No. 21-1271

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,

Petitioners,

v.

REBECCA HARPER, ET AL.,

Respondents.

On Writ of Certiorari to the
North Carolina Supreme Court

AMICUS CURIAE BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Legislative Exchange Council ("ALEC") is America's largest, non-partisan voluntary membership organization of state legislators who are dedicated to the principles of limited government, free markets, and federalism. ALEC seeks to foster respect for the role of state legislatures within our constitutional system, ensure the legislative role is respected by the judiciary, and preserve the legislative power and prerogatives granted by the United States Constitution.

ALEC and its members have a strong interest in this case because Article I expressly provides that rules for federal congressional elections are established in each State by "the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. The North Carolina Supreme Court disregarded that clear command, unconstitutionally substituting its own redistricting preferences for the "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam) (vacating state court's construction of rules enacted by the state legislature for administration of federal elections). That erroneous decision must be reversed because a state constitutional provision cannot withdraw or limit the Federal Constitution's

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than ALEC or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs.

express grant of authority to state legislatures. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC")*, 576 U.S. 787, 827 (2015) (Roberts, C.J., dissenting) ("In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way."). And even if that were possible, none of the state constitutional provisions at issue in this case even purports to do so.

If the North Carolina decision is permitted to stand, state courts will usurp the prerogatives of state legislatures. "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring). That assignment has salutary effects, keeping certain nonjusticiable questions principally within the political branches best equipped to resolve them. But this constitutional arrangement "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

That risk is real. Already, some results-oriented state court judges are manipulating similarly indefinite state constitutional provisions to thwart the Framers' design and take policymaking in the federal election sphere away from legislatures. But judicial decisions about redistricting are just as

capable of achieving partisan ends when they are unmoored from constitutional restraints. They are not necessarily more virtuous or sound, they just substitute the preferences of a different branch of state government. Policymaking by judges disguised as constitutional interpretation threatens public trust in the judiciary and disserves the fundamental principle that districting decisions are "primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2495–96 (2019).

The judicial activism in North Carolina is representative of activist litigation strategies afoot in many states, most undertaken by partisan litigants (Republicans and Democrats) seeking advantage in federal elections through judicial decree. Unless stopped by this Court, the North Carolina decision will embolden activists and spawn imitation. The potential result is widespread usurpation of one of the most significant responsibilities expressly assigned to state legislatures by the Federal Constitution. To borrow a local colloquialism, ALEC and its members urge this Court "to nip it in the bud!" *The Andy Griffith Show: One Punch Opie* (CBS television broadcast Dec. 31, 1962).

SUMMARY OF ARGUMENT

The Federal Constitution assigns responsibility for determining federal congressional districts "to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496. Through the Elections Clause, the Framers codified

their judgment that state legislatures and Congress are best equipped to weigh, balance, and compromise a host of traditional districting criteria. That this process would entail political and policy considerations was well understood by the Framers and they assigned the responsibility, appropriately, to a political branch.

Acting pursuant to its constitutionally delegated authority, the North Carolina General Assembly enacted the redistricting maps at issue in this case. The North Carolina Supreme Court held that those maps constituted "partisan gerrymanders" and, in the first such application of that State's "free elections" clause, ruled that the congressional plan violated the North Carolina Constitution. To remedy the supposed constitutional violation, the court substituted its own judicially drawn congressional districts and ordered the 2022 congressional elections to be held under its maps.

The Federal Constitution prohibits state court usurpation of the legislature's authority. Because the Federal Constitution, not the North Carolina Constitution, grants the General Assembly authority to regulate federal elections subject to Congress's check, only the Federal Constitution or Congress can remove or limit that authority. And because there is no allegation in this case that the General Assembly's maps violated either the Federal Constitution or an act of Congress, the decision of the North Carolina Supreme Court must be reversed.

The decision also must be reversed because it is wrong. None of the state constitutional provisions the

North Carolina Supreme Court cited says anything about partisan considerations in redistricting, and only one mentions elections at all. The state court's decision to read an atextual limitation into the state constitution departed from two-and-a-half centuries of practice in which the North Carolina courts had never found a partisan gerrymandering claim justiciable. Because the North Carolina Supreme Court's strained judicial interpretation countermands the clearly expressed intent of the state legislature, the court's construction of the state constitution presents a federal question for this Court's resolution.

