core beyond which a state can't

19   depart, so it's -- it's a -- it's a federal

20   question and the state can't depart so greatly

21   from it that it's no longer really property for

22   purposes of the federal Constitution.

23   This federal content or the federal

24   check, is it from the word "legislature," so the

25   clause says, "shall be prescribed in each state

1   by the legislature thereof." And at some point,

2   if a state court adopts an interpretation of a

3   statute or a constitutional provision that's --

4   pick your adjective or adverb -- you know,

5   significantly departs from, so novel, egregious,

6   it's no longer acting as a court exercising the

7   normal judicial review function but is acting

8   like -- like a legislature, is that how you

9   would articulate the argument?

10   MR. KATYAL: I think so in general, so

11   I'd make -- I have a couple of tweaks to it. So

12   I agree with you the ultimate test is, is the

13   court, you know, have such little legal

14   reasoning that it can only be understood as

15   seizing the policymaking apparatus that would

16   otherwise exist.

17   And we would ground that not just in

18   the word "legislature" but also in the word

19   "regulation," and so, if it's ordinary judicial

20   review as it has been for 233 years, we don't

21   think there'd be a violation.

22   And lastly, Justice Barrett, we would

23   ground it in something you mentioned a moment --

24   to my friend on the other side, the Eleventh

25   Amendment and the -- excuse me, the Tenth

         1   Amendment --

         2   JUSTICE BARRETT: Right.

         3   MR. KATYAL: -- and the special

         4   solicitude there for state processes as -- as

         5   they take them. And, indeed, their reply brief

         6   at page 6 says, look, we'll take the state

         7   processes as we find them. And, here, that

         8   state process includes judicial review and there

         9   should be only review by this Court in the most

        10   extreme circumstances, which can only be

        11   policymaking, not any of his other, you know,

        12   tests or backup tests and the like.

        13   JUSTICE BARRETT: Okay. Again,

        14   putting aside what specific language we would

        15   adopt for that test, accepting that it would be

        16   stratospheric, sky high, why would it be

        17   different in the constitutional context, in

        18   other words, a state court interpreting a state

        19   constitution as opposed to a state court

        20   interpreting a state statute if what we're

        21   getting at grounded in the language of the

        22   clause in both instances is, is this a

        23   regulation or is this a legislature?

        24   MR. KATYAL: They're -- they're

        25   absolutely both incredibly high, which is why

 1   this Court's never second-guessed anything.

 2   I do think there's something, you

 3   know, special about state constitutions, but I

 4   don't want that to be, like, a framing effects

 5   thing to say just because that standard is

 6   extraordinarily high, that means the statutory

 7   standard is lower, a lot lower. It's not.

 8   I mean, this Court doesn't do that.

 9   It is one of those cardinal principles going

10   back to Neal's Lessee in 1832 that state courts

11   are the masters of --

12   JUSTICE BARRETT: Well, I --

13   MR. KATYAL: -- their own statutes.

14   JUSTICE BARRETT: -- I get that. But

15   that's just about where we locate the standard.

16   That doesn't deny the proposition that there's

17   some federal content there that there would have

18   to be some federal check.

19   MR. KATYAL: I -- I think there

20   probably would be. Again, my friend on the

21   other side somehow disclaiming statutes and

22   saying you shouldn't, so we don't think you

23   should get into statutes here at all.

24   JUSTICE BARRETT: Right.

25   MR. KATYAL: But I do worry the blast

 1   radius of this theory is going to reach

 2   statutes, and that's something this Court should

 3   worry about.

 4   JUSTICE BARRETT: Thank you.

 5   CHIEF JUSTICE ROBERTS: Justice

 6   Jackson?

 7   JUSTICE JACKSON: Yeah. Just to

 8   follow up on what Justice Barrett just said, I

 9   -- I'm wondering whether the answer about why a

10   state constitution is different in this context

11   is because the state constitution is the font of

12   authority for all the relevant parties in terms

13   of this dispute. The state constitution is what

14   tells the state legislature what it cannot --

15   can and cannot do, what the state court can and

16   cannot do.

17   And I understand we have the -- the

18   peculiar circumstance of the state supreme court

19   being the one to interpret the state

20   constitution, but it is different in terms of

21   its legal consequence and stature than a

22   statute.

23   Am I wrong in thinking about it that

24   way?

25   MR. KATYAL: No, we think you're

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1   absolutely right. And so that's why state

2   constitutions reflect the most fundamental

3   principles, like the free elections clause,

4   often in broad, open-ended language, just like

5   the federal Constitution in McCulloch versus

6   Maryland.

7   JUSTICE JACKSON: And they apply in

8   different ways. Like, you know, it's not just

9   the state constitutional provisions that speak

10   specifically to elections that apply and

11   constrain the state legislature.

12   I guess what I'm a little worried

13   about is the -- the suggestion that when the

14   legislature is acting -- is -- is exercising

15   legislative authority in this context, it does

16   not have to adhere to any state constitutional

17   constraints on its power when it's the state

18   constitution that gives it its power and tells

19   us when it is appropriately acting as the

20   legislature not just with respect to the issue

21   of elections but in general.

22   MR. KATYAL: That's a hundred percent

23   right, Justice Jackson. We've never had a

24   creation of that animal in the state -- in -- in

25   the federal Constitution empowering states to do

1   that. And if that were what the founders

2   intended, surely someone would have said so and

3   it would have prompted a massive debate. There

4   are three Federalist Papers on the Elections

5   Clause. Not a word, anything like this. What

6   he would do is gut the ordinary --

7   JUSTICE JACKSON: So --

8   MR. KATYAL: -- checks and balances.

9   JUSTICE JACKSON: And so, to me, it's

10   not so much the sort of troubling worry of we

11   have the state legislature violating federal

12   constitutional law because we as the Supreme

13   Court and other courts in the federal system can

14   look at that because it's a question of did they

15   violate the federal Constitution.

16   Here, he's saying, no, we do have to

17   comply with the federal Constitution. What we

18   can violate is the state constitution. And what

19   I don't -- I -- I can't wrap my mind around that

20   argument.

21   MR. KATYAL: I can't either, Your

22   Honor. In Shelby County, this Court said it's

23   up to states primarily to regulate elections

24   through their constitutions and statutes. And

25   what he would do is gut the ability of states to

 1   do that.

 2   All 50 states have clauses, equal

 3   protection, assembly, speech, and others. He

 4   would nullify them all --

 5   JUSTICE JACKSON: Thank you.

 6   MR. KATYAL: -- in addition to the

 7   smaller voting regulations.

 8   CHIEF JUSTICE ROBERTS: Thank you,

 9   counsel.

10   Mr. Verrilli.

11   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

12   ON BEHALF OF THE STATE RESPONDENTS

13   MR. VERRILLI: Mr. Chief Justice, and

14   may it please the Court:

15   I'd like to make three points. First,

16   Petitioners' argument cannot be reconciled with

17   Smiley. Smiley held that because the Elections

18   Clause invokes the state legislature's

19   law-making function, the conditions which attach

20   to the making of state laws apply.

21   Judicial review is such a condition,

22   and there's no basis in text or history for

23   concluding that a governor's veto can act as a

24   substantive check on the legislative

25   prerogative, but judicial review cannot.

1   Second, the General Assembly's

2   statutory authorization makes this an even

3   clearer case for affirmance, and in particular,

4   it establishes conclusively that North Carolina

5   courts do not in any way usurp the legislative

6   function when they draw remedial maps in the

7   manner that the statute describes.

8   And third, since the founding, state

9   constitutions have always limited how state

10   legislatures discharge their Elections Clause

11   responsibilities.

12   Today, in addition to the states'

13   constitutions that expressly express partisan

14   gerrymandering, constitutions address absentee

15   voting, voting by the military, voter ID, and

16   primary elections and many other aspects of the

17   electoral process.

18   That -- excuse me -- that Petitioners

19   must repudiate all of that longstanding and

20   comprehensive history is a very powerful

21   indication that they are misreading the

22   Elections Clause.

23   I welcome the Court's questions.

24   JUSTICE THOMAS: Mr. Verrilli, the --

25   how far would you go with that? There's been

1   some discussion about we can only review state

2   courts at a sky-high level or a stratospheric

3   level or -- we -- we ran into a similar problem

4   with that in Bush v. Gore.

5   How would you articulate our review

6   standard --

7   MR. VERRILLI: Yes, Justice Thomas.

8   JUSTICE THOMAS: -- for state supreme

9   courts?

10   MR. VERRILLI: Justice Thomas, I -- I

11   appreciate the opportunity to do so. And let me

12   just try to articulate what we think a clear

13   correct standard is. And we think the standard

14   is that you'd ask whether the state decision is

15   such a sharp departure from the state's ordinary

16   modes of constitutional interpretation that it

17   lacks any fair and substantial basis in state

18   law. We think that is actually the best

19   distillation of the kinds of tests that were

20   identified in the Bush v. Gore concurrence as

21   being potentially relevant.

