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 Supreme Court of North Carolina

BRIEF OF ARKANSAS, ARIZONA, ALABAMA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

The following 13 States submit this brief as amici curiae: Arkansas, Arizona, Alabama, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah.[1]

Amici States have strong interests in the correct branch of their state governments carrying out redistricting. Separation of powers is fundamental to the proper functioning of state government because it ensures political accountability and also protects liberty. Conversely, the states have no interest in one branch of their governments usurping the proper function of another.

The threats to state interests are clear in this case. If state courts are allowed to override legislative decisions based on vague state constitutional provisions, then the delegation from the federal Elections Clause is transformed from its text and intent. This undermines the rule of law.

SUMMARY OF ARGUMENT

Amici States make one primary argument in this brief: that the text of the Elections Clause matters and that its enforcement by federal courts poses no threat to state sovereignty in our federal system.

The Framers could have assigned the power over federal elections in the first instance to states, without specifying which entity of state government would have primary responsibility. But recognizing that

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[1] Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief, and only Amici States through their Attorneys General made a monetary contribution to this brief's preparation and submission.

prescribing the times, places, and manner of federal elections is fundamentally a legislative role, the Framers specified that this delegated power would be exercised by "the Legislature thereof."

Text and the rule of law matter. This Court should clearly hold that none of the state constitutional provisions relied on by the Supreme Court of North Carolina empowers it to legislate the manner of congressional elections, and it should reverse the North Carolina Supreme Court's opinion imposing a court-drawn map in place of a legislatively-enacted one.

ARGUMENT

I. Because the Elections Clause assigns redistricting authority to "the Legislature," courts may not read vague state constitutional provisions to impose detailed criteria on redistricting.

A. The Elections Clause does not let courts act as legislatures.

The Constitution assigns authority to "prescribe[]" "[t]he Times, Places and Manner of holding [congressional] Elections" to "the Legislature" of each state. U.S. Const. art. I, § 4 (Elections Clause). A legislature is "[t]he power that makes laws." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813 (2015) (quoting 2 Thomas Sheridan, A Complete Dictionary of the English Language (4th ed. 1797); 2 Samuel Johnson, A Dictionary of the English Language (1st ed. 1755)). This Court has explained that the word as used in the Elections Clause refers to the "legislative process" as defined by each state's constitution. *Ariz. State Legislature*, 576 U.S. at 799.

North Carolina's courts are not part of its legislative process. The State's "legislative power" is "vested in the General Assembly" and kept "separate and distinct" from the judicial power. N.C. Const. art. I, § 6 & art. II, § 1. Indeed, North Carolina forbids its judges from exercising powers "vested exclusively in the [legislature]." *Person v. Bd. of State Tax Comm'rs*, 115 S.E. 336, 339 (N.C. 1922). Thus, North Carolina's courts are not "[t]he power that makes laws" and cannot set North Carolina's redistricting policy.

That straightforward conclusion is consistent with *Arizona State Legislature*. True, that case rejected limiting "Legislature" to the official representative body alone. 576 U.S. at 805. There, the people adopted a constitutional amendment by initiative that reassigned redistricting authority from the legislature to an independent commission. *Id.* at 799. Still, the Court blessed that arrangement as falling within the definition of "Legislature." *Id.* at 813.

But the Court understood its conclusion as compelled by three earlier cases. *See id.* at 805-07 (summarizing cases). *Ohio v. Hildebrant* let the people veto a redistricting plan by referendum. 241 U.S. 565, 566-67 (1916). *Hawke v. Smith* confirmed that holding in dicta: any part of the state's "legislative authority" could redistrict. 253 U.S. 221, 230-31 (1920). Finally, *Smiley v. Holm* blessed a gubernatorial veto over congressional-redistricting legislation. 285 U.S. 355, 368-69 (1932). The Court read these cases to define the "Legislature" for Elections Clause purposes as encompassing any of "the State's prescriptions for lawmaking." *Ariz. State Legislature*, 576 U.S. at 808.

And the Court recognized the frequent incorporation of popular referenda and independent commissions into the lawmaking process. *Id.* at 805-07, 814. The People are the ultimate source of all legislative power. *Id.* at 824 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819)).

