No. 21-1271

In the Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF STATE CONSTITUTIONAL HISTORIANS LAWRENCE FRIEDMAN AND ROBERT F. WILLIAMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are Professor Lawrence Friedman and Professor Robert F. Williams, both law professors and constitutional historians with a specialty in state constitutional law. Professor Friedman is Professor of Law at New England Law | Boston. Professor Friedman is the author of a constitutional law casebook and co-author, with Professor Robert F. Williams, of the leading state constitutional law casebook, and has published numerous scholarly articles on federal and state constitutional law. Professor Friedman was recently selected by Oxford University Press to edit its series on American state constitutions. Professor Williams is Distinguished Professor of Law Emeritus at Rutgers Law School. Professor Williams is an expert in state constitutional law and is the Director of the Center for State Constitutional Studies at Rutgers. Professor Williams is the author of numerous books and articles in the field of constitutional and state constitutional law, and is co-author, with Professor Lawrence Friedman, of the leading state constitutional law casebook.

Amici have each devoted their academic careers to the study of American constitutional law, including the historical and legal development of state constitutions. *Amici* respectfully submit that the views expressed herein will assist the Court in its consideration of this case.

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[1] Counsel for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. *Amici*'s institutional affiliations are for identification only.

SUMMARY OF ARGUMENT

The Framers' personal experience drafting, debating, and serving under the evolving state constitutions of the pre-Founding period instilled a deep understanding of state legislatures as products of state constitutions, subject to state constitutional checks and balances. By 1787, the Framers' experience with relatively unfettered state legislatures had sown widespread distrust of raw legislative authority, which led to state constitutional reforms that included checks on state legislative power. Accordingly, the Framers who drafted and proposed the Constitution of 1787—and the founding generation that ratified it— understood the term "Legislature" as used in the Elections Clause to refer to a lawmaking authority created, *and bound*, by a state's constitution and laws.

The Framers and the founding generation were steeped in recent experience with state constitutional experimentation. Nearly all of the Framers had participated in writing state constitutions or served in office under newly enacted state constitutions: At least 13 of the 55 delegates to the Philadelphia Convention had attended constitutional conventions in their own states, and more had participated in the drafting of their state's constitution. And they brought that experience with them to the 1787 Constitutional Convention in Philadelphia.

The founding generation both understood and intended that state legislatures were limited by constitutional and legal constraints. That understanding followed inexorably from their direct experience with the constitutional checks and balances that emerged to restrain legislative authority in the latter wave of pre-Founding state constitutional development. It is inconceivable that the same men who sought to establish

a system of checks and balances on legislative authorities within their own state constitutional systems would have awarded state legislatures a special federal constitutional exemption to act beyond that limited authority.

ARGUMENT

I. Pre-Founding State Constitutions Experimented with, and Ultimately Rejected, a Model of Unfettered Legislative Authority.

In the decade following independence, the new American states "became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries." Jackson Turner Main, *The American States in the Revolutionary Era*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 1, 23 (Ronald Hoffman & Peter J. Albert eds., 1981).[2] The period between independence and the constitutional convention of 1787 was one of the most dynamic periods in the development of American constitutional theory and practice.

During this period, two basic constitutional models emerged in the new states. Beginning in 1776 a "First Wave" of state constitutions took a strict view of the separation of powers but rejected meaningful checks and balances among the branches. Constitutions enacted in this First Wave largely followed a model of unchecked legislative supremacy, an experiment that quickly came to

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[2] *Amici* are together publishing a second edition of *The Law of American State Constitutions*, forthcoming in 2023. *Amici*'s understanding of the historical record relevant to this brief is unchanged from the first edition cited in this brief.

be regarded as a failure. In the wake of that experiment, a "Second Wave" of state constitutions incorporated the lessons of the First Wave. The state constitutions of New York (1777), Massachusetts (1780), and New Hampshire (1784), incorporated meaningful checks and balances as a corrective to the perceived excesses of the First Wave's legislative supremacy.