The need for resolution is underscored by decisions in other states. In Pennsylvania, Maryland, and elsewhere, state courts have abused similarly vague state constitutional provisions to override specific federal elections regulations established by the legislature. And there is a significant risk that number could grow because more than thirty states have "free elections" clauses that activists are casting as newfound fonts of judicial power to regulate federal elections unmoored from constitutional text, structure, history, and tradition. The Federal Constitution prohibits that result, and this Court should so hold.

ARGUMENT

I. The Federal Constitution Requires North Carolina's Legislature To Determine Its Federal Congressional Districts.

A. The Elections Clause Grants Districting Authority To Each State's "Legislature."

Article I of the U.S. Constitution grants state legislatures districting authority. The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

As relevant here, the Elections Clause has two functions. First, the Clause imposes "the duty" on States "to provide for the election of representatives to the Federal Congress." *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). That requires, among other things, that States define congressional districts corresponding to the number of federal representatives they are apportioned.

Second, the Elections Clause specifies that the entity within each State responsible for this important task is "the Legislature thereof." The Framers knew the districting power for the new

federal offices they created must lie somewhere. After some debate, "[t]hey settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496.

The authority to establish federal congressional districts is thus not a typical state legislative power exercised pursuant to a grant of authority under a state constitution. Rather, this Court has recognized that when a state legislature enacts a statute regulating the time, place, and manner of an election, it acts by virtue of an "exclusive delegation of power under the Elections Clause." *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see also Ex parte Siebold*, 100 U.S. 371, 383 (1879) (explaining "the power of Congress, as well as that of the State legislatures, to regulate the election of senators and representatives arises" from the Elections Clause). That delegation is subject to restraint by the Federal Constitution or, as stated in the Elections Clause itself, by an act of Congress that makes or alters an election rule.[2]

As recently as two years ago this Court confirmed, in the context of the Constitution's assignment of

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[2] This Court has identified two federal constitutional restraints on districting authority: "one-person, one-vote and racial gerrymandering." *Rucho*, 139 S. Ct. at 2495; *see Wesberry v. Sanders*, 376 U.S. 1 (1964); *Shaw v. Reno*, 509 U.S. 630 (1993). Perhaps the most well-known congressional restraints are the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified 52 U.S.C. §§ 10101–10702), and the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified 52 U.S.C. §§ 20901–21145). None of these is at issue in, or would be affected by, this case.

authority to state legislatures to appoint presidential electors, that such assignment "convey[s] the broadest power of determination" to the legislature subject only to another constraint expressed in the Federal Constitution. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). The Court further observed that states cannot impose other conditions on the legislature's appointments that would conflict with the Federal Constitution. *Id.* at 2324 n.4.

The reasons the Framers assigned primary authority for setting the rules governing federal elections to state legislatures are well known. Foremost, the selection of legislative institutions reflects the Framers' "preference for the democratic process" in regulating elections. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (opinion of Kennedy, J.). In the Elections Clause and elsewhere, the Framers provided that federal elections would be principally regulated by "the political branches." *Rucho*, 139 S. Ct. at 2506; *see* U.S. Const. art. I, § 4, cl. 1; art. II, § 1, cl. 2.

The Framers made this choice notwithstanding their familiarity with districting problems. During the colonial period, as afterwards, the political gerrymander was "alive and well." *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality). To take one prominent example, Thomas Jefferson, among others, accused Patrick Henry of attempting to gerrymander James Madison out of the First Congress. Thomas Rogers Hunter, *The First Gerrymander? Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 Early Am. Studies 781 (2011).

The Elections Clause was the Framers' solution to these problems. By "leaving in state legislatures the initial power to draw districts for federal elections" while permitting "Congress to 'make or alter' those districts if it wished," *Vieth*, 541 U.S. at 275, the Framers ensured democratic accountability.