Justices and scholars dispute the historical permissibility of legislative delegations to commissions. *Compare Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019), *with id.* at 2133 (Gorsuch, J., dissenting). But whatever the right answer to that question, this Court and several states have permitted such delegations. *Cf. Humphrey's Executor v. United States*, 295 U.S. 602, 628-29 (1935) (describing the FTC as "quasi legislative"); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vanderbilt L. Rev. 1167, 1191-1201 (1999) (summarizing state nondelegation doctrines). That was true of Arizona when *Arizona State Legislature* was decided. *See* 576 U.S. at 814 ("[S]tate legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves."). So Arizona's redistricting commission was part of its legislative process and fell within the Elections Clause's grant of authority.

But *Arizona State Legislature*'s reasoning cannot be stretched to cover North Carolina's courts. No precedent lumps courts into the legislative process. And for good reason: "At no point" during ratification "was there a suggestion that the … courts had a role to play" in districting. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019). "Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Id.* To the contrary, the Framers

conceived of the judiciary as a distinct branch of government, entirely separate from a legislature. So judges could not exercise lawmaking authority. As Alexander Hamilton explained, judges have "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78 (Alexander Hamilton).

And early courts disclaimed legislative power. Even while working to strengthen the Court relative to the other branches, the Marshall Court acknowledged that legislatures could not "delegate to the Courts … powers which are strictly and exclusively legislative"—powers such as the exclusively legislative authority over congressional redistricting. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). So when the Founders delegated to state lawmakers the authority to manage federal congressional elections, they would not have conceived of the state judiciary as a potential part of the legislative process.

In short, the Elections Clause forbids state courts from usurping state legislatures' districting authority, and *Arizona State Legislature*'s broad understanding of legislative power does not endorse judicial lawmaking either. The legislative process may set clear rules. And courts may, in exercising the judicial power, "giv[e] effect" to those rules. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824). But under the Elections Clause, state courts may not legislate themselves.

B. North Carolina's courts improperly acted as legislatures.

In spite of the command of the Elections Clause, North Carolina's courts improperly assumed the legislature's redistricting power here. The state constitution says nothing about redistricting. Even so, its Supreme Court relied on a conglomeration of constitutional provisions—equal protection, free speech and assembly, and a general guarantee that "[a]ll elections shall be free," N.C. Const. art. I, § 10—to impose a detailed redistricting plan on the General Assembly. Pet.App. 77a-102a; *see Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from denial of application for stay). It unilaterally adopted political-science standards for district-drawing. Pet.App. 231a. It ordered the Assembly to redraw maps in compliance with those standards and "submit" them for court inspection, along with "an explanation of what data [the Assembly] relied on …, including what methods they employed in evaluating the partisan fairness of the plan." *Id.* Compounding the error, the Superior Court forced its own congressional map on North Carolinians. Pet.App. 293a.

The North Carolina Supreme Court cast its mandate as simple judicial review. Pet.App. 9a, 122a-123a. It noted that redistricting "must be performed 'in conformity with the State Constitution,'" and that judges are tasked with explaining what that constitution means. Pet.App. 9a. Plus, it cited North Carolina statutes that authorized it to identify defects and even adopt an interim plan. Pet.App. 137a-139a; N.C. Gen. Stat. §§ 120-2.3, -2.4.

But the court's interpretation of the state constitution ranged far afield of traditional judicial review. And the remedy, even if procedurally authorized by statute, impermissibly exchanged the judicial for the legislative role.

Judicial review at the Founding was constrained. Courts could, of course, "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That included interpreting legislation and constitutions, reconciling the two, and granting appropriate remedies. *See generally* William Baude, *Severability First Principles*, 109 Va. L. Rev. (forthcoming 2023).[2] But the courts were required to leave all "important" decisions up to lawmakers. *Wayman*, 23 U.S. at 43; *see also Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (explaining that *Wayman* proscribed courts from setting the "general policy"). Even common-law judges were understood as "expounding, declaring, and publishing what the law … is," not making new law. Sir Matthew Hale, The History of the Common Law of England 67 (James Moore 1792). As Blackstone explained it, judges could "maintain and expound" an existing law, but they could not "pronounce a new [one]." 1 William Blackstone, Commentaries on the Laws of England *69 (J.B. Lippincott Co. 1893).

