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

BRIEF OF CHARLES PLAMBECK AND JONI WALSER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

H. DAVID ROSENBLOOM
Counsel of Record
CAPLIN & DRYSDALE
1 Thomas Cir NW # 1100,
Washington, DC 20005
(202) 862-5037
drosenbloom@capdale.com
Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are citizens of the United States attentive to the fundamental principles of the constitution of their ancestral home of North Carolina. *Amici* wish to bring to the attention of the Court the operation of the North Carolina Constitution, intertwined as it is with the divisions and reconciliations of North Carolina's political history. The issue of representation in the legislature is not remote or hypothetical to North Carolinians. Divergences from popular accountability are the sources of the most shameful chapters of the state's history. The present welfare of its people depends directly on the responsiveness of its representatives.

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

SUMMARY OF ARGUMENT

I. The Free Elections Clause of the North Carolina Constitution guarantees that "[a]ll elections shall be free." N.C. CONST. art. I, § 10. This guarantee of free elections has always been an essential component of democracy in North Carolina. North Carolina adopted this guarantee in its original 1776 Constitution, and it has renewed that guarantee in each of its successive constitutions.

a. The historical context in which North Carolina adopted the Free Elections Clause in 1776 makes clear that the Clause prohibits partisan gerrymandering. The 1776 Clause was modeled on the English Bill of Rights of 1688. Bill of Rights Act 1688, 1 W. & M. (Eng. & Wales) ("Election of Members of Parliament ought to be free."). One goal of that 1688 law was to eliminate the manipulation of electoral units for partisan control of the legislature. In the preceding years, politicians and the Crown purged political foes from municipal corporations, which selected most members of the House of Commons. Partisans remodeled these voting units by revoking their charters and then reissuing them with different terms, and even created new corporations. The Free Election provision in the Bill of Rights Act 1688 aimed to extinguish that prerogative.

Pre-Revolutionary North Carolina saw similar interference with Free Elections. During the eighteenth century, officials in North Carolina used the power to design voting districts as a way of maintaining power and disenfranchising opponents. Although the right to Free Elections was the law in North Carolina in this period, its remedy was intermittent because redress often lay in bodies with conflicts of interest. A primary goal of the drafters of the 1776 North Carolina Constitution was to disarm the General Assembly, in whom they vested control over the executive, of the ability to wield discriminatory power as before.

It was against this historical backdrop of the misuse of the power to define electoral units that North Carolina adopted the Free Elections Clause in 1776. Like the Free Elections guarantee in the 1688 Bill of Rights, the Clause was part of a new constitutional order aimed at addressing recurring internal schisms in North Carolina. To make the Clause more effective than in the prior constitutional arrangement, the Clause was incorporated in North Carolina's written constitution, beyond the power of the legislature to amend or abridge. It was expressed in the Declaration of Rights as a broad reservation of power retained by the people, never granted to the legislature in the first place, held in trust by an independent judiciary. These augmentations are important in the present case because Petitioners seek to void them, essentially resurrecting an

uncontrollable Parliament with the same powers Americans fought to overthrow.

The Clause was extended in 1868 to all elections, and in 1971 "ought" was replaced with the more commanding "shall." Because of its constitutional status, the Free Election guarantee binds the General Assembly and all other North Carolina officials.

b. The North Carolina judiciary has the responsibility to vindicate the Free Elections Clause through its power of judicial review. To that end, North Carolina has long recognized the power of the judiciary to void unconstitutional districting legislation, to oversee the production of interim remedial maps, and to partner with the legislature by statute to ameliorate constitutionally destructive partisan conflict.

North Carolina statutes acknowledge judicial actions enforcing the Clause in actions challenging districting maps. In particular, North Carolina statutes prescribe the manner for bringing legal suits, *see* N.C. Gen. Stat. § 1-267.1, and the procedures that North Carolina courts must follow in adjudicating those disputes, *id.* § 120-2.4. Moreover, North Carolina statutes authorize the courts to draw new maps when necessary to remedy legal defects in maps drawn by the General Assembly. Under § 120-2.4(a1), if a court determines that a proposed map is defective, and the General Assembly subsequently fails to

provide a lawful map, the court may "impose its own substitute plan" to remedy the defects identified in the original maps. § 120-2.4(a). The court must do so "only to the extent necessary" to remedy the specific defects identified by the court. § 120-2.4(a1).

II. North Carolina's scheme – which prohibits the legislature from drawing discriminatory electoral districts, permits judicial review of electoral maps, and incorporates judicial remedying of defective maps – is consistent with the Elections Clause of the United States Constitution, which empowers the "Legislature" in each state to prescribe the "Manner of holding Elections." U.S. CONST. art. 1, § 4, cl. 1.

a. The Elections Clause does not exempt state legislatures from the requirements of their own state constitutions when they enact legislation regulating the manner of elections. The Elections Clause merely adds a task for state legislatures to legislate. But in enacting legislation pursuant to the Elections Clause, the state legislature must continue to comply with its own state constitution.

Petitioners suggest that state legislatures need not comply with state constitutions when legislating pursuant to Article I, § 4 because they are exercising federal power. But that cannot be the case because reading Article I, § 4 to confer federal legislative power on the state would violate Article I, § 1, which vests "All legislative power" in "Congress."