22   Now I will say that we think that's a

23   highly deferential test. We think also it has

24   to be -- it's of vital importance to recognize

25   that states can have different modes of

1   constitutional interpretation than this Court

2   has with respect to the federal Constitution,

3   and those have to be respected.

4   But -- and then, you know, I think

5   probably the -- the line in Bush v. Gore in the

6   concurrence that best sums it up is that, does

7   it -- does the state court decision

8   impermissibly distort beyond any fair reading

9   the state law? So we -- we think that's the --

10   the operative test here, again, highly

11   deferential, have to respect the way in which

12   state courts go about constitutional

13   interpretation. But I think that's the test.

14   And if I -- if I could build on that,

15   I think, Mr. Chief Justice, that is the answer

16   actually to the question that Your Honor raised

17   about vague and general provisions. What my

18   friends on the other side have said is those are

19   categorically unenforceable. They're

20   categorically unenforceable under the Elections

21   Clause.

22   That just can't be right. There's no

23   textual basis for that. And as a

24   jurisprudential matter, the -- the federal

25   Constitution, of course, has vague and general

 1   provisions, and no one requires that level of

 2   specificity before they can be enforced in -- in

 3   the elections context.

 4   CHIEF JUSTICE ROBERTS: Well, if you

 5   --

 6   MR. VERRILLI: So --

 7   CHIEF JUSTICE ROBERTS: -- just -- I

 8   recognize your point about categorically

 9   unenforceable, but where do you line up on that

10   and some of the detail, like what's going to be

11   applied is an efficiency gap of whatever in a

12   judicial determination? Is -- is -- is that

13   categorically unenforceable, or can you say that

14   in this case that seems specific enough to be

15   carrying out the duty under the constitution of

16   the legislature?

17   MR. VERRILLI: If I could make a

18   prefatory point, and then I'll --

19   CHIEF JUSTICE ROBERTS: Yeah.

20   MR. VERRILLI: -- I'll answer Your

21   Honor's question directly.

22   CHIEF JUSTICE ROBERTS: Sure.

23   MR. VERRILLI: The prefatory point is

24   this. I just want to make sure this -- that

25   this -- we all keep this in mind: They are not

       1   making an argument that the -- that the North

       2   Carolina Supreme Court's decision in this case

       3   would be struck down under the standard I

       4   articulated or any other standard. In fact,

       5   they began their argument, and they said, I

       6   think, by my count, six or seven times that they

       7   accept the North Carolina Supreme Court's

       8   decision as a fair reading of North Carolina

       9   law. So whatever the Court concludes with

      10   respect to the application of that -- the -- the

      11   -- the need for a standard like this, it's

      12   not -- it's not a basis to overturn the decision

      13   here for -- for the reasons I identified.

      14   Now, with respect to Your Honor's

      15   question, I think I would -- the way I read the

      16   North Carolina Supreme Court decision is a

      17   little different, starting with the fair -- the

      18   free elections clause. It basically, as I read

      19   the opinion, conducted a historical analysis of

      20   the kind that should be familiar as a matter of

      21   constitutional interpretation. They went back

      22   to the English Bill of Rights, which was about

      23   the manipulation of electoral processes so that

      24   the Parliament would be in the king's pocket

      25   essentially. They looked at comparable events

1   that occurred in North Carolina at the time of

2   the founding.

3   And then, although this was not in the

4   opinion, you know, of course, I do think that

5   what James Madison was saying about the

6   Elections Clause itself -- and the best place to

7   look for that is page 27 of The Founding Era

8   scholars' brief -- he talked about, because this

9   was general language, the risks of abuse were --

10   were manifold and could not all be imagined.

11   And what he was basically talking

12   about, one thing he says -- and this is the

13   August 9th debates of the Convention -- one

14   thing he says in those August 9th debates is,

15   you know, there's a real risk that the powers

16   that are in control of the state legislatures

17   will rig the process for choosing members of

18   Congress in a way that they can project their

19   disproportionate power in the state into the

20   Congress. So those --

21   CHIEF JUSTICE ROBERTS: Well, maybe

22   that gets -- touches a point that may be a

23   little too abstract to address, but the nature

24   of judicial authority at the time of the

25   founding and thereafter I think is quite

1   different than the nature of judicial authority

2   today. I mean, even just looking at court

3   opinions, you can see that what -- what courts

4   do as a general matter can be really quite

5   specific in terms of injunctive relief and the

6   sort of thing that is at issue here.

7   And I wonder if the -- I -- I guess I

8   wonder how we should go about taking that into

9   account.

10   MR. VERRILLI: Yeah. And so --

11   CHIEF JUSTICE ROBERTS: Their early

12   statements about this is what the Court did in

13   1800 and whatever. And I wonder if the same

14   concerns that are at issue today about the

15   exercise of judicial authority were really on

16   the plate back then.

17   MR. VERRILLI: So I -- I guess the way

18   I would think about that, Mr. Chief Justice, is

19   that what -- what the North Carolina Supreme

20   Court was doing here, I think, was saying this

21   is the historical genesis of the free elections

22   clause. This is the kind of problem it has to

23   -- that it's -- it's there to address. The

24   extreme partisan gerrymandering -- and this was

25   an extreme gerrymander -- the extreme partisan

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 1    gerrymandering we face here is a cognate kind of
 2    problem.  We have to figure out, using modern
 3    doctrine and modern approaches, how to address
 4    it.
 5            And I do think, if I could -- I don't
 6    want to be presumptuous here -- but, as I read
 7    the opinion for the Court in Rucho, the idea of
 8    the -- of the Court there was that looking at
 9    this Court's understanding and history of the
10    Equal Protection Clause and the Free Speech
11    Clause, you know, given that history, it wasn't
12    possible to derive particular and manageable
13    standards.
14            But there's a key -- as I read it at
15    least, a key predicate there is that -- and the
16    opinion reflects this -- that the Equal
17    Protection Clause doesn't impose any restriction
18    on partisan motivation or intent, and,
19    therefore, the only thing you can look at is the
20    result and, you know, how -- how fair is unfair.
21            CHIEF JUSTICE ROBERTS:  But --
22            MR. VERRILLI:  But --
23            CHIEF JUSTICE ROBERTS:  Go ahead.
24            MR. VERRILLI:  If I could.  The -- the
25    key difference I think, one key difference and
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1   it applies here, is that if one looks at those

2   number -- number of state constitutional

3   provisions that expressly limit or prohibit

4   partisan gerrymandering, and there are quite a

5   number now -- I don't know, seven, eight,

6   including many of the big states -- there, they

7   focus on intent. And policing for an

8   impermissible intent is something that courts

9   know how to do and is subject to

10   judicially manageable standards. You know, with

11   respect to race, of course, you have the

12   Arlington Heights framework.

13   And I think, again, that they have not

14   challenged this opinion. They said it's fair --

15   CHIEF JUSTICE ROBERTS: Right, but --

16   MR. VERRILLI: -- but -- but I -- but

17   I will say it does have a very substantial

18   intent focus, and I would point the Court in

19   particular to pages 125a to 129a of the --

20   CHIEF JUSTICE ROBERTS: If I -- if I

21   could?

22   MR. VERRILLI: -- appendix to the

23   petition. I'm sorry.

24   CHIEF JUSTICE ROBERTS: The -- you

25   have -- again, today, particularly in the

1   redistricting area, if the court is involved,

2   it's often -- I don't know if it's typical or

3   whatever -- they act through the appointment of

4   special masters. The judges don't sit in the

5   back room with lines drawing the districts, but

6   other -- other people do. And I wonder if

7   there's a disconnect between the level of the

8   grant of authority, whether it's along the lines

9   that Chief Justice Rehnquist put in -- in the

10   Palm Beach case or something else, and how it's

11   actually practiced on the ground.

12   MR. VERRILLI: Yeah. So I think that

13   whatever might be the case in other situations,

14   here, of course, in North Carolina, we have an

15   express statutory authorization saying a

16   particular three-judge court shall impose a

17   remedial map and shall do so under the following

18   constraints. It's good for one trip only, its

19   interim map. It -- the legislature has to be

20   given a full and fair opportunity to remedy the

21   constitutional problem before that remedial

22   process kicks in.

23   And then -- and then, third, the map

24   has to deviate as minimally as possible from the

25   map that the legislature enacted. And then,

1   within those constraints, that remedial process

2   occurs. And so I -- I think that -- and I --

3   and I guess, more generally, I would think, if

4   one recognizes, as I think has to be the case,

5   that states do have the constitutional authority

6   to enforce state constitutional provisions here

7   and they declare that a state legislative act is

8   unconstitutional, in the case of a redistricting

9   map, then it naturally follows that there is

10   going to be remedial authority, and that

11   remedial authority in this instance really

12   responds to a profound practical problem, which

13   is you have to have a map to have an election.