By 1787, the Framers of the federal Constitution confronted existing state legislatures that were both creatures of their state's constitutions and subject to those constitutions' significant constraints. In concept and execution, the state legislatures that existed at the time of the federal Constitution's drafting and ratification were already subordinated to, and bound by, a higher law. Fresh off their direct experience of unchecked legislative authority in the pre-Founding period, the Framers would not have sought to upend that legal arrangement—and nothing in the Constitution they drafted did so.

A. First Wave State Constitutions Tested Structures that Aggrandized Legislative Authority at the Expense of the Judicial and Executive Powers.

The first half of 1776 saw a flurry of state constitutional drafting in anticipation of independence. On January 5, 1776, New Hampshire became the first state to adopt a new state constitution, and several states soon followed. Provisional state governments in South Carolina (March 1776), Virginia, (June 1776), New Jersey (July 1776), Delaware (September 1776), Pennsylvania (September 1776), Maryland (November 1776), and North Carolina (December 1776) quickly drafted constitutions to replace their colonial governing structures.

In pursuit of a more egalitarian government after breaking with Great Britain, the legislative bodies that hastily drafted new state constitutions adopted forms of government that favored a supreme legislature and a weakened executive power. *See* Robert F. Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS 62 (2009). Constitutional structures thought to favor the elite or aristocratic classes—such as a second house of the legislature or a powerful executive—were rejected as monarchical or aristocratic. M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 149 (1967).

Pennsylvania's 1776 Constitution represents a prime example of the First Wave of state constitutions. In September 1776, Pennsylvania's constitutional convention adopted a radically republican form of government. The Pennsylvania Constitution drew heavily on Thomas Paine's *Common Sense*, which strongly argued for establishing simple, republican governments, operated by unicameral legislatures with a wide elective franchise. *See* Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 47. Reflecting Paine's egalitarian view of republicanism, the 1776 Pennsylvania Constitution satisfied the First Wave drafters' appetite for legislative supremacy, creating a unicameral legislature devoid of any effective checks and balances, such as an upper house or an executive veto. The theory underlying this governmental structure was clear: Unfettered legislative discretion was the ultimate embodiment of the people's will. Benjamin L. Carp, REBELS RISING: CITIES AND THE AMERICAN REVOLUTION 210 (2007).

The Pennsylvania charter incorporated only bare-minimum checks to curb potential excesses of the legislature: requirements for open proceedings, public

deliberation, annual elections, rotation in office, and periodic review of legislative activity by a specially elected group overseers called the Council of Censors. *See* Pa. Const. of 1776, §§ 13-15, 19, 47. These checks did not give power to the executive and judicial branches to check the legislature in the way checks and balances are understood today. As James Madison later recognized in The Federalist, even the most promising of these checks on legislative authority—the Council of Censors, which was established to check for, and recommend fixes to, overreaches of legislative and executive authority[3]—repeatedly failed to prevent violations of Pennsylvania's constitution. *See* THE FEDERALIST Nos. 48 & 50 (Madison).

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[3] The Council of Censor's full constitutional charge, found at Section 47 of the 1776 Pennsylvania Constitution, states that it shall be the Council's duty

> to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution: They are also to enquire whether the public taxes have been justly laid and collected in all parts of this commonwealth, in what manner the public monies have been disposed of, and whether the laws have been duly executed. For these purposes they shall have power to send for persons, papers, and records; they shall have authority to pass public censures, to order impeachments, and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution.

Pa. Const. of 1776, § 47.