Moreover, it is impossible under North Carolina law for the state legislature to operate untethered from the state constitution. Extra-constitutional acts are not regarded as acts of the legislature, and therefore are not by the "legislature *of the state*" within the meaning of Article I, § 4.

The Free Elections Clause is superior to every other article of the Constitution – legislative, executive, or judicial. This means, among other things, that all state legislation concerning electoral districts, *including for federal elections*, must comply with the Free Elections Clause of the State Constitution, and the State Supreme Court has the last word on that.

Nor is there any merit to Petitioners' suggestion that the North Carolina Courts cannot enforce North Carolina's Free Elections Clause because it does not provide a judicially manageable standard. Whether the Free Elections Clause provides a judicially manageable standard is a question of state law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938), and the North Carolina Supreme Court has determined the clause is judicially enforceable.

b. In carrying out its power to prescribe the "Manner" of conducting elections under the Elections Clause, a state legislature need not make every decision relating to the elections itself. Instead, the legislature may set forth general policies and

authorize other branches to make decisions to carry out its directives.

This principle is well established. As this Court has repeatedly recognized, Congress may validly authorize agencies to make decisions to implement those policies. Doing so does not result in the agency impermissibly exercising legislative power; instead, the agency merely carries out the legislative policies established by Congress. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

So too with Elections Clause legislation. A state legislature may choose to determine by statute general policies relating to establishing election districts but authorize another non-legislative body to draw a map. In drawing maps pursuant to those policies, the non-legislative body does not enact legislation; instead, the non-legislative body merely implements the legislation adopted by the state legislature.

North Carolina follows precisely this path. Through various statutes, the General Assembly has implicitly recognized the power of the North Carolina courts to review districting maps, and it has explicitly authorized the courts to create remedial maps if the General Assembly fails to produce a remedial map that is free from legal defects. These statutes thus make judicial review and remedial maps part of the manner for producing districting maps.

Contrary to petitioners' assertion, there is no basis to think that the Elections Clause prohibits states from tasking state judiciaries to carry out legislative policies regarding the Manner of conducting elections. Courts regularly carry out legislative policies through their decisions. *See, e.g.*, *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

Even if the Elections Clause did prohibit state legislatures from conferring decision-making authority on others, this Court would not be in a position to deem North Carolina's scheme unconstitutional. State law determines which bodies of the state exercise state legislative power. The North Carolina Supreme Court is the appropriate body to determine which bodies have the authority to exercise state legislative power.

ARGUMENT

The Free Elections Clause of the North Carolina Constitution guarantees that "[a]ll elections shall be free." N.C. CONST. art. I, § 10. As its long history demonstrates, the Free Election Clause is an essential component of democracy in North Carolina. It extends to prohibiting partisan gerrymandering.

In 2022, in *Harper v. Hall,* 868 S.E.2d 499 (N.C. 2022), the North Carolina Supreme Court struck down an unrepresentative districting scheme because it violated the Free Elections Clause and other guarantees of the North Carolina Constitution. For the United States Supreme Court to restrict voting rights in North Carolina as Petitioners urge, it must thread an alternative history and operation of the North Carolina Constitution that extinguishes a foundational and hard-bought right reserved by the people of North Carolina. Then it must assume the supremacy of the United States Constitution under thin authority and legislate new replacement rules that the people of North Carolina must obey.

A candid reading of law and history illuminates that the phrase "elections ought to be free" in the 1688 Bill of Rights was specifically intended to eliminate the prerogative to manipulate electoral units for partisan control of the legislature. The framers of the North Carolina Constitution of 1776, addressing analogous internecine fractures, employed the same

phrase to guarantee its people the right to elections free from manipulation by a partisan legislature. The framers corrected two weaknesses in the prior constitutional order. First, by means of a written constitution unalterable except by the people, they elevated the right above all powers of the legislature to alter or curtail. They housed the right in a Declaration of Rights that is supreme to all other constitutional or statutory provisions. Second, they charged a body independent of the General Assembly, the North Carolina judiciary, with vindicating the right. The General Assembly incorporates this structure in elections statutes that specify the procedures to be followed by the courts in hearing challenges to elections. When the North Carolina Supreme Court decided *Harper v. Hall,* it was not usurping the role of the legislature; it was performing a constitutionally and statutorily assigned task in accordance with long-prevailing norms.

The Elections Clause in Article I, § 4 of the U.S. Constitution charges the state legislatures with determining the "[t]he Times, Places and Manner" of holding Elections. In performing that function, the state legislature necessarily engages in state lawmaking and must act in compliance with the state constitution. Nothing in the Election Clause turns the General Assembly into a federal legislative body. Nor does the Elections Clause somehow authorize the General Assembly to engage in lawmaking exempt from the requirement that in doing so it comply with

the State Constitution as adjudicated by the state judiciary. The Federal Elections Clause is intended to prevent state misconduct, not license it.