14   CHIEF JUSTICE ROBERTS: Thank you.

15   JUSTICE KAGAN: So --

16   MR. VERRILLI: Somebody's got to step

17   in.

18   JUSTICE KAGAN: -- Mr. Verrilli, I

19   mean, what if you were in a state which didn't

20   have the kind of procedures that North Carolina

21   had? And, as you say, there has to be a remedy.

22   But let's say a state just sort of did it on its

23   own without even -- you know, without kicking it

24   back, without saying, look -- let -- let's say

25   there was time enough to kick it back, and --

1   and -- and the state court did not kick it back.

2   Are there any limits on this? Should there be

3   any limits on this?

4   MR. VERRILLI: So there might be. You

5   know, a useful analogue on the federal side,

6   there's a whole body of equitable principles

7   that -- that apply in precisely this context

8   that say, as a matter of exercise of equitable

9   jurisdiction, the court's got to give the

10   legislature a full and fair shot to remedy it

11   first, should deviate as little as possible from

12   the -- the map that the legislature enacted.

13   And I -- I -- I guess that in order

14   for those to apply in the state situation, they

15   would have to have a basis in the constitution.

16   I could envision an argument that those kinds of

17   constraints on remedies could be something that

18   you could think of as within the -- as

19   appropriate, given the Elections Clause. But,

20   again, this case, it's very straightforward.

21   This is as constrained a remedial situation as

22   you are going to see.

23   JUSTICE KAGAN: And just --

24   JUSTICE GORSUCH: And -- oh, sorry.

25   JUSTICE KAGAN: No, go ahead.

1   JUSTICE GORSUCH: No, please.

2   JUSTICE KAGAN: Just a quick question.

3   Is -- when you gave your standard, the -- the

4   sort of, you know --

5   MR. VERRILLI: Sharp departure from --

6   JUSTICE KAGAN: Yes.

7   MR. VERRILLI: -- the state's ordinary

8   modes of --

9   JUSTICE KAGAN: Yeah, which is --

10   MR. VERRILLI: -- constitutional

11   interpretation --

12   JUSTICE KAGAN: And -- and you said --

13   MR. VERRILLI: -- that lacks any fair

14   and substantial basis in state law.

15   (Laughter.)

16   JUSTICE KAGAN: Good. Your -- your

17   highly deferential standard, and deferential as

18   to interpretive method as well as to anything

19   else.

20   MR. VERRILLI: Yes, thank you.

21   JUSTICE KAGAN: Yeah. Is that

22   standard for you, should that be the same

23   standard as for statutes, or do you agree with

24   Mr. Katyal that there actually is a gap between

25   the two?

 1   MR. VERRILLI: Yeah, I'm not sure that

 2   I see a gap between the two, I mean, except in

 3   the following sense, that one could, I think --

 4   think -- one could think that with respect to a

 5   statute, because there's a difference between

 6   interpreting a statute and interpreting a

 7   constitution, that with respect to the

 8   interpretation of a constitution, there may --

 9   state supreme courts may have more leeway

10   because there is after all a constitution

11   they're interpreting. And so I -- I could see

12   in application the standard might work out

13   differently in some cases, but -- but I don't

14   think it's a difference in the standard as much

15   as in the application of the standard.

16   JUSTICE GORSUCH: Actually, this

17   follows right up on that, so that was very

18   helpful. I'm glad I waited. The question I

19   think, as Justice Barrett suggested, is, has the

20   legislature prescribed the time, place, and

21   manner? And I think your standard and our --

22   our sky-high, astronomical, and I think we

23   ventured into outer space at points standard, is

24   asking have the -- has the judicial opinion in

25   interpreting the law, let's deal with statutes

1   first, gone so far afield that we can no longer

2   fairly say as a matter of federal law that the

3   legislature is the one who prescribed the time,

4   place, and manner? Is that a fair understanding

5   of -- of our task here as --

6   MR. VERRILLI: I think the -- that --

7   JUSTICE GORSUCH: -- under federal

8   law?

9   MR. VERRILLI: -- I think that's kind

10   of the underpinning of the idea that what you're

11   trying to solve for is the problem of a state

12   court going so far afield and being so

13   disconnected from existing precedent, from

14   history, et cetera, that you would come to the

15   conclusion that they're really not engaging in

16   the function of judicial review --

17   JUSTICE GORSUCH: Well, the

18   legislature didn't prescribe these things. I

19   mean, that's the text that we're asked to

20   interpret, right?

21   MR. VERRILLI: Well, right, but I -- I

22   guess, Your Honor, I would say that --

23   JUSTICE GORSUCH: Have they gone so

24   far afield that we --

25   MR. VERRILLI: -- when it comes to the

1   question, if I could just -- if I could just say

2   it this way.

3   JUSTICE GORSUCH: Well, I just want to

4   make --

5   MR. VERRILLI: Yeah, yeah.

6   JUSTICE GORSUCH: -- just make sure

7   we're on the same page. You know, that's the --

8   MR. VERRILLI: Well --

9   JUSTICE GORSUCH: -- that's the

10   federal standard, and one way of analyzing that,

11   I think, if I'm understanding you, and if I'm

12   not, please say so, when we're dealing with

13   statutory law is, if they've gone so far afield

14   or into outer space, that's an indication that

15   it's no longer the legislature prescribing it.

16   MR. VERRILLI: Well, I guess I would

17   put it differently.

18   JUSTICE GORSUCH: Okay.

19   MR. VERRILLI: I guess what I would --

20   JUSTICE GORSUCH: How?

21   MR. VERRILLI: -- say is that the --

22   that the Framers took legislatures as they found

23   them, that the -- that the judicial review under

24   the state constitution is a condition of the

25   normal operation of state law and the language

1   of Smiley, that -- and, therefore, it should be

2   expected that courts will review federal

3   election regulation by state legislatures under

4   the state constitution, that that -- and that

5   they --

6   JUSTICE GORSUCH: Okay. Thank you --

7   MR. VERRILLI: -- can validate --

8   JUSTICE GORSUCH: -- Mr. Verrilli.

9   Thank you.

10   JUSTICE JACKSON: Can I just follow up

11   --

12   CHIEF JUSTICE ROBERTS: Thank you.

13   JUSTICE JACKSON: -- on that? Oh.

14   CHIEF JUSTICE ROBERTS: We'll --

15   JUSTICE JACKSON: Sorry.

16   CHIEF JUSTICE ROBERTS: -- we'll go

17   through.

18   Justice Thomas?

19   Justice Alito?

20   JUSTICE ALITO: Is your standard a

21   standard that can be flunked?

22   MR. VERRILLI: Yeah, I assume it could

23   be flunked.

24   JUSTICE ALITO: Give me an example of

25   something that would flunk your standard.

                    MR. VERRILLI: So, you know, I think a

naked declaration that a -- that an act of a

legislature under a free and fair elections

clause is unfair, without any grounding in

history or precedent or -- or sound analysis of

a kind that the state -- that the state, you

know, is appropriate under that state's mode of

interpretation, I -- I think -- I think you

could envision that possibility happening.

                    JUSTICE ALITO: Okay.

                    MR. VERRILLI: I do think that would

be a rare case, but I think --

                    JUSTICE ALITO: Yeah, I appreciate

that answer because I think the worst thing we

could do, although it might be attractive for

some reasons, is to say, well, there is a limit,

but, you know, we -- we -- but it's one where --

that in practice can never be exceeded, so we

have a standard, but it's just -- you know, it

doesn't mean anything.

                    Under that understanding, let me talk

about the decision in this case. And we've

heard about the English Bill of Rights. I mean,

did any -- has anybody ever thought that the

English Bill of Rights had anything to do with

 1   one-person, one-vote, much less political

 2   gerrymandering?

 3   MR. VERRILLI: Well, I think the

 4   historical roots of those doctrines, yeah, do

 5   trace back to the idea that the English Bill of

 6   Rights was trying to deal with, which was the

 7   manipulation of the electoral process, including

 8   the -- the who is going to represent what area,

 9   in order to entrench those in power.

10   JUSTICE ALITO: Well, wasn't it true

11   -- you probably know more about British

12   constitutional history than I do, but wasn't it

13   true that well into the 19th Century the British

14   Parliament was notorious for having rotten

15   boroughs, you know, parliamentary districts

16   where there were practically no inhabitants, but

17   that was a good way of entrenching a Tory member

18   or a Liberal member? Wasn't that true?

19   MR. VERRILLI: Well, but that was a

20   bad thing, and I think it was --

21   JUSTICE ALITO: It was -- it was a bad

22   --

23   MR. VERRILLI: -- something that the

24   Framers were --

25   JUSTICE ALITO: -- yeah, it was a bad

1   thing, but that was under the English Bill of

2   Rights, was it not?

3   MR. VERRILLI: Well -- well, but the

4   -- I guess the point is that what is this free

5   elections clause trying to get at in the North

6   Carolina constitution and the other

7   constitutions that adopted it at the time of the

8   framing, and this is the problem.