Though the Pennsylvania Council of Censors failed as an effective check on the legislature, it did identify several instructive examples of state legislative overreach: replacing courts with the legislature's committee of grievances as a "shorter and more certain mode of obtaining relief"; "seizing and taking the goods of the inhabitants of this state[] for the use of the army"; authorizing tax collectors "to break open houses in the day time, without . . . affording a sufficient foundation"; dissolving marriages; and infringing upon "the sacred rights of a citizen to trial by jury." THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA: TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF 1776, AND THE COUNCIL OF CENSORS 86–88 (John S. Wiestling printer, 1825). As Gouverneur Morris later observed, "the Council of Censors in [Pennsylvania] points out . . . many invasions of the legislative department on the Executive . . . within the short term of seven years, and in a State where a strong party is opposed to the Constitution . . . ." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299–300 (James Madison) (Max Farrand ed., 1911).

Other First Wave constitutions followed the trend toward aggrandized legislative authority that "tended to exalt legislative power at the expense of the executive," which had come to be identified with the overreach of the British crown, "and the judiciary." William M. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 21 (1972); *see* Jackson Turner Main, THE SOVEREIGN STATES, 1775–1783, at 99–102 (1973). In the 1776 Virginia constitution, for example, the governor was authorized to

act only "with the advice of a Council of State," whose membership was elected by the legislature, or with the express consent of the legislature. Va. Const. of 1776. In New Jersey, the governor was selected by the Legislative Council and General Assembly and limited to a one-year term. N.J. Const. of 1776, § VII. In South Carolina, the chief executive was limited to a single term. S.C. Const. of 1776, § XIII. In South Carolina, New Jersey, and Virginia, the legislature elected high ranking officials in the executive and judicial branches. S.C. Const. of 1776, §§ III, XIX-XXI; N.J. Const. of 1776, §§ VII, IX; Va. Const. of 1776. The New Jersey and North Carolina Constitutions allowed for the removal of justices by the legislature for "misbehavior." N.J. Const. of 1776, § XII; N.C. Const. of 1776, § XXXIII.

And although most First Wave constitutions created bicameral legislatures, they generally conferred greater power on the lower houses. *See* Main, THE SOVEREIGN STATES, 1775–1783, at 200 (noting that "the house of representatives . . . during the first years of statehood [became] the most important part of the government."). For example, the 1776 South Carolina Constitution created a bicameral legislature where the lower house elected the members of the upper house. S.C. Const. of 1776 § II. As James Wilson of Pennsylvania lamented, the First Wave had an "excessive partiality" to state legislatures, "into whose lap, every good and precious gift was profusely thrown." 1 COLLECTED WORKS OF JAMES WILSON, at 699 (Kermit L. Hall & Mark David Hall eds., 2007).

B. Second Wave State Constitutions Rejected Unfettered Legislative Excesses in Favor of Co-Equal Branches of Government Designed to Check Legislative Authority.

The Second Wave of state constitution-making saw a gradual but important shift away from First Wave models. Second Wave state constitutions rejected unfettered legislative power and favored coequal branches of government featuring checks and balances. *See* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 452 (1969).

The shift was a deliberate and direct reaction to the systems established in Pennsylvania and other First Wave states, of which state constitutional framers in New York, Massachusetts, and elsewhere were keenly aware. Reports and pamphlets on the proceedings in Pennsylvania were in regular national circulation, and the presence of delegates from all 13 states in Philadelphia for the Second Continental Congress in 1776 ensured that the adoption of Pennsylvania's Constitution and the controversy surrounding it received national attention. Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 44.

Second Wave state framers viewed the 1776 Pennsylvania constitution as an instructive but cautionary tale. Like most delegates to the Continental Congress in Philadelphia, the New York delegation was intimately familiar with Pennsylvania's constitutional model, the controversy over its adoption, and the early excesses of its legislature. In early 1777, New York's delegates to the Continental Congress in Philadelphia wrote home about the controversy over the Pennsylvania Constitution of 1776:

> The unhappy Dispute about their Constitution is the fatal Rock on which they have split, and which threatens them with Destruction. We ardently wish that in our own State the utmost Caution may be used to avoid a like calamity. Every wise Man here wishes that the establishment of new Forms of Government had been deferred . . . .