The General Assembly has implicitly recognized that election disputes are subject to judicial review in state court by enacting statutes specifying the procedures to be followed in hearing such disputes. The Federal Supreme Court must defer to the electoral rights and processes established in the North Carolina Constitution and statutes. Outside an act of Congress, there is no self-executing power in the Elections Clause that changes the state framework.

Petitioners have no discernible endgame. Their novel restructuring of the constitutional order would void all state constitutional restrictions on the legislature in federal districting. It would render useless the various solutions to gerrymandering cited with approval in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495-96 (2019). It fancifully imagines that hidden in the word "legislature" lies a cockatrice egg that will hatch now after 233 years to devour the constraints placed by states on their legislatures.

It must be understood how profound it would be for the highest court in the world's most powerful democracy to annul the words "elections ought to be free" – words which entered time with representative government over 750 years ago, descend unaltered in the oldest active statute of England, fortify

constitutions throughout the common law world, and undergird the European Declaration of Human Rights.

I. The North Carolina Supreme Court's decision faithfully implements North Carolina law, as reflected in the state constitution and statutes enacted by the General Assembly.

A. The North Carolina Constitution guarantees the right to elections free from partisan gerrymandering

The words "elections ought to be free" of the Free Elections Clause have prohibited election manipulation since they originated 747 years ago in the First Statute of Westminster of 1275. First Statute of Westminster (1275), 3 Edw. 1 ch. 5 (Eng.).[2] The principle that elections should be free has for centuries been the basis of representative government and the legitimacy of law. As Chief Justice Holt

[2] The right may have even older roots as a common law right. *See* EDWARD COKE, SECOND INSTITUTES OF THE LAWS OF ENGLAND 169 (1669) ("[T]his act briefly rehearseth the old rule of the common law (for that elections ought to be free)."). *See also* Woolas v Speaker of the House of Commons, [2010] EWHC 3169 (Admin) [90], [2012] QB 1 (stressing that the principle that elections should be free has for centuries been the basis of democracy and that the Statute of Westminster and the Bill of Rights Act of 1688 "are both in force to this day.")

explained, "by the common law of England, every commoner hath a right not be subjected to laws, made without their consent . . . [their] power is lodged in their representatives, elected by them for that purpose . . . and the grievance here is, that the party not being allowed his vote, is not represented." Judgment of Chief Justice Holt in *Ashby v. White*, 1704, *reprinted in* 8 ENGLISH HISTORICAL DOCUMENTS 172 (*D. Douglas & A. Browning* eds., 1953).

North Carolina and four other contiguous states incorporated the words "elections ought to be free" in their 1776 constitutive documents.[3] See PA. CONST., Declaration of Rights, art. VII (1776); MD. CONST., Declaration of Rights, art. V (1776); VA. CONST., Bill of Rights, §6 (1776); N.C. CONST. of 1776, Declaration of Rights, § 6; Declaration of Rights and Fundamental Rules of the Delaware State § 6 (1776) *reprinted in* 5 THE FOUNDERS' CONSTITUTION 6 (Philip B. Kurland & Ralph Lerner, eds. 1987). The clause enjoins partisan election legislation to the present day. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018); *Harper v. Hall*, 868 S.E.2d at 552; *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 820-24, 859 (Del. Ch. 2015); Mem. & Order 6, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. 2022).

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[3] Twenty-six states have active free elections clauses. *See* Joshua A. Douglas, *State Constitutional Right to Vote*, 67 VAND. L. REV. 89, 103 & n.86 (2019).

1. These 1776 free elections clauses derive proximately from the Bill of Rights Act of 1688, which enjoined partisan manipulation of electoral units. The period stretching from 1642 to 1688 in England saw significant government interference with electoral rights. J. JONES, THE REVOLUTION OF 1688 IN ENGLAND 35-6 (1972). As the power of parliament grew over this period, political parties (to emerge as Whigs and Tories) and the Crown sought to manipulate elections to secure parliamentary control. An important innovation to achieve this goal was control over the electoral units, the boroughs. Boroughs and other municipal corporations returned eighty percent of the members of Parliament. Kevin Costello, *Mandamus and Borough Political Life 1615-1780*, 42 J. LEGAL HIST. 171, 171-201 (2021). "Municipal governments administered boroughs," and the boroughs in turn "were responsible for selecting most of the members to the House of Commons." Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 256 (2021). Thus, control over municipal corporations was crucial to controlling parliament.

Partisans interfered with municipal governments in various ways. Sometimes, using royal prerogative, they simply purged unfriendly officers and appointed friendly ones. *See* JONES, *supra*, at 137. Other times, they remodeled the government itself, revoking charters and then reissuing them with different

terms. *See* P. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS 1650-1730 190-192 (Cambridge, 1998). They supplemented this remodeling by creating new charters or eliminating old charters. JONES, *supra*, at 133 (reporting the creation of thirty-two new municipal governments).

