

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TIMOTHY K. MOORE, IN HIS OFFICIAL)
4 CAPACITY AS SPEAKER OF THE)
5 NORTH CAROLINA HOUSE OF)
6 REPRESENTATIVES, ET AL.,)
7 Petitioners,)
8 v.) No. 21-1271
9 REBECCA HARPER, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Wednesday, December 7, 2022

15
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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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-1271, Moore versus Harper.

Mr. Thompson.

ORAL ARGUMENT OF DAVID H. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Mr. Chief Justice, and may it please the Court:

The Elections Clause requires state legislatures specifically to perform the federal function of prescribing regulations for federal elections. States lack the authority to restrict the legislatures' substantive discretion when performing this federal function.

As Alexander Hamilton wrote in Federalist 78, the scope of legislative authority is governed by the commission under which it is exercised. Here, that commission is contained in the United States Constitution, and it is federal law alone that places substantive restrictions on state legislatures performing 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 a 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's -- there are
4 good reasons why there would be a substantive
5 limitation even if not a procedural limitation.

6 We can see this in James Madison's
7 remarks. I would refer the Court to the third
8 volume of Elliot's Debates, page 367, where
9 James Madison laments partisan gerrymandering,
10 and he singles out one state, South Carolina,
11 for opprobrium for their partisan gerrymander.
12 And their partisan gerrymander was found right
13 in the state constitution.

14 And that's the rule that my friends on
15 the other side are advocating for. They're
16 saying you can have a partisan gerrymander, but
17 you have to put it in the state constitution.

18 JUSTICE BARRETT: So that's not so
19 much -- your argument then this
20 procedural/substantive distinction is not
21 so much a matter of the text, that it's you're
22 pulling some things from the history and saying
23 that James Madison's comment supports this
24 procedural/substantive line?

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

1 it in precedent, Your Honor, and -- and text and
2 structure and history. So I'll take those one
3 at a time if I may.

4 JUSTICE BARRETT: Sure.

5 MR. THOMPSON: So the precedent would
6 be Smiley on the one hand seems to suggest that
7 procedural limitations can be circumscribed on
8 the legislature, and Palm Beach County as we
9 read it teaches that substantive limits cannot
10 be placed on a state legislature. So that's the
11 precedent.

12 In terms of the text, I think all of
13 us agree, Your Honor, that it's a law-making
14 function and so -- and the text shows that where
15 it says prescribe regulations, this is the --
16 the law-making function, and so it makes sense
17 the founders structurally would have said, okay,
18 there's a pre-existing entity, the state con- --
19 the state legislature, and we're going to have
20 that be bound by its procedures, but we're going
21 to have federal substantive limitations, and you
22 can see this with state courts and courts --

23 JUSTICE JACKSON: But can I ask you a
24 question? Can I ask you a question, because
25 you -- you -- you suggest that there's this

1 thing called the legislature that the framers
2 were familiar with, and I'm trying to understand
3 why what counts as the legislature isn't a
4 creature of state constitutional law.

5 MR. THOMPSON: Well, Your Honor, I --
6 I think this Court in Arizona did say that the
7 states have a lot of flexibility in terms of
8 defining what state legislature means, but what
9 Arizona did not say is that there could be
10 substantive limitations.

11 JUSTICE JACKSON: But -- but -- well,
12 I don't understand how that's a different thing.
13 In other words, if the state constitution tells
14 us what the state legislature is and what it can
15 do and who gets on it and what the scope of
16 legislative authority is, then, when the state
17 supreme court is reviewing the actions of an
18 entity that calls itself the legislature, why
19 isn't it just looking to the state constitution
20 and doing exactly the kind of thing you say when
21 you -- when you admitted that this is really
22 about what authority the legislature has?

23 In other words, the authority comes
24 from the state constitution, doesn't it?

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

1 federal function, and we know that from Leser.
2 So this Court in Leser held it's a federal
3 function. When these duties are assigned to the
4 states, that is a duty that is assigned by the
5 federal --

6 JUSTICE JACKSON: Yes, it's a duty.
7 The duty is to make this legislative
8 determination, that is, the determination about
9 elections.

10 My question is, where does the
11 entity's power come from to make any
12 determinations at all, right? I mean, yes, I
13 see that the federal Constitution is giving them
14 the right to make a particular determination,
15 but they're not giving just anybody in the state
16 that right. They're giving somebody called the
17 legislature and, in order for us to have a thing
18 called the legislature, we have to look at the
19 state constitution to determine where those --
20 you know, what that entity's powers are, how
21 they can be exercised.

22 Other than that, I don't really
23 understand how the legislature is authorized to
24 act at all.

25 MR. THOMPSON: Well, Your -- Your

1 Honor, we know that's not right because, in
2 Leser, the people of Maryland tried to prevent
3 women from voting, and the way they did that is
4 they put in their state constitution a
5 prohibition on adopting the Nineteenth
6 Amendment, and then it came to this Court and
7 this Court said that this is a federal function
8 and that substantive limit of the state
9 constitution was inapplicable. So that's what
10 we're dealing with here, is a federal function.

11 JUSTICE SOTOMAYOR: But that was
12 because it -- it violated the federal
13 Constitution, not because it violated the state
14 constitution. But let me go back to what I
15 don't fundamentally understand about this case.

16 The text of the Constitution, the
17 Elections Clause says, the legislature in each
18 state shall prescribe the time, place, and
19 manner of elections.

20 We know that before the founding, at
21 the founding of the Constitution, decades after,
22 and even to today that state constitutions have
23 regulated time, place, and manner. We have the
24 voice votes. We have one constitution that set
25 elections at the courthouse and not in the

1 county where the legislature wanted it. We have
2 laws about voice votes as opposed to ballot
3 votes.

4 It seems to me that if I'm a
5 textualist and I read that the legislature in
6 each state shall prescribe the time, place, and
7 manner of elections that your argument would
8 have to be that you can't regulate -- the state
9 constitution can't regulate that. But there is
10 no substantive limitation in the Constitution.

11 And the Tenth Amendment says the
12 powers not delegated to the United States by the
13 Constitution, nor prohibited by it to the
14 states, are reserved to the states respectively
15 or to the people. And if there's no substantive
16 limitation in the Elections Clause, I don't know
17 how we could read one in.

18 MR. THOMPSON: Your Honor, so I think
19 there are a few points there --

20 JUSTICE SOTOMAYOR: To reserve power
21 to the states to decide whether apportionment or
22 malapportionment should be prohibited. We've
23 already had a case, Groh, by Justice Scalia, who
24 said that that was perfectly okay for a state
25 constitution to prohibit malapportionment.

1 Under your theory, the state
2 constitution shouldn't have been permitted to do
3 that substantive thing. So explain it to me.

4 MR. THOMPSON: Yeah. So let me start
5 with where Your Honor started, which was with
6 the history, and we read the history very
7 differently than my friends on the other side
8 because they point to 16 constitutions early in
9 the founding of the republic that they claim
10 regulate federal elections. Five of those
11 relate to transitional governments.

12 There was no state legislature. So it
13 would have been impossible for the state
14 legislature to adopt the first rules, and by
15 their own terms, they were schedules that faded
16 away once the state legislature had been
17 elected.

18 Then that leaves nine which say --
19 that have regulations relating to --

20 JUSTICE SOTOMAYOR: There were only
21 13.

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

24 JUSTICE SOTOMAYOR: There were 13
25 colonies, counselor. If I got six of them doing

1 something that's contrary to what you're saying,
2 that seems like a fairly substantial majority to
3 me.

4 MR. THOMPSON: Well, Your Honor, I --
5 I'm going to get --

6 JUSTICE SOTOMAYOR: You can -- you can
7 try to knock them down one at a time, but you're
8 still with about six of them that can't be
9 disputed.

10 MR. THOMPSON: I'm going to knock them
11 all down with one, so it'll be 12 to 1 in my
12 favor by the time I'm done, Your Honor.

13 JUSTICE SOTOMAYOR: Yes. If you
14 rewrite history, it's very easy to do.

15 MR. THOMPSON: I'm not rewriting
16 history, Your Honor. What we're saying is that
17 when it says all elections, it's referring to
18 the offices that were created by that
19 constitution.

20 You can see that in Vermont. It says
21 all freeholders shall be eligible for office.
22 It's not talking about the presidency of the
23 United States because there's an age
24 qualification. It's talking about the --

25 JUSTICE SOTOMAYOR: So why is it that

1 in all of those states the legislatures
2 understood that all elections meant that you
3 were going to have paper elections, ballots, in
4 both federal and congressional?

5 MR. THOMPSON: I -- I think it is
6 telling what those state legislatures
7 understood, and if we look at Pennsylvania and
8 Tennessee, they took those all elections shall
9 be by ballot and they promulgated two statutes
10 to implement -- to implement and regulate to
11 their -- their elections law.

12 For the state ones, they passed a law
13 saying all elections shall be by ballot for the
14 state races and they cited back to those state
15 constitutional provisions. And then they passed
16 a separate law for the federal elections and
17 they did not cite back to that provision. Why
18 not? Because, presumably, they understood that
19 they were not bound by that, but they were
20 simply trying to harmonize --

21 JUSTICE SOTOMAYOR: But that -- that
22 is a large step, counsel.

23 JUSTICE BARRETT: Mr. Thompson --

24 MR. THOMPSON: Yeah.

25 JUSTICE BARRETT: -- if I can just

1 piggyback quickly on Justice Sotomayor's
2 question. At the outset, Justice Sotomayor
3 said, you know, pointing to the Tenth Amendment
4 and other structural assumptions of the
5 Constitution, that we presume that states
6 possess power unless they've given it up.

7 So this is my question about the
8 Elections Clause. If it did not appear in the
9 Constitution, would the baseline assumption have
10 been that the states possess the power to
11 regulate elections for federal office anyway?
12 Because, if so, I don't see how it's a
13 delegation as suppose -- as opposed to a clause
14 that clips state authority perhaps by saying it
15 must be exercised by the legislature and by
16 giving Congress the power of override. But I
17 wouldn't describe that as a delegation if the
18 states had the baseline power to start.

19 MR. THOMPSON: Your Honor, in U.S.
20 Term Limits, this Court held -- the majority
21 held that it was a delegation of power from the
22 federal government.

23 We understand that there are members
24 of the Court who take the opposite view, who say
25 no, it was a reserved power and it was -- and

1 it's protected by the Tenth Amendment, and
2 nothing in our argument today depends upon the
3 resolution of that debate which we understand is
4 ongoing on the Court.

5 What we're saying is, regardless of
6 whether it was a delegated power or a reserved
7 power or maybe both, where they reserved it and
8 it was given to them, regardless of how one
9 resolves that, it is a federal function. That's
10 what Leser teaches. It's a federal function.
11 And if we go back to the words of Alexander
12 Hamilton, you look in for purposes of judicial
13 review of what's the commission that this power
14 is, and the commission means mandate. That's
15 how Samuel Johnson defined "commission." And
16 the mandate comes from the federal Constitution,
17 Your Honor.

18 I'd like to go back to your question
19 about structure. You know, you had asked me
20 where are we getting this distinction between
21 substance and procedure. And I had mentioned
22 precedent, and I had said there was a lawmaking
23 function in the text. And I was getting to the
24 structure.

25 The structure is -- is a familiar one.

1 We obviously see the founders, in cases like
2 Leser, taking that preexisting state legislature
3 and assigning a federal function to it, but we
4 also see it in state courts, state courts bound
5 by state procedures and yet having exclusive
6 federal question jurisdiction until 1875. So
7 this was a structure that was understood by the
8 founders to take an existing entity with
9 existing procedures but to empower it to
10 exercise federal authority, and -- and that's
11 what we see.

12 And that's what Joseph Story, in 1820,
13 when he rises and eloquently, you know, speaks
14 as to why there can't be a limit on the power,
15 it's because it's a federal function. And I
16 think Joseph Story's speech in 1820 is relevant,
17 too, with respect to what do all elections mean,
18 because the Massachusetts Constitution of 1780
19 had a provision that says all elections shall be
20 free.

21 JUSTICE JACKSON: Can I ask you a
22 question about it being a federal function? So
23 is it your argument that the state constitution
24 has no role to play, period?

25 MR. THOMPSON: In terms of imposing

1 substantive limits --

2 JUSTICE JACKSON: Mm-hmm.

3 MR. THOMPSON: -- on the exercise of
4 that federal function, that is our position.

5 JUSTICE JACKSON: So what are -- what
6 procedural limits can the state constitution
7 impose in this context?

8 MR. THOMPSON: Presentment would be a
9 -- a limitation. So Smiley teaches that if
10 there's -- if it requires presentment to the
11 governor, so that the governor can veto it, then
12 that would be a -- a procedural limitation that
13 can be imposed by the state constitution.

14 JUSTICE KAGAN: Mr. Thompson, why
15 doesn't Smiley stand for maybe a broader but
16 simpler proposition? Which is when we -- when
17 we think about this word "legislature," we're
18 thinking about it as embedded in a system of
19 constraints, and one of those constraints is the
20 governor, and another of those constraints is
21 the courts. And that's the normal way that
22 legislatures operate and act, is as subject, not
23 as absolute, but as subject to constraints. And
24 Smiley said we take that system as we find it.
25 We take the constraint of the governor as we

1 find it. Why not, too, then the constraint of
2 the courts?

3 MR. THOMPSON: We -- we agree, Your
4 Honor, the -- the constraint of the court
5 applying federal law. That's the teaching of
6 Palm Beach County, as we read that case. There
7 was a vacatur of the Florida Supreme Court to
8 send it back after having cited --

9 JUSTICE KAGAN: But it would be
10 ordinary constraints, and the constraints can
11 come from the federal Constitution or the
12 constraints can come from the state
13 constitutions. State actors, state courts,
14 operate in both spheres and do both things. And
15 that's the ordinary operation of the courts.
16 And that's what Smiley says. It's the
17 legislature subject to the ordinary set of
18 constraints that operate on them.

19 MR. THOMPSON: We read Leser to teach
20 that when it's -- the ordinary constraint is
21 federal law, that it's bound by federal law.
22 That's the ordinary constraint.

23 JUSTICE KAGAN: Well, if that's coming
24 from Leser, I mean -- so then you're going to
25 sort of our precedent. And I would think that

1 our precedent gives you a lot of problems, I
2 mean, if you really take every statement that
3 this Court has said about the matter at hand.
4 I'll just read you a few of them and they're --
5 they're pretty recent, you know?

6 Smiley is the one we've been talking
7 about, and that says, just as Congress is
8 subject to limitations in the federal
9 Constitution, when it makes laws -- and now I'm
10 quoting -- "there is no intimation of a purpose
11 to exclude a similar restriction imposed by
12 state constitutions upon state legislatures."

13 And then in Arizona, we say nothing in
14 the elections clause instructs, and this Court
15 has never held, that a state legislature may
16 prescribe regulations on the time, place, and
17 manner of holding federal elections in defiance
18 of provisions of the state's constitution.

19 And on -- as to that point, the
20 dissent was right with the majority. So both of
21 them took issue with the proposition that
22 legislatures would exercise their authority
23 without the constitutional checks that a state
24 court provides.

25 And then in Rucho, three years ago,

1 the Court assured everybody in a case very much
2 like this one -- it was a case about
3 gerrymandering, and it says complaints about
4 districting need not echo into a void because
5 provisions in state statutes and state
6 constitutions can provide standards and guidance
7 for state courts to apply in addressing
8 gerrymandering.

9 So one, two, three, in all recent
10 cases, we've said: Of course, state courts
11 applying state constitutions typically constrain
12 state legislatures when they redistrict, when
13 they enact election laws.

14 MR. THOMPSON: Let me start, if I may
15 with Arizona, Your Honor. In Arizona, the
16 plaintiff was the Arizona state legislature.
17 The Arizona state legislature did not make any
18 complaints about the substantive restrictions in
19 that referendum, and it's not clear it would
20 have had Article III standing to complain about
21 a constraint being placed on a different entity.
22 So nothing in this Court's decision went -- went
23 to the substance that was in that --

24 JUSTICE KAGAN: Yeah. I guess what
25 I'm saying is that in each of these three, we

1 have very clear statements, and I appreciate the
2 fact that this issue was not the one before us
3 in each of those three, just as it wasn't in the
4 case that you mentioned to me that started off
5 my quoting other things. If you're going to
6 quote one at me, I'm going to quote three at
7 you.

8 (Laughter.)

9 JUSTICE KAGAN: And, you're right,
10 we're here for the first time dealing with this
11 issue. This is a novel challenge. So I'm not
12 saying that we like sat here as a Court and
13 addressed hundreds of pages of briefing on this
14 challenge. I'm saying that three times in not
15 so many years we've understood this to be an
16 established proposition of law.

17 MR. THOMPSON: So, Your Honor, let me
18 now address Rucho, the most recent, where this
19 Court said "we express no view" on these policy
20 proposals. And many of the policy proposals
21 that were identified in Rucho are ones that are
22 fully consistent with the line we are drawing.
23 The Rucho majority pointed to statutes in Iowa
24 and Delaware that banned partisan
25 gerrymandering. The Rucho majority pointed to a

1 constitutional amendment in Missouri that
2 designated and created the office of a state
3 demographer to draw state lines.

4 And, essentially, that's what we have
5 here in North Carolina. Partisan gerrymandering
6 has now been banned at the state level for the
7 state races, and we're not here challenging
8 that, and that presumably will have a salutary
9 influence, if the actual legislature itself is
10 not gerrymandered, then when it comes to the
11 role of doing congressional races. And there
12 were referendum -- independent commissions were
13 referenced by the Rucho majority, and we're not
14 debating that.

15 And Congress -- and Congress just this
16 -- this session, the House of Representatives,
17 which has more at stake than the Senate in terms
18 of redistricting, passed a bill that would have
19 banned partisan gerrymandering in all 50 states.
20 And that's what the founders envisioned the
21 solution to this problem was, was a political
22 solution going to Congress.

23 JUSTICE KAVANAUGH: Your --

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

1 JUSTICE SOTOMAYOR: Counsel --

2 JUSTICE KAVANAUGH: Your -- go ahead.

3 JUSTICE SOTOMAYOR: You don't dispute
4 that there could be judicial review of -- by the
5 Supreme Court of a federal constitutional
6 violation?

7 MR. THOMPSON: Correct, Your Honor.

8 JUSTICE SOTOMAYOR: You don't dispute
9 that federal courts and state courts can both
10 review a provision for violation to the federal
11 Constitution?

12 MR. THOMPSON: Correct, Your Honor.

13 JUSTICE THOMAS: But you are disputing
14 that the states can't review -- state courts
15 can't review a state legislated voting system to
16 find whether it complies with the state
17 constitution?

18 MR. THOMPSON: Well, it can for
19 procedural reasons, like in Smiley --

20 JUSTICE SOTOMAYOR: Right.

21 MR. THOMPSON: -- like -- there wasn't
22 presented to the governor.

23 JUSTICE SOTOMAYOR: So let's go to the
24 -- your -- the substantive/procedural reasons
25 still -- distinction makes no sense to me

1 because the only thing the Constitution, as I
2 mentioned earlier, controls is the procedural
3 issues, time, place, and manner.

4 But take a line item veto provision,
5 for example. In more than 40 states, these
6 provisions empower governors to accept or reject
7 legislation by altering its content. If, for
8 example, a governor partially vetoes a bill to
9 appropriate funds to administer congressional
10 elections, is that a substantive constraint or a
11 procedural constraint? Just a yes or no.

12 MR. THOMPSON: It's procedural.

13 JUSTICE SOTOMAYOR: Oh.

14 MR. THOMPSON: It's a hoop that has to
15 be jumped through.

16 JUSTICE SOTOMAYOR: Okay. So the
17 governor vetoes a map drawn by the legislature
18 and decides it's constitutionally permitted.
19 Why is it substantive?

20 MR. THOMPSON: We're not saying.
21 We're saying if a governor -- consistent with
22 Smiley, if a governor vetoes --

23 JUSTICE SOTOMAYOR: No, he -- the
24 constitutional provision permits him to -- to
25 alter the contents.

1 MR. THOMPSON: Oh, to alter the
2 content. Well, that --

3 JUSTICE SOTOMAYOR: That's what I
4 said.

5 MR. THOMPSON: That's the key
6 distinction. If it's a hoop that has to be
7 jumped through in order for the -- the
8 legislature to get the code of elections, it
9 wants it's procedural. If it's a limit on their
10 substantive ability to get the code they want,
11 then --

12 JUSTICE SOTOMAYOR: It's a yes or no,
13 can the governor do this?

14 MR. THOMPSON: Can -- can the governor
15 change the substance?

16 JUSTICE SOTOMAYOR: Yes.

17 MR. THOMPSON: No.

18 JUSTICE SOTOMAYOR: No. So that
19 becomes substance instead of procedure. So your
20 first answer has now changed.

21 MR. THOMPSON: A veto is permissible,
22 a change in substance is not.

23 JUSTICE SOTOMAYOR: What about a state
24 constitutional provision that precludes
25 legislators from acting during special sessions

1 on certain matters? Could a state court reject
2 the Congressional Election Bill if it is outside
3 the scope of a special session? Yes or no?

