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 Petition for Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF THE NATIONAL REPUBLICAN REDISTRICTING TRUST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state legislative redistricting effort underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the U.S. Constitution, the State Legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily by applying the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries,

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[1] No counsel for any party authored this brief in whole or in part, and no party, party's counsel, or any person other than Amicus Curiae or its counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of all parties. All parties were given timely notice of Amicus Curiae's intent to file.

avoiding the forced combination of disparate populations as much as possible. Such sensible districts follow the principle that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any state. Article I, Section 4 of the U.S. Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches—the State Legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The Elections Clause is unmistakably clear: the power to regulate the "Times, Places and Manner of holding Elections" is vested in State Legislatures primarily and Congress secondarily. U.S. CONST. art. I, § 4, cl. 1. The plain language of the Clause leaves no room for state and federal courts to alter election regulations set by those who wield the politically accountable levers of government. And for good reason. The power to regulate elections is, by nature, legislative, so the Framers sensibly vested it in legislative bodies. Given the proximity of the legislator-constituent relationship, lawmakers are uniquely well-suited to correctly navigate the tradeoffs, value judgments, compromises, and political resolutions inherent in election regulation (in general) and in drawing electoral districts (in particular).

Fealty to these principles does not mean that state and federal courts have no role to play in election administration, or that the power of State Legislatures is categorical and plenary. Fidelity to Article I, Section 4 simply means that all branches of government must stay in their respective lanes. When legislatures enact election-related laws, they must do so under the federal and state constitutional principles that guide their work. When courts review the legislature's work, they enjoy no license to rewrite those laws as they see fit. Article I, Section 4's plain text simply underscores that the Framers intended the business of regulating political elections to remain in the able hands of the politically accountable branch.

Much ink has been spilt over how much Article I, Section 4 limits the power of courts (and state executive bodies) while augmenting the power of State Legislatures.[2] In NRRT's view, the answer lies between the two extremes. Wherever the Court draws the line, however, it is unassailably the case that the North Carolina Supreme Court transgressed it entirely. Under no defensible construction of Article I, Section 4 may a state court use the phrase "[a]ll elections shall be free," N.C. CONST. Art. I, § 10, to (1) contrive a partisan-gerrymandering prohibition, (2) use that contrivance to fabricate an otherwise non-justiciable partisan-gerrymandering cause of action, and (3) bequeath upon lower courts the dispensation to pronounce the best way to gauge how much is too much partisanship for this newly concocted cause of action.

Not one step in the North Carolina Supreme Court's decisionmaking resembled the work of a judicial body. Instead, the State Supreme Court commandeered the role of the legislative branches (both the North Carolina General Assembly and Congress) charged via Article I, Section 4, with drawing the State's electoral boundaries. In so doing, the North Carolina Supreme Court violated the Elections Clause's clear language, basic separation-

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[2] *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020); Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023).

of-powers principles, principles of federalism, and this Court's precedent.

ARGUMENT

I. ARTICLE I, SECTION 4 FORECLOSES THE ABILITY OF COURTS (STATE OR FEDERAL) TO CREATE ELECTION RULES.

The plain terms of the Elections Clause are unambiguous. The power to "prescribe[]" (*i.e.*, create)[3] election rules is enjoyed by State Legislatures (first) and Congress (as a backstop). U.S. CONST. art. I, § 4, cl. 1. They contemplate no role for the state or federal judiciary to "prescribe[]" (*i.e.*, create) election regulations of their own. This is unsurprising. The Elections Clause's straightforward pronouncement is consistent with basic separation-of-powers considerations and unbroken precedent from this Court. Understanding this cohesiveness elucidates the volume with which the North Carolina Supreme Court's escapades cry out for this Court's remedial action.

A. Article I, Section 4's plain text assigns to State Legislatures the authority to regulate elections within their boundaries.

Some constitutional provisions are subject to reasonable debate. *See, e.g.*, U.S. CONST. amend. IV (protecting against "unreasonable searches and

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[3] *Prescribe*, BLACK'S LAW DICTIONARY (2d online ed.) ("To direct; define; mark out.").

seizures"); U.S. CONST. amend. VIII (protecting against "cruel and unusual punishments"). Others are not. *See, e.g.*, U.S. CONST. art. I. § 1 (mandating that Congress be a bicameral legislature); U.S. CONST. art. II, § 1, cl. 5 (mandating that the president be at least thirty-five years old).