Here, the North Carolina Supreme Court divined detailed redistricting requirements from vague text (or, more accurately, political-science literature that the majority found persuasive). That "ha[s] the hallmarks of legislation." *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from denial of application for stay). North Carolina's equal-protection and free-

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[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064156

speech clauses do not mention elections, let alone elaborate on redistricting guidelines. *See* N.C. Const. art. I, §§ 12, 14, 19. And though the free-elections clause at least mentions elections, the meaning of its vague declaration cannot possibly include political-science criteria. *See* N.C. Const. art. I, § 10.

Indeed, "it is not even clear" how to maximize freedom while redistricting. *Rucho*, 139 S. Ct. at 2500. Redistricting is a prime example of policymaking outside of the traditional judicial role. Those drawing the lines have a host of goals to choose from. *Id.* at 2500-01. Balancing such a wide variety of often competing interests is a quintessentially legislative activity. It bears little resemblance to the work courts do in interpreting written texts and applying them. *Cf. Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022) (likening *Roe*'s specific rules drawn from general principles to a "veritable code").[3]

The interpretative-legislative rule distinction in administrative law provides a useful analogy. This Court has not yet distinguished between the two. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015). But lower courts have drawn a bright line between explaining what a statute already means and imposing new conditions not in the text. *See, e.g.*, *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169-70 (7th Cir. 1996) (Posner,

[3] Amici States do not dispute that courts may ensure maps respect one-person-one-vote and do not racially gerrymander. But these inquiries are fundamentally different from partisan gerrymandering litigation, which requires judges to craft their own standard for how much politics is too much.

C.J.). Doing the latter is "the clearest possible example of [legislation]," not interpretation. *Id.*

Indeed, courts in states with analogous provisions have recognized as much. Thirteen state constitutions include a provision resembling North Carolina's free elections clause.[4] Yet only one court—Pennsylvania's Supreme Court—has read the provision as sweepingly as North Carolina's Supreme Court did. *See League of Women Voters v. Pennsylvania*, 178 A.3d 737 (Pa. 2018). And that court even admitted that no "provision" of its state constitution supplies "explicit standards which are to be used in the creation of congressional districts." *Id.* at 814.

Arkansas's treatment of its state's analogue serves as a useful contrast. Arkansas's constitution provides that elections "shall be free and equal." Ark. Const. art. III, § 2. Yet rather than invent sweeping rules governing elections, the Arkansas Supreme Court has read that language to solely prohibit "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 124, 126 (1883); *see also Jones v. Glidewell*, 13 S.W. 723, 725-26 (Ark. 1890) (holding that the clause prevents intrusions on the secrecy of the ballot). Indeed, rather than place substantive limits on the legislature's authority to draw districts or otherwise set election rules, the clause's only substantive limitation has been against courts: Arkansas courts may not nullify the results of an election unless some wrong "render[s] the result of the election uncertain."

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[4] Ariz. Const. art. II, § 21; Ark. Const. art. III, § 2; Del. Const. art. I, § 3; Ill. Const. art. III, § 3; Ind. Const. art. II, § 1; Ky. Const. § 6; Okla. Const. art. III, § 5; Or. Const. art. II, § 1; Pa. Const. art. I, § 5; S.D. Const. art. VI, § 19; Tenn. Const. art. I, § 5; Wash. Const. art. I, § 19; Wy. Const. art. I, § 27.

Whitley v. Cranford, 119 S.W.3d 28, 34 (Ark. 2003). In this way, Arkansas's courts have remained faithful to the traditional role of the judiciary; North Carolina's have instead inserted themselves into core policymaking decisions.

So too, at the Founding, managing the legislature's work—or even redoing it—has been more akin to legislation, not an appropriate judicial remedy. Traditionally, judicial remedies were limited to a "single affirmative act." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 841 (1994) (Scalia, J., concurring) (quoting H. McClintock, Principles of Equity 160 (2d ed. 1948)). Once the defendant complied, the court's role ended. *Id.* Whatever their use today, broader remedies requiring ongoing judicial supervision of another branch far exceeded "the inherent limitations" on Founding-era judges. *Missouri v. Jenkins*, 515 U.S. 70, 126-31 (1995) (Thomas, J., concurring) (explaining the historical limits).