4 MR. THOMPSON: If it's outside the
5 scope of a special session, that is a --

6 JUSTICE SOTOMAYOR: All right.

7 MR. THOMPSON: -- substantive
8 limitation because they can't start the process.

9 JUSTICE SOTOMAYOR: It seems to me
10 it's procedural in its most common understanding
11 because it's a question of how you do things,
12 not what's in it.

13 MR. THOMPSON: If you can't start the
14 process, then it's a substantive limitation.

15 JUSTICE SOTOMAYOR: Well, I -- it
16 seems that every answer you give is to get you
17 what you want, but it makes little sense. We
18 have more than one occasion said that we
19 describe the task in *Mistretta* of distinguishing
20 between substantive and procedural rules as a
21 logical morass that the Court is loathed to
22 enter.

23 MR. THOMPSON: And I --

24 JUSTICE SOTOMAYOR: And I simply --
25 I -- what I don't understand is the question

1 that Justice Jackson asked you, which is, if
2 judicial review is in the nature of ensuring
3 that someone is acting within their
4 constitutional limits, I don't see anything in
5 the words of the Constitution that take that
6 power away from the states.

7 MR. THOMPSON: It comes from the fact
8 that it's a federal function, and with respect
9 to the legal morass, that's when this Court has
10 taken a functionalist approach. We're adopting
11 a formalistic approach, and it's my friends on
12 the other side who are adopting a functionalist
13 test. You can see this on page 57 --

14 JUSTICE JACKSON: But, Mr. Thompson --

15 MR. THOMPSON: -- of the state brief.

16 JUSTICE JACKSON: But Mr. Thompson --
17 Mr. Thompson, just following up on what was just
18 mentioned, I guess what I don't understand is
19 how you can cut the state constitution out of
20 the equation when it is giving the state
21 legislature the authority to exercise
22 legislative power.

23 It's the state constitution that is
24 telling the legislature when and under what
25 circumstances it can actually act as the

1 legislatures. Let me -- let me ask it this way.

2 What if what is at issue is not any
3 particular exercise of the state's legislature,
4 legislative authority, such as its -- its
5 ability to make time, place and manner
6 determinations, but whether the entity that is
7 purporting to exercise that power qualifies as
8 this particular state's legislature.

9 So you can imagine that we have two
10 different state entities who claim to be the
11 legislature for the purpose of the Elections
12 Clause, and both of them start acting as such.
13 They set election dates. They have procedures.
14 They issue competing maps and set -- set out
15 different statements about when elections would
16 be held.

17 Would that dispute, the dispute over
18 which entity is really the state's legislature,
19 be decided by federal or state courts and which
20 law would apply?

21 MR. THOMPSON: It -- it's state law.
22 I think that's a lot of what was happening in
23 the Arizona where the independent commissioning
24 was saying we're the legislature --

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

1 substantive constitutional law, we look to the
2 state --

3 MR. THOMPSON: We're saying --

4 JUSTICE JACKSON: -- constitution to
5 decide --

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

7 JUSTICE JACKSON: -- which --

8 MR. THOMPSON: Well, it's a procedural
9 issue as to who is the legislature. But we --

10 JUSTICE JACKSON: I'm sorry, why is
11 that a procedural issue? My question is, we
12 have these two entities, both of which say we
13 are the "legislature" of the state for the
14 purpose of the Elections Clause, and there's a
15 dispute about that.

16 I think you're agreeing with me that
17 that would go to the state supreme court, and
18 I'm asking, wouldn't the state supreme court
19 look at the state constitution and -- and what
20 it says about who gets to act as the legislature
21 and what authority they have.

22 Wouldn't it be looking at the state
23 constitution to make that determination?

24 MR. THOMPSON: And that's what
25 Arizona --

1 JUSTICE JACKSON: I'm sorry, yes or
2 no?

3 MR. THOMPSON: Arizona --

4 JUSTICE JACKSON: Did -- would it be
5 looking at the state constitution or the federal
6 Constitution?

7 MR. THOMPSON: Arizona teaches that
8 the states have the authority wide latitude to
9 define state legislature how they want. This is
10 a separate analytical question as --

11 JUSTICE JACKSON: Okay. But what I'm
12 trying to understand is why it's a different
13 analytical question --

14 MR. THOMPSON: Well, because the --

15 JUSTICE JACKSON: -- because to the
16 extent that the state constitution tells us what
17 the legislature is and what the scope of its
18 authority, how it's supposed to act, what it's
19 supposed to do, if that's a state constitutional
20 issue, then what I don't understand is why
21 aren't all of that entity's actions necessarily
22 involving the state constitution? It only gets
23 its authority from that document.

24 MR. THOMPSON: Because Leser teaches
25 exactly the opposite is true. In Leser the

1 state constitution forbade Maryland from
2 ratifying the Nineteenth Amendment, and this
3 Court said it didn't apply that state --

4 CHIEF JUSTICE ROBERTS: Counsel --

5 JUSTICE JACKSON: That's -- that's
6 because that particular issue was delegated to
7 someone else. I'm talking about the authority
8 of the state to act.

9 MR. THOMPSON: Well, Your Honor, under
10 U.S. Term Limits, the majority of this Court
11 said that the power to act in this place, in
12 this sphere, comes from the federal
13 Constitution.

14 Now what -- so the whole premise of
15 this line of inquiry is faulty, but what I'm
16 saying is that our position is whether the term
17 limits majority or dissent was correct. It's a
18 federal function.

19 CHIEF JUSTICE ROBERTS: Counsel, you
20 make the point at -- at -- several points in
21 your brief about the nature of the state
22 limitation that the courts were interpreting, a
23 free election, a fair election. Is -- is that a
24 substantive argument or is that just sort of a
25 style point or -- I mean, if they had a more

1 precise articulation of what the limits were
2 that they were going to apply, whether it's
3 going to be a particular percentage of
4 gerrymandering, a -- a departure, or something
5 more substantive.

6 Is it the problem that they're just
7 interpreting something that gives them free rein
8 or is that not a consideration?

9 MR. THOMPSON: Well, there are two
10 problems, Your Honor. And so under our
11 primary theory, the problem is that there's a
12 substantive limit of any sort being imposed by
13 the state constitution on the state legislature.

14 But under our backup liability theory,
15 the problem is that there is a lack of
16 judicially manageable and discoverable
17 standards. And as this Court said in *Rucho*,
18 judicial action must be governed by standard, by
19 rule.

20 And when the state supreme court was
21 freed of standards and rules, it was no longer
22 acting as the judiciary. It was taking
23 legislative power. And its -- the result of its
24 work had the hallmarks of legislation, Your
25 Honor. So it's both problems.

1 JUSTICE ALITO: Mr. Thompson, even
2 under your primary theory, however, is it
3 inevitable that there will be questions about
4 the meaning of statutes enacted by the
5 legislature to govern elections?

6 JUSTICE KAVANAUGH: Mr. Thompson --

7 JUSTICE ALITO: Mr. Thompson --

8 JUSTICE KAVANAUGH: No, go ahead. Go
9 ahead.

10 JUSTICE ALITO: Mr. Thompson, even
11 under your primary theory, however, isn't it
12 inevitable that the state courts are going to
13 have to interpret those provisions and isn't it
14 inevitable that state election officials in the
15 Executive Branch are going to have to make
16 decisions about all sorts of little things that
17 come up concerning the 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 1.

5 Point 2, 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 that
17 says elections in North Carolina shall be free,
18 and the North Carolina Supreme Court said, well,
19 what that means is there can't be any partisan
20 gerrymandering, redistricting has to be done
21 under one of these methods that we set out, that
22 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

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 --

5 JUSTICE ALITO: I -- I --

6 MR. THOMPSON: -- to the Court on a
7 statute but that statute would be permissible --
8 that statute would be permissible but not for
9 this type of claim.

10 So if there were some other claim
11 where they said, well, the election isn't free
12 because of, you know, there's not one person,
13 one vote. Okay, well, that's a judicially
14 manageable standard.

15 JUSTICE KAVANAUGH: Your position
16 seems to go further than Chief Justice
17 Rehnquist's decision in *Bush v. Gore*, where he
18 seemed to acknowledge that state courts would
19 have a role interpreting state law and that
20 federal court review of that should be, in his
21 words, deferential and simply should be a check
22 to make sure that the state court had not
23 significantly departed from state law. And he
24 drew on a body of precedent that has existed
25 previously.

1 And so I think the other side and the
2 Solicitor General say that stands for a general
3 principle which they're okay with, that there
4 can be some federal court review of state court
5 review of state law, deferential, so long as
6 there's no significant departure as a general
7 principle.

8 Why is that -- your position seems to
9 go further than that, and I'm -- where are you
10 getting that out of Chief Justice Rehnquist's
11 concurrence, or are you saying that was wrong?

12 MR. THOMPSON: No. No, Your Honor.
13 What we're saying is that we have a -- that that
14 was dealing with statutes. We're dealing with
15 constitutions, and we have a even more
16 deferential, a maximally deferential position.
17 We say just take whatever the state supreme
18 court says the law is, the substantive law is,
19 just take it at face law. Do not examine in any
20 way whether it is novel, a significant
21 departure, an impermissible distortion. Just
22 take it at face value, and then assess did it
23 place a substantive limit on the state
24 legislature?

25 So we would defer entirely for

1 purposes of our liability arguments in this
2 Court to -- and assume that what the North
3 Carolina Supreme Court did here was correct.

4 JUSTICE KAVANAUGH: What do you
5 think's the best case supporting this
6 substance/procedure distinction?

7 MR. THOMPSON: I would say Palm Beach
8 County. I think the Florida Supreme 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: Didn't -- didn't
16 use the word "substantive" though.

17 MR. THOMPSON: Well, any limit. So
18 maybe it's even more robust. But -- and would
19 sweep --

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,
4 alternative ground" to decide the case in your
5 favor which would allow some substantive state
6 restrictions 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 being
13 allowed if there's an efficiency ratio of more
14 than 7 percent, then that would be a judicially
15 discoverable and manageable standard. You could
16 -- we -- 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 -- I'm sorry. Go ahead.

22 MR. THOMPSON: The neuroscientist who
23 drew these maps apparently knows how to -- to
24 draw the efficiency ratio.

25 But in any event, so that would be an

1 example of a provision that would flunk our
2 primary test because it would be a substantive
3 limitation, but it would pass our backup test
4 because there was judicially discoverable and
5 manageable standards.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Justice Thomas?

8 Justice Alito anything?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: I -- I take your
11 answer to mean that there are no judicially
12 enforceable standards to interpret the Freedom
13 of Speech, Freedom of Assembly, and Equal
14 Protection Clauses of the Constitution because
15 they, on their face, would appear to be as
16 unmanageable.

17 MR. THOMPSON: No --

18 JUSTICE SOTOMAYOR: Or broad, and yet
19 we routinely let federal and state courts review
20 those provisions -- acts --

21 MR. THOMPSON: No, Your Honor --

22 JUSTICE SOTOMAYOR: -- different
23 claims.

24 MR. THOMPSON: -- that's not our
25 position at all. Our position is you need to

1 look at the type of claims. So take equal
2 protectin. That's sweeping and capacious
3 language. And if it's the type of claim where
4 you're looking to assess whether race is the
5 predominant motive or whether there's a
6 violation of one person, one vote, there are
7 judicially discoverable and manageable
8 standards.

9 JUSTICE SOTOMAYOR: Some of them were
10 created by the courts.

11 MR. THOMPSON: Yes, with judicially --

12 JUSTICE SOTOMAYOR: But the point --
13 and so what's different than what the court did
14 here in North Carolina where it looked to the
15 meaning of -- to the meaning of the English Bill
16 of Rights of 1689, which apparently was the
17 basis for the state's constitution, and it said
18 that the meaning was to curb royal efforts to
19 manipulate parliamentary elections. It then
20 looked to other states that had read in the free
21 election clause and other clauses of the state
22 constitution to find that political
23 gerrymandering violated this term. How is that
24 any different than what we normally do in our
25 review?

1 MR. THOMPSON: Nothing in the English
2 Bill of Rights told the North Carolina Supreme
3 Court whether an efficiency ratio of 6, 7, 8, 9,
4 10 percent --

5 JUSTICE SOTOMAYOR: But --

6 MR. THOMPSON: -- was acceptable.
7 There is no judicial --

8 JUSTICE SOTOMAYOR: You're -- you're
9 not answering my question. Absent the Election
10 Clause, is this term so unmanageable that you're
11 saying that the North Carolina court would not
12 have power to determine what free election
13 clause meant in their constitution?

14 MR. THOMPSON: They would be
15 exercising legislative power. It's just like
16 Rucho. This is the exact same issue that
17 divided this Court in Rucho and for the same
18 reason it was a violation of Article III, namely
19 there were no judicials -- there were no
20 standards, there were no rules, and so it wasn't
21 a case of controversy. So, too, here it would
22 be an act of legislative power for a court to
23 make this determination.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: If I could,

1 Mr. Thompson, I'd like to step back a bit and
2 just, you know, think about consequences,
3 because this is a theory with big consequences.

4 It -- it would say that if a
5 legislature engages in the most extreme forms of
6 gerrymandering, there is no state constitutional
7 remedy for that, even if the courts think that
8 that's a violation of the constitution. It
9 would say that legislatures could enact all
10 manner of restrictions on voting, get rid of all
11 kinds of voter protections that the state
12 constitution in fact prohibits. It might allow
13 the legislatures to insert themselves, to give
14 themselves a role, in the certification of
15 elections and -- and -- and -- and -- and the
16 way election results are calculated.

17 So -- and in all these ways, I think
18 what might strike a person is that this is a
19 proposal that gets rid of the normal checks and
20 balances on the way big governmental decisions
21 are made in this country. And -- and you might
22 think that it gets rid of all those checks and
23 balances at exactly the time when they are
24 needed most, because legislators, we all know,
25 have their own self interest. They want to get

1 reelected. And so there are countless times
2 when they have incentives to suppress votes, to
3 dilute votes, to negate votes, to prevent voters
4 from having true access and true opportunity to
5 engage the political process.

6 And so I just thought -- I mean, I
7 would give you a chance to respond to that
8 because it seems very much out of keeping with
9 the way our governmental system works and is
10 meant to work. And I think if I could just
11 connect it up to the last question that I asked,
12 it's why in all these recent cases, we have
13 statements that say, of course, when the
14 legislature act -- acts, it's subject to the
15 normal constraints, I mean, in this area of all
16 areas I guess I would add.

17 MR. THOMPSON: Your Honor, so our --
18 our position is that checks and balances do
19 apply, but they come from the federal
20 Constitution and the panoply of federal laws
21 like the Voting Rights Act and other statutes
22 that are highly protective of voters. So there
23 is a check. There is a balance. And there's
24 also a political. So we've got the legal check
25 from federal law, and we've got the political

1 check that the founders envisioned of going to
2 Congress. And as I mentioned, this very
3 Congress, this House of Representatives, voted
4 to ban partisan in gerrymandering in all 50
5 states.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: And on that history
10 in terms of checks and balances, what sorts of
11 concerns might --- might the founders have had
12 if state constitutions were allowed to trump
13 overstate legislatures?

14 MR. THOMPSON: I think there are two
15 and we can learn them from James Madison and
16 Joseph Story. So James Madison, as I mentioned,
17 specifically singled out South Carolina as a
18 place that had taken its gerrymander and
19 entrenched it right into the constitution
20 itself, and, of course, Virginia in 1830 does
21 the same thing, where the slave owners try to
22 aggrandize their political power by putting a
23 partisan gerrymander right in the state
24 constitution, and there's nothing anyone in the
25 state can do to -- do about it short, of course,

1 of amending the constitution or coming to
2 Congress.

3 And the flip side of that is what
4 Joseph Story in Section 820 of his Commentaries
5 on the Constitution says, which is he calls it a
6 boon, a boon that the state legislatures have
7 this, what he said on -- on the floor of the
8 Massachusetts convention, unlimited discretion.
9 The boon is because they have adaptability,
10 adaptability to what he said were local
11 politics, local convenience, and you don't have
12 that adaptability when it's in a state
13 constitution.

14 JUSTICE GORSUCH: Subject to federal
15 constitutional constraints and federal court
16 review and state court review of federal
17 constitutional claims.

18 MR. THOMPSON: Absolutely, Your Honor.

19 JUSTICE GORSUCH: And, historically,
20 at least as I've looked at it, you've got the
21 example of Virginia trying to constitutionalize
22 the 3/5 rule with respect to African Americans.

23 MR. THOMPSON: Yes, Your Honor,
24 exactly right.

25 JUSTICE GORSUCH: You've got the

1 example in Maryland of -- of trying to deny the
2 opportunity to adopt the Nineteenth Amendment to
3 the Constitution.

4 MR. THOMPSON: That's right, Your
5 Honor.

6 JUSTICE GORSUCH: And I believe,
7 during the Civil War, there were examples as
8 well of states that in their constitutions would
9 not have permitted absent soldiers from voting
10 in their home state elections but for the fact
11 that state legislatures refused to follow those
12 rules.

13 MR. THOMPSON: That's right, Your
14 Honor, and the Supreme Court of New Hampshire,
15 the Supreme Court of Vermont took this up and
16 said these state substantive limitations, they
17 do not apply because it's a federal function.

18 JUSTICE GORSUCH: So the political
19 saliency point, I think, you know, depends on
20 whose ox is being gored at what particular time.

21 I wanted to just make sure I
22 understood your colloquy with Justice Kavanaugh
23 and I believe the Chief Justice too, the
24 difference between this and the Bush versus Gore
25 circumstance that Chief Justice Rehnquist spoke

1 about in his concurrence. It seems to me there
2 are two types of problems. One is, is a state
3 court actually interpreting a statute or is it
4 going too far afield, to the point where someone
5 might say it's not following the statute?

6 MR. THOMPSON: Yes, that's one --
7 that's the Bush versus Gore concurrence problem.

8 JUSTICE GORSUCH: And then you have a
9 separate problem of when a state court does not
10 even try to interpret the law and just annuls
11 the law outright, and that's this case.

12 MR. THOMPSON: I -- I -- I actually
13 think differently.

14 JUSTICE GORSUCH: Or am I wrong about
15 that?

16 MR. THOMPSON: Yeah, I think,
17 respectfully, Your Honor, you are because, even
18 though we actually think that's an accurate
19 description of what happened here, that's not
20 our position in this Court. Our court is assume
21 that the North Carolina Supreme Court was
22 entirely right about what they did and that it
23 was --

24 JUSTICE GORSUCH: As a matter of state
25 law?

1 MR. THOMPSON: As a matter of state
2 law, but that it is then still impermissible
3 because it is imposing a substantive limitation
4 on the state legislature.

5 JUSTICE GORSUCH: Via this mélange of
6 state constitutional provisions.

7 MR. THOMPSON: Yes, Your Honor.

8 JUSTICE GORSUCH: Okay. All right. I
9 -- I -- I understand it now. Thank you.

10 MR. THOMPSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: In interpreting
14 the state statutes, can a state court rely
15 on canons of interpretation that say interpret
16 those state statutes in light of state
17 constitutional provisions?

18 MR. THOMPSON: Your Honor, so what
19 Chief Justice Rehnquist said in the Bush versus
20 Gore concurrence was he said look to the
21 novelty, look to see whether, when you look at
22 the text, you look at the canons of
23 construction, you look at any other sources, at
24 precedent, you look at all the panoply of
25 different tools available to state court judges,

1 and if it would be a surprise to someone that
2 this is what the statute meant, he had a novelty
3 test. And -- and so that would be the way you
4 would do it.

5 Of course, in this case that's not --
6 JUSTICE KAVANAUGH: Is that -- is that
7 a yes to the question?

8 MR. THOMPSON: Well, Your Honor, yes,
9 you would look at state canons of construction
10 in that very different context.

11 JUSTICE KAVANAUGH: Which could be
12 rooted in the state constitution?

13 MR. THOMPSON: I'm not an expert on
14 that, Your Honor. It's not implicated by --
15 this case -- you can rule in our favor in this
16 case and it will not determine the result of
17 that case.

18 JUSTICE KAVANAUGH: And then the
19 Conference of Chief Justices' brief makes the
20 point I think, as do the other briefs, that
21 nearly all state constitutions regulate federal
22 elections in some way and that that is, as
23 earlier questions have pointed out, some of the
24 early state constitutions did that. What do we
25 do with that historical practice in thinking

1 about how to analyze this question?

2 MR. THOMPSON: In -- at the time of
3 the founding, the original 13 states, our view
4 properly understood was that there was only one
5 state that did it. It was Delaware. It was an
6 outlier. There was no debate whatsoever about
7 the Elections Clause. And it said that, you
8 know, voting will be by ballot.