The Elections Clause falls irrefutably in the latter category. It provides, with no room for interpretive gloss, that the power to regulate the "Times, Places and Manner of holding Elections . . . *shall* be prescribed in each *State* by the *Legislature* thereof." U.S. CONST. art. I, § 4, cl. 1 (emphases added). "Congress," in turn, may "make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

Delegation of election-regulation prescriptions to legislative bodies fits cleanly within the American conception of legislative power. Election regulation (whether enacting election procedures or drawing district maps) is an exercise of purely legislative authority—*i.e.*, the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated," THE FEDERALIST NO. 78 (A. Hamilton); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) (legislative power includes authority to "prescribe general rules for the government of society").

Because legislative decision-making is a uniquely "difficult and deliberative process[]," *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting), it involves tradeoffs, value judgments, and compromises. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Burdick v. Takushi*, 504 U.S. 428

(1992); *see also* THE FEDERALIST NO. 59 (A. Hamilton). To ensure this political power is exercised for the good of the governed, those who wield it must remain accountable to those they serve. This is why lawmakers must convince their constituents that they should be reelected after their terms expire.

None of this changes in the election-regulation context. If anything, the plain terms of Article I, Section 4 stand as a reminder from the Founders that designing election procedures and drawing electoral maps are, at their core, "prescri[ptions] [of] the rules by which the duties and rights of every" election is "to be regulated," THE FEDERALIST NO. 78 (A. Hamilton). In other words, they are legislative acts that legislative bodies must undertake. And, critically, if voters do not approve of these legislative acts, the voters retain the power to hold the architects of those legislative acts accountable at the ballot box.

B. The Constitution's structure confirms that Article I, Section 4 means what it says.

Although the Court may stop at the Elections Clause's plain text to rightly resolve this case, a review of the Constitution as a whole cements the correct outcome. The NRRT's interpretation of the Elections Clause fits cleanly into the Constitution's structure, and "[s]tructure is everything." Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418-19 (2008). That is why the Constitution erects "high walls and clear distinctions" between bodies vested with legislative,

executive, and judicial powers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

In particular, a high wall partitions bodies vested with legislative power and those vested with judicial power. "To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design." NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 52-53 (Forum Trade Paperback ed., 2020) (2019). Removing this barrier and allowing one body to exert both powers has been recognized as hazardous throughout Anglo-American jurisprudence: "Were [the judicial power] joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 259-60 (1765). Said differently, "[t]he judicial Power . . . is not *whatever* judges choose to do." *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.) (emphasis in original) (discussing the limited power of the federal judiciary under Article III).

Given the paramount importance of election-regulation "prescription," it made all the sense in the world for the Framers to explicitly vest electoral regulation in the politically accountable legislative branches (both state and federal). Doing so vitalized both the horizontal and vertical separation of powers that the Founding Generation believed essential to preserve liberty. *See* THE FEDERALIST NO. 45 (J. Madison); THE FEDERALIST NO. 51 (J. Madison). Indeed, the Founders reiterated the primacy of the

legislative branch each time they enumerated an electoral provision in our Nation's Charter.[4] In other words, the Framers intentionally "entrust[ed]" these matters to "political entities." *Rucho*, 139 S. Ct. at 2497.

Leaving the courts out of the election-regulation-prescription process was a deliberate choice, and a wise one at that. Because judges lack the "background, competence, and expertise" to make public policy decisions, *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (internal quotation marks omitted), the judiciary is ill-equipped to make the tradeoffs, value judgments, compromises, and political decisions inherent in determining electoral rules of engagement. Worse still, judges, removed as they often are from electoral politics (relative, at least, to legislators), simply do not function under the political-accountability auspices that exist to ensure that political power emanates from the "consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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[4] *See* U.S. CONST. art. I, § 4, cl. 1 (times, places, and manner of elections to state and national legislature); U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors"); U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"); U.S. CONST. art. II, § 1, cl. 3 (detailing Congress's role in counting electoral votes); U.S. CONST. amend. XII (same).

Because "[l]egislatures," by comparison, "enjoy far greater resources for research and factfinding . . . than . . . can be mustered in litigation between discrete parties before a single judge," *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay), they get to "prescribe" the rules of electoral engagement. And as the most politically accountable government officials, they "must compromise to achieve . . . broad social consensus" when doing so, "something not easily replicated in courtrooms where typically one side must win and the other lose." *Id.* State Legislatures, in particular, are vested with power over election regulation because they are "far nearest" to the people, Letter XII from Federal Farmer to the Republican (Jan. 12, 1788), and they are "more likely to be in sympathy with the interests of the people," Robert G. Natelson, *The Original Scope of the Congressional Power To Regulate Elections*, 13 U. PA. J. CONST. L. 1, 31 (2010) (citing sources).