Letter from Philip Livingston, James Duane, and William Duer to Abraham Ten Broeck (Apr. 29, 1777), reprinted in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, at 344 (Edmund C. Burnett ed., 1923).

New York's constitutional convention ultimately rejected the First Wave's example and adopted a constitution that imposed significant checks on the legislative authority. It had a bicameral legislature in which both chambers were directly elected. N.Y. Const. of 1777, § II. Its governor was elected for a three-year term with no limit on reelection. *Id.* § XVII. Importantly, it established a Council of Revision that could veto "laws inconsistent with the spirit of this constitution, or with the public good" that were "hastily and unadvisedly passed" as a check on the legislature—direct checks on the legislature that Pennsylvania's Council of Censors, which could merely report on constitutional violations, lacked. *Id.* § III. With limits in place to curb the legislative excesses so controversial in Pennsylvania, New York's 1777 Constitution represented the beginning of the second wave of state constitution making.

This Second Wave model blended governmental powers in a manner that appealed to critics of the Pennsylvania Constitution. And New York's early experience with its Second Wave constitution demonstrated that its checks on legislative power were

more than parchment barriers: The Council of Revision, of which John Jay was a member, went on to veto 58 legislative enactments prior to the federal Constitutional Convention. Charles Coleman Thach, Jr., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY, at 38–39 (1923).

John Adams was an early and ardent critic of the Pennsylvania constitution. His *Thoughts on Government*, written in the spring of 1776 in response to, among other things, Paine's *Common Sense*, took issue with Paine's vision of egalitarian unicameralism that the Pennsylvania Constitution embraced. Following adoption of the Pennsylvania's constitution, which Adams thought a "foolish . . . plan," 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 332–33 (L.H. Butterfield ed., 1961), Dr. Benjamin Rush recalled:

> So great was [Adams's] disapprobation of a government composed of a single legislature, that he said to me upon reading the first constitution of Pennsylvania "The people of your state will sooner or later fall upon their knees to the King of Great Britain to take them again under his protection, in order to deliver them from the tyranny of their own government.

A MEMORIAL CONTAINING TRAVELS THROUGH LIFE OR SUNDRY INCIDENTS IN THE LIFE OF DR. BENJAMIN RUSH 105 (Louis Alexander Biddle ed., 1905).

Adams' misgivings about the Pennsylvania model were shared by other participants in state constitution-making late in the First Wave and into the Second. In 1775, Thomas Stone, a Maryland delegate to the Continental Congress, wrote to Pennsylvanian John Dickinson that he thought "it not improbable that a well

formed govt in a state so near as [Maryland] might tend to restore the affairs of [Pennsylvania] from that anarchy [and confusion] which must attend any attempt to execute their present no plan of polity." Letter from Thomas Stone to John Dickinson, Archives of Maryland (Biographical Series): Thomas Stone (1743–1787). Similarly, the arrival of Adams' *Thoughts on Government* in North Carolina, while the Provincial Congress considered an anti-aristocratic draft constitution, heavily influenced debates in that state. Elisha P. Douglass, REBELS & DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS & MAJORITY RULE DURING THE AMERICAN REVOLUTION 31–32, 124–25 (1955). A member of the Provincial Congress working on the North Carolina Constitution wrote to Samuel Johnson: "You have seen the constitution of Pennsylvania—the motley mixture of limited monarchy and an execrable democracy—a beast without a head. The mob made a second branch of the legislature." *See* Elisha P. Douglass, *Thomas Burke, Disillusioned Democrat*, 26 N.C. Hist. Rev. 150, 158 (April 1949).

Adams' *Thoughts on Government* also best articulated the form of government available to state constitutional framers as an alternative to the Pennsylvania model: a "balanced government," or a constitution of checks and balances, in which bicameralism and executive power counterbalanced the lower house, which "should be in miniature an exact portrait of the people at large." Nat'l Archives, *III. Thoughts on Government, April 1776*,https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 (last visited October 26, 2022).