Nor did the Framers contemplate a role for judges. During ratification, "many objected" to "congressional oversight" of state legislatures. *Ibid.*; *see* 2 Joseph Story, *Commentaries on the Constitution of the United States* 280 (1833) ("the superintending power of congress" was "assailed by the opponents of the constitution, both in and out of the state conventions, with uncommon zeal and virulence"). But there is no evidence that anyone suggested the judiciary should draw congressional districts. "Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Rucho*, 139 S. Ct. at 2496.

In addition to ensuring democratic accountability, the Elections Clause recognizes a state "legislature's expertise." *League of United Latin Am. Citizens*, 548 U.S. at 415. The Framers understood that state legislatures are the body best equipped to adapt districting decisions "to the peculiar local, or political convenience of the states." 2 Story, *supra*, at 287.

That is because congressional district drawing is essentially public policy and, like all policymaking, involves a complex mix of competing considerations. In many states, legislatures adopt principles, or

criteria, that guide their decision making.[3] Traditional criteria include compactness, contiguity, preservation of communities of interest, preservation of cores of prior districts, and avoiding pairing incumbents. *See* Nat'l Conf. State Legislatures, *Redistricting Criteria* (July 16, 2021), https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx. In addition to these (and other) traditional criteria, some legislatures choose to prohibit use of certain information, including partisan data. *Ibid.*

Balancing these factors is often more art than science, and "political considerations will likely play an important, and proper, role in the drawing of district boundaries." *Vieth*, 541 U.S. at 299 (citation omitted). State legislatures are equipped for this task because "politicians, unlike nonpartisan observers, normally understand how 'the location and shape of districts' determine 'the political complexion of the area.'" *Id.* at 358 (Breyer, J., dissenting) (quoting

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[3] As the Court recently observed in *Rucho*, some states have moved to limit partisan considerations in districting decisions. 139 S.Ct. at 2507–08. Such limitations might be judicially enforceable consistent with the Elections Clause if imposed by a legislature upon itself. *Compare* Colo. Const. art. V, §§ 44, 46 (amended upon state legislature initiation) *with* Mo. Const. art. III, § 3 (amended in 2018 by citizen petition; amended in 2020 upon state legislature initiation); Fla. Const. art. III, § 20(a) (amended by citizen petition); Mich. Const. art. IV, § 6 (same). But limitations cannot be conjured or imposed, in the first instance, by non-legislative institutions such as state courts. "The States do not . . . 'retain autonomy to establish their own governmental processes' if those 'processes' violate the United States Constitution." *AIRC*, 576 U.S. at 827 (Roberts, C.J., dissenting).

Gaffney v. Cummings, 412 U.S. 735, 753 (1973)). Furthermore, "[i]t is precisely because politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense." *Ibid.*

In sum, the Federal Constitution recognizes districting decisions are "primarily a matter for legislative consideration and determination." *Reynolds*, 377 U.S. at 586; *see Rucho*, 139 S. Ct. at 2495–96. And because the Federal Constitution assigns principal responsibility to state legislatures, judicial relief becomes appropriate only when a legislature fails to comply with federal constitutional or statutory restraints.

B. The North Carolina Legislature Fulfilled Its Constitutional Role.

Acting pursuant to its authority under the Elections Clause, the North Carolina General Assembly undertook a public redistricting process in response to reapportionment based on the 2020 decennial census.

The start of the process was delayed by the COVID-19 pandemic. While the General Assembly waited on the U.S. Census Bureau to provide the new population data, the Joint Redistricting Committee met and agreed to certain criteria to guide the redistricting process. These included many traditional criteria, and prohibited use of racial data, partisan considerations, and election results data. App. to Application for Stay 317a–18a ("App.").

When the redistricting process began, the Joint Redistricting Committee held public hearings in each of North Carolina's thirteen existing congressional districts. App. 319a. To "instill public confidence" as it developed the new district maps, the General Assembly "requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms." App. 322a. These stations were "open during normal business hours, and both the rooms and the screens of the station computers [were] live streamed while the stations were open." App. 322a.

Following this process, the General Assembly enacted its new maps on November 4, 2021. App. 326a. The maps were promptly challenged in state court as violative of the North Carolina Constitution, with plaintiffs alleging that the maps were predominantly based on partisan considerations.