The Framers got it right when they recognized the hazards of intermingling legislative and judicial power. Their grasp of this peril percolates throughout the Constitution's structure. And this common structural thread accentuates the Elections Clause's textual commitment of authority to the legislative branches.

C. This Court's precedent, from the founding era through the present, confirms Article I, Section 4's textual limitation.

Finally, it bears reiterating that this isn't the first time the Court has considered the right calibration of authority in our constitutional republic. This Court, in turn, has never waivered—election regulation (including creation of electoral maps) is a "legislative function" to "be performed in accordance with" a States' "prescriptions for lawmaking." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) ("*AIRC*"). This "lawmaking" process may include a referendum, *see, e.g.*, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916), or a governor's imprimatur, *see, e.g.*, *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932). But no matter the steps through which the legislative process must progress, the process remains fundamentally legislative.

For example, in 1916, this Court decided *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565. There, the Ohio General Assembly passed a new congressional district map. *Id.* at 566. A referendum was held, as allowed under the State Constitution, and Ohioans rejected the map. *Id.* This Court approved Ohio's "decision to employ a referendum *in addition* to redistricting by the legislature. The result of the decision was to send the *Ohio Legislature* back to the drawing board to do the redistricting." *AIRC*, 576 U.S. at 840 (Roberts, C.J., dissenting) (internal citations omitted). Notably, the Court never suggested that state or federal courts should absorb the task of redrawing Ohio's districts. Instead, it held that the legislative power was to remain in a

legislative entity—the Ohio General Assembly—even though the Ohio General Assembly had to start the legislative process from scratch.

Decades later, this Court decided *Smiley v. Holm*, 285 U.S. 355. There, the Minnesota Legislature passed a new congressional district map, but the Governor vetoed it. *Id.* at 361-62. This Court held that the Elections Clause "did not prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature. As in *Hildebrant*," though, "the legislature was not" ousted from the process. *AIRC*, 576 U.S. at 841-42 (Roberts, C.J., dissenting) (internal citations omitted). Instead, it had to start the legislative process anew.

In 1993, although this Court recognized the "significant role" that state courts have in redistricting, it still acknowledged the primacy of the State Legislature in drawing districts. *See Growe v. Emison*, 507 U.S. 25, 33 (1993). After an impasse between the legislature and the governor, a Minnesota state court adopted both congressional and state legislative maps. *Id.* at 28-30. A federal district court in Minnesota simultaneously adopted its own redistricting plan and issued an injunction prohibiting implementation of any other plan but its own. *Id.* at 31. The Minnesota state-court panel refused to release its congressional plan because of the federal court's injunction. *Id.* Litigation ensued.

This Court unanimously concluded that the federal court should have deferred to the state court's plan. *Id.* at 35. The Court held that the state court's adoption of a plan was exactly the sort of

"state judicial supervision of redistricting we have encouraged." *Id.* at 34.

Growe therefore recognizes the primacy of the legislature in enacting redistricting plans. Only when the legislature fails may courts step in, and this Court has expressed its preference—a state court should exercise supervisory authority instead of a federal court. *Growe*, then, does not stand for the proposition that state courts may prescribe redistricting criteria in the first instance.

Even in *AIRC*, this Court highlighted that redistricting is an exercise of legislative power. 576 U.S. at 814. Although Justice Ginsburg, writing for the majority, and Chief Justice Roberts, writing in the dissent, disagreed over whether a State Legislature could be displaced by a redistricting commission, both concluded that redistricting is a legislative power that should reside in a quintessentially lawmaking body—be that the State Legislature or a redistricting commission. *Compare id.* at 793, *with id.* at 825 (Roberts, C.J., dissenting).

* * *

The plain text of the Elections Clause, the structure of the Constitution, and this Court's precedent agree. Election regulation "prescription" is a legislative power that must remain vested in legislative bodies. U.S. CONST. art. I, § 4, cl. 1. And as the Elections Clause makes plain, the legislative body primarily tasked with election regulation is the State Legislature.

II. KEEPING STATE COURTS IN THEIR PROPER LANE DOES NOT MEAN STRIPPING THEM OF THEIR ROLE.

Although legislatures (state first, then federal) are constitutionally tasked with creating election regulations, state and federal courts do indeed have a role when, inevitably, election-related disputes arise. Through express and judicially manageable state and federal constitutional provisions, courts can, and must, ensure that state legislative enactments comply with state and federal foundational law. Striking the right balance is critical for making sure that *both* legislative and judicial actors avoid straying into a separation-of-powers jumble.