So long as the Crown applied this innovative use of its legal powers to consolidate the monopoly position of its Tory-Anglican allies at the expense of their Whig enemies, they went unchecked, if not unopposed. JONES, *supra*, at 156. However, when James II made extensive use of those same powers in an effort to secure the election of a Parliament supportive of Catholic toleration, both Whigs and Tories united against this constitutional and religious threat and supported a Protestant Dutch invasion to depose the King. *See* George Henry Artley, Law and Politics under the Later Stuarts: Sir John Holt, the Courts, and the Constitutional Crisis of 1688, at 214 (2019) (Ph.D. thesis, U. Oxford). Partisan interference in the freedom of parliamentary elections via manipulation of electoral units was thus a major reason for the Revolution of 1688. See JONES, *supra*, at 129-30 ("Of all domestic policies, the campaign to pack Parliament was easily the most important in provoking the Revolution"); *see also* HENRY BOLINGBROKE, A DISSERTATION UPON PARTIES 81 (8th ed. 1754) (arguing that interference with elections "laid the ax to the root of all our liberties at once."). It also led the Convention

Parliament to reaffirm, and require successor monarchs to acquiesce to, the 1688 Bill of Rights injunction that elections "ought to be free." Preamble to Bill of Rights Act of 1688 (condemning the Crown "by the Assistance of diverse evill Councellors, Judges and Ministers . . . [for] [v]iolating the Freedome of Election of Members to serve in Parlyament."); *see also* BOLINGBROKE, *supra*, at 202 (praising the "principal, declared right of the people of Britain, that the election of members to sit in parliament shall be free" and noting its constraint on actions of Parliament); Ross, *supra*, at 288 (arguing that the 1688 Act was a clear embrace of principles aimed at preventing electoral interference).

The context of this reaffirmation of the principle of free elections thus makes clear that the concept of free elections was understood to embrace more than the idea that voters ought not be unduly coerced when voting. It also condemned shaping electoral units for partisan gain. *See* Sir Richard Temple, Debates in 1689: January 29, *in* 9 GREY'S DEBATES OF THE HOUSE OF COMMONS, (Anchitell Grey ed., 1769) (settlement intended "to provide for Elections of Parliaments, that Corporations may not be made tools to nominate whom they please."); s*ee also* Report to the Lords on *Ashby v. White in* 17 HOUSE OF LORDS JOURNAL 526-36, available at http://www.british-history.ac.uk/lords-jrnl/vol17/pp526-536 ("If he who hath a Right to vote be hindered by him who is to take his Vote, or to manage the Election, that Election is

not free."). The language "ought to be free" was intended to eliminate electoral districting as an instrument of discriminatory power.

2. a. From North Carolina's very beginnings as a proprietary colony in 1662 and continuing in 1729 when it became a royal colony, these principles of free elections operated. One complaint lodged in 1705 with the Lords Proprietors of Carolina relied on that principle, stating that "it is one of the fundamental Rights and unquestionable Privileges belonging to Englishmen That all Elections of their Representatives to serve in Parliament ought to be free." Petition of John Ashe, 2 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 891, 903 (Saunders ed., 1886) *(*hereinafter "COLONIAL RECORDS").

The guarantee of free elections in North Carolina was understood to prohibit fashioning voting precincts simply for partisan gain. For example, in 1732, the Lords of Trade heard charges that the Governor violated the right to free elections by dividing old precincts, creating unnecessary new ones, and preventing the Assembly from erecting necessary new precincts "whereby his Arts he has endeavored to prepossess People in a future election according to his desire, his Designs herein being . . . to get a Majority of his creatures in the Lower House." *Rice v.*

Burrington (Nov. 17, 1732), *in* 3 COLONIAL RECORDS 375, 380 (Saunders, ed. 1886).[4]

Still, the colonial government did not always honor the principle of free elections. In 1771, for example, the Governor and the Eastern-dominated Assembly sought to disenfranchise a group of early revolutionaries, the Piedmont Regulators, by redrawing electoral districts.[5] This led to a bloody war and grisly executions. Article from the Boston Gazette Concerning Opposition to Taxes and Fees for Public Officials in North Carolina (July 22, 1771), *in* 8 COLONIAL RECORDS 639, 639-43.

b. It was against this backdrop of partisan interference with elections in North Carolina, England, and the broader British Atlantic world that North Carolina adopted its own Free Election Clause,

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[4] The petitioners argued: "Does it not savour of absurdity to say that the People have a part in making their Laws . . . but that the Governor and Council are entirely of themselves to . . . divide old & erect new Precincts at their pleasure . . .. Will such be the Delegates of the People? Will the People have any part in enacting such laws?" Memorandum by Nathaniel Rice and John Baptista Ashe Concerning Precincts, *in* 3 COLONIAL RECORDS 448, 456 (Saunders, ed. 1886).

[5] "The Acts for erecting four new counties seemed a measure highly necessary . . . as it separated the main body of the Insurgents from Orange County and left them in Guilford." Letter from William Tryon to Wills Hill, Marquis of Downshire (Mar. 12, 1771), *in* 8 COLONIAL RECORDS 525, 527 (Saunders, ed. 1886).

declaring in its 1776 Constitution: "That elections of members, to serve as Representatives in General Assembly, ought to be free." N.C. CONST. of 1776, Declaration of Rights, § 6.