9 JUSTICE KAVANAUGH: What about the
10 historical practice over time, which has
11 certainly developed in a way that state
12 constitutions do regulate federal elections?
13 What weight, if any, do we place on that? Also,
14 there's some federal statutes as well that are
15 cited by the other side. I just want to make
16 sure you've had a chance to talk about those as
17 well. So the --

18 MR. THOMPSON: Yeah.

19 JUSTICE KAVANAUGH: -- historical
20 practice in the states and those federal
21 statutes.

22 MR. THOMPSON: Your Honor, we think
23 the way to think about this is consistent with
24 the Court's opinion in Bruen last term where it
25 looked very focused on the time of the founding,

1 1791, obviously, we're looking for the public
2 meaning of the Constitution as that founding
3 generation passes away. Adams and Jefferson die
4 on the 50th anniversary of the Declaration of
5 Independence. As we get out of the 1820s, there
6 is very limited information you can get as to
7 the original public meaning of the Constitution.

8 But -- so it can be a confirming --
9 that subsequent history as in Bruen can be a
10 confirming historical tradition that -- that --
11 but it can't undermine what the text and the
12 founding era history show to be the case.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: So could you -- I
17 want to follow up on Justice Kavanaugh's
18 question about Chief Justice Rehnquist's
19 concurrence in Bush versus Gore. So I
20 understand that that's not this case because
21 that was an interpretation of a statute and
22 we're talking about a state constitution. But I
23 take it that if we were talking about an
24 interpretation of a statute you would agree with
25 Chief Justice Rehnquist's approach.

1 MR. THOMPSON: Yes. Yes. Yes, we do
2 agree.

3 JUSTICE BARRETT: And on the theory
4 that at that point the state court would not be
5 acting as a court but would be acting more as a
6 legislature?

7 MR. THOMPSON: That -- that's right,
8 Your Honor. I do want to point out that if the
9 Court were to rule in our favor in this case, it
10 would not necessarily follow that it would have
11 to rule the same way as the Bush versus Gore
12 concurrence for this reason.

13 Statutes are always less problematic
14 under the Elections Clause because they can be
15 repealed. They can be rewritten by the state
16 legislature. So, by definition, a statutory --
17 an impermissible distortion of a statute, it can
18 be remedied by the state legislature.

19 Now it couldn't in Bush versus Gore.
20 There wasn't enough time. But the point is --
21 and we think the concurrence was correct, but I
22 just wanted to make the point that it does not
23 necessarily follow that if the Court rules in
24 our favor in this case that that case would come
25 out the -- the way the -- the concurrence did in

1 Bush versus Gore.

2 JUSTICE BARRETT: I have a question
3 that follows up on that, but before I move to
4 that, I just want to ask you quickly, so if
5 we're asking about novelty, if we're asking
6 about an egregious departure or if we're asking
7 about the distinction between substance and
8 procedure, those are kind of all notoriously
9 difficult lines to draw, you know, but in your
10 colloquy with Justice Sotomayor, you were
11 talking about the lack of judicially manageable
12 standards for, say, free and fair elections.

13 Why don't you think -- why do you
14 think that that's less judicially manageable
15 than, say, deciding whether something is
16 substance versus procedure or an egregious
17 departure, truly novel?

18 MR. THOMPSON: Well, just to be clear,
19 Your Honor, so in terms of figuring out whether
20 there has been an impermissible distortion of a
21 statute --

22 JUSTICE BARRETT: Mm-hmm.

23 MR. THOMPSON: -- that's where you
24 have to look to see whether it's novel.

25 JUSTICE BARRETT: Right. But I

1 thought you said you agreed with that approach.

2 MR. THOMPSON: I do. I'm just saying
3 that in this case where we're -- none of that is
4 implicated.

5 JUSTICE BARRETT: I understand that.

6 MR. THOMPSON: Yeah. Okay. And so I
7 -- I apologize.

8 JUSTICE BARRETT: Well, I guess I
9 think substance and -- substance and procedure,
10 as many of the questions --

11 MR. THOMPSON: Yes.

12 JUSTICE BARRETT: -- that you've
13 gotten indicate, are difficult to separate out.
14 And so I'm saying --

15 MR. THOMPSON: Yeah.

16 JUSTICE BARRETT: -- you're leaning
17 pretty hard on the lack of judicially manageable
18 standards for things like free and fair
19 elections. So I'm saying, why should we take
20 solace in a substance/procedure definition as
21 a -- as a more manageable line?

22 MR. THOMPSON: Well, thank you, Your
23 Honor. And I would point to the Court's
24 decision from 1946, Murphree, where it is
25 talking about the Rules Enabling Act and is

1 setting up the line between substance and
2 procedure.

3 JUSTICE BARRETT: Which is, as a -- as
4 a former civil procedure teacher, I can tell you
5 is a hard line to draw and a hard line to teach
6 students in that context as well.

7 MR. THOMPSON: Well, and the Court
8 could take a functionalist or a formalistic
9 approach, but we're saying take a formalistic
10 approach. Say that if it is a hoop that needs
11 to be jumped through, then it is procedural.
12 And if it's an effort to limit the content --
13 and this is an easy case, that this is obviously
14 substantive, because there was a map and it was
15 thrown in the trash by the courts.

16 And so this isn't even close to the
17 line. But we think my friends on the other
18 side, they're trying to adopt and asking the
19 Court to adopt a functionalist approach.
20 They're saying -- they say on page 57 of the
21 state respondents' brief that, yes, there is
22 something to this idea that the -- that there
23 are limits on the extent to which the state
24 constitution can control the state legislature.
25 The state legislature has to have "a central

1 role." That is a functionalist test if ever
2 there was one. And how do you define the
3 center, and how far from the center can you go?
4 And, oh, by the way, if this is in the center,
5 then the center is pretty much coterminous with
6 the circumference because, you know, we've been
7 --

8 JUSTICE BARRETT: Okay.

9 MR. THOMPSON: -- sidelined
10 completely.

11 JUSTICE BARRETT: I'm sorry to cut you
12 off. I just don't want to take too much of my
13 time. I just want to ask one last question.

14 You were pointing out that state
15 constitutions entrench norms and so they're more
16 problematic than statutes.

17 MR. THOMPSON: Yes.

18 JUSTICE BARRETT: But a lot of state
19 constitutions can be amended by simple
20 majorities inside the referendum process. And
21 so, you know, we know from Hildebrand that if a
22 districting is done by referendum, that's okay,
23 you know, that doesn't violate the Elections
24 Clause.

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

1 state constitution is amended and some
2 substantive provision is added by referendum but
3 it would be problematic, why is that
4 problematic? When it can be changed by a simple
5 majority, why is that more entrenchment and why
6 would we say that having it appear in the
7 Constitution is problematic when, if it appeared
8 through the referendum process and the
9 legislative process, it's not.

10 MR. THOMPSON: Well, respectfully,
11 Your Honor, if we're trying to get at the
12 original public meaning of the Constitution, I
13 think everyone agreed in Arizona that these
14 referendum were unknown at the time of the
15 founding. And so James Madison --

16 JUSTICE BARRETT: But you're stuck
17 with Hildebrand. I thought you weren't trying
18 to get rid of it.

19 MR. THOMPSON: I'm not trying to get
20 rid of it, but if we're trying to say why
21 would -- why would the founders have objected
22 and been worried about partisan gerrymanders in
23 a state constitution, they would have been
24 worried about it because it was maximally
25 entrenching.

1 That's -- if the question is why would
2 they have drawn the line the way they drew the
3 line, that I'm saying they draw -- drew the line
4 is because Madison was worried about
5 entrenchment in the state constitution, and some
6 states may have this procedure, others don't.

7 But typically, you know, if you want
8 to try to solidify something to the maximum
9 extent possible politically, you typically put
10 it into a constitution.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: Yes. Excuse me. Do
14 you agree with me that the Elections Clause
15 doesn't take any position as to who the entity
16 in the state is that qualifies as the
17 legislature?

18 MR. THOMPSON: We -- we think the
19 dissent in Arizona was correct and that the
20 legislature meant the legislature plus the
21 gubernatorial veto.

22 JUSTICE JACKSON: Legislature defined
23 by whom?

24 MR. THOMPSON: Well, I would point the
25 Court to Samuel Johnson's definition where he

1 said the three branches of the legislature --

2 JUSTICE JACKSON: So not the state
3 constitution? That doesn't -- I mean, I -- I
4 read the Elections Clause as essentially giving
5 the entity, whoever it is, that is the
6 legislature, the power to make this decision,
7 but not taking a position as to who the
8 legislature is.

9 MR. THOMPSON: And that is what the
10 Arizona majority said and we're perfectly
11 content to abide by that.

12 JUSTICE JACKSON: Okay. So if that's
13 true, if it is the state's constitution that
14 tells us who the legislature is and whether what
15 they're doing is a valid exercise of legislative
16 authority, then I guess what I don't understand
17 is why constitutional limits on the exercise of
18 that entity on its power don't still apply, even
19 in this context.

20 So, in other words, the Elections
21 Clause says you get the right to make this
22 decision. You have that policy determination.
23 But the state constitution is the thing that
24 gives this particular entity its authority to
25 make any determinations and the state

1 constitution says things like, when you make a
2 determination about things in your policymaking
3 role, in the legislative power that we're giving
4 you, you have to make sure that, you know,
5 people are treated equally.

6 You have -- whatever the
7 constitutional provisions are that we say --
8 that you're saying are so vague or whatnot, are
9 limitations on that entity's legislative
10 authority, not just in this area but in every
11 area, whenever they undertake to make a law.

12 And so I guess what I'm trying to
13 understand is why are you suggesting that in the
14 context of the Elections Clause, when this
15 entity would ordinarily be bound by all of the
16 limitations in the state constitution in its
17 legislative authority role, why suddenly in this
18 context do you say, no, no, no, all those other
19 constitutional provisions that would bind or
20 constrict legislative authority that the state
21 gives you because you are the state legislature,
22 right, why -- why do those evaporate in this
23 world?

24 I read it as though the state court is
25 essentially saying our constitution authorizes

1 you to be the legislature, only insofar as you
2 act in accordance with our constitution's
3 tenets. And you haven't done that in this
4 instance.

5 Why am I wrong about sort of
6 conceptualizing it in that way?

7 MR. THOMPSON: Because it's a federal
8 function. And that's what Leser teaches. So
9 there was a constitutional prohibition on the
10 Maryland legislature allowing women to vote
11 and --

12 JUSTICE JACKSON: No, I'm asking --
13 can I just -- when you say "federal function," I
14 guess maybe that's where I'm getting hung up. I
15 thought it was a determination, a delegation of,
16 you know, policymaking power in the sense of you
17 get to make this decision.

18 But the authority for that body,
19 wherever it is, that's called the legislature,
20 comes from the state because, you know, that --
21 that was my example about we have two different
22 entities in the state fighting. Who's the
23 legislature, right? It's -- what the
24 constitution of the state says that gives you
25 the power, entity X, to be the one who is the

1 legislature making this elections decision.

2 If I'm right about that, then what is
3 being delegated from the federal Constitution is
4 not your power as a legislature, it is just
5 delegating to you the decision about time, place
6 and manner, which is fine, but you have to do
7 that consistent with the authority that you have
8 as an entity to make legislative decisions, and
9 that comes from the state constitution.

10 MR. THOMPSON: And U.S. Term Limits
11 says that is not right.

12 JUSTICE JACKSON: All right.

13 MR. THOMPSON: That the premise of
14 your question is not right.

15 JUSTICE JACKSON: All right. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Katyal.

20 ORAL ARGUMENT OF NEAL K. KATYAL
21 ON BEHALF OF THE PRIVATE RESPONDENTS

22 MR. KATYAL: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 For 233 years, states have not read
25 the Elections Clause the way you just heard.

1 There are two reasons to affirm. One is that
2 when enacting legislation, there's no such thing
3 as an independent state legislature.

4 The other is that North Carolina
5 statutes authorize what the North Carolina court
6 did, all focus on the first.

7 Petitioner's idea that state
8 legislatures created by state constitutions are
9 independent of them is wrong. It is rejected by
10 the Articles of Confederation, rejected by the
11 early state constitutions, rejected by the
12 founding practice, especially New York, where
13 judges vetoed federal election bills.

14 It's also rejected by this Court in
15 cases such as Smiley and Hildebrand. Just three
16 years ago in *Rucho*, this Court promised state
17 constitutions can provide standards for state
18 courts to apply and singled out for approval a
19 Florida court decision that used a state
20 constitution to invalidate a federal map.

21 To accept Petitioner's claim, you'd
22 have to ignore the text, history and structure
23 of our federal Constitution as well as nearly
24 every state constitution today. Petitioners say
25 for two centuries, nearly everyone has been

1 reading the clause wrong.

2 That's a lot of wrong, and a lot of
3 wrong past elections. Frankly, I'm not sure
4 I've ever across a theory in this Court that
5 would invalidate more state constitutional
6 clauses as being federally unconstitutional,
7 hundreds of them from the founding to today.

8 It's worth taking a pause to think
9 about what Petitioners are saying. They claim
10 the word "legislature" means a species of state
11 law that has literally never existed. State law
12 making, unconstrained by a state constitution,
13 that the founders intended to create that
14 animal, surely someone would have said
15 something.

16 Finally the blast radius from their
17 theory would sow elections chaos forcing a
18 confusing two-track system with one set of rules
19 for federal elections and another for state
20 ones.

21 Case after case would wind up in this
22 Court with a political party on either side of
23 the V. That would put this Court in a difficult
24 position instead of leaving it to the 50 states.

25 JUSTICE THOMAS: Mr. Katyal, would you

1 spend some time on discussing the source of the
2 state court's involvement in a federal election.

3 MR. KATYAL: Yeah, we --

4 JUSTICE THOMAS: I understand the
5 Court is created under state constitution, but
6 this is a federal matter.

7 MR. KATYAL: Correct, and we for
8 reasons Justice Kavanaugh said, Your Honor,
9 think that Palm Beach basically says there is
10 sort of federal issue here with respect to
11 Elections Clause, and we think obviously the
12 state court got it right and didn't violate the
13 Elections Clause, but we think that's the source
14 of authority here.

15 And, Justice Thomas, if I may, in two
16 decades of arguing before you, I have waited for
17 this precise case because it speaks to your
18 method of interpretation, which is history. And
19 the founding evidence here is overwhelming, and
20 I'd point you to four things.

21 First, the Constitution uses the same
22 word, legislatures, as the Articles of
23 Confederation, and 10 state constitutions under
24 the Articles regulated federal delegates.

25 Second, after the Constitution was

1 ratified, states kept regulating it. States
2 like Delaware and Maryland and Mississippi
3 expressly regulated federal elections, as did
4 three quarters of the states.

5 Third, New York in 1792, this example
6 is really important, I think it's truly action
7 as opposed to the talk from Schuyler and Justice
8 Story. In 1792, the council revision, which has
9 four people on it, three judges, one governor,
10 vetoed a federal elections bill for the
11 selection of delegates to the House of
12 Representatives. It was a time, place, manner
13 thing. Why did they -- why did they veto it?
14 They said because it is "repugnant to the state
15 constitution." That is very strong evidence.
16 That's exactly the example you used in Smiley to
17 build your decision there.

18 And lastly and most importantly, the
19 dog never barked. The Federalist Papers have
20 three different Federalist Papers on everything
21 he's been talking about the Elections Clause.
22 Not a person said anything like that they were
23 trying to create this strange animal. This
24 isn't looking like into a crowd and trying to
25 pick out your friends. This is like looking

1 into the Lollapalooza crowd and picking
2 out everyone who speaks 15 languages.

3 JUSTICE GORSUCH: I don't know about
4 --

5 CHIEF JUSTICE ROBERTS: Okay. That --

6 JUSTICE GORSUCH: -- Lollapalooza.
7 (Laughter.)

8 JUSTICE GORSUCH: But, while we're
9 looking at crowds, Mr. Katyal -- I'm sorry,
10 Chief. You want to go ahead?

11 CHIEF JUSTICE ROBERTS: No, no. Go
12 ahead. I'm still trying to sort the analogy
13 out.

14 JUSTICE GORSUCH: You want to touch
15 the Lollapalooza, yeah, yeah.

16 (Laughter.)

17 JUSTICE GORSUCH: Right. That's --
18 that was a Lollapalooza.

19 It is a small point, but, on Smiley,
20 on -- on the veto question, just narrowly on the
21 veto question, you know, Locke, Montesquieu, The
22 Federalist Papers treat that as a legislative
23 power and -- and a sharing of the legislative
24 power. And it's in Article I, which kind of
25 suggests it's -- the founders considered it a

1 legislative power. So I -- I guess I'm a little
2 less moved by -- by -- by that Lollapalooza than
3 you are. Maybe you can help me out, though.

4 MR. KATYAL: Sure. Of course. And I
5 think it's reflective in the Chief Justice's
6 comments to my friend on the other side. There
7 is certainly something legislative there, but I
8 think that the overall point of Smiley is to say
9 -- and my friend says this in the reply brief at
10 page 6 -- you take legislatures as you find
11 them. He agrees with that proposition. That's
12 what Smiley did as well. The legislature as it
13 found -- as it was found in Minnesota in
14 Smiley was --

15 JUSTICE GORSUCH: And nobody here
16 thinks the North Carolina Supreme Court is
17 exercising a legislative function. We all agree
18 on that too, right?

19 MR. KATYAL: Correct. Correct.

20 JUSTICE GORSUCH: Okay. So that kind
21 of takes care of that argument --

22 MR. KATYAL: Well --

23 JUSTICE GORSUCH: -- I mean, doesn't
24 it?

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

1 think --

2 JUSTICE GORSUCH: What am I missing?

3 MR. KATYAL: -- underlying Smiley is
4 something more specific than that. It's
5 basically saying that the conditions on the
6 lawmaking power -- that's the language at page
7 365 -- apply, and, certainly, one condition on
8 the lawmaking power only in two states at the
9 founding but more at the time of Smiley was the
10 governor's veto.

11 JUSTICE GORSUCH: Yeah.

12 MR. KATYAL: But, here --

13 JUSTICE GORSUCH: And -- and that's
14 because, if we want to look at our friends in
15 the Federalist Papers and everywhere else, that
16 was considered sharing of -- there was no
17 absolute separation of powers. There was an
18 exception that --

19 MR. KATYAL: Right.

20 JUSTICE GORSUCH: -- that they had to
21 be mixed. You know -- you know your Federalist
22 41 and 47 and 51 better than I do, I'm sure.
23 But -- but that that was a legislative function
24 that was given to the President and there it is
25 in Article I.

1 MR. KATYAL: Not disagreeing with that

2 --

3 JUSTICE GORSUCH: Okay. All right.

4 MR. KATYAL: -- Justice Gorsuch. What
5 I am saying is that Smiley focused on two
6 things, the word "legislature" but also the word
7 "regulate."

8 JUSTICE GORSUCH: All right.

9 MR. KATYAL: And together they create
10 a lawmaking system, and what Smiley says is
11 you're then subject to the constraints of that
12 lawmaking system, one of which was judicial
13 review, well-established at the founding, far
14 more established than the veto.

15 JUSTICE GORSUCH: All right. Now
16 we're off on another tangent. Go for it.

17 MR. KATYAL: So far more established
18 than the veto. And so, you know, seven
19 different states had judicial review at the
20 founding. If the method of Smiley -- the method
21 of Smiley is to say, look, the founders knew
22 about the veto because it was in two states, did
23 they textually exclude it in the language? The
24 answer was no.

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

1 -- I don't hear your friend on the other side
2 really questioning now at least whether there is
3 judicial review. I understood his primary
4 argument to be, you know, even though the
5 states, we agree, he says, can come in and look
6 at this, what they have to be doing is applying
7 federal law.

8 And so that's the part that I keep
9 getting hung up on. Can you -- can you help? I
10 mean, we have said at certain times here in the
11 questioning today that various entities are
12 exercising legislative power or not, or maybe
13 the Court is exercising legislative power. I
14 thought we told -- we -- we were able to tell
15 when something is a legislative power by
16 reference to the state's constitution, that they
17 tell us when legislative power is being
18 exercised at all, validly or whatever. Am I
19 wrong about thinking about it in this way?

20 MR. KATYAL: You're absolutely right,
21 Justice Jackson. So two points. One, we can't
22 figure out what Petitioners' theory honestly is.
23 What they just told you is the opposite of what
24 they started with on page 1 of their brief,
25 where they said state courts have no role. They

1 said legislature means legislature. But then
2 you get caveat after caveat. It includes
3 governor. It includes referenda. It includes
4 independent commissions in the reply brief they
5 say. Then they state, well, but state courts
6 can't do it, but maybe they can for federal
7 review, maybe they can if it's procedural or
8 non-abstract. I mean, the one thing we know,
9 they're not making a textual argument anymore.

10 Now, with respect to this federal
11 function argument you were asking about, Smiley
12 dead rejects it. That's exactly what the
13 Minnesota Supreme Court said below. They
14 actually called it a federal agency. And what
15 this Court did unanimously reversed and it said
16 no because, here, you are acting "as a lawmaking
17 body," which is what I was saying to Justice
18 Gorsuch from page 364.