9   JUSTICE ALITO: All right. 1776,

10   200-plus years ago. Was anybody at that time

11   saying election isn't free if there's political

12   gerrymandering?

13   MR. VERRILLI: Well, you know, I don't

14   know if they were saying it in exactly those

15   terms, but there is an amicus brief that

16   addresses what was going on in North Carolina.

17   It's Pam -- Penn Bank I think is the name --

18   Plan Bank maybe -- I'm sorry if I'm

19   mispronouncing it -- which talks about actual

20   controversies with respect to the way districts

21   were drawn in North Carolina in the 1770s.

22   JUSTICE ALITO: Well, sure there was

23   controversy, and where -- and this isn't --

24   political gerrymandering is no new thing, right?

25   It was known at the time of the founding.

1   MR. VERRILLI: Yeah. Well, yes, but

2   --

3   JUSTICE ALITO: That's where the name

4   comes from, right?

5   MR. VERRILLI: Sure, sure, but the --

6   but the question is what problem is the -- is

7   the North Carolina Supreme Court trying to

8   address here, and my point is it's a problem

9   very much in the nature of the problem that gave

10   rise to the free and fair elections clause.

11   And if I could just make an obvious

12   point, I guess, but, you know, when the Framers

13   adopted the free speech clause, they were

14   principally concerned about prior restraints.

15   But we don't interpret the free speech clause as

16   applying only to prior restraints, obviously,

17   and so --

18   JUSTICE ALITO: And then the North

19   Carolina Supreme Court sets out certain methods

20   that could be used in determining whether there

21   is political gerrymandering, the mean/median

22   difference, the efficiency gap, means

23   simulations. Would that -- would anybody have

24   understood that in 1776?

25   MR. VERRILLI: No, I -- I doubt it,

 1   but those are means of implementing a

 2   fundamental principle. Those aren't fundamental

 3   principles themselves. And the fundamental

 4   principle that I -- that the North Carolina

 5   Supreme Court articulated as I read the opinion

 6   is that you don't want the electoral districts

 7   to manipulate it, be manipulated so that one

 8   group of voters is severely disadvantaged as

 9   compared to another group of voters of a

10   different party of the same size.

11   JUSTICE ALITO: Okay. So let's turn

12   to precedent, which is another way of

13   interpreting a state constitution. What

14   grounding in North Carolina precedent was there

15   for this decision? My understanding is that the

16   most relevant decision, which is -- suggests

17   that the North Carolina constitution doesn't

18   address political gerrymandering.

19   MR. VERRILLI: Yes. So the -- so the

20   Dodson case came up with my friend on the other

21   side, I think, or maybe with Mr. Katyal, but I

22   should talk about that for a minute. You know,

23   to say that the partisan gerrymandering analysis

24   in that, I mean, it was a flea on the tail of a

25   dog. When you read that opinion, it was -- that

          1   was a case about racial gerrymandering.

          2   Ninety-nine percent of the opinion is about it.

          3   The parties threw in this kind of offhand

          4   argument in their opening brief that said, well,

          5   there's also a problem here in that it violates

          6   the Good of the Whole provision. And the -- and

          7   then the -- the appellees, the respondents in

          8   that case said, well, you haven't articulated

          9   any standard to decide which of these two

         10   competing maps better serves the good of the

         11   whole. The -- the appellants said nothing in

         12   the reply brief. The court said, well, you

         13   haven't articulated any basis for deciding on

         14   the difference between the two. And, of course,

         15   the North Carolina Supreme Court recognized that

         16   in this very case.

         17   JUSTICE ALITO: Were there -- were

         18   there prior decisions of the North Carolina

         19   Supreme Court that step by step led to this

         20   conclusion --

         21   MR. VERRILLI: So --

         22   JUSTICE ALITO: -- that the free

         23   elections clause prohibits political

         24   gerrymandering?

         25   MR. VERRILLI: So I'm going to answer

1   Your Honor's question, but I do want to just

2   interject one more time that they have said that

3   this decision is a fair representation of North

4   Carolina law. They are not challenging it under

5   the standard I articulated or any other

6   standard. They have made a different argument,

7   which is that this is categorically a violation

8   of the -- of the Elections Clause for state

9   supreme courts to invoke -- to apply vague and

10   general provisions.

11   And so I'm happy to keep answering

12   Your Honor's questions, I am, but -- but I just

13   want to reinforce that that's -- they have

14   conceded that this is a fair interpretation of

15   North Carolina law.

16   JUSTICE ALITO: All right. And then

17   we get to the introductory statement that

18   Justice Gorsuch mentioned, and, boy, that seems

19   awfully close to what you said would be a

20   violation.

21   MR. VERRILLI: I don't --

22   JUSTICE ALITO: Well, you know, they

23   -- I mean, then there's a hundred pages, you

24   know, of elaboration, but, basically, at the

25   beginning, they say what they're doing, and,

 1   basically, they're saying in no uncertain terms,

 2   look, there's legislative malfunction here. The

 3   legislature has adopted a -- a political

 4   gerrymandering, and it's really hard to amend

 5   the state constitution and we don't have a

 6   referendum to correct it, so there's a big

 7   problem in the state and we have to step in.

 8   MR. VERRILLI: Well, but --

 9   JUSTICE ALITO: That's awfully close

10   to what you just --

11   MR. VERRILLI: No, I -- I -- I -- I

12   disagree quite strongly with that, first, with

13   respect to the specific thing that they said in

14   this paragraph -- and I think we're talking

15   about the same paragraph -- and then with

16   respect to the way in which the opinion analyzes

17   it.

18   They -- they do say: Okay, we don't

19   have a referendum process. It's hard to amend

20   the Constitution. The reason it's hard to amend

21   the Constitution is because you've got -- you

22   have to get 60 percent of the legislature as the

23   first step. And the problem here, of course, is

24   the actions of the legislature.

25   And then the -- what -- what -- and I

1   think this is what Your Honor is referring to,

2   but there -- you know, there's a sentence here

3   which we haven't talked about, and what the

4   North Carolina Supreme Court says, "it is no

5   answer to say that responsibility for addressing

6   partisan gerrymandering is in the hands of the

7   people when they are represented by legislators

8   who are able to entrench themselves by

9   manipulating the very democratic process from

10   which they derive their constitutional

11   authority."

12   Now one can agree or disagree with

13   that as a premise for judicial intervention, but

14   that's essentially John Hart Ely's Democracy and

15   Distrust. And you may not think that that's an

16   appropriate way to think about how the federal

17   Constitution ought to be interpreted and

18   applied, but I don't see how one could say that

19   that is so far outside the bounds of reasonable

20   interpretive principles that the state court

21   here was acting as a legislature and not a

22   court. I just don't see how you could say that.

23   And then, of course, with respect to

24   the specific analysis beyond the free elections

25   clause, there's a very lengthy Equal Protection

1   Clause analysis, which is rooted in substantial

2   precedent --

3   JUSTICE ALITO: Thank you.

4   MR. VERRILLI: -- and which --

5   JUSTICE ALITO: Thank you,

6   Mr. Verrilli.

7   MR. VERRILLI: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Sotomayor?

10   JUSTICE SOTOMAYOR: Mr. Verrilli, I --

11   I'm trying to organize an opinion if I were to

12   rule in your favor. And -- and you say some

13   things are within bounds, some things are not.

14   How would you write it, I mean, to answer some

15   of the questions my colleagues have raised and

16   to knock it down, okay?

17   I -- I guess, first, you would say

18   take Petitioners' broadest view, that the

19   legislature means state legislators, not state

20   courts, and so there can't be any judicial

21   review. That's easy to write and say there

22   obviously has to be judicial review because it's

23   part of the regulation process.

24   What comes after that?

25   MR. VERRILLI: So --

1   JUSTICE SOTOMAYOR: How --- how do we

2   deal with his distinction between procedural and

3   substantive? How do we deal with this question

4   of --

5   MR. VERRILLI: I think the Court could

6   write a very --

7   JUSTICE SOTOMAYOR: -- did this Court

8   -- why --

9   MR. VERRILLI: Sorry.

10   JUSTICE SOTOMAYOR: -- why we don't

11   reach the question of whether this Court went

12   too far with legislating and not reviewing?

13   MR. VERRILLI: I think the Court could

14   write a very straightforward opinion, and I

15   think a good place to start would be the

16   following quote from Chief Justice Hughes's

17   unanimous opinion for the Court in Smiley, which

18   says: "The question then is whether the

19   provision of the federal Constitution, thus

20   regarded as determinative, invests a legislature

21   with a particular authority and imposes upon it

22   a corresponding duty, the definition of which

23   imports a function different from that of a

24   lawgiver" -- and then these are the key four

25   words -- "and thus renders inapplicable the

1   conditions which attach to the making of state

2   laws."