The Free Elections Clause in the 1776 constitution addressed recurring internal schisms in North Carolina not dissimilar from those animating the 1688 revolution. *See generally*, HUGH T. LEFLER & WILLIAM S. POWELL, COLONIAL NORTH CAROLINA: A HISTORY 217-239 (1973). It provided a path to civil peace through legitimately fair sectarian representation. It sought to incapacitate the legislature from subverting elections—elections that are the primary check on the power of the legislature. *See* Letter from Samuel Johnston to James Iredell (Apr. 20, 1776), *in* 1 THE PAPERS OF JAMES IREDELL 350, 351 (Don Higginbotham, ed. 1976) ("[T]here can be no check on the Representatives of the People in a Democracy but the people themselves . . . .").

The 1776 Constitution corrected two flaws in the prior constitutional order that had limited the effectiveness of the right of Free Elections. First, it incorporated the right in a written constitution that could not be altered by the legislature, only by the electors themselves. N.C. CONST. of 1776, Declaration of Rights, § 6. It reserved from the legislature the power to violate the Free Elections Clause and other rights enumerated in the Declaration of Rights. *Trs.*

of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 59 (1805) ("The people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and these they have expressed in the Bill of Rights and the Constitution."); *see also*, *Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 149 (Jonathan Elliot ed., 2d ed., 1836) (Hereinafter "ELLIOT'S DEBATES") (Iredell states "a bill of rights [operates] as an exception to the legislative authority in such particulars."). These are structurally superior to all other constitutional provisions and acts of the General Assembly. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1762, 1765, 1768 (1992). They "ought never to be violated, on any presence whatsoever." N.C. CONST. of 1776, § 44. They are written in intentionally broad and enduring language. 4 ELLIOT'S DEBATES 149.

Second, it established a body independent of the General Assembly, the North Carolina judiciary, to vindicate the Free Elections Clause. N.C. CONST. of 1776, § 13. *Bayard v. Singleton,* 1 N.C. 5 (Super. Ct. L. & Eq. 1787), incorporated the principle of judicial review in the jurisprudence of North Carolina. *Id.* at 7. In the decision by Judge Samuel Ashe, a drafter of the State Declaration of Rights and Constitution, the court addressed the right of elections in a way that

reflected the original suspicion of an untethered legislature: "[I]f the members of the General Assembly could [violate the Declaration of Rights], they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.* at 7.

Since 1776, North Carolina has only strengthened this right. Each transformation in the political culture is fully intertwined with transformations in the law of free elections. In 1868, the state amended the constitution to address the failures of representation that led to the Civil War.[6] The Free Elections Clause guarantee was extended to *all* elections instead of merely elections of representatives. N.C. CONST. of 1868, art. 1, § 10.

In *People ex. rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875), the Court addressed districts drawn such that "one vote in the first and second wards counts as much as seven votes in the third ward," saying "[t]hat

[6] The majority of North Carolina voters were non-slaveholding yeoman farmers (Whigs) who in February 1860 rejected secession. Subsequent acts of a legislature skewed in favor of slave-holding interests (Tories) drove North Carolina into the Civil War. D. CROFTS, RELUCTANT CONFEDERATES: UPPER SOUTH UNIONISTS IN THE SECESSION CRISIS (Chapel Hill, 1989).

[such a scheme] is a plain violation of fundamental principles, the apportionment of representation, is too plain for argument." 73 N.C. at 204. The Court also held that the grant to the legislature of the power to establish voting districts did not also convey the power to abridge the right to vote, or for that matter "carry with it authority to reverse the whole order of things as established by the [State] Constitution." *Id.* The 1868 Constitution also improved the responsiveness and accountability of the judiciary through popular election. *See Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825, 1837-45, 1850-51 (John V. Orth ed., 1992).

And in 1971, North Carolina supplemented election protections by adding an equal protection clause. N.C. CONST. art. I, § 19. North Carolina also amended the Free Elections Clause from elections "ought to be free" to its current form of elections "shall be free." *Compare* N.C. CONST. of 1868, art. I, § 10 *with* N.C. CONST., art. I, § 10. In doing so, the Constitution changed the principle of free elections from the aspirational "ought" to be free to being a mandatory requirement for all elections. *See N.C. State Bar v. DuMont*, 286 S.E.2d 89, 97 (N.C. 1982) (provisions of the Declaration of Rights "are commands and not mere admonitions").

B. The General Assembly has tasked the North Carolina Courts to review maps for compliance with the Free Elections Clause and to draw remedial maps when necessary

North Carolina law enforces the Free Elections clause by tasking the state judiciary to review apportionment maps and remedy those that violate the Free Elections Clause.

In that regard, North Carolina has long recognized court actions to vindicate rights in the North Carolina constitution. See *Bayard,* 1 N.C. (1 Mart) at 7. In particular, the North Carolina Supreme Court has repeatedly recognized the right to bring challenges based on the Free Elections Clause and related Declaration of Rights protections. *See, e.g., Van Bokkelen*, 73 N.C. at 216 (Citing the Free Elections Clause, the plaintiffs asked: "How can an election be free when a part of the voters are driven from the polls by a Legislative exclusion?").