19 It's the exact opposite of his example
20 of -- of the Leser case. Leser is about Article
21 V. It's about a totally different text. The
22 text of Article V is application of the state
23 legislatures. The whole point of Smiley,
24 Justice Jackson, is to say this is different
25 because it's a lawmaking system not just because

1 of the word "legislature" but also because of
2 the word "regulation." There is no regulation
3 that has ever existed that has been exogenous to
4 the state constitution. It's literally a
5 species that never existed.

6 JUSTICE ALITO: Mr. Katyal, can I ask
7 you some questions about the boundaries of your
8 argument. So suppose a state constitution says
9 that congressional districts will be determined
10 by the state supreme court exercising
11 legislative power. Is that consistent with the
12 Elections Clause?

13 MR. KATYAL: We don't think it would
14 be, Your Honor. So we think, in general, there
15 may be some redefinition of the legislature that
16 Arizonans -- the Arizona decision might permit.
17 That isn't what we are arguing here. We're
18 talking about ordinary checks and balances like
19 judicial review, and so --

20 JUSTICE ALITO: All right. Suppose
21 that the state constitution says that the
22 legislature can adopt congressional maps, but in
23 that instance, the state supreme court shall sit
24 as a council of revision to determine whether
25 the maps are fair.

1 MR. KATYAL: Yes.

2 JUSTICE ALITO: Is that okay?

3 MR. KATYAL: We do think that the
4 history there would suggest it is. Nothing in
5 our argument, of course, depends on it. Again,
6 ordinary judicial review, that is all we think
7 you should reach in this case. Not that, but
8 the New York example is exactly that.

9 JUSTICE ALITO: Well, that's not
10 really judicial review. That is because they're
11 not --

12 MR. KATYAL: Correct.

13 JUSTICE ALITO: -- reviewing it for
14 anything. So --

15 MR. KATYAL: Right.

16 JUSTICE ALITO: -- what was your
17 answer there? That is okay or that is not okay?

18 MR. KATYAL: Nothing in our position
19 depends on it, Your Honor, but the historical
20 test, which is what he's using, New York in
21 1792, did exactly that.

22 JUSTICE ALITO: Well, I'm not sure I
23 understand your argument, but, okay, on to
24 another example. Suppose the state supreme
25 court says the essence of our state constitution

1 is fairness and we don't think that the map
2 adopted by the legislature is fair. Is that
3 okay?

4 MR. KATYAL: The constitution says
5 that the map adopted by the legislature is or
6 the state court says that?

7 JUSTICE ALITO: The state constitution
8 -- the state supreme court says that the essence
9 of our state constitution is fairness. It
10 doesn't point to a particular provision in the
11 state constitution. It just says the essence of
12 our state constitution is fairness to all of our
13 citizens, and the map adopted by the legislature
14 is not fair.

15 MR. KATYAL: Yes, Your Honor, we think
16 that would -- again, nothing turns on that here,
17 but the answer to your question is yes, we think
18 that would be constitutional, and the reason why
19 is because there's a trident of safeguards that
20 would prevent any sort of abuse. The first one,
21 the safeguard, is in the state process itself.
22 As Judge Sutton's work explains, state courts
23 have all sorts of mechanisms to restrain them,
24 including popular accountability and, as Justice
25 Barrett pointed out a moment ago, a much easier

1 amendment process.

2 JUSTICE ALITO: Well, that's a little
3 bit -- that's a little bit off the point. As
4 far as popular accountability is concerned, we
5 have seen examples of state -- many state
6 supreme courts are elected. And some states
7 allow partisan elections. So there's been a lot
8 of talk about the impact of this decision on
9 democracy. Do you think that it furthers
10 democracy to transfer the political controversy
11 about districting from the legislature to
12 elected supreme courts where the candidates are
13 permitted by state law to campaign on the issue
14 of districting?

15 MR. KATYAL: Yes Your Honor, we do,
16 and the reasons for that are threefold. Number
17 one, there are any number of checks on that
18 process, including, as Justice Barrett says, the
19 amendment process and other things that Judge
20 Sutton warns about.

21 Second, the founders laced into the
22 Elections Clause itself a specific remedy for
23 your concern, which is that Congress can come in
24 and supplant -- any particular state court
25 decision they don't like, they can say this

1 North Carolina map should be reinstated, they
2 could supplant all the state constitutions.

3 JUSTICE ALITO: But can't you say the
4 same thing about allowing the legislature to
5 do -- which is popularly elected, to do the --
6 to make the map? Congress can always come in.

7 MR. KATYAL: Sure, and that's exactly
8 what Smiley and -- and -- Smiley rejected, this
9 idea that there's only -- that that's the one
10 remedy, in Wesberry as well. They said that's
11 just indicia of the fact that the founders
12 distrusted state legislatures and wanted checks
13 and balances. Here, of course, we're only
14 seeking ordinary ones.

15 And, third, with respect to your
16 question of the -- the catastrophic
17 consequences, we think, for reasons Justice
18 Kagan said, that cuts entirely the other way. I
19 mean, the blast theory by their -- by their
20 theory -- blast radius by their theory starts at
21 the size extra large. It starts with
22 invalidating 50 different state constitutions
23 today. Elections clauses are in 27. All states
24 have equal protection clauses, speech clauses,
25 assembly clauses. Thirty of them guarantee the

1 right to a secret ballot. There's vote -- five
2 of them, voter ID --

3 JUSTICE ALITO: And what about -- what
4 about the approach set out by Justice -- by
5 former Chief Justice Rehnquist? Does that -- is
6 that also a lollapalooza?

7 MR. KATYAL: No --

8 JUSTICE ALITO: Does that have a huge
9 blast radius?

10 MR. KATYAL: No, Your Honor, as long
11 as we understand, as Justice Kavanaugh said a
12 moment ago, that that is about statutes. And
13 here --

14 JUSTICE ALITO: Well, as applied --
15 how about if it's applied to a state
16 constitution --

17 MR. KATYAL: Right.

18 JUSTICE ALITO: -- as well.

19 MR. KATYAL: So for 233 years, this
20 Court has never second-guessed a state court
21 interpretation of its own constitution in any
22 context. Forget about the election --

23 JUSTICE ALITO: Well, I don't think --
24 is that true?

25 MR. KATYAL: I --

1 JUSTICE ALITO: We have to decide
2 whether there is an adequate and independent
3 state ground, right, for --

4 MR. KATYAL: Right.

5 JUSTICE ALITO: -- a rule that's --
6 that a state court invokes?

7 MR. KATYAL: Yep. You certainly do
8 decide it. I don't think you've ever
9 second-guessed it and said they've gotten it
10 wrong. My friends from the --

11 JUSTICE ALITO: We've never said that
12 one is inadequate?

13 MR. KATYAL: I don't think you've ever
14 said a constitutional provision is, Your Honor.

15 JUSTICE ALITO: Well, have we ever
16 said that a state law is inadequate --

17 MR. KATYAL: Yes. So --

18 JUSTICE ALITO: -- or rule?

19 MR. KATYAL: So that's -- and that's
20 the distinction I was drawing, referring to
21 Justice Kavanaugh. With respect to -- with
22 respect to a statute, there's one set of
23 standards, but with a constitution there does
24 have to be a sky-high standard. So we don't
25 doubt, Justice Alito, if the state constitution

1 said, for example, that absentee balloting is
2 required, and some judge can come in -- or state
3 statute even, some judge came in and said the
4 state supreme court said, you know, we don't
5 like absentee voting, we like -- voting is a
6 civic thing, you've got to do it in person
7 for policy reasons --

8 JUSTICE ALITO: I thank you.

9 MR. KATYAL: -- then --

10 JUSTICE ALITO: Thank you, Mr. Katyal.
11 I have a few more questions, but I'll wait for
12 the next period.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Mr. Katyal, you quote in your brief,
15 and we've heard it this morning as well, the
16 language from Rucho that says -- says provisions
17 in state constitutions can provide standards and
18 guidance for state courts to apply in
19 redistricting. Do you think the phrase "fair
20 and free elections" is providing standards and
21 guidelines?

22 MR. KATYAL: I -- I do. Let me say
23 two things about that. Number one, Your
24 Honor --

25 CHIEF JUSTICE ROBERTS: Just before

1 you -- I'll let you get in, but providing
2 standards and guidelines in the context of an
3 opinion that emphasized how unmanageable and
4 indeterminate the various proposals were --

5 MR. KATYAL: You said --

6 CHIEF JUSTICE ROBERTS: -- with
7 respect to partisan gerrymandering --

8 MR. KATYAL: Right. But you said that
9 about the federal -- the federal review. And I
10 think it's very different at the state level,
11 for two reasons. One is, of course, states
12 don't have the same type of justiciability
13 concerns. And, second, you anchored it in
14 really a political legitimacy point about this
15 Court at page 2507. You said we can't -- we're
16 one Supreme Court, these cases are inherently
17 political. Everything is going to wind up here
18 and be seen and through a -- seen by the
19 outsiders through a political lens.

20 I think that point cuts the other way
21 with respect to this case because if you left it
22 to the decentralized 50 state systems with their
23 own traditions -- and this is something that
24 Judge Sutton's work talks about -- yes, you can
25 have an abstract clause. Many state

1 constitutions do. And for the most important of
2 reasons that suggests actually -- you know, that
3 -- those are sometimes the most fundamental
4 provisions to the state. That's what the state
5 constitutional law scholars' brief explains. So
6 the idea that you could just nullify those by
7 saying they're too abstract is really
8 problematic.

9 And the other thing I would say is
10 when you use that language, he just chalked it
11 up to you saying that's about the congressional
12 proposals and -- he said it was about it -- that
13 the words that "we express no view" apply to
14 that language that you just read. That's just a
15 flat misreading of the case. You used that
16 language I said, then there was some talk about
17 congressional proposals and the U.S. Congress,
18 that's what you said you expressed no view on.

19 CHIEF JUSTICE ROBERTS: Just --

20 MR. KATYAL: Five Justices -- sorry.

21 CHIEF JUSTICE ROBERTS: Yeah. And
22 just to be clear, when you say "you," you mean
23 the Court, right?

24 MR. KATYAL: Exactly.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. KATYAL: Yes.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: When -- at
4 page -- near the end of your brief, at page 49,
5 you say that this Court always has jurisdiction
6 to intervene in rare cases where state courts
7 act lawlessly to obstruct federal rights. And
8 you look to Chief Justice Rehnquist's opinion as
9 saying that the standards would be reviewable
10 when the -- they significantly depart from
11 well-established meaning of state law.

12 When you're falling back in that
13 situation, do you bump into Mr. Thompson when
14 he's falling back the other way?

15 (Laughter.)

16 MR. KATYAL: Ha. No, because he
17 actually just disclaimed it. He said I'm not
18 second-guessing the North Carolina state
19 legislature. So the separate opinion that was
20 written in this case earlier, all those
21 arguments, I take it, are now off the table
22 about the North Carolina court going too far or
23 misreading its own constitution.

24 For us, Mr. Chief Justice, because
25 this Court has never really confronted the

1 situation of saying a state court got it wrong
2 on its own constitution, we think that standard
3 has to be sky high. It is the, you know,
4 ultimate affront to sovereignty of a state to
5 say its own state court got things wrong.

6 And we'd say the corollary is it's an
7 equal affront to say a state can't even have
8 these clauses in its constitution, that they're
9 unenforceable. You know, things like the free
10 elections clause have been around since 1776 in
11 North Carolina. They predate the Declaration of
12 Independence.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas -- Thomas, anything
16 further?

17 JUSTICE THOMAS: Actually, I don't,
18 but I've been waiting 30 years to ask him a
19 question.

20 (Laughter.)

21 MR. KATYAL: That was pretty funny.

22 CHIEF JUSTICE ROBERTS: Drum roll.

23 JUSTICE THOMAS: You said that the
24 this Court doesn't normally second-guess state
25 court interpretations of their own constitution.

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

2 MR. KATYAL: Yeah, I don't think it
3 was -- I think you can declare it
4 unconstitutional, any number of things like
5 that. But to say that they just got their own
6 constitution wrong is -- just as a matter of
7 interpretation, that is, as a --

8 JUSTICE THOMAS: But it was purely an
9 interpretation of their own constitution and --

10 MR. KATYAL: And a violation of
11 federal law, right? So --

12 JUSTICE THOMAS: Well, yeah, I mean,
13 but that's just a way -- I mean, you can
14 raise -- you -- it's -- in the end, it was
15 invalidating their interpretation of their
16 redistricting principles.

17 MR. KATYAL: And -- and, Justice
18 Thomas, our only point to you, and it's the same
19 point picking up on Justice Kavanaugh's question
20 to my friend, at page 78 of Bush versus Palm
21 Beach Canvassing Board, you said -- the Court
22 said that -- that sovereignty is not --

23 JUSTICE THOMAS: Well, I was there
24 too, yeah.

25 MR. KATYAL: Sovereignty was at its

1 apex when you're talking about state
2 constitutions and interpretations by state
3 courts.

4 JUSTICE THOMAS: Let me ask this, just
5 as -- it may be a bit unfair. If the state
6 legislature had been very, very generous to
7 minority voters in their redistricting, and the
8 state supreme court said under their state
9 constitution, that this was -- violated their
10 own state constitution of North Carolina, would
11 you be making the same argument?

12 MR. KATYAL: So the -- if -- yes, I
13 mean there is --

14 JUSTICE THOMAS: You just -- Justice
15 Gorsuch said it seems as though it depends on
16 whose ox is being gored. So I'm changing which
17 ox is being gored.

18 MR. KATYAL: Yeah. No, we don't think
19 anything turns on the substance of the
20 individual decisions --

21 JUSTICE THOMAS: But you would still
22 be there --

23 MR. KATYAL: Our point --

24 JUSTICE THOMAS: -- making the same
25 point?

1 MR. KATYAL: Our point to you, Justice
2 Thomas, is that this Court has never
3 second-guessed state court interpretations of
4 their own constitution. And so if there's a
5 general clause and it happens to benefit or hurt
6 --

7 JUSTICE THOMAS: Yeah.

8 MR. KATYAL: -- minority voters, as
9 Judge Sutton says, that's a process the states
10 deal with. And as I was saying to Justice
11 Alito, there's a special safeguard here, which
12 is the second half of the Elections Clause which
13 allows Congress to supplant whatever that errant
14 state court decision is.

15 JUSTICE THOMAS: So when is it --
16 again, I'd like you to just tell me, what is the
17 source of the authority for the state of North
18 Carolina's supreme court to be involved in a
19 federal election? I understand that there's no
20 disagreement about a state legislator. But this
21 is a federal election, and it's similar to the
22 problem we had with the presidential election in
23 Bush v. Gore.

24 MR. KATYAL: It's just like Smiley,
25 Your Honor. It's the exact same thing. So

1 there is a federal issue. The North Carolina
2 court is interpreting the elections clauses and
3 powers, and -- and the question is whether or
4 not they have misread it or not. And so I think
5 that's the source of the -- of the substantive
6 -- alleged substantive violation here. I think
7 you're absolutely right, the spirit of your
8 question, for 233 years, this Court's never
9 gotten involved and said, hey, we're going to,
10 you know, rove and say the North Carolina court
11 got it wrong or their provision was too abstract
12 for enforcement or anything like that. Rather,
13 this Court has always stayed on the sidelines,
14 let the state process unfold, subject to that
15 other part of the trident check, Congress in the
16 second half of the Elections Clause.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: I was asking some
19 questions earlier about instances in which it is
20 necessary for a federal court in applying
21 federal law to delve into the meaning of state
22 law. And while federal courts generally take
23 state law to be whatever the state supreme court
24 says it is, there are instances where that is
25 not the rule, and I mentioned one.

1 Put aside for a moment your
2 distinction between a state constitution and a
3 state statute. Whether -- whether a rule
4 invoked by the state supreme court is an
5 adequate rule, in deciding whether there is an
6 adequate and independent state ground for a --
7 for a rule that the -- the state supreme court
8 applies, right, that's an instance of that?

9 MR. KATYAL: Correct.

10 JUSTICE ALITO: All right. How about
11 the Contract Clause, whether the -- was there a
12 violation of the Contract Clause? Doesn't the
13 Court have to determine whether there really was
14 a contract under the law of the state at the
15 time when the contract in question was formed?

16 MR. KATYAL: Right. We don't doubt
17 that. It's just under a very deferential
18 standard review. We're not disagreeing.

19 JUSTICE ALITO: What about the Takings
20 Clause, was there a taking of property?
21 Property is defined by state law, but what -- if
22 a state supreme court says this thing is not
23 property, does that answer the federal question?

24 MR. KATYAL: Again, not -- not -- you
25 know, yes, we think all of those are examples of

1 this Court looks into it. Here, of course,
2 we're talking about state constitutions being
3 interpreted by state courts, so it's a little
4 different than these scenarios, but yes.

5 JUSTICE ALITO: All right. What about
6 if there's -- along the same lines, what if
7 there is a claim that there was a deprivation of
8 property? Once again, property is primarily
9 defined by state law, but does the state supreme
10 court have free rein to say, no, there was no
11 deprivation because there was no property?

12 MR. KATYAL: So the state court does
13 under its own processes depending on the text
14 and the history in that state, which differs
15 from state to state for reasons Judge Sutton
16 says, and this is the same answer I'd given to
17 Justice Thomas. We don't doubt that there is
18 some review by this Court in the most -- in
19 extreme circumstances. It's just that the
20 standard is incredibly high.

21 What my friend is saying is, well,
22 because it's a federal function, it's somehow
23 immunized from state court review altogether.
24 And that's just not -- there's no conflict
25 between federal and state schemes. It's like,

1 for example, Spending Clause litigate --
2 legislation like the Clean Air Act or Clean
3 Water Act, which require the passage of state
4 laws to enforce, but nobody says they're exempt
5 from the state constitution.

6 JUSTICE ALITO: Well, you say the
7 standard is incredibly high, but does it go up
8 to the stratosphere or, you know, into outer
9 space? When you say that it would be okay for a
10 state to set up the state supreme court as the
11 council of revision or that it would be okay for
12 the supreme court -- a state supreme court
13 simply to say the essence of our constitution is
14 fairness, you would say that that can be done.
15 So that sounds like no standard at all.

16 MR. KATYAL: Again, Your Honor, we're
17 saying ordinary checks and balances, that's all
18 you have to do here, but, yes, we think there
19 are other checks that deal with that, those
20 precise problems. If there is in a clause
21 that's abstract and being misinterpreted, both
22 the state process itself as well as Congress can
23 come in and supplant that.

24 So their -- you know, those
25 accusations -- this is Judge Griffith's brief --

1 are made all the time about even decisions by
2 this Court. He points to Citizens United and
3 Heller as examples. And what this Court has --
4 what he says is there's a special check here
5 because you have Congress being able to come in
6 --

7 JUSTICE ALITO: But Congress can -- I
8 don't know why that's an answer because Congress
9 can come in anytime, under any circumstances, no
10 matter what we say the Elections Clause means.
11 Congress can always come in and --

12 MR. KATYAL: Right.

13 JUSTICE ALITO: -- establish the
14 manner of conducting congressional elections.

15 MR. KATYAL: But what this Court said
16 is that what that clause reflects is a distrust
17 of state legislatures. That's what you said in
18 Hildebrand and in Smiley, and there -- excuse
19 me, in Smiley and Wesberry, and in those cases,
20 you rejected that precise argument. And so it
21 is a check on judicial adventurism to the extent
22 you're worried about it.

23 JUSTICE ALITO: What is the check on
24 -- last question. What is the check on an
25 appointed state supreme court? Suppose a state

1 supreme court, the justices of the state supreme
2 court had the same protection against removal
3 and all of the other protections that federal
4 court --

5 MR. KATYAL: Yeah.

6 JUSTICE ALITO: -- federal courts do.
7 What is the check on them?

8 MR. KATYAL: So it is the amendment
9 process, which, as Justice Barrett -- Justice
10 Barrett said, I think, boomerangs on them when
11 you try to exempt state statute -- statutes
12 because amendment processes are often easier.
13 Judge Sutton's book talks about that. And you
14 have the congressional check.

15 And my last point to you, Justice
16 Alito, is, what's the check on the other side?
17 All he's giving you is federal constitutional
18 review, which is, you know, only a few clauses
19 of the Constitution, as Rucho says, many of
20 them nonjusticiable.

21 So the states have regulated this for
22 233 years in a particular way. The blast radius
23 from his theory can extend to state statutes. I
24 understand he's disclaiming them, but the next
25 petitioner won't, the theory's going to apply

1 and may even reach delegations to state
2 officials, which would be a -- you know, a
3 dramatic change, as the Ben Ginsberg amicus
4 brief explains.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: Counselor, could
9 you deal with the examples, the historical
10 examples your colleague spoke about as
11 supporting his position, Virginia's 3/5 rule,
12 Maryland's Nineteenth Amendment rule? I think
13 your brief does an adequate job on the Story
14 issue, but --

15 MR. KATYAL: So -- so the Maryland one
16 is just about the amendment process, and that's
17 Leser, and that's just a totally different text
18 and so on and certainly doesn't bear on the
19 original meaning of the Elections Clause.