Massachusetts's constitutional experience between 1776 and 1780 represents the best example of Second Wave state constitution-making and its adoption of

Thoughts on Government's "balanced government." *Id.* Facing pressure to enact a legitimate state constitution following the Declaration of Independence, Massachusetts' legislative body drafted and proposed a constitution in 1778. That 1778 Massachusetts constitution was modeled predominantly on the Pennsylvania constitution and deeply influenced by Paine's *Common Sense*—and was ultimately rejected by Massachusetts voters. Stephen E. Patterson, POLITICAL PARTIES IN REVOLUTIONARY MASSACHUSETTS 171–96 (1973). Following the rejection of the 1778 Massachusetts Constitution, Adams himself was the principal architect of a new 1780 constitution that incorporated restraints on legislative authority promoted in *Thoughts on Government*. Lawrence Friedman & Lynnea Thody, THE MASSACHUSETTS STATE CONSTITUTION 9–10 (2001). As one scholar observed:

> The 1780 Massachusetts Constitution was the most important one written between 1776 and 1789 because it embodied the Whig theory of republican government, which came to dominate state level politics; the 1776 Pennsylvania Constitution was the second most important because it embodied the strongest alternative. The Massachusetts document represented radical Whiggism, moderated somewhat by the form of mixed government, if not the actual substance. Pennsylvania Whigs wrote the most radical constitution of the era, one lacking even a bow in the direction of mixed government.

Donald S. Lutz, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 129 (1980).

The shift between the First and Second Waves, best epitomized by the differences between the Pennsylvania constitution and the constitutions of New York and Massachusetts (1780), was not merely a rebalancing of roles in the name of coequality. It was also a deliberate move by Second Wave drafters to target and tamp down legislative supremacy. *See* Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 63–64; *id.* at 248 ("The new executive and judicial powers operated as a check on recognized legislative power rather than a sharing of legislative power."). While the First Wave marked a radical rejection of monarchial structures—or any semblances thereof—the Second Wave emerged as an antidote to the First Wave's legislative overreaches.

Pennsylvania's constitution thus transformed from archetype into antithesis: At the Constitutional Convention, "Madison, Randolph, Wilson, and Morris, who were among the most influential delegates at the Constitutional Convention, saw the existing state constitutions, with Pennsylvania's as the most extreme example, as unable to provide checks against wide-ranging assaults on liberty and property by the relatively unfettered state legislatures." *Id.* at 67. Historian Richard Ryerson has referred to Pennsylvania's as "America's most un-Madisonian Constitution." *Id.* (quoting Richard A. Ryerson, "Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalists Party," in *Sovereign States in an Age of Uncertainty*, at 98).

But the Pennsylvania constitution nonetheless served as an invaluable tool for Second Wave drafters. Indeed, its "most important contribution . . . was to provide a highly visible, national focal point for the competing arguments on the key constitutional issue of the founding decade—

namely, the relationship between separation of powers and checks and balances." *Id.* at 70. As a foil, Pennsylvania's constitution highlighted the embedded pitfalls of a structurally imbalanced—and unchecked—government, and paved the path toward a new model both at the state and federal levels.

II. The Framers Came to the 1787 Constitutional Convention with Direct Experience of this Evolution in State Constitutional Design.

Of the 55 delegates at the Constitutional Convention, at least 13 had been present at their respective state constitutional conventions. Nat'l Archives, *Biographical Index of the Framers of the Constitution* (available at https://www.archives.gov/founding-docs/founding-fathers) (last visited Oct. 26, 2022). One scholar estimates that as many as half of the 55 delegates played a role in drafting state constitutions prior to the 1787 Convention. W.C. Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 Annals Am. Acad. Pol. & Soc. Sci. 380, 417 (1897).