This view is rooted in history. Shortly after the 1688 settlement, as partisan competition resumed with ferocity, Chief Justice Lord Holt wrote that the right to free elections is actionable and requires a remedy in law. *Ashby v. White,* (1703) 92 Eng. Rep. 126, 127. Although Holt was in dissent, the House of Lords subsequently adopted his view. As Lord Townshend's report to the House of Lords on the case

states: "Would it not look very strange, in a Constitution so formed that the Commons of *England* have an undoubted Share in the Legislative Authority, which is to be exercised by their Representatives, chosen by themselves, in which every Freeholder . . . hath a Right to vote . . . the Person injured shall have no Remedy, though the Injury be done to such a Right, upon the Security whereof the Lives, Liberty, and Property, of all the People of England so much depend?" 17 HOUSE OF LORDS JOURNAL, *supra*, at 525-535. Holt's dissent and the Report of the House of Lords also clarify that adjudicating the right and remedy is a constitutional matter to be decided by the judiciary and not the legislature; the protection is a fundamental personal right that cannot be abridged by the legislature; and prohibits any form of "management" that disturbs the will of the elector. *Id.* Curtailing free elections is not a legitimate privilege of the legislature. Enforcing free elections does not interfere with legitimate government objectives. If not prosecuted, it will lead to increasing corruption of elections. *See also* HALLIDAY, *supra*, at 291-303 (discussing how the 1688 Revolution transformed the judiciary as well as the legislature and executive, and how in the subsequent decades the King's Bench partnered with Parliament to remedy and ameliorate the worst of the constitutional impacts of acute partisan politics.)

North Carolina statutes also envisage suits to enforce the Free Elections Clause. The General

Assembly has adopted various statutes regulating the procedures for bringing and resolving those actions. Significantly, the General Assembly adopted these statutes regulating the procedures for challenging elections in the wake of the North Carolina Supreme Court's decision in *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), which struck down an elections map created by the General Assembly and oversaw a remedial map. *Id.* at 398. An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes To The Election Laws And to Other Laws Related to Redistricting, 2003 N.C. Sess. Laws 1313, 1415-16.

N.C. Gen. Stat. § 1-267.1 specifies that election challenges may be heard only by a three-judge panel in Wake County. The statutes also prescribe strict procedures courts must follow in reviewing districting plans. Among other requirements, section 120-2.3 requires that a court, when "declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts," must make specific findings of fact and conclusions of law and must "identify every defect found by the court." § 120-2.3.

By adopting these detailed procedures regarding how court challenges to elections (including challenges to the lawfulness election districts) shall be

conducted, the General Assembly has integrated the process of judicial review. *See* HENRY J. FRIENDLY, MR. JUSTICE FRANKFURTER AND THE READING OF STATUTES, IN BENCHMARKS 196, 232-33 (1967) (codification through silence or reenactment is appropriate where the legislatures opts to limit instead of overturn a decision); *see also Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys Project, Inc.*, 576 U.S. 519, 536-37 (2015) (Congress's decision to restrict instead of prohibit a process ratifies that process). This resembles very closely the non-antagonistic and mutually reinforcing efforts of Parliament and the King's Bench to ameliorate and stabilize the intense partisan politics after 1688. *See* HALLIDAY, *supra*, at 24-27, 275-76, 301-02, 346.

In addition to contemplating judicial review of districting plans, North Carolina statutes instruct the courts to draw new maps when necessary to remedy legal defects in maps drawn by the General Assembly. If a court determines that a proposed map is defective, it must provide the General Assembly with a period of time to generate a new map that addresses those legal defects. § 120-2.4(a)-(a1). If the General Assembly fails to provide a lawful map within that time, a court may "impose its own substitute plan" to remedy the defects identified in the original maps. § 120-2.4(a1). The court must do so "only to the extent necessary" to remedy the specific defects identified by the court. *Id.*

Under this scheme, the General Assembly retains the primary role in fashioning districts for elections. The courts may intervene only when the General Assembly has exceeded its authority by drawing a map that is unlawful; the courts may adopt a remedial map only when the General Assembly then subsequently fails to produce a lawful map after it has been informed of the legal problems with its initial map.

C. The North Carolina Courts faithfully followed North Carolina Law

In this case, the North Carolina courts faithfully followed the procedures and requirements for judicial review of electoral maps mandated by these statutes adopted by the General Assembly. The actions challenging the initial map generated by the General Assembly were heard by a three-judge court in Wake county. *N.C. League of Conservation Voters v. Hall*, 2021, No. 21 CVS 500085, 2021 WL 6883732 at *1 (Super. Ct. Dec. 3, 2021). On appeal from that court, the North Carolina Supreme Court enjoined the use of the map based on specific findings that they violated the Free Elections Clause. *Harper v. Hall*, 867 S.E.2d 554, 557 (N.C. 2022) (Mem.). The courts subsequently provided an opportunity for the General Assembly to submit remedial maps. *Id.* at 558; Order on Submission of Remedial Plans, *Harper v. Hall*, No. 21 CVS 500085 2022 WL 2610498, at *1-2 (Super. Ct.