20 With respect to Virginia, it
21 absolutely cuts the other way. That's the
22 1830s.

23 JUSTICE SOTOMAYOR: That's what I
24 thought.

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

1 you know, time period of the founding, and we
2 have provision after provision start even before
3 the founding with the Articles of Confederation
4 which I think blow apart their historical
5 theory.

6 But, with respect to Virginia, yeah,
7 one person said this would violate the Elections
8 Clause and, you know what happened, James
9 Madison and the Chief Justice of this Supreme
10 Court, John Marshall, did -- voted for the bill
11 even after that objection. So, if anything, it
12 cuts the other way. But I am not aware of a
13 decision by this Court that invalidates early
14 state constitutional provisions as being
15 federally unconstitutional in the way that this
16 theory does.

17 JUSTICE SOTOMAYOR: And you don't take
18 quarrel with the fact that a state could
19 interpret a state constitution in a way that
20 violates the federal Constitution? That's what
21 they're arguing here.

22 MR. KATYAL: Right. No, we don't
23 doubt that. It's just under, as we were talking
24 about, that stratospheric standard of review
25 because it's never -- to my knowledge, it's

1 never really happened by this Court. And I
2 think Bush versus Palm Beach Canvassing Board
3 says it's got to be the highest standard, higher
4 than Chief Justice Rehnquist's opinion in Bush
5 versus Gore.

6 JUSTICE SOTOMAYOR: Well, I -- I
7 thought of those cases as basically saying that
8 there was a due -- federal due process problem
9 if an interpretation violates due process in
10 some way.

11 MR. KATYAL: Correct. There's a
12 novelty concern, particularly in the criminal
13 context, about adequate and independent state
14 grounds, picking up on Justice Alito's point.
15 Novelty I don't think applies quite here because
16 we're not talking about fair warning in the same
17 way as the federal context.

18 JUSTICE SOTOMAYOR: Exactly, but I
19 always thought of those cases, those extremes
20 being rooted in the federal Constitution's due
21 process.

22 MR. KATYAL: It can be in that
23 context. Here, I think it's rooted in the
24 Elections Clause itself, which was my answer to
25 Justice Thomas.

1 JUSTICE SOTOMAYOR: Okay.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: If I could go over
4 some of the ground that you've been asked about
5 about the Rehnquist concurrence and make sure I
6 understand your position and the issues that are
7 in front of us and so forth.

8 So, as I understand it, the -- the one
9 area of agreement I found between you and
10 Mr. Thompson is you also think that the
11 Rehnquist concurrence is about statutes, not
12 about Constitution --

13 MR. KATYAL: Correct.

14 JUSTICE KAGAN: -- as in this case.
15 So your view, as Mr. Thompson's view, is that
16 the Rehnquist concurrence by its terms isn't
17 implicated here?

18 MR. KATYAL: Correct.

19 JUSTICE KAGAN: But you say there, you
20 say you have no doubt that there's a kind of
21 corollary for the constitutional side of things.

22 MR. KATYAL: Yes.

23 JUSTICE KAGAN: So does that mean it's
24 not just like there may be a corollary? You
25 think that there is a corollary?

1 MR. KATYAL: Yeah, I think the
2 Elections Clause at some point could be violated
3 in the -- like the example of absentee voting
4 that I gave you a moment ago.

5 JUSTICE KAGAN: Yeah, but you say so
6 it's sky high, it's stratospheric, it's
7 whatever. So, when you look at the Rehnquist
8 concurrence, and it was only a concurrence, so
9 it didn't really have to pick a single standard,
10 there were actually a lot of different standards
11 floating around in the Rehnquist concurrence,
12 and some of them sound easier to satisfy than
13 others. You know, like, one is like not a fair
14 reading, which doesn't sound all that difficult.
15 One is absurd, which sounds a lot more
16 difficult. But you're saying even more than the
17 highest --

18 MR. KATYAL: I mean --

19 JUSTICE KAGAN: -- statement in the
20 Rehnquist opinion --

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

22 JUSTICE KAGAN: -- because the
23 Constitution is different?

24 MR. KATYAL: Right, I think absurd,
25 inconceivable is what he uses at one place, or

1 no basis. The Conference of Chief Justices, all
2 50 Chief Justices are before you saying at page
3 19 of their brief the standard is no plausibly
4 defensible basis for the state court's
5 determination. I think all of these, regardless
6 of the words that are used here, Justice Kagan,
7 I think --

8 JUSTICE KAGAN: But you're saying it
9 should be higher on the constitutional side than
10 on the statute.

11 MR. KATYAL: Correct.

12 JUSTICE KAGAN: And why is that?

13 MR. KATYAL: Because we are -- it is
14 the apex, as Palm Beach Canvassing Board says,
15 of a state's sovereignty, as a state's
16 constitution. And to say that their own high
17 court got it wrong is really a very grave thing.
18 I -- I still am not sure that that's ever
19 happened in any context from this Court.

20 JUSTICE KAGAN: And -- and whatever
21 the exact wording of the standard is that you
22 think applies on the constitutional side, would
23 that be implicated in this case?

24 MR. KATYAL: Oh, no not at all,
25 because he just disclaimed it anyway in his

1 argument today. And he said, we're not asking
2 you to second-guess the North Carolina
3 constitution.

4 But if you adopt his view about
5 abstract clauses or things like that, I don't
6 know what is abstract and what isn't abstract.
7 I mean, you know, you could imagine even the
8 most concrete provision, polls shall close -- be
9 open until 8 p.m., that sounds very concrete,
10 but as the amici briefs say, like the Ben
11 Ginsberg brief, what about a hurricane or a
12 plumbing leak or a terrorist attack, every
13 clause is going to have open-ended stuff in them
14 and you're opening Pandora's Box if you side
15 with any version and he's got nine different
16 versions.

17 JUSTICE KAGAN: Right. I -- I was
18 asking a somewhat different thing. I -- I was
19 just asking whether this decision in this case
20 can remotely be understood to run into the
21 constitution -- the constitutional corollary of
22 the Rehnquist principle.

23 MR. KATYAL: Miles away from it, which
24 is why I think he's disclaiming it. I mean,
25 that was thorough judicial interpretation for

1 reasons our brief explains.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: First, just a -- a
5 point of clarification, Mr. Katyal.

6 You -- you take the position that
7 Virginia correctly understood the constitution
8 when it adopted its three-fifths requirement for
9 purposes of calculating African American persons
10 in its constitution.

11 MR. KATYAL: No, Your Honor. So,
12 there -- there's several different provisions
13 being debated in 1830. One is the three-fifths
14 provision. We're not talking about
15 three-fifths. We're talking about the
16 regulation of federal districts which --

17 JUSTICE GORSUCH: But --

18 MR. KATYAL: -- is what the Elections
19 Clause violation was about.

20 JUSTICE GORSUCH: But you're saying
21 what Virginia did at that time was consistent
22 with a proper understanding of the Elections
23 Clause.

24 MR. KATYAL: Well, the Elections
25 Clause, yes.

1 JUSTICE GORSUCH: That's what I'm
2 asking.

3 MR. KATYAL: Yes.

4 JUSTICE GORSUCH: Okay. So you are
5 defending that.

6 MR. KATYAL: Not the three-fifths --

7 JUSTICE GORSUCH: I guess I'm
8 surprised by that given that when the Elections
9 Clause issue was raised in that debate as I
10 understand it from the briefs before us, the
11 convention attendees and others basically said,
12 yeah, that might be so but who cares, we have to
13 protect our -- our property interests in
14 slavery.

15 MR. KATYAL: Yeah. So that's a
16 different provision, Justice Gorsuch, so that's
17 why I'm saying, you know, it's a nice smear of
18 what happened in 1830 that -- that has been
19 levied by my friend on the other side. But --
20 in the Elections Clause --

21 JUSTICE GORSUCH: You agree that they
22 were not attending to the Elections Clause, they
23 were attending to what their perceptions of what
24 their property rights were.

25 MR. KATYAL: No. This was about the

1 districting and that's what was at issue in the
2 Elections Clause. And that --

3 JUSTICE GORSUCH: What would -- fine.
4 If you don't answer that, maybe you can get at
5 it this way. What would prevent a state before
6 the Civil War from adopting what you say didn't
7 happen and would never happen, a three-fifths
8 rule in their state constitutions?

9 MR. KATYAL: So, the state
10 constitutions, they could adopt that rule and
11 whatever that is, and it may be consistent with
12 the federal rule at the time, you know, pre the
13 Civil War.

14 JUSTICE GORSUCH: So -- you would
15 defend that as consistent with an appropriate
16 understanding of the Elections Clause?

17 MR. KATYAL: No, no, I'm saying it has
18 nothing to do with it with what we're talking
19 about here.

20 JUSTICE GORSUCH: I'm asking you would
21 a state prior to the Civil War --

22 MR. KATYAL: No --

23 JUSTICE GORSUCH: -- be able through
24 --

25 MR. KATYAL: No --

1 JUSTICE GORSUCH: -- it's Elections
2 Clause --

3 MR. KATYAL: No --

4 JUSTICE GORSUCH: On what ground?

5 MR. KATYAL: -- position on that.
6 We're only talking --

7 JUSTICE GORSUCH: No position on that
8 --

9 MR. KATYAL: -- about ordinary checks
10 and balances, Justice Gorsuch --

11 JUSTICE GORSUCH: No position on that
12 at all?

13 MR. KATYAL: And Justice Gorsuch --

14 JUSTICE GORSUCH: How about -- how
15 about a state then that puts political
16 gerrymandering into its state constitution.

17 MR. KATYAL: Yeah, so --

18 JUSTICE GORSUCH: This Court as a --
19 as a federal matter as you know has said we
20 abstain from dealing with those things under
21 Rucho. So a state could do that too, right.

22 MR. KATYAL: Well, I don't -- well, I
23 think there'll be any number of state violations
24 that may be at issue there if that happens.

25 JUSTICE GORSUCH: It's in the state

1 constitutions.

2 MR. KATYAL: Still, state
3 constitutions often have --

4 JUSTICE GORSUCH: Let's just say as a
5 matter of state law pristine. Then what?

6 MR. KATYAL: Yeah. So then I -- I
7 don't think that it would necessarily, it would
8 stay the federal Elections Clause violation at
9 that point.

10 JUSTICE GORSUCH: Yeah.

11 MR. KATYAL: Again, nothing in here
12 turns on it. We're talking about ordinary
13 judicial review, checks and balances akin to --

14 JUSTICE GORSUCH: I understand -- I --

15 MR. KATYAL: -- what the Chief Justice
16 is talking about --

17 JUSTICE GORSUCH: I understand -- I
18 understand the mantra, okay? Let me ask you to
19 turn back to the question about, you know, if
20 we -- if you think the Rehnquist view was
21 appropriate on constitutional grounds, what do
22 we do with this opinion?

23 At least some -- some of the amici
24 tell us that we've never had a state court
25 strike down a state law with respect to federal

1 congressional districting on political
2 gerrymandering grounds until the last several
3 years. So if we're talking about 200 years'
4 worth of history, this one is pretty new, too,
5 right?

6 MR. KATYAL: Not exactly. So I'd say
7 a couple of things about that. First --

8 JUSTICE GORSUCH: Just -- just really
9 quickly, because I don't want -- I don't want to
10 expend too much time. When -- when was the
11 first one of these in -- in your understanding?

12 MR. KATYAL: 1854, Massachusetts, the
13 Warren decision.

14 JUSTICE GORSUCH: All right. Besides
15 that.

16 MR. KATYAL: Yeah. And so then Alob
17 in 1932, but that's just for maps, so --

18 JUSTICE GORSUCH: And then -- and then
19 it's 2015, right?

20 MR. KATYAL: No, I don't think that's
21 right. So first of all --

22 JUSTICE GORSUCH: Okay. All right.

23 MR. KATYAL: -- outside of maps --

24 JUSTICE GORSUCH: Fine. Let's put
25 that aside. Let's put that aside.

1 MR. KATYAL: Okay.

2 JUSTICE GORSUCH: Put that aside.

3 What do we do with the fact that in
4 this opinion that we have before us, the North
5 Carolina Supreme Court said it had to do
6 something because the legislature would not act.
7 The only way that -- that, partisan
8 gerrymandering can be addressed is through the
9 courts.

10 About five, seven years ago, it
11 refused a political gerrymandering claim itself
12 under the open-ended Good of the Whole Clause.
13 And now it's come back and cited a -- a m@lange
14 of -- of open-ended other provisions that it's
15 now accepting.

16 So I understand the standard is sky
17 high, but at least given some contestable
18 history, and I understand you contest it, but I
19 put that there. You've got -- you've got, this
20 novelty within North Carolina and switching
21 positions with North Carolina, let me add one
22 more and then I'll -- I'll shut up.

23 We have a very lengthy opinion from
24 the North Carolina Supreme Court. It addresses
25 the elections -- Federal Elections Clause issue

1 in three paragraphs on page 122 of the petition
2 appendix.

3 At the very least, all of these
4 interesting and important issues, and able
5 counsel on both sides, were not available to
6 that court then. What should we do in that
7 circumstance.

8 MR. KATYAL: Well, certainly with
9 respect to that federal issue, we think it only
10 honestly needed three paragraphs because in
11 those three paragraphs, they talk about all of
12 the things that we just talked about, obviously
13 not the detail, and I'd love to give you more
14 detail, Justice Gorsuch.

15 But, you know, then you said, well,
16 the -- the decision was based -- the decision
17 talked about it being hard for the legislature
18 to act. And I understand that was the basis of
19 a separate opinion by this Court.

20 I think that point actually
21 underscores the caution this Court should have
22 when reviewing state court decisions because
23 that's not what the North Carolina Supreme Court
24 actually said at those pages.

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

1 MR. KATYAL: Yes, page 88. I
2 understand.

3 JUSTICE GORSUCH: That -- that the
4 only way partisan --

5 MR. KATYAL: Exactly.

6 JUSTICE GORSUCH: -- gerrymandering
7 can be addressed --

8 MR. KATYAL: And it's not saying it's
9 too difficult to -- for the legislature to act.
10 They're making a point about like --

11 JUSTICE GORSUCH: Oh no.

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

13 JUSTICE GORSUCH: That they can't do
14 that. Right. I understand that.

15 MR. KATYAL: -- John Hart Ely point
16 about how the legislature has been captured.
17 It's the same at point that the Chief Justice
18 made at oral argument in Rucho.

19 And it's -- and they're basically
20 saying, and this is page 88 to 90 of the
21 opinion, that because there's a process defect,
22 there's a special role for this Court in North
23 Carolina, and they trace it back to 1787. North
24 Carolina Supreme Court in Bayard which said the
25 exact same thing, that we were worried about

1 legislative self-dealing --

2 JUSTICE GORSUCH: All right.

3 MR. KATYAL: -- and installing
4 themselves.

5 JUSTICE GORSUCH: Got it.

6 MR. KATYAL: So it's the heart of the
7 tradition.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: I just want to
11 follow up on your discussion with Justice Kagan
12 on pages 48 to 50 of your brief and pages 26 to
13 28 of the Solicitor General's brief on the -- on
14 the Rehnquist concurrence there.

15 And you -- I think you said the state
16 court -- a check to prevent state court judicial
17 adventurism I think was your phrase or to ensure
18 that state courts don't manipulate state law to
19 frustrate federal rights.

20 And as Justice Alito pointed out,
21 there are civil rights due process cases, treaty
22 clause, contract clause, adequate and
23 independent state ground we had a few weeks ago,
24 that kind of issue.

25 And I -- I read Justice Ginsburg's

1 dissent in Bush v. Gore to actually accept the
2 principle, or at least not dispute the
3 principle, although she of course vigorously
4 disputed the application of that principle in
5 that case.

6 Then I go to your brief on 48 to 50
7 and I thought you said it's unremarkable
8 proposition. I didn't see in your brief a
9 distinct standard between statutes and
10 constitutions. I don't think that's there in 48
11 to 50.

12 And I guess following up on Justice
13 Kagan's, why would we use -- we're going to have
14 to work the adjectives and the adverbs --

15 MR. KATYAL: Yep.

16 JUSTICE KAVANAUGH: -- if we follow
17 something like that, but why would we say, you
18 know, significant departure for statutes and
19 plainly indefensible for constitutional
20 interpretations --

21 MR. KATYAL: Right.

22 JUSTICE KAVANAUGH: -- is that going
23 to really help the clause at all?

24 MR. KATYAL: Right. So I do think
25 it's in our brief. We quote the language from

1 Bush versus Palm Beach Canvassing Board and
2 about -- about constitutions and state
3 constitutions being at the apex, Justice
4 Kavanaugh.

5 And the reason for that is two fold.
6 Number 1, there is very serious --

7 JUSTICE KAVANAUGH: But, but -- keep
8 going.

9 MR. KATYAL: -- federal -- there's
10 very serious federalism concerns generally. All
11 those contexts you gave me before about adequate
12 and independent, those are actually reviewing
13 procedural rules, state statutes and the like.

14 Reviewing state constitutions, again,
15 the apex of state sovereignty. I think
16 federalism is generally different. And then B,
17 in this unique context where Congress already
18 has a backup check and can supplant any state
19 court decision it doesn't want by name or
20 supplant -- supplant state courts altogether in
21 the second half of the Elections Clause,
22 whatever the standard is for Bush versus Gore,
23 or something like that, to the extent you might
24 think there was a constitutional issue, it's
25 going to be even higher here because the framers

1 put Congress in and how to check specifically
2 for this problem.

3 JUSTICE KAVANAUGH: Okay. I
4 understand the apex, but just to be clear,
5 you're not saying no federal judicial review
6 when the state court has interpreted the state
7 constitution in a case of this nature, correct?

8 MR. KATYAL: We -- we -- no, we think
9 it should be under the highest standard of
10 review --

11 JUSTICE KAVANAUGH: Right.

12 MR. KATYAL: -- if it's a state
13 constitution, yes.

14 JUSTICE KAVANAUGH: And I'll repeat
15 the question, then. You're not saying no
16 judicial review -- federal judicial review of
17 state court interpretation of state
18 constitutions in this area, correct?

19 MR. KATYAL: Right, we're not saying
20 that. It's just under a high -- sky high
21 standard.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: My question picks up
25 on Justice Kavanaugh's. So in terms of what the

1 federal content is to this state question, I'll
2 tell you one way that I've been thinking about
3 it and you can tell me if it's consistent or
4 inconsistent with your view.

5 Just as say in the due process context
6 we say property is a state law question but
7 there's some core beyond which a state can't
8 depart, so it's a -- it's a -- it's a federal
9 question and the state can't depart so greatly
10 from it that it's no longer property for the
11 purposes of the federal Constitution.

12 This federal content or the federal
13 check, is it from the word legislature, so the
14 clause says, "shall be prescribed in each state
15 by the legislature thereof." And at some point
16 if a state court adopts an interpretation of a
17 statute or a constitutional provision that's --
18 pick your adjective or adverb, you know,
19 significantly departs from so novel, egregious,
20 it's no longer acting as a court exercising the
21 normal judicial review function but is acting
22 like a -- like a legislature, is that how you
23 would articulate the argument?

24 MR. KATYAL: I think so in general, so
25 I'd make -- I have a couple of tweaks to it. So

1 I agree with you the ultimate test is, is the
2 court, you know, have such little legal
3 reasoning that it can only be understood as
4 seizing the policymaking apparatus that would
5 otherwise exist.

6 And we would ground that not just in
7 the word "legislature" but also in the word
8 "regulation," and so if it's ordinary judicial
9 review as it has been for 233 years, we don't
10 think there'd be a violation.

11 And lastly, Justice Barrett, we would
12 ground it in with something you mentioned a
13 moment -- to my friend on the other side, the
14 Eleventh Amendment, and -- excuse me, the Tenth
15 Amendment --

16 JUSTICE BARRETT: Right.

17 MR. KATYAL: -- and the special
18 solicitude there for state processes as they
19 take them.

20 And indeed their reply brief at page 6
21 says, look, we'll take the state processes as we
22 find them. And here that state process includes
23 judicial review and there should be only review
24 by this Court in the most extreme circumstances
25 which can only be policymaking, not any of his

1 other, you know, tests or backup tests and the
2 like.

3 JUSTICE BARRETT: Okay, again, putting
4 aside what specific language we would adopt for
5 that test, accepting that it would be
6 stratospheric, sky high, why would it be
7 different in the constitutional context, in
8 other words, a state court interpreting a state
9 constitution as opposed to a state court
10 interpreting a state statute if what we're
11 getting at grounded in the language of the
12 clause in both instances is, is this a
13 regulation, is this a legislature?

14 MR. KATYAL: They're -- they're
15 absolutely both incredibly high, which is why
16 this Court has never second-guessed anything.

17 I do think there's something, you
18 know, special about state constitutions, but I
19 don't want that to be like a framing effects
20 thing to say, just because that standard is
21 extraordinarily high, that means the statutory
22 standard is lower, a lot lower. It's not.