C. The North Carolina Supreme Court Replaced The Legislature's Districting Maps With Its Own.

The maps were initially upheld. A three-judge panel of the Superior Court held that the North Carolina Constitution does not prohibit partisan gerrymandering, App.523a–540a, and, further, that partisan gerrymandering claims are nonjusticiable in North Carolina, App. 540a–47a.

In a four-to-three decision, the North Carolina Supreme Court reversed. Rejecting nearly 250 years of redistricting practice, the four Justice majority held that "partisan gerrymandering claims are justiciable

under the North Carolina Constitution." App. 83a. Next, the court held that the maps "constitute[d] partisan gerrymanders" and thus violated "the North Carolina Constitution's Declaration of Rights." App. 147a.

Three Justices dissented. They explained the majority's analysis was "unguided by the constitutional text" and its "time-honored meaning," App. 170a, and that "none of the constitutional provisions" relied upon by the majority purport to address let alone "prohibit the practice of partisan gerrymandering," App. 235a. With respect to justiciability, the dissenting Justices held that the North Carolina Constitution provides "no judicially discernible manageable standard," App. 191a, and makes clear that concern about partisan gerrymandering "is textually committed to the General Assembly" and not the courts, App. 192a.

The state Supreme Court's establishment of a new constitutional right naturally begged novel definitional and methodological questions regarding its contours. Yet the court declined to prescribe specific instructions for achieving "partisan fairness." App. 136a. The court ruled that it did not "believe it prudent or necessary" to identify a particular standard to "conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." App. 134a–35a.

Instead, the court recommended a list of four mathematical tests, apparently drawn from political science literature, that "may be useful" to future map drawers and courts: (i) an "efficiency gap" of 7% or

less; (ii) a "mean-median" metric of 1% or less; (iii) a "partisan symmetry" test with no objective metric; and (iv) a similarly subjective "close votes, close seats" analysis. App. 137a–38a; *see* App. 135a.

On remand, the General Assembly undertook the task of drawing new districts for its state house, state senate, and its congressional seats utilizing the state Supreme Court's two objective mathematical tests—the "efficiency gap" and "mean-median" tests. As set forth in the legislators' briefs and expert reports before the state courts, the legislature used a uniform set of historical election data and a widely accepted districting software program called "Maptitude," combined with traditional districting criteria such as geography, to draw and analyze its maps for all three districting plans. Utilizing that uniform method, the legislature drew three districting plans that its expert concluded met the court's mathematical goals. Expert Rep. of Dr. Michael Barber, at 6 (filed in appendix to Mot. Temp. Stay, *Harper v. Hall*, 868 S.E.2d 95 (N.C. 2022) (Case No. 413PA21)). According to the legislature's policy expert, the re-drawn congressional districts scored 0.61% under the mean-median test and 5.3% under the efficiency gap test—both well within the thresholds approved by the state Supreme Court. *Ibid.*

These districting plans were then submitted to the Superior Court for judgment. Recognizing the limitations of its own expertise in the mathematical and policy complexities, the Superior Court appointed three retired judges to serve as "special masters" and authorized them, in turn, to employ the services of four political scientists to analyze the legislature's

districting plans and prepare a report to the Superior Court. *See* App. 268a.

This is where, as a matter of process, the court's displacement of the legislature truly manifested. According to a motion filed by the legislators, two of the court-appointed political scientists engaged in *ex parte* substantive communications with the plaintiffs' experts. The Superior Court denied the legislators' motion to disqualify the two court-appointed experts and, moreover, forbade the legislature from filing objections or exceptions to the report of the special masters before the Superior Court made its own determination. App. 276a–77a; *see* App. 268a–69a.

Curiously, although the legislature had applied uniform data, software and methods, the special masters' report accepted the legislature's districting plans for the state house and state senate but rejected the legislature's plan for federal congressional seats. App. 270a–71a. The explanation the special masters' report provided for these conflicting "findings" was conclusory and cursory: "Unlike the proposed remedial [state] House and Senate plans, there is substantial evidence from findings of the advisors [i.e., the political science experts] that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%." App. 271a. But nowhere did the special masters' report elaborate its precise metrics, methodology, the software system used, or even the universe of election data the court-appointed experts utilized to come to this conclusion. There was no opportunity for discovery or cross-examination. Thus, the legislature, and the public, were left completely in the dark about

the experts' inputs and specific mathematical conclusions.