3   In Smiley, the Court answered that

4   question with an emphatic "no" with respect to

5   the governor. An emphatic "no" is equally

6   appropriate here. There is a limit to the -- to

7   the state court's ability to enforce state

8   constitutional provisions. That limit is the

9   standard that I articulated twice and I won't

10   articulate for a third time. And --

11   JUSTICE SOTOMAYOR: So we --

12   MR. VERRILLI: But -- and that - but

13   the -- but the --

14   JUSTICE SOTOMAYOR: You're -- you

15   think we should reach that question?

16   MR. VERRILLI: Well, but then I was

17   going to say, but the Petitioners have not -- if

18   the Court wants to save that for another day, it

19   can, but I guess we're comfortable with the

20   articulation of it. The key point for us is the

21   Petitioners have not made any argument under

22   that standard, and, therefore, there is -- in

23   fact, the opposite, they have conceded that this

24   is a faithful and fair interpretation of North

25   Carolina law and, therefore, there's no basis

1   for overturning the decision of the North

2   Carolina Supreme Court.

3   CHIEF JUSTICE ROBERTS: Justice Kagan?

4   JUSTICE KAGAN: Mr. Verrilli, I've

5   been thinking a good deal about this

6   constitutional analogue to the Rehnquist

7   principle, and your colloquy with Justice Alito

8   made me feel uneasy about it, and I think that

9   the reason is because it shows how very good

10   judges on very good courts can find it

11   incredibly easy to disagree with each other.

12   And so, if Justice Alito asked you can

13   it be flunked, I think what I want to ask you

14   after hearing that colloquy is, is there a

15   danger it's going to be satisfied too easily?

16   And I'll just -- you know, I think

17   that every single one of us on this bench has

18   written opinions at times, you know, saying that

19   other judges, whether it's other judges on this

20   Court or -- or lower court judges, you know,

21   have engaged in policymaking rather than in law.

22   And, I mean, it's just sort of one of the things

23   that judges say when they really disagree with

24   another opinion.

25   And -- and so how -- you know, if you

1   say acting as a legislature, not as a court,

2   acting as a policymaker, not as a court, I mean,

3   these really are things -- it's not just this

4   Court, it's every court -- these are things that

5   judges say to each other all the time. How is

6   this going to be a check that's used rarely --

7   MR. VERRILLI: Well --

8   JUSTICE KAGAN: -- rather than, like,

9   whenever you basically, you don't disagree

10   strongly.

11   MR. VERRILLI: So I -- I apologize for

12   putting it this way, but I think that's up to

13   this Court, because this Court's going to be

14   applying it. And I think the -- the phrase from

15   the Bush against Gore concurrence that I think

16   captures it pretty well is, does it

17   impermissibly distort beyond any fair reading

18   state law? That -- that is deferential, a very

19   deferential standard. It, I think, encompasses

20   the point that I made that you've got to respect

21   the state courts' modes of constitutional

22   interpretation.

23   And then -- and I -- but I do think

24   for all the reasons of federalism and state

25   sovereignty and -- and comparative institutional

1   competence, that, of course, it needs to be

2   applied very deferentially. There aren't going

3   to be very many cases that -- I would think that

4   would satisfy it. There will be some perhaps,

5   but there won't be very many.

6   And -- but I think that -- but,

7   anyway, that's the way I think it -- it would --

8   that's the way I think it would go.

9   CHIEF JUSTICE ROBERTS: Justice

10   Gorsuch?

11   Justice Kavanaugh?

12   Justice Barrett?

13   JUSTICE BARRETT: Just quickly,

14   Mr. Verrilli. You got some questions about the

15   remedy. And, you know, the Chief Justice was

16   asking about special masters drawing the map,

17   and, you know, here, we had experts come in.

18   We've been talking primarily about the liability

19   question. You did get some questions about

20   remedy. Do you -- I just wanted to give you a

21   chance to say something about our jurisdiction,

22   whether we have jurisdiction to review --

23   MR. VERRILLI: You know, we --

24   JUSTICE BARRETT: -- the portion --

25   MR. VERRILLI: -- we don't think

 1   there's a final judgment here yet. I mean, the

 2   -- the question of the proper remedy is before

 3   the three-judge court on remand. And the, you

 4   know -- and the argument being -- that's at play

 5   there is, should the court accept the

 6   legislature's remedial plan or the alternative

 7   remedial plan drawn by the court? And the

 8   answer to that could matter to the way the Court

 9   analyzes the issue.

10   Now I will say -- I take my -- the

11   argument of my friends on the other side to be

12   that the two issues of whether you could have a

13   remedial process at all and whether you can have

14   judicial review at all are so intimately bound

15   up that you -- you should address that issue,

16   and that's why I was focused on it.

17   CHIEF JUSTICE ROBERTS: Justice

18   Jackson?

19   JUSTICE JACKSON: I just have one

20   question that goes back to this issue of

21   constitution being different than statute from

22   -- from the perspective of us trying to figure

23   out what to do here.

24   Justice Gorsuch asked, I thought, a

25   very clarifying question, and it sort of came up

 1   again with Justice Kagan's remarks, which is

 2   we're really trying to kind of sort of figure

 3   out when and under what circumstances the state

 4   legislature has usurped legislate -- legislative

 5   power in some sense. And I think Justice Kagan

 6   is correct that that's sort of in the eye of the

 7   beholder. But, you know, what -- what is the

 8   body of law that we would reference to answer

 9   the very standard that you have articulated,

10   when it warps it? What -- what are we looking

11   at to determine how --

12   MR. VERRILLI: So --

13   JUSTICE JACKSON: -- far --

14   MR. VERRILLI: -- I think the standard

15   is drawn -- and I think Justice Alito in his

16   colloquy with Mr. Katyal went through the

17   various places where the Court applies that kind

18   of a standard, and the Bush against Gore

19   concurrence references most of those.

20   JUSTICE JACKSON: Mm-hmm.

21   MR. VERRILLI: And we were drawing

22   that standard from the -- that same body of law.

23   And it's -- and it is a very good question.

24   JUSTICE JACKSON: But I guess I'm

25   asking, do you do -- isn't the baseline what the

1   state constitution says? We start there and

2   then --

3   MR. VERRILLI: Sure.

4   JUSTICE JACKSON: -- we say are you

5   doing something so far --

6   MR. VERRILLI: Yeah.

7   JUSTICE JACKSON: -- far beyond that?

8   MR. VERRILLI: Is it so far -- is it

9   so far out of bounds that you -- you can't reach

10   it.

11   JUSTICE JACKSON: And the reason we're

12   doing that is because we're worried about some

13   sort of separation of powers issue as between

14   the state legislature and the state courts?

15   MR. VERRILLI: Well, there is some --

16   I think there is some -- there is a federal

17   interest at play, I think, is the -- is the

18   answer because of the Elections Clause. There's

19   a federal interest at play. We think that the

20   federal interest -- the -- the -- that the

21   Elections Clause itself, as we've said, reflects

22   a judgment that the state -- that the -- that

23   you take state legislatures as you find them,

24   which means that they're subject to judicial

25   review under the state constitution because,

 1   otherwise -- you know, if they make a law that's

 2   unconstitutional under the state constitution,

 3   in the words of Marbury, it's no law at all.

 4   And so I think that --

 5   JUSTICE JACKSON: And they're not

 6   really a legislature, presumably --

 7   MR. VERRILLI: Right.

 8   JUSTICE JACKSON: -- because the

 9   constitution tells them --

10   MR. VERRILLI: Well, that -- that --

11   that's the argument.

12   JUSTICE JACKSON: Yes.

13   MR. VERRILLI: And if I could, there's

14   just one last point I'd like to make about whose

15   ox is being gored here, which I think is quite

16   important.

17   Actually, there's a great deal of

18   sentiment in this country about the problems

19   with extreme partisan gerrymandering, and this

20   Court's opinion in Rucho acknowledged it. And

21   states have actually responded in nonpartisan

22   ways. I can think of four states, New York,

23   Florida, California, and Ohio, all of which are

24   in the control of one political party where,

25   presumably, the incentives would have been lined

 1   up to maximize partisan advantage through the

 2   redistricting process, but in all four of those

 3   states, they amended their constitutions through

 4   the work of the people to restrict partisan

 5   gerrymandering, and those provisions have been

 6   enforced. I mean, the provision was enforced in

 7   New York, of course, just earlier this year.

 8   And so I do think it is more than

 9   whose ox is being gored. This is a really

10   important issue in this country, and I think it

11   would be an extraordinary thing to say, as my

12   friends on the other side are saying here, that

13   the Elections Clause requires that all of those

14   provisions and countless others be -- be

15   disabled with respect to congressional

16   elections. That would be an extraordinary thing

17   to do, and, before doing that, I would hope that

18   the Court would -- would see a case much, much

19   clearer than the one that the Petitioners have

20   presented. Thank you.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   counsel.