23 I mean, this Court doesn't do that.
24 It is one of those cardinal principles, going
25 back to Neal's Lessee in 1832, that state courts

1 are the masters of --

2 JUSTICE BARRETT: Well, I --

3 MR. KATYAL: -- their own statutes.

4 JUSTICE BARRETT: -- I, get that. But
5 that's just about where we locate the standard.
6 That doesn't deny the proposition that there's
7 some federal content there that there would have
8 to be some federal check.

9 MR. KATYAL: I -- I think there
10 probably would be. Again, my friend on the
11 other side somehow disclaiming statutes and
12 saying you shouldn't, so we don't think you
13 should get into statutes here at all.

14 JUSTICE BARRETT: Right.

15 MR. KATYAL: But I do worry the blast
16 radius of this theory is going to reach statutes
17 and that's something this Court should worry
18 about.

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: Yeah. I'm just --
23 to follow up on what Justice Barrett just said.
24 I -- I'm wondering whether the answer about why
25 a state constitution is different in this

1 context is because the state constitution is the
2 font of authority for all the relevant parties
3 in terms of this dispute.

4 The state constitution is what tells
5 the state legislature what it cannot -- can and
6 cannot do, what the state court can and cannot
7 do.

8 And I understand we have the -- the
9 peculiar circumstance of the state supreme court
10 being the one to interpret the state
11 constitution. But it is different in terms of
12 its legal consequence and stature than a
13 statute.

14 Am I wrong in thinking about it that
15 way?

16 MR. KATYAL: No, we think you're
17 absolutely right. And so that's why state
18 constitutions reflect the most fundamental
19 principles, like the free elections clause,
20 often in broad, open-ended language, just like
21 the federal Constitution in McCulloch versus
22 Maryland.

23 JUSTICE JACKSON: And they apply in
24 different ways. Like, you know, it's not just
25 the state constitutional provisions that speak

1 specifically to elections that apply and
2 constrain the state legislature.

3 I guess what I'm a little worried
4 about is the -- the suggestion that when the
5 legislature is acting -- is -- is exercising
6 legislative authority in this context, it does
7 not have to adhere to any state constitutional
8 constraints on its power when it's the state
9 constitution that gives it its power and tells
10 us when it is appropriately acting as the
11 legislature, not just with respect to the issue
12 of elections, but in general.

13 MR. KATYAL: That's 100 percent right,
14 Justice Jackson. We've never had a creation of
15 that animal in the state -- in -- in the federal
16 Constitution empowering states to do that.

17 And if that were what the founders
18 intended, surely someone would have said so and
19 would have prompted a massive debate. There are
20 three federalist papers on the Elections Clause.
21 Not a word, anything like this, what he would do
22 is gut the ordinary --

23 JUSTICE JACKSON: So --

24 MR. KATYAL: -- checks and balances.

25 JUSTICE JACKSON: And so to me it's

1 not so much the sort of troubling worry of we
2 have the state legislature violating federal
3 constitutional law because we as the Supreme
4 Court and other courts in the federal system can
5 look at that because it's a question of did they
6 violate the federal Constitution.

7 Here he is saying, no, we do have to
8 comply with the federal Constitution. What we
9 can violate is the state constitution. And what
10 I don't -- I -- I can't wrap my mind around that
11 argument.

12 MR. KATYAL: I can't either, Your
13 Honor. In Shelby County, this Court said it's
14 up to states primarily to regulate elections
15 through their constitutions and statutes. And
16 what he would do is gut the ability of states to
17 do that.

18 All 50 states have clauses, equal
19 protection assembly, speech and others. He
20 would nullify them all --

21 JUSTICE JACKSON: Thank you.

22 MR. KATYAL: -- in addition to the
23 smaller voting regulations.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Verrilli.

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

3 ON BEHALF OF THE STATE RESPONDENTS

4 MR. VERRILLI: Mr. Chief Justice and
5 may it please the Court:

6 I'd like to make three points. First,
7 Petitioner's argument cannot be reconciled with
8 Smiley. Smiley held that because the Elections
9 Clause invokes the state legislature's
10 law-making function, the conditions which attach
11 to the making of state laws apply.

12 Judicial review is such a condition
13 and there's no basis in text or history for
14 concluding that a governor's veto can act as a
15 substantive check on the legislative prerogative
16 but judicial review cannot.

17 Second, the General Assembly statutory
18 authorization makes this an even clearer case
19 for affirmance. And in particular, it
20 establishes conclusively that North Carolina
21 courts do not in any way usurp the legislative
22 function when they draw remedial maps in the
23 manner that the statute describes.

24 And third, since the founding, state
25 constitutions have always limited how state

1 legislatures discharge their Elections Clause
2 responsibilities.

3 Today in addition to the state's
4 constitutions that expressly express partisan
5 gerrymandering, constitutions address absentee
6 voting, voting by the military, voter ID and
7 primary elections and many other aspects of the
8 electoral process.

9 That -- that -- excuse me, that
10 Petitioners must repudiate all of that
11 long-standing and comprehensive history, the
12 very powerful indication that they are
13 misreading the Elections Clause.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Mr. Verrilli, the --
16 how far would you go with that? There's been
17 some discussion about we can only review state
18 courts at a sky high level or stratospheric
19 level or -- we -- we ran into a similar problem
20 with that in Bush v. Gore.

21 How would you articulate our review
22 standards?

23 MR. VERRILLI: Justice Thomas, I -- I
24 appreciate the opportunity to do so. And let me
25 just try to articulate what we think a clear and

1 correct standard is. And we think the standard
2 is that you'd ask whether the state decision is
3 such a sharp departure from the state's ordinary
4 modes of constitutional interpretation that it
5 lacks any fair and substantial basis in state
6 law. We think that is actually the best
7 distillation of the kinds of tests that were
8 identified in the Bush v. Gore concurrence as
9 being potentially relevant.

10 Now, I will say that we think that's a
11 highly deferential test. We think also it has
12 to be -- it's of vital importance to recognize
13 that states can have different modes of
14 constitutional interpretation than this Court
15 has with respect to the federal Constitution,
16 and those have to be respected.

17 But -- and then, you know, I think
18 probably the -- the line in Bush v. Gore in the
19 concurrence that best sums it up is that does it
20 -- does the state court decision impermissibly
21 distort beyond any fair reading the state law?
22 So we -- we think that's the -- the operative
23 test here, again, highly deferential, have to
24 respect the way in which state courts go about
25 constitutional interpretation. But I think

1 that's the test.

2 And if I -- if I could build on that,
3 I think, Mr. Chief Justice, that is the answer
4 actually to the question that Your Honor raised
5 about vague and general provisions. What my
6 friends on the other side have said is those are
7 categorically unenforceable. They're
8 categorically unenforceable under the Elections
9 Clause. That just can't be right. There's no
10 textual basis for that. And as a
11 jurisprudential matter, the -- the federal
12 Constitution, of course, has vague and general
13 provisions, and no one requires that level of
14 specificity before they can be enforced in -- in
15 the elections context.

16 CHIEF JUSTICE ROBERTS: Well, if you
17 --

18 MR. VERRILLI: So --

19 CHIEF JUSTICE ROBERTS: Just -- I
20 recognize your point about categorically
21 unenforceable, but where do you line up on that
22 and some of the detail, like what's going to be
23 applied is an efficiency gap of whatever in a
24 judicial determination? Is -- is -- is that
25 categorically unenforceable or can you say that

1 in this case that seems specific enough to be
2 carrying out the duty under the constitution of
3 the legislature?

4 MR. VERRILLI: If I could make a
5 prefatory point, and then I'll --

6 CHIEF JUSTICE ROBERTS: Yeah.

7 MR. VERRILLI: -- I'll answer Your
8 Honor's question directly.

9 CHIEF JUSTICE ROBERTS: Sure.

10 MR. VERRILLI: The prefatory point is
11 this -- I just want to make sure this -- that
12 this -- we all keep this in mind: They are not
13 making an argument that the -- that the North
14 Carolina Supreme Court's decision in this case
15 would be struck down under the standard I
16 articulated or any other standard. In fact,
17 they began their argument, and they said, I
18 think, by my count six or seven times, that they
19 accept the North Carolina Supreme Court's
20 decision as a fair reading of North Carolina
21 law. So whatever the Court concludes with
22 respect to the application of that -- the -- the
23 need for a standard like this, it's not -- it's
24 not a basis to overturn the decision here for
25 the reasons I identified.

1 Now, with respect to Your Honor's
2 question, I think I would -- the way I read the
3 North Carolina Supreme Court decision is a
4 little different, starting with the fair -- the
5 free elections clause. It basically, as I read
6 the opinion, conducted a historical analysis of
7 the kind that should be familiar as a matter of
8 constitutional interpretation. They went back
9 to the English Bill of Rights, which was about
10 the manipulation of electoral processes so that
11 the Parliament would be in the king's pocket,
12 essentially. They looked at comparable events
13 that occurred in North Carolina at the time of
14 the founding.

15 And then, although this was not in the
16 opinion, you know, of course, I do think that
17 what James Madison was saying about the
18 Elections Clause itself -- and the best place to
19 look for that is page 27 of The Founding Era's
20 scholars' brief -- he talked about, because this
21 was general language, the risks of abuse were --
22 were manifold and could not all be imagined.
23 And what he was basically talking about, one
24 thing he says -- and this is the August 9th
25 debates of the Convention -- one thing he says

1 in those August 9th debates is, you know,
2 there's a real risk that the powers that are in
3 control of the state legislatures will rig the
4 process for choosing members of Congress in a
5 way that they can project their disproportionate
6 power in the state into the Congress. So those
7 --

8 CHIEF JUSTICE ROBERTS: Well, maybe
9 that -- that touches a point and may be a little
10 too abstract to address, but the nature of
11 judicial authority at the time of the founding
12 and thereafter, I think is quite different than
13 the nature of judicial authority today. I mean,
14 you can -- just looking at court opinions, you
15 can see that what -- what courts do as a general
16 matter can be really quite specific in terms of
17 injunctive relief and the sort of thing that is
18 at issue here.

19 And I wonder if the -- I -- I guess I
20 wonder how we should go about taking that into
21 account.

22 MR. VERRILLI: Yeah. And so --

23 CHIEF JUSTICE ROBERTS: Their early
24 statements about this is what the Court did in
25 1800 and whatever. And I wonder if the same

1 concerns that are at issue today about the
2 exercise of judicial authority were really on
3 the plate back then.

4 MR. VERRILLI: So I -- I guess the way
5 I would think about that, Mr. Chief Justice, is
6 that what -- what the North Carolina Supreme
7 Court was doing here, I think, was saying this
8 is the historical genesis of the free elections
9 clause. This was the kind of problem it has to
10 -- that it's -- it's there to address. The
11 extreme partisan gerrymandering -- and this was
12 an extreme gerrymander -- the extreme partisan
13 gerrymandering is a cognate kind of problem. We
14 have to figure out, using modern doctrine and
15 modern approaches, how to address it.

16 And I do think, if I could -- I don't
17 want to be presumptuous here -- but as I read
18 the opinion for the Court in Rucho, the idea of
19 the -- of the Court there was that looking at
20 this Court's understanding and history of the
21 Equal Protection Clause and the Free Speech
22 Clause, you know, given that history, it wasn't
23 possible to derive particular and manageable
24 standards. But there's a key -- as I read it at
25 least, a key predicate there is that -- and the

1 opinion reflects this -- that the Equal
2 Protection Clause doesn't impose any restriction
3 on partisan motivation or intent; and,
4 therefore, the only thing you can look at is the
5 result and, you know, how -- how fair is unfair.

6 CHIEF JUSTICE ROBERTS: But --

7 MR. VERRILLI: But --

8 CHIEF JUSTICE ROBERTS: Go ahead.

9 MR. VERRILLI: If I could. The -- the
10 key difference I think, one key difference and
11 it applies here, is that if one looks at those
12 number -- number of state constitutional
13 provisions that expressly limit or prohibit
14 partisan gerrymandering, and there are quite a
15 number now -- I don't know, seven, eight,
16 including a number of the big states -- their --
17 they focus on intent. And policing for an
18 impermissible intent is something that courts
19 know how to do and is subject to
20 judicially manageable standards. You know, with
21 respect to race, of course, you have the
22 Arlington Heights framework.

23 And I think, again, they have not
24 challenged this opinion. They said it's fair --

25 CHIEF JUSTICE ROBERTS: Right, but --

1 MR. VERRILLI: -- but I will say it
2 does have a very substantial intent focus, and I
3 would point the Court in particular to pages
4 125a to 129a of the --

5 CHIEF JUSTICE ROBERTS: If I -- if I
6 could --

7 MR. VERRILLI: -- appendix to the
8 petition. I'm sorry.

9 CHIEF JUSTICE ROBERTS: The -- you
10 have -- again, today, particularly in the
11 redistricting area, if the court is involved
12 it's often -- I don't know if it's typical or
13 whatever -- they act through the appointment of
14 special masters. The judges don't sit in the
15 back room with lines drawing the districts, but
16 other -- other people do. And I wonder if
17 there's a disconnect between the level of the
18 grant of authority, whether it's along the lines
19 that Chief Justice Rehnquist put in -- in the
20 Palm Beach case or something else, and how it's
21 actually practiced on the ground.

22 MR. VERRILLI: Yeah. So I think that
23 whatever might be the case in other situations,
24 here, of course in North Carolina, we have an
25 express statutory authorization saying a

1 particular three-judge court shall impose a
2 remedial map and shall do so under the following
3 constraints. It's good for one trip only, its
4 interim map. It -- the legislature has to be
5 given a full and fair opportunity to remedy the
6 constitutional problem before that remedial
7 process kicks in.

8 And then -- and then, third, the map
9 has to deviate as minimally as possible from the
10 map that the legislature enacted. And then
11 within those constraints, that remedial process
12 occurs. And so I -- I think that -- and I --
13 and I guess, more generally, I think if one
14 recognizes, as I think has to be the case, that
15 states do have the constitutional authority to
16 enforce state constitutional provisions here,
17 and they declare that a state legislative act is
18 unconstitutional, and in the case of a
19 redistricting map, then it naturally follows
20 that there is going to be remedial authority.
21 And that remedial authority in this instance
22 really responds to a profound practical problem,
23 which is you have to have a map to have an
24 election.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 JUSTICE KAGAN: So --

2 MR. VERRILLI: Somebody has got to
3 step in.

4 JUSTICE KAGAN: Mr. Verrilli, I mean,
5 what if you were in a state which didn't have
6 the kind of procedures that North Carolina had?
7 And as you say, there has to be a remedy. But
8 let's say a state just sort of did it on its own
9 without even -- you know, without kicking it
10 back, without saying, look -- let -- let's say
11 there was time enough to kick it back, and --
12 and -- and the state court did not kick it back.
13 Are there any limits on this? Should there be
14 any limits on this?

15 MR. VERRILLI: So there might be. You
16 know, a useful analogue on the federal side,
17 there's a whole body of equitable principles
18 that -- that apply in precisely this context
19 that say, as a matter of exercise of equitable
20 jurisdiction, the court's got to give the
21 legislature a full and fair shot to remedy it
22 first, should deviate as little as possible from
23 the -- the map that the legislature enacted.

24 And I -- I -- I guess in order for
25 those to apply in the state situation, they

1 would have to have a basis in the constitution.
2 I could envision an argument that those kinds of
3 constraints on remedies could be something that
4 you could think of as within the -- as
5 appropriate, given the Elections Clause. But,
6 again, this case, it's very straightforward.
7 This is as constrained a remedial situation as
8 you are going to see.

9 JUSTICE KAGAN: And just --

10 JUSTICE GORSUCH: And -- sorry.

11 JUSTICE KAGAN: No, go ahead.

12 JUSTICE GORSUCH: No, please.

13 JUSTICE KAGAN: Just a quick question.

14 Is -- when you gave your standard, the -- the
15 sort of, you know --

16 MR. VERRILLI: Sharp departure from --

17 JUSTICE KAGAN: Yes.

18 MR. VERRILLI: -- the state's ordinary
19 modes of --

20 JUSTICE KAGAN: Yeah. Which is --

21 MR. VERRILLI: -- constitutional
22 interpretation --

23 JUSTICE KAGAN: And you said --

24 MR. VERRILLI: -- that lacks any fair
25 and substantial basis in state law.

1 (Laughter.)

2 JUSTICE KAGAN: Good. Your -- your
3 highly deferential standard, and deferential as
4 to interpretive method as well as to anything
5 else.

6 MR. VERRILLI: Yes, thank you.

7 JUSTICE KAGAN: Is that standard for
8 you, should that be the same standard as for
9 statutes or do you agree with Mr. Katyal that
10 there actually is a gap between the two?

11 MR. VERRILLI: I'm not sure I see a
12 gap between the two, except in the following
13 sense, that one could, I think think -- one
14 could think that with respect to a statute,
15 because there is a difference between
16 interpreting a statute and interpreting a
17 constitution, that with respect to the
18 interpretation of a constitution, there may --
19 states -- state supreme courts may have more
20 leeway because it is after all a constitution
21 they're interpreting. And so I -- I could see
22 in application the standard might work out
23 differently in some cases but I don't think it's
24 a difference in the standard as much as the
25 application of the standard.

1 JUSTICE GORSUCH: Actually, this
2 follows right up on that. Very helpful. I'm
3 glad I waited. The question I think as Justice
4 Barrett suggested is has the legislature
5 prescribed the time, place and manner? And I
6 think your standard and our -- our sky-high,
7 astronomical and I think we ventured into outer
8 space, standard -- has the judicial opinion in
9 interpreting the law, let's deal with statutes
10 first, gone so far afield that we can no longer
11 fairly say as a matter of federal law that the
12 legislature is the one who prescribed the time,
13 place, and manner. Is that a fair understanding
14 of -- of our task here as --

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

16 JUSTICE GORSUCH: -- under federal
17 law?

18 MR. VERRILLI: I think that's kind of
19 the underpinning of the idea that what you are
20 trying to solve for is the problem of state
21 court going so far afield and being so
22 disconnected from existing precedent, from
23 history, et cetera, that you would come to the
24 conclusion that they are really not engaging the
25 -- in the function of judicial review --

1 JUSTICE GORSUCH: Well, the
2 legislature didn't prescribe these things, I
3 mean, that's the text that we're asked to look
4 for, right?

5 MR. VERRILLI: Right, but I guess,
6 Your Honor, I would say that --

7 JUSTICE GORSUCH: And have we gone so
8 far afield that --

9 MR. VERRILLI: If I could -- if I
10 could just say it this way.

11 JUSTICE GORSUCH: Well, I just want to
12 make sure --

13 MR. VERRILLI: Yeah, yeah.

14 JUSTICE GORSUCH: -- we're on the same
15 page.

16 MR. VERRILLI: Well --

17 JUSTICE GORSUCH: That's the-- that's
18 the federal standard and one way of analyzing
19 that I think, if I'm understanding you, and if
20 I'm not please say so, when we're dealing with
21 statutory law is if they've gone so far afield
22 or into outer space that's an indication that
23 it's no longer the legislature prescribing it.

24 MR. VERRILLI: Well, I guess I would
25 put it differently.

1 JUSTICE GORSUCH: Okay.

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

3 JUSTICE GORSUCH: How?

4 MR. VERRILLI: -- say is that the --
5 that the framers took legislatures as they found
6 them, that the -- that the judicial review under
7 the state constitution is a condition of the
8 normal operation of state law and the language
9 of Smiley, that -- and, therefore, should be
10 expected that courts will review federal
11 election regulation by state legislatures under
12 the state constitution, that that, and that
13 they --

14 JUSTICE GORSUCH: Okay. Thank you --

15 MR. VERRILLI: -- validate --

16 JUSTICE GORSUCH: -- Mr. Verrilli,
17 thank you.

18 JUSTICE JACKSON: Can I just follow up

19 --

20 CHIEF JUSTICE ROBERTS: Thank you.

21 JUSTICE JACKSON: -- on that?

22 CHIEF JUSTICE ROBERTS: We'll go --

23 JUSTICE JACKSON: Oh, sorry.

24 CHIEF JUSTICE ROBERTS: -- we'll go
25 through.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: Is your standard a
4 standard that can be flunked?

5 MR. VERRILLI: Yeah, I assume it could
6 be flunked.

7 JUSTICE ALITO: Give me an example of
8 something that would flunk your standard.

9 MR. VERRILLI: So, you know, I think a
10 naked declaration that a -- that an act of a
11 legislature under a free and fair Elections
12 Clause is unfair, without any grounding in
13 history or precedent or -- or sound analysis of
14 a kind that the state, you know, is appropriate
15 under that state's mode of interpretation, I --
16 I think -- I think you could envision that
17 possibility happening.

18 JUSTICE ALITO: Okay.

19 MR. VERRILLI: I do think that would
20 be a rare case, but I think --

21 JUSTICE ALITO: I appreciate that
22 answer because I think the worst thing we could
23 do, although it might be attractive for some
24 reasons, is to say, well, there is a limit but,
25 you know, we -- we -- but it's one that in

1 practice can never be exceeded, so we have a
2 standard but it's just, you know, it doesn't
3 mean anything.