The Superior Court merely accepted the special masters' report as conclusive and attached it to its final order. The Superior Court concluded that the legislature's congressional districting plan was unconstitutional and cited as support solely the special masters' report findings. App. 253a–55a, 262a–63a. The Superior Court adopted the special masters' proposed replacement congressional map. App. 266a.

The North Carolina Supreme Court denied the legislators' motion to stay implementation of the Superior Court's districting plan, effectively ordering the 2022 congressional elections to proceed under the Superior Court's map. App. 2a.

Eventually, the legislators were able to discern, through inferences and reverse engineering, apparent differences in the data sets and software utilized by the court-appointed experts as well as apparent flaws in the experts' methodology which the legislators detailed in subsequent briefs to the North Carolina Supreme Court. Legis. Defs.-Appellants' Br., at 22–31, *Harper v. Hall*, 380 N.C. 317 (2022) (Case No. 2022-NCSC-17). However, by this time the die was cast. Without delving more deeply into the inputs and methods utilized by the lower court's appointed experts, the state Supreme Court deferred to the "factual findings" of the Superior Court (i.e., the findings of the special masters and their experts) and adopted the Superior Court's map for the upcoming congressional districts. *See* App. 2a; App. 266a.

The upshot is that a federal election will be held in North Carolina this year according to the opaque policy preferences of four political scientists, concocted outside the view of the public, rather than the North Carolina legislature. That constitutes usurpation.

II. The Federal Constitution Prohibits State Courts From Usurping State Legislatures.

A. State Courts May Not Use State Constitutions To Override Legislative Districting Authority.

Because the Federal Constitution, not the North Carolina Constitution, grants the General Assembly authority over federal elections, only the Federal Constitution can remove or limit that authority. The authority conferred by the Elections Clause cannot be countermanded by a state constitution. Therefore, in holding that the North Carolina Constitution prohibited the General Assembly's congressional maps, the North Carolina Supreme Court violated the Federal Constitution.

The rule could not be otherwise. The Elections Clause assigns districting authority "to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496; *see* section I.A, *supra*. And there is no allegation here that the districts drawn by the General Assembly violate any statute of Congress or any provision of the Federal Constitution.

Those facts compel the conclusion that the General Assembly's maps are valid notwithstanding the contrary rulings of the North Carolina Supreme

Court. "[I]f a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts authority to make whatever rules it thought appropriate for the conduct of a fair election," then "the authority to make rules governing federal elections" under the Elections Clause "would be meaningless." *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (Alito, J., dissenting from denial of certiorari) (quoting *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.)). "[U]nder the U.S. Constitution, the state courts do not have a blank check to rewrite state elections laws for federal elections." *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in the denial of application to vacate stay).

The principle that a State cannot countermand a direct grant of authority under the Federal Constitution was affirmed by this Court long ago. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court upheld a Michigan statute providing for the appointment of presidential electors by congressional district. Construing the Electors Clause of Article II, the Court held that because the clause granted appointment power to "the legislature" it "operat[ed] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.* at 25. Underscoring the point, the Court quoted approvingly from a report of Congress declaring that because the appointment "power is conferred upon the legislatures of the states by the [C]onstitution of the United States" it "cannot be taken from them or modified by their state constitutions." *Id.* at 35

(citation omitted).[4] *See also Leser v. Garnett*, 258 U.S. 130, 137 (1922) (holding state legislatures' ratification of the Nineteenth Amendment valid because Article V of the Federal Constitution commits ratification to "the Legislatures" and thus "transcends any limitations sought to be imposed by the people of a state" through their state constitutions).