23   General Prelogar.

24

25

           1   ORAL ARGUMENT OF GENERAL ELIZABETH B. PROLOGAR,

           2   FOR THE UNITED STATES, AS AMICUS CURIAE,

           3   SUPPORTING THE RESPONDENTS

           4   GENERAL PRELOGAR: Mr. Chief Justice,

           5   and may it please the Court:

           6   Throughout our nation's history, state

           7   legislatures enacting election laws have

           8   operated within the bounds of their state

           9   constitutions enforced by state judicial review.

          10   This practice dates from the Articles of

          11   Confederation, and the Framers carried it

          12   forward by using parallel language in the

          13   Elections Clause to assign state legislatures a

          14   duty to make laws.

          15   Text, long-standing practice, and

          16   precedent show that the Elections Clause did not

          17   displace this ordinary check on state

          18   law-making. Petitioners' contrary theory

          19   rejects all of this history and would wreak

          20   havoc in the administration of elections across

          21   the nation. Their theory would invalidate

          22   constitutional provisions in every single state,

          23   many tracing back to the founding. That would

          24   sow chaos on the ground as state and federal

          25   elections would have to be administered under

 1   divergent rules and federal courts, including

 2   this Court, would be flooded with new claims,

 3   often at the 11th hour, in the midst of hotly

 4   contested elections.

 5   The Court should adhere to the

 6   consistent practice that has governed for more

 7   than two centuries and should reject

 8   Petitioners' atextual, ahistorical, and

 9   destabilizing interpretation of the Elections

10   Clause.

11   JUSTICE THOMAS: General, I must say

12   it's -- I think it -- it seems a bit ironic that

13   you're on the other side of a federalism issue.

14   The -- do you agree with the highly deferential

15   standard that we've been discussing here?

16   GENERAL PRELOGAR: We do --

17   JUSTICE THOMAS: It would seem to take

18   you out of the equation or the national

19   government out of the equation.

20   GENERAL PRELOGAR: No, not at all.

21   Justice Thomas, we, of course, recognize that

22   Congress has its own check under the second half

23   of the Elections Clause, and that remains

24   constant no matter what the states are doing

25   through their state election laws.

             1   But as well, with respect to this idea

             2   of whether there is an outer federal

             3   constitutional standard that could apply here,

             4   we agree that that's so and the Court could

             5   recognize that kind of constitutional claim.

             6   Now we also agree that that would have

             7   to be highly deferential, and I think that that

             8   stems from the recognition that to state this

             9   kind of claim under the Elections Clause you

            10   would have to be identifying a situation where a

            11   state court isn't actually engaged in the

            12   process of judicial review.

            13   We understand the Elections Clause to

            14   pick up through the law-making function that

            15   ordinary check and balance. And so, if a state

            16   court is conducting judicial review and is

            17   interpreting its state constitution, that --

            18   that presents no fundamental conflict with the

            19   Elections Clause itself.

            20   So the standard would have to be

            21   trying to identify those circumstances when a

            22   state court isn't really functioning through the

            23   process of ordinary judicial review, and we

            24   think that that would be an extraordinary

            25   situation that is unlikely to arise very often,

1   but there is an outside federal constitutional

2   check that could be applied in this context.

3   JUSTICE GORSUCH: General, just to --

4   oh, I'm sorry.

5   JUSTICE THOMAS: No. Just one last

6   point. It would seem that that would preclude

7   you, your involvement, if the Florida -- I'm --

8   I'm sorry, the North Carolina Supreme Court had

9   a decision or rendered a decision that was not

10   generous or less generous or actually

11   antagonistic to an interest that you would

12   normally defend.

13   GENERAL PRELOGAR: We agree that our

14   theory does not depend on the particular state

15   constitutional provision that's being enforced.

16   Of course, there are a panoply of federal laws

17   that apply in this context as well. And so, if

18   there was some state constitutional provision

19   like you were positing earlier that would be

20   fundamentally in conflict with the Voting Rights

21   Act, then, of course, under the Supremacy

22   Clause, that provision would have to yield.

23   JUSTICE GORSUCH: General, I should

24   have asked this question to Mr. Verrilli, so

25   apologies to both of you. Just what is the

1   status of the state court proceedings right now?

2   GENERAL PRELOGAR: So my understanding

3   is that the appeal of the remedial map --

4   JUSTICE GORSUCH: Yeah.

5   GENERAL PRELOGAR: -- is still

6   pending. And I -- I don't know when a decision

7   is expected. I thought I saw in the briefing

8   somewhere that it was expected by the end of

9   this year, but I don't believe it's arrived yet.

10   JUSTICE GORSUCH: Okay. That's

11   helpful. Thank you. And then I just wanted you

12   to address what I understood the other side's

13   argument to be -- and -- and I may be misstating

14   it, so forgive me, both of you -- that Chief

15   Justice Rehnquist's theory that there's some

16   outer bounds, and we can disagree over or argue

17   about whether or how far in the atmosphere it

18   should go, make sense because, to the extent, as

19   Justice Barrett was pointing out, the question

20   before us is whether the rule, the time, place,

21   and manner regulation has been prescribed by the

22   legislature.

23   And we can say, hey, ordinarily,

24   courts will interpret and apply the rules

25   prescribed by the legislature, and executive

1   agents will enforce the rules prescribed by the

2   legislature pursuant to their ordinary

3   obligations as executive officers. I get that.

4   But it's something different, I think

5   the argument goes from the other side, when a

6   state court says or any -- any institution says

7   we're not going to enforce the rules prescribed

8   by the legislature for whatever reason, in this

9   case it's because of the state constitution, but

10   it could be an executive officer who

11   contumaciously refuses to do so or whatever one

12   imagines.

13   But, here, by definition, I think

14   we're in agreement that the rules prescribed by

15   the legislature are not going to be applied in

16   this case. So I think that's the argument as I

17   understand it. I just wanted to give you a

18   chance to address it because I haven't heard

19   anybody address it yet.

20   GENERAL PRELOGAR: Sure, and I

21   appreciate the opportunity to do so. So I think

22   that the premise of the question was focused

23   on the legislature's power under the Elections

24   Clause to set the time, place, and manner of

25   federal elections. And if I'm understanding the

      1   question correctly, our view is not that it

      2   would transgress the legislature's power to

      3   depart from its law when that's the ordinary

      4   practice of judicial review. It might be the

      5   case that the legislature's work has to yield to

      6   a state constitutional provision because however

      7   they prescribe the time, place, and manner of

      8   elections could violate equal protection, for

      9   example, under the state constitution as well as

     10   the federal if it violates one-person, one-vote.

     11   So sometimes state courts through the

     12   ordinary process of judicial review and

     13   constitutional adjudication are, of course,

     14   setting aside what the legislature has done with

     15   respect to its manner regulations.

     16   JUSTICE GORSUCH: And by definition

     17   invoking some higher authority under state law

     18   to not enforce the rules about time, place, and

     19   manner prescribed by the legislature, right?

     20   GENERAL PRELOGAR: Correct, and our

     21   theory is that that's consistent with the

     22   Elections Clause under this Court's precedent

     23   because the Framers vested the state legislature

     24   with their law-making power, and that has always

     25   been understood to be subject to state

1   constitutional constraints.

2   There is no category of state law that

3   has previously existed that detaches the state

4   legislature from the state constitution and

5   allows it free rein to have whatever laws it

6   wants without that state constitutional check.

7   And we think that the text and the history and

8   precedent forcefully reinforce this idea that

9   the Framers would have understood that when they

10   were giving this law-making power it carried

11   with it those ordinary checks and balances.

12   JUSTICE KAGAN: And when Mr. Thompson

13   says, well, it should be subject to the

14   constraint of federal review but not of -- of

15   state constitutional review, what do you think

16   of that distinction?

17   GENERAL PRELOGAR: I think this Court

18   has rejected that distinction already in cases

19   like Smiley and Hildebrant, and they rejected

20   exactly the theory that my friend has proposed

21   about looking at the federal function.

22   In Smiley, the Court said that's not

23   what you look at. You look at the specific

24   function that's been assigned. And when it's a

25   law-making function, that carries with it the

    1   ordinary checks and balances that apply to state

    2   law, including those applied by the state

    3   constitution.

    4   That was the very distinction the

    5   Court draw -- drew with Hawke versus Smith and

    6   the separate ratification function. That's a

    7   different question. And cases like Leser that

    8   he's repeatedly relied on are looking at a

    9   different function under the Constitution.

    10   But, with law-making, the relevant

    11   fact is that the Framers would have understood

    12   that that comes with it judicial review and

    13   state constitutional constraints, both

    14   substantive and procedural.