4 Under that understanding, let me talk
5 about the decision in this case. And we've
6 heard about the English bill of rights. I mean,
7 has anybody ever thought that the English bill
8 of rights had anything to do with one person,
9 one vote, much less political gerrymandering?

10 MR. VERRILLI: Well, I think the
11 historical roots of those doctrines, yeah, do
12 trace back to the idea that the English bill of
13 rights was trying to deal with, which was the
14 manipulation of the electoral process, including
15 the, who is going to represent what area, in
16 order to entrench those in power.

17 JUSTICE ALITO: Well, wasn't it true,
18 you probably know more about British
19 constitutional history than I do, but wasn't it
20 true that well into the 19th century the British
21 Parliament was notorious for having rotten
22 boroughs, you know, parliamentary districts
23 where there were practically no inhabitants but
24 that was a good way of entrenching a Tory member
25 or a Liberal member; wasn't that true?

1 MR. VERRILLI: But that was a bad
2 thing.

3 JUSTICE ALITO: It was -- it was a
4 bad thing but that was under the English bill of
5 rights, was it not?

6 MR. VERRILLI: I guess the point is
7 what is this free elections clause trying to get
8 at in the North Carolina constitution and other
9 constitutions that adopted it at the time of the
10 framing.

11 JUSTICE ALITO: All right. 1776, 200
12 plus years ago. Was anybody at that time saying
13 election isn't free if there is political
14 gerrymandering?

15 MR. VERRILLI: Well, you know, I don't
16 know if they were saying it in exactly those
17 terms, but there is an amicus brief that
18 addresses what was going on in North Carolina.
19 It's Pam -- Penn Bank I think is the name --
20 Plan Bank maybe -- I'm sorry if I'm
21 mispronouncing it -- which talks about actual
22 controversies with respect to the way districts
23 are drawn in North Carolina in the 1770s.

24 JUSTICE ALITO: Well, sure there was
25 controversy, and where -- and this isn't --

1 political gerrymandering is no new thing, right?
2 It was known at the time of the founding.

3 MR. VERRILLI: Yeah. Well, yes, but
4 --

5 JUSTICE ALITO: That's where the name
6 comes from, right?

7 MR. VERRILLI: Sure, sure, but the --
8 but the question is what problem is the -- is
9 the North Carolina Supreme Court trying to
10 address here, and my point is it's a problem
11 very much in the nature of the problem that gave
12 rise to the fair and free elections clause.

13 And if I could just make an obvious
14 point, I guess, but, you know, when the framers
15 adopted the free speech clause, they were
16 principally concerned about prior restraints.
17 But we don't interpret the free speech clause as
18 applying only to prior restraints, obviously,
19 and so --

20 JUSTICE ALITO: And then the North
21 Carolina Supreme Court sets out certain methods
22 that could be used in determining whether there
23 is political gerrymandering, the mean/median
24 difference, the efficiency gap, means
25 simulations. Would that -- would anybody have

1 understood that in 1776?

2 MR. VERRILLI: No, I -- I doubt it,
3 but those are means of implementing a
4 fundamental principle. Those aren't fundamental
5 principles themselves. And the fundamental
6 principle that I -- that the North Carolina
7 Supreme Court articulated as I read the opinion
8 is that you don't want the electoral districts
9 to manipulate it, be manipulated so that one
10 group of voters is severely disadvantaged as
11 compared to another group of voters of a
12 different party of the same size.

13 JUSTICE ALITO: Okay. So let's turn
14 to precedent, which is another way of
15 interpreting a state constitution. What
16 grounding in North Carolina precedent was there
17 for this decision? My understanding is that the
18 most relevant decision is -- suggests that the
19 North Carolina constitution doesn't address
20 political gerrymandering.

21 MR. VERRILLI: Yes. So the -- so the
22 Dodson case came up with my friend on the other
23 side, I think, or maybe with Mr. Katyal, but I
24 should talk about that for a minute. You know,
25 to say that the partisan gerrymandering analysis

1 in that, I mean, it was a flea on the tail of a
2 dog. When you read that opinion, it was -- that
3 was a case about racial gerrymandering.
4 Ninety-nine percent of the opinion is about it.
5 The parties threw in this kind of offhand
6 argument in their opening brief that said, well,
7 there's also a problem here in that it violates
8 the good of the whole provision. And the -- and
9 then the -- the appellees, the respondents in
10 that case said, well, you haven't articulated
11 any standard to decide which of these two
12 competing maps better serves the good of the
13 whole. The -- the appellants said nothing in
14 the reply brief. The court said, well, you
15 haven't articulated any basis for deciding on
16 the difference between the two. And, of course,
17 the North Carolina Supreme Court recognized that
18 in this very case.

19 JUSTICE ALITO: Were there -- were
20 there prior decisions of the North Carolina
21 Supreme Court that step by step led to this
22 conclusion --

23 MR. VERRILLI: So --

24 JUSTICE ALITO: -- that the free
25 elections clause prohibits political

1 gerrymandering?

2 MR. VERRILLI: So I'm going to answer
3 Your Honor's question, but I do want to just
4 interject one more time that they have said that
5 this decision is a fair representation of North
6 Carolina law. They are not challenging it under
7 the standard I articulated or any other
8 standard. They have made a different argument,
9 which is that this is categorically a violation
10 of the -- of the Elections Clause for state
11 supreme courts to invoke -- to apply vague and
12 general provisions.

13 And so I'm happy to keep answering
14 Your Honor's questions, I am, but -- but I just
15 want to reinforce that that's -- they have
16 conceded that this is a fair interpretation of
17 North Carolina law.

18 JUSTICE ALITO: All right. And then
19 we get to the introductory statement that
20 Justice Gorsuch mentioned, and, boy, that seems
21 awfully close to what you said would be a
22 violation.

23 MR. VERRILLI: I don't --

24 JUSTICE ALITO: Well, you know, they
25 -- I mean, then there's a hundred pages, you

1 know, of elaboration, but, basically, at the
2 beginning, they say what they're doing, and,
3 basically, they're saying in no uncertain terms,
4 look, there's legislative malfunction here. The
5 legislature has adopted a -- a political
6 gerrymandering, and it's really hard to amend
7 the state constitution and we don't have a
8 referendum to correct it, so there's a big
9 problem in the state and we have to step in.

10 MR. VERRILLI: Well, but --

11 JUSTICE ALITO: That's awfully close
12 to what you just --

13 MR. VERRILLI: No, I -- I -- I -- I
14 disagree quite strongly with that. First, with
15 respect to the specific thing that they said in
16 this paragraph -- and I think we're talking
17 about the same paragraph, and then with respect
18 to the way in which the opinion analyzes it.

19 They -- they do say: Okay, we don't
20 have a referendum process. It's hard to amend
21 the Constitution. The reason it's hard to amend
22 the Constitution is because you've got -- you
23 have to get 60 percent of the legislature as the
24 first step. And the problem here, of course, is
25 the actions of the legislature.

1 And then, the -- what -- what -- and I
2 think this is what Your Honor is referring to,
3 but there -- you know, there's a sentence here
4 which we haven't talked about, and what the
5 North Carolina Supreme Court says, "it is no
6 answer to say that responsibility for addressing
7 partisan gerrymandering is in the hands of the
8 people when they are represented by legislators
9 who are able to entrench themselves by
10 manipulating the very democratic process from
11 which they derive their constitutional
12 authority."

13 Now, one can agree or disagree with
14 that as a premise for judicial intervention, but
15 that's essentially John Hart Ely's Democracy and
16 Distrust. And you may not think that that's an
17 appropriate way to think how the federal
18 constitution ought to be interpreted and
19 applied, but I don't see how one can say that
20 that is so far outside the bounds of reasonable
21 interpretive principles, that the state court
22 here was acting as a legislature and not a
23 court. I just don't see how you could say that.

24 And then, of course, with respect to
25 the specific analysis beyond the free elections

1 clause, there's a very lengthy equal protection
2 clause analysis, which is rooted in substantial
3 precedent --

4 JUSTICE ALITO: Thank you.

5 MR. VERRILLI: -- and which --

6 JUSTICE ALITO: Thank you,

7 Mr. Verrilli.

8 MR. VERRILLI: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Mr. Verrilli, I'm
12 -- I'm trying to organize opinion if I were to
13 rule in your favor. And -- and you say some
14 things are within bounds; some things are not.
15 How would you write it? I mean, to answer some
16 of the questions my colleagues have raised and
17 to knock it down, okay?

18 I -- I guess, first, you would say
19 take Petitioners' broadest view, that the
20 legislature means state legislators, not state
21 courts, and so there can't be any judicial
22 review. That's easy to write and say there
23 obviously has to be judicial review because it's
24 part of the regulation process.

25 What comes after that?

1 MR. VERRILLI: So --

2 JUSTICE SOTOMAYOR: How --- how do we
3 deal with his distinction between procedural and
4 substantive? How do we deal with this question
5 of --

6 MR. VERRILLI: I think the Court could
7 write a very --

8 JUSTICE SOTOMAYOR: -- that this
9 Court, why --

10 MR. VERRILLI: Sorry.

11 JUSTICE SOTOMAYOR: -- why we don't
12 reach the question of whether this Court went
13 too far with legislating and not reviewing?

14 MR. VERRILLI: I think the Court could
15 write a very straightforward opinion, and I
16 think a good place to start would be the
17 following quote from Chief Justice Hughes's
18 unanimous opinion for the Court in *Smiley*, which
19 says: "The question then is whether the
20 provision of the Federal Constitution, thus
21 regarded as determinative, invests a legislature
22 with a particular authority, and imposes upon it
23 a corresponding duty, the definition of which
24 imports a function different from that of a
25 lawgiver" -- and then these are the key four

1 words -- "and thus renders inapplicable the
2 conditions which attach to the making of state
3 laws."

4 In *Smiley*, the Court's -- answered
5 that question with an emphatic "no" with respect
6 to the governor. An emphatic "no" is equally
7 appropriate here. There is a limit to the -- to
8 the state court's ability to enforce state
9 constitutional provisions. That limit is the
10 standard that I have articulated twice, and I
11 won't articulate for a third time. And --

12 JUSTICE SOTOMAYOR: So we --

13 MR. VERRILLI: But -- and that, but
14 the -- but the --

15 JUSTICE SOTOMAYOR: You think we
16 should reach that question?

17 MR. VERRILLI: Well, but then I was
18 going to say, but the Petitioners have not -- if
19 the Court wants to save that for another day, it
20 can, but I guess we're comfortable with the
21 articulation of it. The key point for us is the
22 Petitioners have not made any argument under
23 that standard. And, therefore, there is -- in
24 fact, the opposite, they have conceded that this
25 is a faithful and fair interpretation of North

1 Carolina law and, therefore, there's no basis
2 for overturning the decision of the North
3 Carolina Supreme Court.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: Mr. Verrilli, I've
6 been thinking a good deal about this
7 constitutional analogue to the Rehnquist
8 principle. And your colloquy with Justice Alito
9 made me feel uneasy about it. And I think that
10 the reason is because it shows how very good
11 judges on very good courts can find it
12 incredibly easy to disagree with each other.
13 And so if Justice Alito asked you can it be
14 flunked, I think what I want to ask you after
15 hearing that colloquy, is, is there a danger
16 it's going to be satisfied too easily?

17 And I'll just -- you know, I think
18 that every single one of us on this bench has
19 written opinions at times, you know, saying that
20 other judges, whether it's other judges on this
21 Court or -- or lower court judges, you know,
22 have engaged in policymaking rather than in law.
23 And, I mean, it's just sort of one of the things
24 that judges say when they really disagree with
25 another opinion.

1 And -- and so how -- you know, if you
2 say acting as a legislature, not as a court,
3 acting as a policy maker, not as a court, I
4 mean, these really are things -- it's not just
5 this Court, its every court -- these are things
6 that judges say to each other all the time. How
7 is this going to be a check that's used rarely
8 --

9 MR. VERRILLI: Well --

10 JUSTICE KAGAN: -- rather than like
11 whenever you basically, you don't disagree
12 strongly.

13 MR. VERRILLI: So I -- I apologize for
14 putting it this way, but I think that's up to
15 this Court, because this Court is going to be
16 applying it. And I think the -- the phrase from
17 the Bush against Gore concurrence that I think
18 captures it pretty well is does it impermissibly
19 distort beyond any fair reading state law? That
20 -- that is deferential, a very deferential
21 standard. It, I think, encompasses the point
22 that I made, that you've got to respect the
23 state court's modes of constitutional
24 interpretation.

25 And then -- and I -- but I do think

1 for all of the reasons of federalism and state
2 sovereignty and -- and comparative
3 constitutional competence, that of course it
4 needs to be applied very deferentially. There
5 aren't going to be very many cases that, I would
6 think -- that would satisfy it. There will be
7 some, perhaps, but there won't be very many.

8 And -- but I think that -- but,
9 anyway, that's the way I think it would --
10 that's the way I think it would go.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: Just quickly,
16 Mr. Verrilli. You got some questions about the
17 remedy. And, you know, the Chief Justice was
18 asking about special masters drawing the map,
19 and, you know, here we had experts come in.
20 We've been talking primarily about the liability
21 question. You did get some questions about
22 remedy. Do you -- I just wanted to give you a
23 chance to say something about our jurisdiction,
24 whether we have jurisdiction to review --

25 MR. VERRILLI: You know, we --

1 JUSTICE BARRETT: -- the portion --
2 MR. VERRILLI: -- we don't think
3 there's a final judgment here yet. I mean, the
4 -- the question of the proper remedy is before
5 the three-judge court on remand. And the, you
6 know -- and the argument being -- that's at play
7 there is should the court accept the
8 legislature's remedial plan or the alternative
9 remedial plan drawn by the court? And the
10 answer to that could matter to the way the Court
11 analyzes the issue.

12 Now, I will say -- I take my -- the
13 argument of my friends on the other side to be
14 that the two issues of whether you could have a
15 remedial process at all and whether you can have
16 judicial review at all are so intimately bound
17 up that you -- you should address that issue,
18 and that's why I was focused on it.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: I just have one
22 question that goes back to this issue of
23 constitution being different than statute from
24 -- from the perspective of us trying to figure
25 out what to do here.

1 Justice Gorsuch asked, I thought, a
2 very clarifying question and it sort of came up
3 again with Justice Kagan's remarks, which is
4 we're really trying to kind of sort of figure
5 out when and under what circumstances the state
6 legislature has usurped legislative power in
7 some sense. And I think Justice Kagan is
8 correct that that's sort of in the eye of the
9 beholder. But, you know, what -- what is the
10 body of law that we would reference to answer
11 the very standard that you have articulated,
12 when it warps it? What -- what are we looking
13 at to determine how --

14 MR. VERRILLI: So --

15 JUSTICE JACKSON: -- far --

16 MR. VERRILLI: I think the standard
17 is -- and I think Justice Alito in his colloquy
18 with Mr. Katyal went through the various places
19 where the Court applies that kind of a standard,
20 and the Bush against Gore concurrence references
21 most of those.

22 JUSTICE JACKSON: Mm-hmm.

23 MR. VERRILLI: And we were drawing
24 that standard from the -- that same body of law.
25 And it's -- and it is very --

1 JUSTICE JACKSON: But I guess I'm
2 asking, do you do -- isn't the baseline what the
3 state constitution says? We start there and
4 then --

5 MR. VERRILLI: Sure.

6 JUSTICE JACKSON: -- we say are you
7 doing something so far --

8 MR. VERRILLI: Yeah.

9 JUSTICE JACKSON: -- far beyond that?

10 MR. VERRILLI: Is it so far -- is it
11 so far out of bounds that you can't reach it.

12 JUSTICE JACKSON: And the reason we're
13 doing that is because we're worried about some
14 sort of separation-of-powers issue as between
15 the state legislature and the state courts?

16 MR. VERRILLI: Well, there is some --
17 I think there is some -- there is a federal
18 interest at play, I think is the -- is the
19 answer because of the Elections Clause. There's
20 a federal interest at play. We think that the
21 federal interest -- the -- the that the
22 Elections Clause itself, as we've said, reflects
23 a judgment that the state -- that the -- that
24 you take state legislatures as you find them,
25 which means that they're subject to judicial

1 review under the state constitution, because
2 otherwise -- you know, if they make a law that's
3 unconstitutional under the state constitution,
4 in the words of Marbury, it's no law at all.
5 And so I think that --

6 JUSTICE JACKSON: And they're not
7 really a legislature, presumably --

8 MR. VERRILLI: Right.

9 JUSTICE JACKSON: -- because the
10 constitution tells them --

11 MR. VERRILLI: That -- that -- that's
12 the argument.

13 JUSTICE JACKSON: Yes.

14 MR. VERRILLI: If I could, there's
15 just one last point I would like to make about
16 whose ox is being gored here, which I think is
17 quite important.

18 Actually there's a great deal of
19 sentiment in this country about the problems
20 with extreme partisan gerrymandering and this
21 Court's opinion in Rucho acknowledged it. And
22 states have actually responded in nonpartisan
23 ways. I can think of four states, New York,
24 Florida, California and Ohio, all of which are
25 in the control of one political party where

1 presumably the incentives would have been lined
2 up to maximize partisan advantage through the
3 redistricting process, but in all four of those
4 states they amended their constitutions through
5 the work of the people to restrict partisan
6 gerrymandering and those provisions have been
7 enforced. I mean, the provision was enforced in
8 New York, of course, just earlier this year.

9 And so I do think it is more than
10 whose ox is being gored. This is a really
11 important issue in this country, and I think it
12 would be an extraordinary thing to say, as my
13 friends on the other side are saying here, that
14 the Elections Clause requires that all of those
15 provisions and countless others be -- be
16 disabled with respect to congressional
17 elections. That would be an extraordinary thing
18 to do, and, before doing that, I would hope that
19 the Court would -- would see a case much, much
20 clearer than the one that the Petitioners have
21 presented. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 General Prelogar.

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, longstanding practice, and
16 precedent show that the Elections Clause did not
17 displace this ordinary check on state lawmaking.
18 Petitioners' contrary theory rejects all of this
19 history and would wreak havoc in the
20 administration of elections across the nation.
21 Their theory would invalidate constitutional
22 provisions in every single state, many tracing
23 back to the founding. That would sow chaos on
24 the ground as state and federal elections would
25 have to be administered under divergent rules

1 and federal courts, including this Court, would
2 be flooded with new claims, often at the 11th
3 hour, in the midst of hotly contested elections.

4 The Court should adhere to the
5 consistent practice that has governed for more
6 than two centuries and should reject
7 Petitioners' atextual, ahistorical, and
8 destabilizing interpretation of the Elections
9 Clause.

10 JUSTICE THOMAS: General, I must say
11 it's -- I think it -- it seems a bit ironic that
12 you're on the other side of a federalism issue.
13 The -- do you agree with the highly deferential
14 standard that we've been discussing here?

15 GENERAL PRELOGAR: We do --

16 JUSTICE THOMAS: It would seem to take
17 you out of the equation or the national
18 government out of the equation.

19 GENERAL PRELOGAR: No, not at all.
20 Justice Thomas, we, of course, recognize that
21 Congress has its own check under the second half
22 of the Elections Clause, and that remains
23 constant no matter what the states are doing
24 through their state election laws.

25 But as well, with respect to this idea

1 of whether there is an outer federal
2 constitutional standard that could apply here,
3 we agree that that's so and the Court could
4 recognize that kind of constitutional claim.

5 Now we also agree that that would have
6 to be highly deferential, and I think that that
7 stems from the recognition that to state this
8 kind of claim under the Elections Clause you
9 would have to be identifying a situation where a
10 state court isn't actually engaged in the
11 process of judicial review.

12 We understand the Elections Clause to
13 pick up through the lawmaking function that
14 ordinary check and balance. And so, if a state
15 court is conducting judicial review and is
16 interpreting its state constitution, that --
17 that presents no fundamental conflict with the
18 Elections Clause itself.

19 So the standard would have to be
20 trying to identify those circumstances when a
21 state court isn't really functioning through the
22 process of ordinary judicial review, and we
23 think that that would be an extraordinary
24 situation that is unlikely to arise very often,
25 but there is an outside federal constitutional

1 check that could be applied in this context.

2 JUSTICE GORSUCH: General, just to --
3 oh, I'm sorry.

4 JUSTICE THOMAS: No. Just one last
5 point. It would seem that that would preclude
6 you, your involvement, if the Florida -- I'm --
7 I'm sorry, the North Carolina Supreme Court had
8 a decision or rendered a decision that was not
9 generous or less generous or actually
10 antagonistic to an interest that you would
11 normally defend.

12 GENERAL PRELOGAR: We agree that our
13 theory does not depend on the particular state
14 constitutional provision that's being enforced.
15 Of course, there are a panoply of federal laws
16 that apply in this context as well. And so, if
17 there was some state constitutional provision
18 like you were positing earlier that would be
19 fundamentally in conflict with the Voting Rights
20 Act, then, of course, under the Supremacy
21 Clause, that provision would have to yield.

22 JUSTICE GORSUCH: General, I should
23 have asked this question to Mr. Verrilli, so
24 apologies to both of you. Just what is the
25 status of the state court proceedings right now?