This Court applied the same principle to a state court during the contested 2000 presidential election. There, amidst recount litigation, the Florida Supreme Court "construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 77 (quoting *McPherson*, 146 U.S. at 25) In a unanimous decision, this Court vacated that judgment because the Florida legislature was "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of

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[4] Nineteenth-century state court decisions agree. *See, e.g.*, *In re Plurality Elections*, 8 A. 881 (R.I. 1887) (holding state constitution could not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States"); *In re Opinion of the Justices*, 45 N.H. 595, 596, 599 (1864) (holding the election of members of Congress "is governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State has no concern with the question"). According to a scholarly review, state courts of the era "generally enforced state laws governing congressional elections, even when they violated state constitutional provisions." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 38 (2021).

authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Ibid.*

Respondents' rejection of these precedents is based upon their mistaken understanding of the word "Legislature." According to Respondents, a "state legislature" is "an entity created and constrained by its state constitution." Br. Opp'n Common Cause 17 (citation omitted). And while it is true that state constitutions may limit the power that they confer upon state legislatures, that observation is inapposite because federal districting authority is an "exclusive delegation of power under the Elections Clause" not a power that originates in a state's constitution. *Cook*, 531 U.S. at 523. As this Court has held, the power to regulate federal elections "'had to be delegated to, rather than reserved by, the States'" because "[t]he federal offices at stake 'arise from the Constitution itself.'" *Id.* at 522 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)); *accord Chiafalo*, 140 S. Ct. at 2324 n.5. Federal districting authority stems from the Federal Constitution, and state constitutions cannot limit power they did not convey.

This Court's decision in *Arizona State Legislature v. AIRC*, 576 U.S. 787 (2015), is not to the contrary. There, the issue was how to define "the Legislature." A majority held that "the people" may "serv[e] as the legislative power for redistricting purposes" by transferring districting authority away from the institutional legislature to an independent redistricting commission. *Id.* at 824. As the four dissenting Justices explained, however, "the Legislature" does not mean "the people" and, "[i]n a conflict between the [State] Constitution and the

Elections Clause, the State Constitution must give way." *Id.* at 827 (Roberts, C.J., dissenting) (citing U.S. Const. art. VI, cl. 2; *Cook*, 531 U.S. at 523). Whether or not the case was correctly decided, all nine Justices agreed that congressional districting is the province of the state legislature.

Furthermore, *AIRC* did not sanction substantive limitations on the legislative power. The state constitutional amendment at issue in that case "remove[d] congressional redistricting authority from the state legislature, lodging that authority, instead, in a new entity, the AIRC." 576 U.S. at 796–97. The amendment imposed no substantive limitations on the power of the legislature to determine its own districting criteria under the Elections Clause, or on how the legislature's delegated authority would be exercised by the AIRC. Thus, the decision provides no support for Respondents' position that state courts can interpret state constitutions to impose substantive restrictions on the authority granted by the Elections Clause. *See also* Morley, *supra*, 55 Ga. L. Rev. at 91–92.

The bottom line is simple. The Federal Constitution grants districting authority to state legislatures, subject to restraints imposed by Congress and the Federal Constitution itself. Because the North Carolina Constitution cannot limit what it did not confer, North Carolina state courts may not use state constitutional provisions to override the General Assembly's districting plan.

B. In This Context, Federal Courts Must Set Aside Strained State Court Interpretations Of State Law.

At the very least, the text of the Elections Clause means that "the clearly expressed intent of the legislature must prevail" over a strained judicial interpretation of a state statute or constitutional provision. *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring). The important federal judicial role in reviewing state court decisions about state law in federal elections "does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures." *Id.* at 115; *see DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring).

That role requires reversal in this case. The intent of the General Assembly could not be clearer. It twice adopted new congressional districting maps that realigned North Carolina's congressional districts to reflect the additional seat gained after the 2020 census. There was no ambiguity in those maps, so this is not a case where the legislatures' handiwork "may well admit of more than one interpretation." *Bush*, 531 U.S. at 135 (Ginsburg, J., dissenting) (citation omitted). Nor is this a case involving a federal statutory or federal constitutional limitation that may validly limit a state legislature's redistricting plan.

Instead, the North Carolina Supreme Court based its decision upon a plainly erroneous construction of the North Carolina Constitution. The North Carolina Constitution explicitly prescribes certain criteria for *state* legislative districting, but is consciously silent

on *federal* districting criteria, and it even denies the executive branch a veto power over the legislature's plans. N.C. Const. art. II, §§ 3, 5, 22.[5] That text and structure, combined with centuries of redistricting experience, and dozens of amendments that have not affected congressional redistricting, serves as compelling evidence that the state constitution does not limit the legislature's decision making.