All but two of the delegates had held public office in their respective states.[4] As legislators, executives, judges, officers, and delegates to the continental congress, the drafters of the federal Constitution had deep practical experience with their respective state constitutions. To the Framers, the existing state legislatures were not a theoretical abstraction but actual governmental

[4] The exceptions were George Washington and James McClurg of the Virginia delegation. *See* Nat'l Archives, *Biographical Index of the Framers of the Constitution* (available at https://www.archives.gov/founding-docs/founding-fathers) (last visited Oct. 26, 2022).

institutions, whose limits the Framers had thoroughly explored—and reinforced—in the preceding decade.

A. The Version of Federalism Adopted By the Framers Rejected the Legislative Omnipotence of First Wave Constitutions.

The Framers' intimate awareness of the pre-Founding evolution in state constitutional design is illustrated by the fact that those Framers with the most direct experience of pre-Founding state constitutionalism were avowed critics and opponents of the First Wave model. These Framers had witnessed the "highly visible" legislative overreach under First Wave constitutional structures, especially in Pennsylvania. Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 70, 248-49. Gouverneur Morris, for example, lamented the Pennsylvania legislature's "excesses [against] personal liberty[,] private property [and] personal safety." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 512 (James Madison).[5] Edmund Randolph similarly pronounced, regarding the future of the Union, that the "chief danger arises from the democratic parts of our state constitutions." Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 67. In the view of some Framers, the Constitutional Convention itself was convened in response to the "corruption & mutability of the Legislative Councils of the States." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 288 (notes of James Madison, recording arguments of John Francis Mercer).

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[5] Morris added rhetorically: "Ask any man . . . if he confides in the State of [Pennsylvania] if he will lend his money or enter into contract? He will tell you no. He sees no stability. He can repose no confidence." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 513 (James Madison).

Thus, the Framers' preference for a checked and balanced federal legislature did not emerge from a vacuum: It was, in part, a product of their own personal experiences with state constitutionalism in the pre-Founding era—and in particular, with the perceived excesses of the First Wave model. James Madison believed a federal constitutional convention was necessary to address the state legislatures' apparent "omnipoten[ce]." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35. He lamented that state governments had "too great a mixture, and even an actual consolidation" of authority in the legislatures. THE FEDERALIST No. 47 (Madison). Dr. Benjamin Rush hoped that the new constitution would "overset [the] dung cart . . . and thereby restore order and happiness to Pennsylvania." 1 LETTERS OF BENJAMIN RUSH, 439-40 (L.H. Butterfield ed., 1951) (Benjamin Rush to Timothy Pickering, Aug. 30, 1787). James Wilson added that "it is from the Natl. Councils that relief is expected." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 253. George Read went so far as to opine that "the state governments must sooner or later be at an end." *Id.* at 141.

The Framers' efforts reflected their skepticism of the First Wave model and evidenced their assumptions about the proper status of a legislature in a constitutional government. James Wilson advocated for an executive with a veto power because "[w]ithout such a self-defense the Legislature can at any moment sink it into non-existence." Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS, at 68. Alexander Hamilton agreed: "An absolute or qualified negative in the executive upon the acts of the legislative body, is . . . an indispensable barrier against the encroachments of the latter upon the former."

THE FEDERALIST No. 66 (Hamilton). The same spirit motivated the Framers' preference for legislative bicameralism: Rejecting Pennsylvania's one-house legislature, the Framers were determined that the federal Congress should be divided in two, with the upper house checking the populism of the lower. They understood bicameralism as essential to avoid the "excess," and the "turbulence and follies," of democracy that plagued early state governments. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48, 51 (statements of Elbridge Gerry and Edmund Randolph).