Under the Elections Clause, only North Carolina's lawmakers could decide whether partisan composition of a district matters. Only they could decide what standards to adopt. And only they could decide where to ultimately draw the lines. By deciding in the legislature's stead, North Carolina's courts strayed far beyond their limits.

C. To prevent courts from legislating redistricting, this Court should limit them to enforcing federal requirements and applying clear rules enacted by "the Legislature" of a state.

To ensure that redistricting power stays with legislatures, this Court should hold that courts may

override legislative decisions only if there is a federal or state statute or constitutional provision that speaks clearly to the matter.[5] *Accord Rucho*, 139 S. Ct. at 2507 ("Judicial action must be governed by *standard*, by *rule*…." (cleaned up)). In other contexts, courts look for clear expressions of legislative intent to accomplish a particular result. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022). For instance, this Court requires "clear congressional authorization" before upholding major regulations. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). This ensures that unelected bureaucrats do not usurp Congress's role. *Id.*

Likewise, limiting a state judiciary to interpreting and applying clear text would guarantee that lawmakers—the people or their elected representatives, not judges—actually chose to constrain redistricting decisions. And that would help state courts "operate in congruence with the Constitution rather than test its bounds" as the court below did. *Id.* at 2616 (Gorsuch, J., concurring) (explaining the justification for clear-statement rules).

Limiting judges to interpreting clear language is consistent with history. Scholars disagree about just how much state constitutions historically constrained election legislation. *Compare* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1,

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[5] Amici States understand that Petitioners more broadly argue against applying substantive state constitutional provisions to constrain the legislature in this context. Amici States take no position on that issue, and the Court need not rule on it to decide this case in Petitioners' favor.

92 (2020) (procedure only), *with* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 463 (2022) (procedure *and* substance). But even the case for broader, substantive constitutional constraints rests on clear constitutional provisions: setting elections dates and polling places, requiring voting to be "by ballot" or "*viva voce*," or defining the franchise. Smith, *Revisiting the History*, at 488-89, 496-98, 516-18 (summarizing constitutional provisions). Those provisions can be easily applied. They do not require courts to craft specific rules from abstract principles.

A clear-statement limitation fits with precedent too. The state constitutional amendment sanctioned by *Arizona State Legislature* details the composition of the new redistricting commission and the process and standards it should apply. *See* Ariz. Const. art. IV, pt. 2, § 1(14)-(15). And amendments cited approvingly in *Rucho* are equally detailed. 139 S. Ct. at 2507 (discussing Colo. Const. art. V, §§ 44, 46; Mo. Const. art. III, § 3; and Fla. Const. art. III, § 20).

North Carolina's free-elections clause is not "remotely comparable." Pet.App. 164a (Newby, C.J., dissenting). It does not set a process for mapmaking or forbid partisan gerrymandering. It does not mandate "equal voting power" or prescribe "political science tests." Pet.App. 165a. It does not even mention redistricting. So it does not demonstrate a clear intent by the people, acting as the ultimate lawmakers, to adopt those rules. By adopting those rules anyway, the North Carolina Supreme Court usurped legislative power and violated the Elections Clause.

II. Requiring clear text empowers the people, not judges.

Rather than acknowledge the Elections Clause's constraints, the North Carolina Supreme Court cast that Clause as an "absurd and dangerous" tool "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." Pet.App. 121a. To the contrary, enforcing the Clause prevents state courts from infringing federal sovereignty and taking choice away from the ultimate sovereigns, the people. *See infra* Part III.

A. States are not sovereign over federal elections. "The Framers split the atom of sovereignty." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). States, as the original sovereigns, "reserve[d]" all powers "not conceded to the government of the Union." 1 Joseph Story, Commentaries on the Constitution of the United States § 626 (5th ed. 1905). But states could only reserve "rights of sovereignty" that they possessed "*before*" the Constitution's ratification. The Federalist No. 32 (Alexander Hamilton) (emphasis added). Powers created *by* the Constitution could in no way be reserved: "No State can say that it has reserved what it never possessed." Story § 627. These new powers inhere in the federal government. *Cook v. Gralike*, 531 U.S. 510, 522 (2001).