Feb. 8, 2022). When the trial court determined that the remedial map submitted by the General Assembly failed to satisfy the Free Elections Clause, it adopted a remedial map that differed from the General Assembly's map only "to the extent necessary to remedy the defects identified by the Court." *Order on Remedial Plans*, 21 CVS 500085, 2022 WL 2610499, at *8-9 (Super Ct. Feb. 23, 2022). Accordingly, the North Carolina courts strictly adhered to North Carolina law.

II. The North Carolina Supreme Court's actions do not conflict with the "Elections Clause" of Article I Section 4 of the Federal Constitution.

Petitioner argues that the Elections Clause in Article I, § 4 of the U.S. Constitution gives state legislatures exclusive power to draw districting maps and, therefore, that the North Carolina Supreme Court lacked authority either to review the General Assembly's redistricting map or to substitute a new map. Pet. Br. at 17. This contention does not withstand scrutiny.

A. State Judicial Review for Compliance with State Constitutions is Consistent with the Elections Clause

Under the Elections Clause state legislatures prescribe the manner in which elections shall be conducted through legislation. *Smiley v. Holm*, 285 U.S. at 366 (1932) ("[T]he subject of 'times, places and manner of holding elections' . . . involves lawmaking in its essential features and most important aspect."). The Elections Clause does not purport to confer some extra-legislative function on state legislatures. The only effect of the clause is to task state legislatures with legislating Federal elections.

Because a state legislature exercises its ordinary legislative power when prescribing the manner for conducting elections, the legislation enacted by the state legislature must comply with that state's constitution, just like any other state legislation.

Petitioners assert that the Elections Clause authorizes only federal constitutional challenges to election maps. Pet. Br. at 11, 48. This argument fails. The only way a state constitution would not limit state legislation enacted pursuant to the Elections Clause would be if the Elections Clause conferred on the state legislatures the authority to enact federal legislation. Nothing in the Clause supports that conclusion. The text simply directs state legislatures to legislate

Federal elections; it does not purport to federalize the state legislatures. Indeed, to say that state legislation in this context was federal would violate Article I, §1 of the Constitution, which provides "[a]ll legislative powers . . . shall be vested in a Congress." U.S. CONST. art. I, § 1.

The second half of the Elections Clause further confirms this point by conferring on Congress the authority to displace the state laws. U.S. Const. art. I, § 1, cl. 1. The reason that Congress can displace the state legislation is that the former's legislation is federal and the latter's is not.

In short, it would be absurd to think that, by authorizing state legislatures to enact legislation regulating elections, the Elections Clause meant to void state constitutional provisions that a state deemed critical to constrain its own legislature.[7]

Under North Carolina law, the General Assembly must follow the North Carolina Constitution to adopt

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[7] One reason the Elections Clause conferred authority on Congress was a distrust of state legislatures, which might otherwise frustrate national elections through self-dealing and corruption. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1004 (2021). The protections in the North Carolina and other state constitutions evince the same distrust and further the same goal.

valid legislation. A repugnant act "would be a mere nullity." *Faris v. Simpson,* 1 N.C. (Cam. & Nor.) 381, 384 (Super. Ct. L. & Eq. 1801). The Declaration of Rights withholds from the General Assembly the power to issue unduly discriminatory election rules. *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992). Specifically as to voting rights, "the people of our State . . . have affirmatively placed upon the General Assembly certain limitations in the apportionment and redistricting process." *Stephenson*, 562 S.E.2d at 402 (Orr, J., concurring). Thus, where its actions violate the North Carolina Constitution, the General Assembly is not exercising the North Carolina legislative power. *State v.* ____, 2 N.C. (1 Hayw.) 28, 29-30 (Supr. Ct. L. & Eq. 1794) ("Whenever the [General] [A]ssembly exceeds the limits of the constitution, they act without authority, and then their acts are no more binding than the acts of any other assembled body.").

Because state legislation under the Elections Clause is simply state legislation, it is subject to the usual constraints imposed on state law—including the requirements that the state legislation be subject to judicial review to assure compliance with the state's constitution. *See, e.g.*, *Smiley*, 285 U.S. at 372-73. North Carolina courts are charged with ensuring that the General Assembly complies with the state Constitution. *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 10 (1833) ("[T]he preservation of the integrity of the [North Carolina] constitution is confided by the

People, as a sacred deposit, to the Judiciary"), *overruled on other grounds by Mail v. Ellington*, 46 S.E. 961, 971 (N.C. 1903).

North Carolina did not abrogate the rights of its citizens to free elections when it ratified the United States Constitution. In the 1788 ratification debates Mr. James Galloway an Anti-Federalist, argued that a legislature captured by partisan interests could perpetuate itself by controlling electoral districts. 4 ELLIOT'S DEBATES, *supra*, at 70. Mr. Steele, Federalist, countered that judicial review and "the right of election" would prevent this. *Id.* at 71.

To avoid these conclusions, Petitioners suggest that North Carolina's Free Elections Clause does not provide a judicially manageable standard and therefore the North Carolina courts could not properly review Respondents' claim. Pet. Br. at 46. That argument is a nonstarter in this Court. It is unquestionably an issue of state law whether the Free Elections clause of the state constitution provides a judicially manageable standard. The North Carolina Supreme Court is the ultimate authority on the meaning of state law. See *Erie* 304 U.S. at 79-80. The North Carolina Supreme Court determined that the Free Elections Clause does provide a sufficiently clear standard for courts to evaluate district maps. *Harper*, 868 S.E.2d at 551. That should be the end of the discussion.