A. When State Legislatures pass laws, they must do so against the backdrop of state and federal constitutional requirements.

Some have suggested that Article I, Section 4 bestows *carte blanche* on State Legislatures to do as they please with no judicial oversight whatsoever. NRRT respectfully disagrees. State legislative discretion is cabined by both the federal and state constitutions, so legislative enactments must withstand state and federal constitutional scrutiny by the judicial branch. This remains true for election-procedure and redistricting legislation.

As an example, the Florida Constitution contains procedural and substantive requirements that the State Legislature must satisfy when it passes laws. It prescribes quorum requirements, a requirement

that all legislation must contain a single subject, and—relevant for the current discussion—a prohibition on certain election-related special laws. *See* FLA. CONST. art. III, §§ 4, 6, 10-11. It also requires that the legislation pass both the Florida House of Representatives and the Florida Senate and be presented to the Governor for approval. *Id.* at art. III, §§ 7-8.

State legislation must also withstand scrutiny under the U.S. Constitution. As this Court has routinely recognized, election regulation remains subject to the First and Fourteenth Amendments. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick*, 504 U.S. at 428. And a State Legislature may not pass legislation with an intent to discriminate. *See* U.S. CONSTITUTION amendment XIV, XV, XIX. This, of course, is why racial gerrymandering cases remain cognizable in federal court, notwithstanding Article I, Section 4. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 237 (1962).

When clear constitutional requirements have been violated by a State Legislature, courts should act. In Florida, for instance, election legislation that is procedurally defective—*e.g.*, when a legislative quorum is not met, when legislation does not contain a single subject, or when legislation amounts to an impermissible special law—should be struck down by Florida courts. So too, should they strike laws not passed by both chambers or not approved by the governor. The same is true when a State Legislature enacts an electoral map that is not contiguous, or malapportioned. And so too if election-procedure legislation violates the First, Fourteenth, Fifteenth, or Nineteenth Amendments.

B. When courts shift from reviewing legislative acts to acting as legislatures, an Article I, Section 4 violation arises.

The simple principles set out above often warp under the pressure of apparent exigency and blur in the shadows of legal gray areas. In those circumstances, some state and federal judicial bodies occasionally take liberties and move from applying election regulations to modifying them or creating new ones. Doing so, however, amounts to unconstitutional usurpation of the legislative power from the legislatures. Article I, Section 4 exists to stop these encroachments in their tracks.

This was seen when concerns about the COVID-19 pandemic affected the 2020 election. For example, in *Republican Party v. Degraffenreid*, the "Pennsylvania Legislature established an unambiguous deadline for receiving mail-in ballots." 141 S. Ct. 732, 732 (2020) (Thomas, J., dissenting from denial of certiorari). "Dissatisfied, the Pennsylvania Supreme Court extended the deadline by three days." *Id.* In so doing, the Pennsylvania Supreme Court usurped legislative power away from the Pennsylvania Legislature and rewrote the State's election rules. *See also Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring). A similar situation occurred in *Democratic National Committee v. Wisconsin State Legislature*, where a federal court rewrote Wisconsin election law and extended the deadline to return absentee ballots. 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

The clear words of the Elections Clause must be "take[n] . . . seriously." *See Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). Indeed, "[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections 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." *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from denial of certiorari).

Distilled to its core, this is the dividing line that the Elections Clause creates. Legislatures make election laws. Courts ensure that election laws comply with state and federal constitutional commands. The task for this Court is to remind all actors in the process that this dividing line matters.

III. THE NORTH CAROLINA SUPREME COURT COULD NOT HAVE TRANSGRESSED ARTICLE I, SECTION 4 MORE SEVERELY.

Although the Constitution contemplates a judicial role in election-related matters, that role is limited, and under no reasonable interpretation of Article I, Section 4 did the North Carolina Supreme Court comply with it. Indeed, it violated the Elections Clause in several ways. First, it invented out of whole cloth a state constitutional prohibition on partisan gerrymandering. In so doing, the State Supreme Court usurped power from the North Carolina General Assembly over election regulation

and arrived at the public policy decision to prohibit partisan gerrymandering in North Carolina. And second, the court gave power to lower state courts to decide which analytical methods best gauge how much partisan influence is too much.

A. The North Carolina Supreme Court invented an extra-textual prohibition on partisan gerrymandering.

The Elections Clause does not vest State Legislatures with unlimited and unchecked power. State Legislatures remain subject to express state and federal constitutional restrictions. *See supra* at Section II(A). In this way, the separation of powers is maintained: political and accountable legislative bodies can prescribe generally applicable election rules, and the judiciary can review these prescriptions for constitutional compliance.