Regulating congressional elections is one of those inherently federal powers. "It is no original prerogative of State power to appoint a representative … for the Union." Story § 627. Instead, the states' power to regulate has been delegated by the Elections Clause. *Id.*; *Cook*, 531 U.S. at 523. States may only exercise that power as delegated: they must regulate

through the legislative process, not by judicial fiat. Story § 627; *cf. EPA*, 142 S. Ct. at 2608-10 (limiting policymakers to exercising authority actually delegated).

Indeed, the Founders understood that the Elections Clause constrained states, just as much as it enabled them. Letting states take the lead on setting the "Times, the Places, [and] the Manner" of congressional elections was practically necessary because states knew best what would work for their citizens. The Federalist No. 60 (Alexander Hamilton). But they recognized that giving states the final word could prove dangerous: states might use their regulatory authority to "engine[er]" the federal government's "destruction." The Federalist No. 59 (Alexander Hamilton). To avoid placing the "Union" at "the[] mercy" of hostile states, the Constitution ensured that some regulatory authority remained in the body where it "would naturally be placed." *Id.* Thus, Congress may preempt state time-place-manner regulations that are contrary to federal prerogatives. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013).

B. Requiring clear statements for congressional-election regulation would safeguard federal authority; it would not restrict state actions where states remain sovereign. Where the Constitution is silent, states are free to act as they see fit. *Cf.* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 843 (2020) ("[S]overeign states retain[] all rights, powers, and immunities that they did not affirmatively surrender in a binding legal instrument."). And the Constitution is silent on *state* elections. *See* U.S. Const. art. I, § 4. To the contrary, the Founders

affirmatively rejected federal supervision over state elections as "an unwarrantable transposition of power." The Federalist No. 59 (Alexander Hamilton).

So states can regulate their elections as they choose. States may select different rules for their elections than for federal ones. *Cf.* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 Nw. U.L. Rev. Online 103, 105 (2017). Their legislatures may delegate their regulatory power. And their judges may interpret state election law as to state elections without federal court review. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

Further, a clear-statement rule would still allow states to experiment with federal election policy. *See Rucho*, 139 S. Ct. at 2507. The people, acting through referenda or through their federal and state legislatures, can decide on the standards governing their elections. *See* Federal Farmer, No. 12 (1788), *reprinted in* 2 The Founders' Constitution 253, 254 (Philip B. Kurland & Ralph Lerner eds., 1987) (describing state legislatures as the bodies "nearest to the people"). To rule in Petitioners' favor, the Court need not speak to whether the people may amend their constitutions to outlaw political gerrymandering, mandate political-science-approved methodology, or constrain redistricting in any other way. *See supra* Part I(C). A clear-statement rule simply ensures that judges do not take these choices away from the people and their representatives. *Rucho*, 139 S. Ct. at 2507.

On the contrary, federal courts eschewing review of state-court decisions regarding federal elections

would enable just that. *See infra* Part III(A). Where state courts usurp the authority of the people and their elected representatives under the Elections Clause, federal-court review must be available. Otherwise, those state-court decisions are effectively unreviewable, and state lawmakers are left with no recourse to vindicate the authority vested in them by the Constitution.

C. A clear-statement rule would not throw elections into chaos. Rather, such a rule would leave in place the extensive election codes enacted by the legislature of each state. And it would not cast doubt on many state constitutional amendments touching election law—amendments that already speak clearly, for instance, *see, e.g.*, Ark. Const. amend. L, § 4; Ohio Const. art. XIX, § 1, or that leave final decision making to the legislature, *see, e.g.*, Ariz. Const. art. VII, § 12; Ark. Const. amend. XXXIX; Fla. Const. art. VI, § 7; La. Const. art. XI, § 1.

It would not unduly increase administrative burdens either. Though the Elections Clause does not apply to state elections, states need not decouple federal from state. As long as the legislative process speaks clearly, it can set the same rules for both. Only if courts step in and overplay their hand will state and federal elections require different treatment.