1 GENERAL PRELOGAR: So my understanding
2 is that the appeal of the remedial map --

3 JUSTICE GORSUCH: Yeah.

4 GENERAL PRELOGAR: -- is still
5 pending. And I -- I don't know when a decision
6 is expected. I thought I saw in the briefing
7 somewhere that it was expected by the end of
8 this year, but I don't believe it's arrived yet.

9 JUSTICE GORSUCH: Okay. That's
10 helpful. Thank you. And then I just wanted you
11 to address what I understood the other side's
12 argument to be, and -- and I may be misstating
13 it, so forgive me, both of you -- that Chief
14 Justice Rehnquist's theory that there's some
15 outer bounds, and we can disagree over or argue
16 about whether or how far in the atmosphere it
17 should go, makes sense because, to the extent,
18 as Justice Barrett was pointing out, the
19 question before us is whether the rule, the
20 time, place, and manner regulation has been
21 prescribed by the legislature.

22 And we can say, hey, ordinarily,
23 courts will interpret and apply the rules
24 prescribed by the legislature, and executive
25 agents will enforce the rules prescribed by the

1 legislature pursuant to their ordinary
2 obligations as executive officers. I get that.

3 But it's something different, I think
4 the argument goes from the other side, when a
5 state court says or any -- any institution says
6 we're not going to enforce the rules prescribed
7 by the legislature for whatever reason, in this
8 case it's because of the state constitution, but
9 it could be an executive officer who
10 contumaciously refuses to do so or whatever one
11 imagines.

12 But, here, by definition, I think
13 we're in agreement that the rules prescribed by
14 the legislature are not going to be applied in
15 this case. So I think that's the argument as I
16 understand it. I just wanted to give you a
17 chance to address it because I haven't heard
18 anybody address it yet.

19 GENERAL PRELOGAR: Sure, and I
20 appreciate the opportunity to do so. So I think
21 that the premise of the question was focused
22 on the legislature's power under the Elections
23 Clause to set the time, place, and manner of
24 federal elections. And if I'm understanding the
25 question correctly, our view is not that it

1 would transgress the legislature's power to
2 depart from its law when that's the ordinary
3 practice of judicial review. It might be the
4 case that the legislature's work has to yield to
5 a state constitutional provision because however
6 they prescribe the time, place, and manner of
7 elections could violate equal protection, for
8 example, under the state constitution as well as
9 the federal, if it violates one person/one vote.

10 So sometimes state courts through the
11 ordinary process of judicial review and
12 constitutional adjudication are, of course,
13 setting aside what the legislature has done with
14 respect to its manner regulations.

15 JUSTICE GORSUCH: And by definition
16 invoking some higher authority under state law
17 to not enforce the rules about time, place, and
18 manner prescribed by the legislature, right?

19 GENERAL PRELOGAR: Correct, and our
20 theory is that that's consistent with the
21 Elections Clause under this Court's precedent
22 because the framers vested the state legislature
23 with their lawmaking power, and that has always
24 been understood to be subject to state
25 constitutional constraints.

1 There is no category of state law that
2 has previously existed that detaches the state
3 legislature from the state constitution and
4 allows it free rein to have whatever laws it
5 wants without that state constitutional check.
6 And we think that the text and the history and
7 precedent forcefully reinforce this idea that
8 the framers would have understood that when they
9 were giving this lawmaking power it carried with
10 it those ordinary checks and balances.

11 JUSTICE KAGAN: And when Mr. Thompson
12 says, well, it should be subject to the
13 constraint of federal review but not of -- of
14 state constitutional review, what do you think
15 of that distinction?

16 GENERAL PRELOGAR: I think this Court
17 has rejected that distinction already in cases
18 like Smiley and Hildebrand and they rejected
19 exactly the theory that my friend has proposed
20 about looking at the federal function.

21 In Smiley, the Court said that's not
22 what you look at. You look at the specific
23 function that's been assigned. And when it's a
24 lawmaking function, that carries with it the
25 ordinary checks and balances that apply to state

1 law, including those applied by the state
2 constitution.

3 That was the very distinction the
4 Court draw -- drew with Hawke versus Smith and
5 the separate ratification function. That's a
6 different question. And cases like Leser that
7 he's repeatedly relied on are looking at a
8 different function under the Constitution.

9 But, with lawmaking, the relevant fact
10 is that the framers would have understood that
11 that comes with it judicial review and state
12 constitutional constraints, both substantive and
13 procedural.

14 JUSTICE JACKSON: Because the
15 lawmaking authority of the entity in question
16 comes from the state constitution, right? I
17 mean, if it's a lawmaking function that we're
18 tapping into, it's the state constitution that
19 gives that entity its lawmaking power and tells
20 it when and under what circumstances and how it
21 can act as the legislature, right?

22 GENERAL PRELOGAR: Exactly. And this
23 is blackletter law, Justice Jackson. A law that
24 violates the Constitution is no valid law at
25 all. And North Carolina, like in many other

1 places, it's void ab initio. That is the kind
2 of constraint that goes into and -- and
3 describes the conditions that attach to the
4 making of law in the first place.

5 JUSTICE JACKSON: So, in effect --

6 CHIEF JUSTICE ROBERTS: Well --

7 JUSTICE JACKSON: -- it's as though
8 the state court is saying you are not "the
9 legislature" for the purpose of the Elections
10 Clause.

11 GENERAL PRELOGAR: Within the meaning
12 of the Elections Clause --

13 JUSTICE JACKSON: Yes.

14 GENERAL PRELOGAR: -- yes, because
15 that's a lawmaking role, we think that the --
16 that the framers would have understood that it's
17 carrying with it that constraint. And that
18 traces directly from the Articles of
19 Confederation because they similarly prescribed
20 this kind of function on state legislatures to
21 provide for the manner of selecting delegates to
22 the Continental Congress, and virtually every
23 state constitution in the relevant period, 10
24 out of 11, had substantive constraints that
25 hemmed in the legislature in how they carried

1 out that function --

2 CHIEF JUSTICE ROBERTS: Well, it's not
3 -- it's not --

4 GENERAL PRELOGAR: -- and that was a
5 familiar practice.

6 CHIEF JUSTICE ROBERTS: -- it's not
7 really that easy, is it, because the reason we
8 have a case is because the power does not simply
9 come from the state constitution, but the power
10 comes from the federal Constitution, which
11 authorizes the legislature to carry it into
12 effect. So the reason there is a case is
13 because of the concern that the state
14 constitutional provision or, in analogous cases,
15 the statutes conflict with the federal
16 Constitution, which authorizes the legislature,
17 which -- a concept that was known to the framers
18 to undertake this responsibility. So I think
19 whichever way you think about in terms of how it
20 should come out, I think you have to address the
21 fact that there is that tension, a -- a tension
22 that we address on a regular basis between the
23 state power and the federal power.

24 GENERAL PRELOGAR: Of course, I
25 acknowledge that that makes this a case, Mr.

1 Chief Justice, but I think using all of the
2 traditional tools here, both with respect to
3 text, history, precedent, each of those counsels
4 forcefully against drawing this kind of
5 substance/procedure distinction.

6 I don't see how you get there on the
7 text alone because, once the Court has
8 understood and explained in numerous cases that
9 this is a lawmaking function, as Justice Kagan
10 explained when she read aloud from this Court's
11 cases, that has been understood to mean that all
12 of the ordinary constraints on lawmaking attach.
13 And this is one of the most fundamental and
14 ordinary constraints on lawmaking.

15 And then there's the history, the
16 Articles of Confederation.

17 CHIEF JUSTICE ROBERTS: Well, if I can
18 -- I don't mean to -- well, I guess I do mean to
19 interrupt, but the way you phrased it is
20 exactly, I guess, where the argument this
21 morning has mostly gone. You say the ordinary
22 restraints, and I think that's what Chief
23 Justice Rehnquist was trying to get at. That's
24 what you're -- whatever standard you want to
25 say, whether it's ordinary or, you know, once in

1 a blue moon, you're saying that that is the
2 question, is what the state is doing, which has
3 the impact on the federal constitutional
4 authority given to the legislature, ordinary or
5 outrageous, however you want to -- to say it.

6 So you do accept the proposition that
7 there is a role for this Court in particular to
8 assess whether or not -- how that conflict is
9 worked out in a particular case?

10 GENERAL PRELOGAR: I do acknowledge
11 that, but I would emphasize in trying to think
12 about this both from a legal standpoint and if I
13 could from a practical standpoint that I would
14 think the Court would want to make clear that
15 this is a very deferential standard. It is not
16 the ordinary case where the Court is
17 second-guessing a state court's interpretation
18 of its own state law.

19 Usually, the Court treats the state
20 courts as conclusive expositors of state law
21 because they have way more institutional
22 competence in their own methodologies, which, of
23 course, may differ from the methodologies this
24 Court would deploy with respect to the federal
25 Constitution, and they have a lot more

1 familiarity with the content of their state law.

2 So I think, to situate this kind of
3 test within this Court's broader doctrine in
4 this area, it would be necessary to recognize
5 that this is not just about thinking that the
6 state court might have gotten it wrong or -- or
7 even very wrong but rather trying to identify
8 the narrow circumstances where the Court can't
9 properly be understood to be conducting judicial
10 review in the first place.

11 It's not acting like a court, because
12 that is the kind of thing that would then seize
13 the legislatures' policymaking power and be
14 understood to transgress the Elections Clause.

15 And just a quick note on the practical
16 point. Any I think lesser rule in this context
17 would invite constant challenges brought in
18 federal courts seeking to relitigate these state
19 law issues often in the midst of these elections
20 as they're unfolding on the ground, and I think
21 it would be important to try to put a check on
22 that type of second bite at the apple that
23 litigants would otherwise try to obtain.

24 JUSTICE ALITO: May I ask you a couple
25 of questions about your interpretation of two

1 federal statutory provisions that you cite, 28
2 U.S.C. 2(a)(C) and 2(a). And 2(a)(C) refers to
3 the law of each state, and then it speaks about
4 the law thereof.

5 Does that -- when it speaks about the
6 law of such state, is it talking just about
7 state law, or is it also talking about
8 provisions of federal law that are applicable in
9 that state and for that matter in every other
10 state in the country? For example -- okay.
11 Yeah.

12 GENERAL PRELOGAR: Go ahead.

13 JUSTICE ALITO: No.

14 GENERAL PRELOGAR: I was going to say
15 we --

16 JUSTICE ALITO: You first.

17 GENERAL PRELOGAR: -- we understand
18 that provision to reflect Congress's recognition
19 that a state can be apportioned in accordance
20 with its law and I would say also in accordance
21 with federal law as it would need to comply with
22 federal law in multiple different ways,
23 including through the involvement of different
24 actors. And so the Court has already concluded
25 in cases like Branch versus Smith that that

1 would include court-drawn remedial maps, for
2 example. That's apportionment --

3 JUSTICE ALITO: Okay. So these --

4 GENERAL PRELOGAR: -- by law.

5 JUSTICE ALITO: -- I mean, these --
6 these provisions talk about districts prescribed
7 by the law of such state, but included within
8 that are federal constitutional constraints, the
9 federal equal protection clause, one person, one
10 vote, the Voting Rights Act, right, that is the
11 law of the state.

12 GENERAL PRELOGAR: I would say yes,
13 those are the present laws.

14 JUSTICE ALITO: And, if that's true,
15 why isn't the Election Clause the law of the
16 state?

17 GENERAL PRELOGAR: We think the
18 Election Clause is the law of the state, but
19 there's no incompatibility with that law --

20 JUSTICE ALITO: Okay. But then that
21 --

22 GENERAL PRELOGAR: -- and with the
23 recognition --

24 JUSTICE ALITO: Yeah.

25 GENERAL PRELOGAR: -- that when state

1 legislatures are doing lawmaking, just as with
2 the --

3 JUSTICE ALITO: Right. Okay.

4 GENERAL PRELOGAR: -- the governor's
5 veto you can have state constitutional checks.

6 JUSTICE ALITO: No, I understand -- I
7 understand all that. I'm just talking to --
8 trying to see whether these statutes add
9 anything, and in light of your answer, it
10 doesn't seem to me they add anything because
11 we're still back to the question of the
12 interpretation of the federal Constitution,
13 right?

14 GENERAL PRELOGAR: I agree there's a
15 federal constitutional question here. We think
16 that these statutes add for purposes of this
17 case just additional confirmation from Congress
18 that it recognized that other organs of the
19 state government, including courts, could play a
20 role in the process.

21 JUSTICE ALITO: I don't think that's
22 really responsive to my question. If the law
23 thereof includes the equal protection clause in
24 the U.S. Constitution and it includes the Voting
25 Rights Act, then it includes also the Elections

1 Clause, and I understood you to agree with that.
2 So we're back to these -- these statutes are not
3 an alternative way to decide the case. It takes
4 us back to the Election Clause constitutional
5 question, right?

6 GENERAL PRELOGAR: That's right, we
7 haven't asked --

8 JUSTICE ALITO: Okay. Thanks.

9 GENERAL PRELOGAR: -- the Court to
10 resolve this case on the basis of these
11 statutes.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?
15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: In fairness to
17 Petitioner, I think that what they're trying to
18 say when they draw this procedural substantive
19 line or this other line of open-ended or
20 specific constitutional provisions, that they're
21 trying to articulate, maybe inarticulately, but
22 articulate that we have to reach the question of
23 how -- when does the federal constitutional
24 provision spring up, meaning at what point has a
25 court acted not as in judicial review but in

1 legislating, and so how would -- and I think Mr.
2 Verrilli gave us a line. What's your line? How
3 would you articulate it?

4 GENERAL PRELOGAR: So I'm happy to
5 give you a line. I'll just say that I don't
6 actually understand them to -- to try to
7 conflate those two arguments. I think that they
8 are trying to make a sweeping argument here that
9 even if the court is acting like a court and
10 faithfully engaged in the process of judicial
11 review, they would nevertheless invalidate any
12 number of constitutional provisions around the
13 states and say those are unenforceable through
14 that process of review.

15 JUSTICE SOTOMAYOR: I -- I agree with
16 you, that's what they're trying to say.

17 GENERAL PRELOGAR: Yes. So -- but
18 just to try to be responsive to your question
19 about a standard, we think that there are
20 obviously multiple formulations that have been
21 offered and are available to the Court, but we
22 think the closest analogue to try to track this
23 problem I've described of when a court is not
24 faithfully engaged in judicial review is to
25 borrow from the adequate and independent state

1 grounds context and specifically the civil
2 rights cases, where the Court has said that if
3 the state court decision is so lacking in any
4 basis and has no fair or substantial support and
5 can only be understood as an effort to frustrate
6 federal rights, then the Court can look past
7 that decision.

8 And, again, we think that this is a
9 high bar. It's not testing for exactly the same
10 thing because, in that context, novelty might be
11 important, for example, if you're surprising a
12 civil rights plaintiff to try to deny a federal
13 forum. Here, we don't think that novelty would
14 carry much weight in the analysis, but we do
15 think that formulation of lacking any fair or
16 substantial support with deference shown to the
17 state's own methodologies and its constitutional
18 interpretation is trying to get at the same idea
19 of when the Court is actually abdicating its
20 judicial role and instead claiming raw
21 policymaking power.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: On your side of the
24 podium, we have one vote in favor of a gap
25 between constitutional and statutory questions

1 and one vote saying it's the -- it's the same,
2 so you get to decide.

3 (Laughter.)

4 GENERAL PRELOGAR: I love casting a
5 deciding vote. We don't think that there is
6 a --

7 JUSTICE KAGAN: Just on your side of
8 the podium.

9 GENERAL PRELOGAR: Sadly, yes. I
10 think that it wouldn't make sense to deploy a
11 different standard or formulation with respect
12 to statutory and constitutional questions
13 because, again, you'd be testing for the same
14 thing, when is this not the court acting like a
15 court when it has gone off the rails and it's
16 just doing policy under the guise of statutory
17 interpretation or constitutional interpretation.

18 But I agree with Mr. Verrilli that I
19 think, in application, this could often come out
20 differently in the sense that usually in
21 statutory interpretation you have a text before
22 you and it might be more evident whether this is
23 just a stark departure from the legislature's
24 work.

25 In the context of constitutional

1 adjudication and contrast, there are often broad
2 provisions, as there are under the federal
3 Constitution, and I think that federal courts
4 should not be in the business of saying that the
5 state courts aren't giving those, for example,
6 just a fair reading looking at their text alone
7 because there is often a lot of additional
8 methodology that has to go into properly
9 interpreting those provisions and distilling
10 them into principles and concrete cases.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: No.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: Just finally, to be
18 clear, in -- in answer, in response to Justice
19 Sotomayor, the reason you see the counsel on the
20 other side as making a sweeping argument that
21 doesn't really require us to employ a test to
22 determine when a court is acting as a court is
23 because they have conceded that this is a court
24 acting as a court, but even still they say its
25 decision needs to be cut out because it's based

1 on state constitutional law and not federal
2 constitutional law. Am I understanding?

3 GENERAL PRELOGAR: That's -- that's
4 exactly right. So they have said multiple times
5 today that they are not asking this Court to
6 delve into the ins and outs of the North
7 Carolina Supreme Court's decision here, that
8 they -- they said they take it at faith -- face
9 value --

10 JUSTICE JACKSON: Right.

11 GENERAL PRELOGAR: -- as an accurate
12 understanding of North Carolina law. And
13 they're instead making far more sweeping
14 arguments that would take off the table 233
15 years of history in this country, state
16 constitutional provisions that have applied
17 under the Articles of Confederation, in the
18 early decades of the republic, and still today,
19 and we think that that would be a distortion of
20 the meaning of the Elections Clause, and it
21 would have enormous and drastic practical
22 consequences.

23 JUSTICE JACKSON: So we can rule here
24 today without adopting any particular test, like
25 Mr. Verrilli's or anything else?

1 GENERAL PRELOGAR: Yes, we agree that
2 it wouldn't be necessary in this case to
3 articulate that standard because we don't think
4 that they're pressing that kind of claim in this
5 case.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Mr. Thompson.

9 REBUTTAL ARGUMENT OF DAVID H. THOMPSON
10 ON BEHALF OF THE PETITIONERS

11 MR. THOMPSON: Thank you, Mr. Chief
12 Justice. Just a few quick points.

13 Number one, on what I meant -- the
14 extent to which we are accepting what the North
15 Carolina Supreme Court's ruling was here as a
16 valid and fair expression of state law, we are
17 doing that for purposes of the two tests that we
18 articulated on our brief. Number one, there
19 can't be any substantive restraint on the state
20 legislature, and number two, it lacked a
21 judicially discoverable and manageable standard.

22 But make no mistake, would this Court
23 say, well, we want to adopt a third standard, we
24 want to take the Bush versus Gore standard and
25 we want to apply it to state constitutions, I

1 would make two points.

2 Number one, the test for a state
3 constitution should be easier to meet than a
4 statute because, for purposes of the Elections
5 Clause, it's far more problematic when a state
6 legislature has its hands tied by a state
7 constitution than when it's tied by a state
8 legislature -- an impermissible distortion of a
9 statute which they can just go back and rewrite.

10 And the second point I would make is,
11 under that standard, and we've heard a
12 multiplicity of standards, but under any of the
13 standards, we think what the North Carolina
14 Supreme Court here did would run afoul of all of
15 those standards because it was not grounded in
16 the text, it was not grounded in the history,
17 and it was not grounded in precedent.

18 Now I would also like to address the
19 suggestion that there will be an increase in
20 cases if the Court were to adopt our standard as
21 opposed to their standard. It's very important
22 to understand that my friends on the other side
23 are articulating two trip wires. They have now
24 articulated two ways in which the Elections
25 Clause could be violated. One is their panoply

1 of stratospheric tests for running --
2 impermissibly distorting state law.

3 But the second way, which they've
4 never disclaimed, it's in their briefs on page
5 57, is they acknowledge that if the legislature,
6 state legislature is deprived a central role, a
7 central role, then that would be a separate way
8 to violate the Elections Clause, and they never
9 tell this Court how that functionalist test is
10 going to be interpreted, how it's going to be
11 applied, and there will be far more litigation
12 under the -- the standards and the tests that my
13 friends on the other side are asking this Court
14 to apply.

15 Now I'd also like to point out that
16 they've said that there would be two sets of
17 rules, rules for federal elections and rules for
18 state elections, if we prevail. From the
19 founding of the republic, states have had the
20 opportunity to have two different sets of
21 elections code and they've consistently declined
22 that invitation, and there's no reason to think
23 that they would do so in this context.

24 And, finally, there was discussion
25 about history and the Articles of Confederation,

1 and, respectfully, their discussion of the
2 Articles of Confederation ignores the
3 fundamental structural change that occurred when
4 the Articles of Confederation were replaced with
5 the Elections Clause, and so we think that is
6 not relevant.

7 I yield back the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel, all counsel. The case is submitted.

10 (Whereupon, at 12:57 p.m., the case
11 was submitted.)

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Official - Subject to Final Review

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