The North Carolina Constitution contains no express prohibition of partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2508 (citing the constitutions and codes of four states who have enacted partisan gerrymandering prohibitions and citing zero court opinions decreeing partisan gerrymandering prohibitions). That, however, did not stop the North Carolina Supreme Court from manufacturing one out of provisions that state simply:

- ”All elections shall be free”;
- “The people have a right to assemble together to consult for their common good, to instruct their represenatives, and to

> apply to the General Assembly for redress of grievances";
>
> - "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse"; and
>
> - "No person shall be denied the equal protection of the laws."

Harper v. Hall, 2022-NCSC-17, ¶ 9 (2022) (citing constitutional provisions). In the State Supreme Court's view, its actions were justified because North Carolina is "a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments." *Id.* ¶ 4. "Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution." *Id.*

Put differently, the North Carolina Supreme Court invented an extra-textual constitutional prohibition on partisan gerrymandering. Now, in North Carolina redistricting disputes , state courts no longer call balls and strikes. Instead, state courts set the strike count and then draw the strike zone. If state courts can invent electoral requirements and impose those requirements on State Legislatures, the Elections Clause means nothing.

Whether to allow partisanship to play a role in electoral district drawing is a question that States

have grappled with since the Nation's conception. *See Rucho*, 139 S. Ct. at 2494-95 (explaining the history of partisan gerrymandering). Some have banned it. *See, e.g.*, N.Y. CONST. art. III, § 4; COLO. CONST. art. V, §§ 44, 46; MICH. CONST. art. IV, § 6. The decision to prohibit it, though, should be made either by legislators accountable to their constituents or by the constituents themselves (*e.g.*, through a state constitutional referendum process).

The reason is obvious. Electoral politics is, in a word, political. The decision to prohibit partisan gerrymandering involves political tradeoffs, value judgments, and compromises. Difficult questions arise along the way: if some partisan consideration must occur in redistricting:

> How much is too much? At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head-to-head races, would that be constitutional?

Rucho, 139 S. Ct. at 2501.

None of these questions slowed down the North Carolina Supreme Court when, by a four-to-three margin, it fabricated a judge-made ban on partisan gerrymandering. The tradeoffs, value judgments, compromises, and political decisions inherent in crafting election regulation were not even an afterthought. This is why Article I, Section 4 exists—to ensure that the power to "prescribe[]" (*i.e.*, create) election rules, including partisan-gerrymandering bans—is wielded by the politically accountable bodies. U.S. CONST. art. I, § 4, cl. 1.

B. The North Carolina Supreme Court empowered lower state courts to determine which analytical method best gauges partisan gerrymandering.

Adding procedural insult to substantive injury, the North Carolina Supreme Court instructed the lower courts under its jurisdiction in how to administer its newly created cause of action. The answer? Social science. Specifically, the State Supreme Court lent its imprimatur to experts who use "various computer simulation programming techniques that allow [them] to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria," and who then compare their maps to those produced by the North Carolina General Assembly. *Harper*, 2022-NCSC-17, ¶ 30; *see also id.* ¶ 163. In the State Supreme Court's view, this allows a "determin[ation]" as to "whether partisan goals motivated the legislature to deviate from these traditional districting criteria." *Id.*

This is not an exercise of judicial authority in any sense of the phrase. And yet, the North Carolina

Supreme Court has now wrested power away from the North Carolina General Assembly and given it to lower state courts and the political scientists that four of seven Justices found most persuasive. Just as the decision to prohibit political gerrymandering is one that sounds in public and political policy, so too is the decision to impose a preferred analytical approach to gauge partisan gerrymandering. By snatching both decisions from the North Carolina General Assembly, the North Carolina Supreme Court doubled its Article I, Section 4 infringement.

The separation of powers matters. The Elections Clause shows that the separation of powers matters even more when policy-laden questions of electoral regulation are at issue. Because the North Carolina Supreme Court trodded on the North Carolina General Assembly by creating a new partisan gerrymandering prohibition on its own, it violated the Elections Clause.

CONCLUSION

The North Carolina Supreme Court treated the Elections Clause as an afterthought. Yet the Elections Clause's clear language, its grounding in the structure of the Constitution, and this Court's precedent require that the Elections Clause be taken seriously.

To remedy the North Carolina Supreme Court's clear violation of the Elections Clause, this Court should grant certiorari and reverse the North Carolina Supreme Court's actions.

April 20, 2022

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