Besides, federalism contemplates that federal and state elections might be run differently. The federal government has adopted rules that do not automatically apply to state elections. *See* Morley, *Dismantling the Unitary Electoral System*, at 110. And states too sometimes differentiate between the two. *See generally id.* at 113-14 (noting that Arizona and Kansas more closely scrutinize registration for

state elections). For instance, Arkansas, Missouri, Ohio, and Pennsylvania let commissions handle state assembly redistricting. *See* Ark. Const. art. VIII, § 1; Mo. Const. art. III, §§ 3, 7; Ohio Const. art. XIX, § 1; Pa. Const. art. II, § 17. But their legislatures draw congressional maps. *See* Ark. Code Ann. §§ 7-2-101 to -105; Mo. Rev. Stat. §§ 128.461-69; Ohio Const. art. XI, § 1; 25 Pa. Cons. Stat. § 3596.301.

Finally, a clear-statement rule would not vest state legislatures with arbitrary and unreviewable power. To the contrary, a clear-statement rule would leave other constitutional checks in place, such as bicameralism and a gubernatorial veto. State legislatures would remain subject to the federal Constitution, which outlaws malapportionment and racial discrimination. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Wright v. Rockefeller*, 376 U.S. 52 (1964).

And state rules are subordinate to Congress's, should the federal legislature choose to intervene. U.S. Const. art. I, § 4. The Elections Clause "functions as a 'default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.'" *Inter Tribal Council*, 570 U.S. at 9. Congress may step in "at any time," if it deems intervention "expedient." *Id.*; *see also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 43-44 (2010). This congressional backstop ensures that redistricting can happen, even if state legislatures act unreasonably, drag their feet, or fail to act at all.

III. The issue in this case is a federal question, and Congress has not separately authorized state courts to circumvent the state legislative process in redistricting.

A. This Court should firmly reject any argument that whether another state entity has usurped the role of "the Legislature" is a state-law question.

This Court should clearly hold that the question of whether another entity of state government has usurped the role of "the Legislature" in setting the times, places, and manner of congressional elections presents a federal, not purely state-law, question. And federal courts are key to enforcing the Elections Clause. Indeed, federal courts may be best positioned to ensure that states respect the separation of powers that the Clause mandates.

That federal, not state law, governs whether another state entity has usurped the legislative function is inherent in *Arizona State Legislature*. There, the Court did not question federal-question jurisdiction. *See* 576 U.S. at 799 (recognizing that a three-judge panel was convened pursuant to 28 U.S.C. § 2284(a)). The only jurisdictional question the Court perceived was whether the Legislature had standing. *Id.* at 804 (holding that it did). The Court thus recognized the question presented as properly within the federal-question jurisdiction of the federal district courts.

Similarly, Justice Alito's dissent from the denial of the application for a stay here recognized that "the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections" is "an exceptionally important and

recurring question" of federal constitutional law. *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from denial of application for stay). Justice Alito correctly explained that "[t]he question presented is one of federal not state law because the state legislature, in promulgating rules for congressional elections, acts pursuant to a constitutional mandate under the Elections Clause." *Id.* at 1091 (citation omitted).

Finally, Chief Justice Rehnquist's concurrence in *Bush v. Gore* also emphasizes the role of federal courts to police the analogous Article II Electors Clause. *See* 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring) (noting that "the text of the [Clause] itself, and not just its interpretation by the courts of the States, takes on independent significance"). The Chief Justice explained that Electors Clause adjudication "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.* at 115.

Respondents will undoubtedly complain that federal-court adjudication would let federal judges substitute their interpretation of state constitutional law for that of the state's highest court. But that claim is manifestly wrong. The federal Constitution expressly limits which entities in state government may engage in congressional redistricting. This federal constitutional limit must be enforced by federal courts.

B. Congress has not used its Elections Clause authority to empower state courts to override state legislatures on redistricting matters.