The concern at the Convention with unchecked legislative power is evident from the debates over the Elections Clause itself.[6] The principal focus of those debates was the degree of power that state legislatures would possess over federal elections. On August 6, 1787, an early version of the Elections Clause recommended by the Convention's Committee of Detail empowered "the Legislature of each State" to regulate elections and allowed Congress to "alter" state laws. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 179. On August 9, when the full Convention debated what would become the Elections Clause, several amendments were proposed. One amendment gave Congress the power to "make" election regulations, rather than simply "alter" state laws. *Id.* at 299. As James Madison explained in his notes on that day's proceedings, Congress's role was necessarily expanded for fear that "the States should fail or refuse altogether" to make rules to elect Congressional representatives—a well-recognized possibility at the

[6] For an in-depth discussion of the history of the Elections Clause at the Constitutional Convention, *see* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997 (2021).

time, as opponents of the new constitution threatened to starve it of authority by preventing state legislatures from holding elections to the new federal congress. *Id.* at 242.

Also on August 9, an amendment by John Rutledge and Charles Pinkney of South Carolina moved to strike Congress's role from election administration in its entirety, arguing that the "States . . . could & must be relied on" to manage congressional elections without constraint. *Id.* at 240. The Rutledge-Pinkney amendment was vociferously denounced by several delegates based on concerns of unfettered legislative control over federal elections. Rufus King argued that Rutledge and Pinkney's amendment was "dangerous" and that "erecting the Genl. Govt. on the authority of the State Legislatures has been fatal to the federal establishment[.]" *Id.* at 241. Gouverneur Morris argued that without a role for Congress, "States might make false returns and then make no provisions for new elections[.]" *Id.* According to his own notes, James Madison's lengthy statement in opposition to the Rutledge-Pinkney amendment highlighted the risk of abuse by self-interested state lawmakers in unfettered legislatures: "the Legislatures of the States ought not to have the uncontrouled right of regulating the times[,] places & manner of holding elections . . . It was impossible to foresee all the abuses that might be made of the discretionary power." *Id.* at 240. The Rutledge-Pinkney amendment was soon after abandoned, and the version of the Elections Clause that preserved Congress's role to not only alter but to make election regulations was adopted unanimously. *Id.* at 241–42.

Statements made during the debates over ratification of the Constitution confirm the Framers' understanding that the Legislatures' power under the Elections Clause

would be constrained. Alexander Hamilton, for example, wrote that the Elections Clause guarded against state legislative overreach, which "in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory," but which required a check in case of "extraordinary circumstances [which] might render that interposition necessary to its safety." THE FEDERALIST No. 59 (Hamilton). At Pennsylvania's ratifying convention, James Wilson argued: "I think it highly proper that the federal government should throw the exercise of this power into the hands of the state legislatures; but not that it should be placed there entirely without control." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 440 (Jonathan Elliot ed., 1901). Richard Morris of New York observed in debates over the Elections Clause that "it was absolutely necessary that the existence of the general government should not depend, for a moment, on the will of the state legislatures." *Id.* at 326.

B. The Framers Understood and Intended that State Court Judicial Review Would Serve as a Check on State Legislative Power.

By 1787, the Framers were also aware that judicial review existed as a check on state legislative authority within many existing state constitutional schemes. This pre- and post-founding experience with judicial review reinforced the Framers' understanding of legislative authority as subordinate to a higher constitutional law. Although *Marbury v. Madison* was still more than a decade away, *Marbury*'s core claim to constitutional supremacy over legislative power was long since established. *See, e.g.*, John Locke, SECOND TREATISE OF

GOVERNMENT § 212 (1690) ("When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make Laws without Authority, which the People are not therefore bound to obey."). At common law, English courts had historically reviewed local law and corporate rules for consistency with common law principles. *See* Philip Hamburger, *Law and Judicial Duty*, 72 Geo. Wash. L. Rev. 1, 12–13 (2003).