In the face of that evidence, however, the North Carolina Supreme Court turned to "the North Carolina Constitution' s Declaration of Rights." App. 147a. The most relevant provision in that declaration states only that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The meaning of that clause, as Justice Newby persuasively explained, is to protect voters from "a fraudulent vote count" and to guarantee their right to "vot[e] according to one's judgment." App. 226a; *see also* John V. Orth & Paul M. Newby, *The North Carolina Constitution* 55–57 (2d ed. 2013) ("The meaning is plain: free from interference or intimidation."). In nearly 250 years, the North Carolina courts had never adopted the view that the clause prohibits partisan considerations in

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[5] The only reference in the North Carolina Constitution to the legislature's adoption of congressional districting plans is a *procedural* reference that the legislation "shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses." N.C. Const. art. II, § 22(5).

drawing state or federal legislative districts. App. 226a.[6]

Indeed, the majority acknowledged that, as recently as 2015, the North Carolina Supreme Court had held that "a partisan gerrymandering challenge" failed because it was "not based upon a justiciable standard." App. 113a (quoting *Dickson v. Rucho*, 368 N.C. 481, 534 (2015), *vacated on other grounds*, *Rucho*, 139 S. Ct. 2484). In that case, districting decisions had been challenged under the similarly general "Good of the Whole" clause. *Dickson*, 368 N.C. at 534. Nevertheless, in this case, the majority abruptly changed course, asserting that the North Carolina Constitution is difficult to amend and that "the only way that partisan gerrymandering can be addressed is through the courts." App. 35a.[7] This Court should see that reasoning for what it is: a majority of the North Carolina Supreme Court amending the state constitution through novel interpretation.

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[6] The majority dismissed the historical record out of hand, falsely claiming that adherence to the original meaning of the free elections clause "compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people." App. 142a. This pejorative rhetoric is, of course, substantively unfounded as both the United States Constitution and the North Carolina Constitution were amended to prohibit abridgment of the right to vote based upon sex or race.

[7] In fact, the current North Carolina Constitution has been amended 42 times. N.C. Legis. Libr., *Amendments to the North Carolina Constitution of 1971* (Jan. 26, 2020), https://sites.ncleg.gov/library/wp-content/uploads/sites/5/2020/01/NCConstAmendsince1971.pdf.

Adding insult to constitutional injury, after twice rejecting the General Assembly's maps the Supreme Court ordered the election to go forward under maps created by the North Carolina courts. App. 2a. But unlike remedial maps that courts may validly develop under the objective standards set forth in the Voting Rights Act, or through enforcement of the Federal Constitution's "one-person, one-vote rule [which] is relatively easy to administer as a matter of math," *Rucho*, 139 S. Ct. at 2501, there is "no objective measure for assessing whether a districting map treats a political party fairly," *ibid.*; *see also* App. 188a–91a. In insisting the otherwise, the state court usurped the policymaking role and "indefinitely retains the redistricting authority, thereby enforcing its policy preferences." App. 171a.[8]

The dissent recognized this as "judicial activism." App. 170a, 207a; *accord Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from the denial of application for stay) ("These explanations have the hallmarks of legislation."). By inserting "a political fairness

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[8] This usurpation by the North Carolina judiciary is especially egregious given that judges in North Carolina, just like members of the General Assembly, are elected on a partisan ticket. Media reports indicate that the decision below has "driven spending in judicial races" in North Carolina. Lydia Wheeler et al., *Abortion Ruling Drives Competition to Control State High Courts*, Bloomberg Law (Aug. 25, 2022), https://news.bloomberglaw.com/us-law-week/state-high-court-races-matter-more-than-ever-in-post-roe-era; *see also* Zach Montellaro et al., *Redistricting, abortion supercharge state Supreme Court races*, Politico (Aug. 17, 2022), https://www.politico.com/news/2022/08/17/state-supreme-court-elections-00051412.

requirement in the constitution without explicit direction from the text" a majority of the court "seize[d] [an] opportunity to advance its agenda" at the expense of the state legislature's constitutionally granted authority. App. 206a–07a.