B. The Decisions of the North Carolina Courts carried out the Manner for conducting Elections prescribed by the State Legislature

In authorizing state legislatures to prescribe the manner for elections, the Elections Clause does not purport to require the state legislature to make every decision relating to the manner of holding elections itself. Nor would it be logical for it to do so. The legislature may set forth general policies and authorize other branches to make decisions to carry out its directives. No one thinks that an employee at a polling location cannot make decisions about how many pens to put in a voting booth for use in filling out ballots, how to queue voters to make the process more orderly, and how much to move a voting booth to the side to make it more accessible. Those decisions relate to the "Manner of holding elections." They are permissible because the poll worker is not fashioning new policies about the manner in which elections are held but rather is implementing the election policies enacted by the state legislature setting forth the manner for conducting elections.

This Court's decisions recognizing Congress's ability to confer decision-making authority on agencies are instructive. Although Article I vests "[a]ll legislative power" in Congress, this Court has long recognized that Congress may authorize agencies to

fashion policy by making rules to implement legislation enacted by Congress. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns.*, Inc., 531 U.S. 457, 472 (2001); *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). An agency establishing policies through rulemaking in this manner does not improperly make decisions that only Congress may make. Instead, the agency's decisions implement the legislative policies enacted by Congress. *See Am. Trucking Ass'ns*, 531 U.S. at 472.

The same logic applies to the Elections Clause. A state legislature may choose to determine by statute general policies relating to establishing election districts but authorize another non-legislative body to draw a map. By acting as directed by the state legislature, the non-legislative body is not enacting legislation or making decisions only the legislature can make. Instead, under that structure, the non-legislative body is merely implementing the legislation adopted by the state legislature.

North Carolina has followed precisely this path. As in the federal system, North Carolina does not require the General Assembly to make all policy decisions but instead permits the legislature to set general policies and allocate decision-making authority to other institutions. *Adams v. Dept. of N.E.R*, 249 S.E.2d 402, 410-11 (N.C. 1978) (complexity

of issues faced by modern legislature make strict adherence to ideal of non-delegation impossible).

Following this principle, the North Carolina legislature has allocated significant authority to the North Carolina courts over districting maps. In particular, as explained above, the General Assembly has implicitly countenanced the state judiciary's review of election districting maps adopted by the General Assembly and explicitly authorized the courts to create remedial maps if the General Assembly fails to produce in a timely fashion a map that is free from legal defects. The North Carolina General Assembly thus has exercised its authority under the Elections Clause to make judicial review and remedial maps part and parcel of the manner by which it has specified elections shall be held in the state. The obvious function of this scheme is to avoid the dilemma of either conducting elections pursuant to a map that violates the North Carolina Constitution or not holding elections at all because of the temporary absence of a districting map.

Petitioners argue that, even if state legislatures may "delegate" authority to state executive officials to review and draw maps, they cannot "delegate" that authority to the state judiciary. Pet. Br. at 45. Therefore, petitioners say, the Elections Clause precludes the North Carolina courts from performing the duty assigned to them by North Carolina law of reviewing maps produced by the General Assembly

and imposing interim remedial maps where they determine it necessary.

Petitioners' argument misapprehends the role of the North Carolina courts in performing their duties. In reviewing district maps and imposing remedial maps when necessary, North Carolina courts do not exercise legislative authority delegated by the General Assembly. Instead, by performing those tasks, the courts are implementing the General Assembly's legislative policy of incorporating judicial review to determine that election maps are lawful, and if necessary to oversee the preparation of an interim remedial map to prevent a legislative void. In other words, the courts are *not* prescribing a new "Manner" for producing election maps; they are simply carrying out the "Manner" the General Assembly has prescribed for producing those maps.

More fundamentally, petitioners' argument rests on the mistaken premise that federal constitutional limits on delegating federal power apply to the states. The federal constitution does not create state governments. To the contrary, states are separate sovereigns that "existed before the Constitution," *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868). Although the Constitution imposes some limits on states, it largely preserves their sovereignty. *Alden v. Maine*, 527 U.S. 706, 714 (1999).

A core feature of retained sovereignty is that states may distribute the executive, legislative, and judicial power as they see fit. *See Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (noting that each state has the "constitutional responsibility for the establishment and operation of its own government"). The prohibition precluding Congress from delegating federal legislative power to the courts therefore does not apply to the states. See *Erie*, 304 U.S. at 79 ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States" and to do otherwise "is a denial of [the state's] independence." (internal citation and quotation marks omitted)). How North Carolina has distributed its legislative power is a question of North Carolina law—and the North Carolina Supreme Court is the ultimate authority on that question.

CONCLUSION

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

Respectfully submitted,

H. DAVID ROSENBLOOM
Counsel of Record
CAPLIN & DRYSDALE
1 Thomas Cir NW # 1100,
Washington, DC 20005
(202) 862-5037
drosenbloom@capdale.com
Counsel for Amici Curiae

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