Nothing in 2 U.S.C. §§ 2a(c) or 2c affects the outcome here. These statutes, adopted by Congress pursuant to the powers reserved to it by the Elections Clause, *see Branch v. Smith*, 538 U.S. 254, 266 (2003), act as default provisions that allow congressional elections to proceed in spite of legislative inaction or defective legislative action. But like the Elections Clause, these statutes do not independently authorize state courts to act as lawmakers in this instance.

For example, in § 2a(c), Congress "set forth congressional redistricting procedures operative only if the State, 'after any apportionment,' had not redistricted 'in the manner provided by the law thereof.'" *Ariz. State Legislature*, 576 U.S. at 811. The Court has viewed the word "manner" as referring to "the State's substantive 'policies and preferences' for redistricting"—clearly functions of the legislature. *See Branch*, 538 U.S. at 277-78. And while this Court has recognized that the language "redistricted in the manner provided by [state] law" within § 2a(c) can include redistricting "by the legislature," "a commission established by the people's exercise of the initiative," or "court decree," *id.* at 812 (citing *Branch*, 538 U.S. at 274), nothing indicates that the language acts on its own to authorize state courts to function in the role assigned to lawmakers. Any state court action must still be pursuant to state legislative authorization and limited to overriding legislative decisions only pursuant to federal law or if a state statute or constitutional provision speaks clearly to the matter. *See supra* Part I(C).

Section 2a(c)'s legislative history further confirms that its language regards state lawmaking authority. A predecessor of this statute originally "provided that a State would be required to follow federally prescribed procedures for redistricting unless '*the legislature*' of the State drew district lines." *Ariz. State Legislature*, 576 at 809 (emphasis added). But to "accommodate" "the fact that several States had supplemented the representative legislature mode of *lawmaking* with a direct lawmaking role for the people, through the processes of initiative … and referendum," Congress "eliminated the statutory reference to redistricting by the state 'legislature," and replaced it with "*in the manner provided by the laws thereof*." *Id.* The Court has recognized that the legislative history of this change "leaves no room for doubt" that "the change was made to safeguard to 'each State full authority to employ in the creation of congressional districts its own laws and regulations.'" *Id.* at 810-11 (cleaned up); *see also id.* at 811 n.20 ("Undeniably … it was the very purpose of the measures to recognize the *legislative* authority each State has to determine its own redistricting regime." (emphasis added)).

Section 2a(c)'s language and history do not indicate a congressional desire to send substantive redistricting decisions to state courts.[6] And the same

[6] And any argument to this effect would certainly face constitutional challenges under the Elections Clause. It would be highly problematic to read that part of the Elections Clause as allowing Congress to delegate to 50 state supreme courts (or any other organs of state government) the power to override state laws enacted by "the Legislature" of a State pursuant to the first part of the Elections Clause. This Court should not read 2 U.S.C. §§ 2a, 2c to raise these constitutional questions.

is true of § 2c. While this Court has recognized that that provision "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming," nothing indicates that it authorizes states courts to act other than pursuant to state legislative authorization when a state's legislature has enacted a map. So while this Court has interpreted §§ 2a(c) and 2c as letting a state court be part of a legislatively authorized redistricting process, the statutes do not delegate lawmaking authority to the state courts.

Branch is not to the contrary. There, when the legislature failed to redistrict, the State Chancery Court adopted a plan. *Branch*, 538 U.S at 258-60. But because Mississippi was still subject to preclearance under § 5 of the Voting Rights Act, the Federal District Court also promulgated a plan should the state-court plan not be precleared by a certain date. *Id.* at 260. When the date passed, the District Court enjoined the State from using the state-court plan and ordered that its own plan be used. *Id.* at 260-60. The Supreme Court affirmed this decision as a proper exercise under 2 U.S.C. § 2c. *Id.* at 272 But this case, unlike *Branch*, does not involve a legislature's failure to redistrict or a federal district court's subsequent redistricting pursuant to § 2c. And *Branch* never suggests that a state court could override a map *adopted* by a state legislature based on vague state constitutional provisions.

CONCLUSION

The Court should hold that none of the conglomeration of state constitutional provisions relied on by the Supreme Court of North Carolina empowers it to legislate the manner of congressional

elections, and it should reverse that court's opinion imposing a court-drawn map.

September 6, 2022

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