The United States Constitution guards against this untoward result by "requir[ing] federal courts to ensure that state courts do not rewrite state election laws." *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring). At a minimum, that duty requires federal courts to set aside under the Elections Clause strained state court interpretations of state law that countermand the clearly expressed intent of the state legislature.

C. There Is A Pressing Need For Supervision.

Sadly, the judicial activism on display in North Carolina is not unique. With increasing frequency, results-oriented state court judges are arrogating to themselves power to regulate federal elections.

These efforts typically proceed by locating vague phrases in state constitutions and manipulating them to override specific federal elections regulations established by the state legislature, as happened below. Activists—most of them partisan litigants seeking partisan electoral advantages—have zeroed in on "free elections" clauses in part because they are common. Thirty states have constitutional provisions declaring that elections shall be "free." *See* Nat'l Conf. State Legislatures, *Free and Equal Election Clauses in State Constitutions* (Nov. 4, 2019), https://www.ncsl.org/research/redistricting/free-

equal-election-clauses-in-state-constitutions.aspx. Eighteen of these states further require that elections be "equal" or "open." *Ibid.* When these general admonitions are reimagined by judges unconstrained by constitutional text, structure, history, and tradition, they become newfound fonts of judicial policymaking power.

Pennsylvania provides a prime example. There, the state legislature enacted a statute providing that "a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 369 (Pa. 2020) (quoting 25 Pa.C.S. § 3511), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). While admitting that this statute contained "no ambiguity," *ibid.*, the state court determined that the State's "Free and Equal Elections Clause" permitted it to "extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters" who mailed their ballots too late, *id.* at 371. *See also Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari) ("The Pennsylvania Supreme Court agreed" that it "could extend the deadline through a vague clause in the State Constitution providing . . . that 'elections shall be free and equal.'" (brackets omitted)).

The Maryland courts have engaged in similar policymaking in the federal redistricting context. Although "[t]here are no provisions in the Maryland Constitution explicitly addressing Congressional districting," *Szeliga v. Lamone*, No. C-02-CV-21-

001816, slip op. at 9, (Md. Cir. Ct. Mar. 25, 2022), Maryland courts have held that the state constitution's declaration that elections "ought to be free and frequent" permits courts to override partisan gerrymanders, *id.* at 24 (quoting Md. Const. art. VII); *see also Parrott v. Lamone*, No. C-02-CV-21-001773 (Md. Cir. Ct. Mar. 25, 2022).

Partisan litigants in other States are pushing similar theories. In New Mexico, the Republican Party asserts that the state legislature's "politically gerrymandered congressional map" dilutes the votes "of registered Republicans." Compl. ¶¶ 89, 98, *Republican Party of N.M. v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022). And in Utah, a collection of left-leaning groups that is similarly dissatisfied with that State's redistricting process argue that "multiple provisions of the Utah Constitution, including the Free Elections Clause" prohibit "partisan gerrymandering." Compl. at 1, *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022).

State court policymaking in cases alleging partisan gerrymandering of congressional districts undermines respect for the judiciary. The people who ratified the Constitution authorized courts to exercise "neither force nor will, but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). Today, however, many citizens "believe judges decide cases based on partisan considerations." App. 172a; *accord* Richard L. Hasen, *Polarization and the Judiciary*, 22 Annu. Rev. Political Sci. 261, 270 (2019) ("Americans

today . . . see [judicial] decisions as political events and see the justices as political."). When judges go beyond their remit and wade into issues that the Federal Constitution assigns to the peoples' elected representatives, that belief is too often confirmed.

That is especially true in disputes about partisan gerrymanders. Such disagreements "are political, not legal." *Rucho*, 139 S. Ct. at 2500. Because this Court has correctly recognized that they are "beyond the competence of the federal courts," *ibid.*, some state courts have rushed to fill the void. But the intractable problems this Court recognized in *Rucho* are not solved merely by moving the dispute down one level.

This Court has eschewed judicial administration of federal elections by federal courts precisely in deference to state legislatures. Now state courts are being asked to engage in the same kind of judicial administration of federal elections.

This Court should reaffirm the authority of state legislatures to set the time, place, and manner of federal elections. Under the Federal Constitution, redistricting decisions are to be made by state legislatures, subject only to restraints imposed by acts of Congress and the Constitution itself.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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