    15   JUSTICE JACKSON: Because the

    16   law-making authority of the entity in question

    17   comes from the state constitution, right? I

    18   mean, if it's a law-making function that we're

    19   tapping into, it's the state constitution that

    20   gives that entity its law-making power and tells

    21   it when and under what circumstances and how it

    22   can act as the legislature, right?

    23   GENERAL PRELOGAR: Exactly. And this

    24   is blackletter law, Justice Jackson. A law that

    25   violates the Constitution is no valid law at

1   all. And North Carolina, like in many other

2   places, it's void ab initio. That is the kind

3   of constraint that goes into and -- and

4   describes the conditions that attach to the

5   making of law in the first place.

6   JUSTICE JACKSON: So, in effect --

7   CHIEF JUSTICE ROBERTS: Well --

8   JUSTICE JACKSON: -- it's as though

9   the state court is saying you are not "the

10   legislature" for the purpose of the Elections

11   Clause.

12   GENERAL PRELOGAR: Within the meaning

13   of the Elections Clause --

14   JUSTICE JACKSON: Yes.

15   GENERAL PRELOGAR: -- yes, because

16   that's a law-making role, we think that the --

17   that the Framers would have understood that it's

18   carrying with it that constraint. And that

19   traces directly from the Articles of

20   Confederation because they similarly prescribed

21   this kind of function on state legislatures to

22   provide for the manner of selecting delegates to

23   the Continental Congress, and virtually every

24   state constitution in the relevant period, 10

25   out of 11, had substantive constraints that

1   hemmed in the legislature in how they carried

2   out that function --

3   CHIEF JUSTICE ROBERTS: Well, it's not

4   -- it's not --

5   GENERAL PRELOGAR: -- and that was a

6   familiar practice.

7   CHIEF JUSTICE ROBERTS: -- it's not

8   really that easy, is it, because the reason we

9   have a case is because the power does not simply

10   come from the state constitution, but the power

11   comes from the federal Constitution, which

12   authorizes the legislature to carry it into

13   effect. So the reason there is a case is

14   because of the concern that the state

15   constitutional provision or, in analogous cases,

16   the statutes conflict with the federal

17   Constitution, which authorizes the legislature,

18   which -- a concept that was known to the Framers

19   to undertake this responsibility. So I think

20   whichever way you think about in terms of how it

21   should come out, I think you have to address the

22   fact that there is that tension, a -- a tension

23   that we address on a regular basis between the

24   state power and the federal power.

25   GENERAL PRELOGAR: Of course, I

1   acknowledge that that makes this a case, Mr.

2   Chief Justice, but I think using all of the

3   traditional tools here, both with respect to

4   text, history, precedent, each of those counsels

5   forcefully against drawing this kind of

6   substance/procedure distinction.

7   I don't see how you get there on the

8   text alone because, once the Court has

9   understood and explained in numerous cases that

10   this is a law-making function, as Justice Kagan

11   explained when she read aloud from this Court's

12   cases, that has been understood to mean that all

13   of the ordinary constraints on law-making

14   attach. And this is one of the most fundamental

15   and ordinary constraints on law-making.

16   And then there's the history, the

17   Articles of Confederation.

18   CHIEF JUSTICE ROBERTS: Well, if I can

19   -- I don't mean to -- well, I guess I do mean to

20   interrupt, but the way you phrased it is

21   exactly, I guess, where the argument this

22   morning has mostly gone. You say the ordinary

23   restraints, and I think that's what Chief

24   Justice Rehnquist was trying to get at. That's

25   what you -- whatever standard you want to say,

 1   whether it's ordinary or, you know, once in a

 2   blue moon, you're saying that that is the

 3   question, is what the state is doing, which has

 4   the impact on the federal constitutional

 5   authority given to the legislature, ordinary or

 6   outrageous, however you want to -- to say it.

 7   So you do accept the proposition that

 8   there is a role for this Court in particular to

 9   assess whether or not -- how that conflict is

10   worked out in a particular case?

11   GENERAL PRELOGAR: I do acknowledge

12   that, but I would emphasize in trying to think

13   about this both from a legal standpoint and if I

14   could from a practical standpoint that I would

15   think the Court would want to make clear that

16   this is a very deferential standard. It is not

17   the ordinary case where the Court is

18   second-guessing a state court's interpretation

19   of its own state law.

20   Usually, the Court treats the state

21   courts as conclusive expositors of state law

22   because they have way more institutional

23   competence in their own methodologies, which, of

24   course, may differ from the methodologies this

25   Court would deploy with respect to the federal

1   Constitution, and they have a lot more

2   familiarity with the content of their state law.

3   So I think, to situate this kind of

4   test within this Court's broader doctrine in

5   this area, it would be necessary to recognize

6   that this is not just about thinking that the

7   state court might have gotten it wrong or -- or

8   even very wrong but rather trying to identify

9   the narrow circumstances where the Court can't

10   properly be understood to be conducting judicial

11   review in the first place.

12   It's not acting like a court, because

13   that is the kind of thing that would then seize

14   the legislatures' policymaking power and be

15   understood to transgress the Elections Clause.

16   And just a quick note on the practical

17   point. Any I think lesser rule in this context

18   would invite constant challenges brought in

19   federal courts seeking to relitigate these state

20   law issues often in the midst of these elections

21   as they're unfolding on the ground, and I think

22   it would be important to try to put a check on

23   that type of second bite at the apple that

24   litigants would otherwise try to obtain.

25   JUSTICE ALITO: May I ask you a couple

1   of questions about your interpretation of two

2   federal statutory provisions that you cite, 28

3   U.S.C. 2(a)(C) and 2(a). And 2(a)(C) refers to

4   the law of each state, and then it speaks about

5   the law thereof.

6   Does that -- when it speaks about the

7   law of such state, is it talking just about

8   state law, or is it also talking about

9   provisions of federal law that are applicable in

10   that state and for that matter in every other

11   state in the country? For example -- okay.

12   Yeah.

13   GENERAL PRELOGAR: Go ahead.

14   JUSTICE ALITO: No.

15   GENERAL PRELOGAR: I was going to say

16   we --

17   JUSTICE ALITO: You first.

18   GENERAL PRELOGAR: -- we understand

19   that provision to reflect Congress's recognition

20   that a state can be apportioned in accordance

21   with its law and I would say also in accordance

22   with federal law as it would need to comply with

23   federal law in multiple different ways,

24   including through the involvement of different

25   actors. And so the Court has already concluded

1   in cases like Branch versus Smith that that

2   would include court-drawn remedial maps, for

3   example. That's apportionment --

4   JUSTICE ALITO: Okay. So these --

5   GENERAL PRELOGAR: -- by law.

6   JUSTICE ALITO: -- I mean, these --

7   these provisions talk about districts prescribed

8   by the law of such state, but included within

9   that are federal constitutional constraints, the

10   federal Equal Protection Clause, one-person,

11   one-vote, the Voting Rights Act, right, that is

12   the law of the state?

13   GENERAL PRELOGAR: I would say yes,

14   those are the present laws.

15   JUSTICE ALITO: And, if that's true,

16   why isn't the Election Clause the law of the

17   state?

18   GENERAL PRELOGAR: We think the

19   Election Clause is the law of the state, but

20   there's no incompatibility with that law --

21   JUSTICE ALITO: Okay. But then that

22   --

23   GENERAL PRELOGAR: -- and with the

24   recognition --

25   JUSTICE ALITO: Yeah.

1   GENERAL PRELOGAR: -- that when state

2   legislatures are doing law-making, just as with

3   the --

4   JUSTICE ALITO: Right. Okay.

5   GENERAL PRELOGAR: -- the governor's

6   veto you can have state constitutional checks.

7   JUSTICE ALITO: No, I understand -- I

8   understand all that. I'm just talking to --

9   trying to see whether these statutes add

10   anything, and in light of your answer, it

11   doesn't seem to me they add anything because

12   we're still back to the question of the

13   interpretation of the federal Constitution,

14   right?

15   GENERAL PRELOGAR: I agree there's a

16   federal constitutional question here. We think

17   that these statutes add for purposes of this

18   case just additional confirmation from Congress

19   that it recognized that other organs of the

20   state government, including courts, could play a

21   role in the process.

22   JUSTICE ALITO: I don't think that's

23   really responsive to my question. If the law

24   thereof includes the Equal Protection Clause in

25   the U.S. Constitution and it includes the Voting

1   Rights Act, then it includes also the Elections

2   Clause, and I understood you to agree with that.

3   So we're back to these -- these statutes are not

4   an alternative way to decide the case. It takes

5   us back to the Election Clause constitutional

6   question, right?

7   GENERAL PRELOGAR: That's right, we

8   haven't asked --

9   JUSTICE ALITO: Okay. Thanks.

10   GENERAL PRELOGAR: -- the Court to

11   resolve this case on the basis of these

12   statutes.