State court practice had reinforced this understanding in the emerging American system. North Carolina courts felt themselves "bound to take notice" of the state constitution "as the fundamental law of the land," and reasoned that an act of the legislature that contradicted the Constitution would "stand as abrogated and without any effect." *Bayard v. Singleton*, 1 N.C. 5 (N.C. Super. 1787). In the Virginia case of *Commonwealth v. Caton*, 8 Va. 5 (1782), Judge Wythe explained that if the legislature "should attempt to overleap the bounds, prescribed to them by the people," then he, "pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further." *Id.* at 8. Other instances of judicial review can be found in New Hampshire's *Ten Pound Act* cases, Rhode Island's *Trevett v. Weeden*, and New York's *Rutgers v. Waddington*. *See* William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455, 480–81 (2005).[7]

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[7] Several post-ratification, pre-*Marbury* state court decisions illustrate that the Framers broadly understood the power of courts to review state legislative acts for conflict with state constitutions. *See, e.g.*, *Kamper v. Hawkins*, 3 Va. 21, 24-30 (Va. Gen. Ct. 1793) (Nelson, J.); *id.* at 35-36 (Roane, J.); *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (C.C.D. Pa. 1795); *Minge v. Gilmour*, 17 F. Cas. 440, 442 (C.C.D.N.C. 1798); *Respublica v. Duquet*, 2 Yeates 493, 498 (Pa.

Other state courts similarly reviewed and struck legislative acts determined to be an overreach of power under the applicable state constitutions. For example, in *Holmes v. Walton* (1780), as discussed in *State v. Parkhurst*, 9 N.J.L. 427 (1802), *aff'd*, (N.J. Jan. 28, 1828), the New Jersey court struck a law requiring juries of six people (instead of the customary twelve) for violating the state constitution's guaranteed right to a trial by jury. *Id.* at 444.

Several pre-convention state constitutions had even recognized the supremacy of constitutions vis-à-vis the legislatures they established by the time the Framers met in Philadelphia. New York instituted the Council of Revision to review and modify "laws inconsistent with the spirit of this constitution, or with the public good." N.Y. Const. of 1777, § III. Delaware, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, and Pennsylvania meanwhile provided that legislative acts and common law that were "incompatible," "repugnant," or otherwise incongruous with the rights guaranteed under their constitutions are invalid. Del. Const. of 1776, Art. 25; Ga. Const. of 1777, Art. VII; Md. Decl. of Rights of 1777, Art. XLII; Mass. Const. of 1780, Ch. 1 Art. IV and Ch. VI Art. VI; N.Y. Const. of 1777, § XXXV; N.J. Const. of 1776, §§ XXI, XXII; N.C. Const. of 1776, § XLIV; Pa. Const. of 1776, § 9.

1799); *Stidger v. Rogers*, 2 Ky. 52, 52 (1801); *State v. Parkhurst*, 9 N.J.L. 427, 443 (1802), *aff'd*, (N.J. Jan. 28, 1828); *Whittington v. Polk*, 1 H. & J. 236, 242–43 (Md. Gen. 1802).

C. The Framers Confronted State Legislatures Already Bound by Constitutional and Legal Limits, Including Judicial Review.

Based on their deep experience with state constitutional development, the Framers appreciated better than most that state legislatures were creatures of state constitutions—and bound to operate within the constitutional structure that had established them. *Amici* respectfully submit that the term "Legislature" in the Elections Clause must be read in that historical context—a context that was recent and vivid to the Framers who had lived through the pre-Founding period in state constitutional development. As discussed above, the Framers had either participated in or witnessed the development of state constitutional systems in which legislatures were bound by the constitutional framework that had created them. Such legislatures could only act within and consistent with a framework that, in many states, also made those constitutional restrictions on legislative authority enforceable in court via judicial review.

The founding generation's experience with unfettered legislative authority renders implausible any conclusion that "legislature" as it is used in the Elections Clause would have been understood to confer a special federal exemption from the state constitutional and legal strictures the Framers had in many cases worked hard to create. But moreover, the Framers had no need to define the metes and bounds of the state lawmaking authorities with which the federal Constitution would interact. Those lawmaking authorities already existed, within an already-vibrant tradition of state constitutional law.

CONCLUSION

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted.

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