13   CHIEF JUSTICE ROBERTS: Thank you,

14   counsel.

15   Justice Thomas, anything further?

16   Justice Sotomayor?

17   JUSTICE SOTOMAYOR: In fairness to

18   Petitioner, I think that what they're trying to

19   say when they draw this procedural/substantive

20   line or this other line of open-ended or

21   specific constitutional provisions, that they're

22   trying to articulate, maybe inarticulately, but

23   articulate that we have to reach the question of

24   how -- when does the federal constitutional

25   provision spring up, meaning at what point has a

 1   court acted not as in judicial review but in

 2   legislating, and so how would -- and I think Mr.

 3   Verrilli gave us a line. What's your line? How

 4   would you articulate it?

 5   GENERAL PRELOGAR: So I'm happy to

 6   give you a line. I'll just say that I don't

 7   actually understand them to -- to try to

 8   conflate those two arguments. I think that they

 9   are trying to make a sweeping argument here that

10   even if the court is acting like a court and

11   faithfully engaged in the process of judicial

12   review, they would nevertheless invalidate any

13   number of constitutional provisions around the

14   states and say those are unenforceable through

15   that limited process of review.

16   JUSTICE SOTOMAYOR: I -- I agree with

17   you, that's what they're trying to say.

18   GENERAL PRELOGAR: Yes. So -- but

19   just to try to be responsive to your question

20   about a standard, we think that there are

21   obviously multiple formulations that have been

22   offered and are available to the Court, but we

23   think the closest analogue to try to track this

24   problem I've described of when a court is not

25   faithfully engaged in judicial review is to

1   borrow from the adequate and independent state

2   grounds context and specifically the civil

3   rights cases, where the Court has said that if

4   the state court decision is so lacking in any

5   basis and has no fair or substantial support and

6   can only be understood as an effort to frustrate

7   federal rights, then the Court can look past

8   that decision.

9   And, again, we think that this is a

10   high bar. It's not testing for exactly the same

11   thing because, in that context, novelty might be

12   important, for example, if you're surprising a

13   civil rights plaintiff to try to deny a federal

14   forum. Here, we don't think that novelty would

15   carry much weight in the analysis.

16   But we do think that formulation of

17   lacking any fair or substantial support with

18   deference shown to the state's own methodologies

19   and its constitutional interpretation is trying

20   to get at the same idea of when the court is

21   actually abdicating its judicial role and

22   instead claiming raw policymaking power.

23   CHIEF JUSTICE ROBERTS: Justice Kagan?

24   JUSTICE KAGAN: On your side of the

25   podium, we have one vote in favor of a gap

1   between constitutional and statutory questions

2   and one vote saying it's the -- it's the same,

3   so you get to decide.

4   (Laughter.)

5   GENERAL PRELOGAR: I love casting a

6   deciding vote. We don't think that there is

7   a --

8   JUSTICE KAGAN: Just on your side of

9   the podium.

10   GENERAL PRELOGAR: Sadly, yes. I

11   think that it wouldn't make sense to deploy a

12   different standard or formulation with respect

13   to statutory and constitutional questions

14   because, again, you'd be testing for the same

15   thing, when is this not the court acting like a

16   court when it has gone off the rails and it's

17   just doing policy under the guise of statutory

18   interpretation or constitutional interpretation.

19   But I agree with Mr. Verrilli that I

20   think, in application, this could often come out

21   differently in the sense that usually in

22   statutory interpretation you have a text before

23   you and it might be more evident whether this is

24   just a stark departure from the legislature's

25   work.

1   In the context of constitutional

2   adjudication and contrast, there are often broad

3   provisions, as there are under the federal

4   Constitution, and I think that federal courts

5   should not be in the business of saying that the

6   state courts aren't giving those, for example,

7   just a fair reading looking at their text alone

8   because there is often a lot of additional

9   methodology that has to go into properly

10   interpreting those provisions and distilling

11   them into principles and concrete cases.

12   CHIEF JUSTICE ROBERTS: Justice

13   Gorsuch?

14   JUSTICE GORSUCH: No.

15   CHIEF JUSTICE ROBERTS: Justice

16   Barrett?

17   Justice Jackson?

18   JUSTICE JACKSON: Just finally, to be

19   clear, in -- in answer, in response to Justice

20   Sotomayor, the reason you see the counsel on the

21   other side as making a sweeping argument that

22   doesn't really require us to employ a test to

23   determine when a court is acting as a court is

24   because they have conceded that this is a court

25   acting as a court, but even still they say its

1   decision needs to be cut out because it's based

2   on state constitutional law and not federal

3   constitutional law. Am I understanding?

4   GENERAL PRELOGAR: That's -- that's

5   exactly right. So they have said multiple times

6   today that they are not asking this Court to

7   delve into the ins and outs of the North

8   Carolina Supreme Court's decision here, that

9   they -- they said they take it at faith -- face

10   value --

11   JUSTICE JACKSON: Right.

12   GENERAL PRELOGAR: -- as an accurate

13   understanding of North Carolina law. And

14   they're instead making far more sweeping

15   arguments that would take off the table 233

16   years of history in this country, state

17   constitutional provisions that have applied

18   under the Articles of Confederation, in the

19   early decades of the republic, and still today,

20   and we think that that would be a distortion of

21   the meaning of the Elections Clause, and it

22   would have enormous and drastic practical

23   consequences.

24   JUSTICE JACKSON: So we can rule here

25   today without adopting any particular test, like

 1   Mr. Verrilli's or anything else?

 2   GENERAL PRELOGAR: Yes, we agree that

 3   it wouldn't be necessary in this case to

 4   articulate that standard because we don't think

 5   that they're pressing that kind of claim in this

 6   case.

 7   CHIEF JUSTICE ROBERTS: Thank you,

 8   counsel.

 9   Rebuttal, Mr. Thompson.

10   REBUTTAL ARGUMENT OF DAVID H. THOMPSON

11   ON BEHALF OF THE PETITIONERS

12   MR. THOMPSON: Thank you, Mr. Chief

13   Justice. Just a few quick points.

14   Number one, on what I meant -- the

15   extent to which we are accepting what the North

16   Carolina Supreme Court's ruling was here as a

17   valid and fair expression of state law, we are

18   doing that for purposes of the two tests that we

19   articulated in our brief. Number one, there

20   can't be any substantive restraint on the state

21   legislature, and number two, it lacked a

22   judicially discoverable and manageable standard.

23   But make no mistake, would this Court

24   say, well, we want to adopt a third standard, we

25   want to take the Bush versus Gore standard and

1   we want to apply it to state constitutions, I

2   would make two points.

3   Number one, the test for a state

4   constitution should be easier to meet than a

5   statute because, for purposes of the Elections

6   Clause, it's far more problematic when a state

7   legislature has its hands tied by a state

8   constitution than when it's tied by a state

9   legislate -- an impermissible distortion of a

10   statute which they can just go back and rewrite.

11   And the second point I would make is,

12   under that standard, and we've heard a

13   multiplicity of standards, but under any of the

14   standards, we think what the North Carolina

15   Supreme Court here did would run afoul of all of

16   those standards because it was not grounded in

17   the text, it was not grounded in the history,

18   and it was not grounded in precedent.

19   Now I would also like to address the

20   suggestion that there will be an increase in

21   cases if the Court were to adopt our standard as

22   opposed to their standard. It's very important

23   to understand that my friends on the other side

24   are articulating two trip wires. They have now

25   articulated two ways in which the Elections

1   Clause could be violated. One is their panoply

2   of stratospheric tests for running --

3   impermissibly distorting state law.

4   But the second way, which they've

5   never disclaimed, it's in their briefs on page

6   57, is they acknowledge that if the legislature,

7   state legislature is deprived a central role, a

8   central role, then that would be a separate way

9   to violate the Elections Clause, and they never

10   tell this Court how that functionalist test is

11   going to be interpreted, how it's going to be

12   applied, and there will be far more litigation

13   under the -- the standards and the tests that my

14   friends on the other side are asking this Court

15   to apply.

16   Now I'd also like to point out that

17   they've said that there would be two sets of

18   rules, rules for federal elections and rules for

19   state elections, if we prevail. From the

20   founding of the republic, states have had the

21   opportunity to have two different sets of

22   elections code and they've consistently declined

23   that invitation, and there's no reason to think

24   that they would do so in this context.

25   And, finally, there was discussion

1   about history and the Articles of Confederation,

2   and, respectfully, their discussion of the

3   Articles of Confederation ignores the

4   fundamental structural change that occurred when

5   the Articles of Confederation were replaced with

6   the Elections Clause, and so we think that is

7   not relevant.

8   I yield back the balance of my time.

9   CHIEF JUSTICE ROBERTS: Thank you,

10   counsel, all counsel. The case is submitted.

11   (Whereupon, at 12:57 p.m., the case

12   was submitted.)

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