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 NORTH CAROLINA SENATOR DANIEL T. BLUE, JR. AND NORTH CAROLINA REPRESENTATIVE ROBERT T. REIVES, II AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Senator Daniel T. Blue, Jr. is the Democratic leader of the North Carolina Senate. Representative Robert T. Reives, II is the Democratic leader of the North Carolina House of Representatives. Amici and the caucus members they lead have sworn oaths to support the constitutions of the United States and of North Carolina. These oaths give amici an interest in protecting North Carolina's autonomy to structure its government as it deems fit, consistent with federal constitutional constraints. The State has carefully considered and chosen what checks to place (and not to place) on the General Assembly's redistricting authority. Members of amici's caucuses were in office in 2003, when the General Assembly enacted North Carolina's framework governing judicial review of redistricting plans, and amici themselves were in office when that framework was amended in 2018. The Elections Clause should not be construed to deprive North Carolina's leaders and citizens of the ability to make those choices.

Amici also have an interest in safeguarding the authority of the General Assembly of which they are leading members. A ruling for petitioners would diminish, not enhance, the Assembly's authority because it would bar the Assembly from enlisting the resources and expertise of other state organs, including the State Board of Elections, to regulate federal elections held in the State. That authority is critical to North Carolina's ability to conduct functional and fair elections. Amici

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

accordingly urge this Court to reject petitioners' interpretation of the Elections Clause and uphold North Carolina's carefully considered scheme for its administration of federal elections.

SUMMARY OF ARGUMENT

I. The Elections Clause does not immunize state legislation regarding federal elections from state judicial review for consistency with state constitutional requirements. This Court has never suggested otherwise. To the contrary, it has confirmed time and again that state courts *may*—and in fact *should*—enforce state constitutional provisions in congressional districting cases. That precedent comports with both the text of the Elections Clause and the Framers' purpose in enacting it.

Petitioners try to circumvent this Court's precedent by inventing a distinction between "substantive" and "procedural" state constitutional provisions. That distinction has no basis in either the Elections Clause or this Court's cases. In fact, the distinction is incompatible with the Court's decision just three years ago in *Rucho* v. *Common Cause*, 139 S.Ct. 2484 (2019), which confirmed that undeniably "substantive" state constitutional limits may apply to state legislation regarding congressional district maps. Petitioners' proposed carve-out of substantive state laws, moreover, would serve no legitimate interest and would lead to perverse results.

Petitioners also conjure a baseless distinction between "specific" and "open-ended" state constitutional provisions, and arbitrarily cabin the remedial authority of state courts to exclude court-ordered districting plans. These arguments not only violate centuries of

real-world practice, but also (like petitioners' substantive-procedural distinction) contradict this Court's precedent, including in redistricting cases. Enforcing these proposed limitations on state courts would require unprecedented and improper federal intrusion into state affairs.

II. Even if the Elections Clause did create a default regime in which state legislation regarding federal elections is immune from state judicial review under state constitutional standards, the decision below would stand. Contrary to petitioners' unsupported view, the North Carolina General Assembly has enacted legislation that expressly authorizes state judicial review and remediation of districting plans that run afoul of the state constitution. The redistricting at issue here proceeded exactly as the state legislature "prescribed," U.S. Const. art. I, §4, cl. 1. A ruling for petitioners would thus infringe the very state-legislative authority petitioners purport to champion. By restricting the ability of state legislatures to enlist help from other organs of the State, such a ruling would result in elections that are less orderly, less reliable, less secure, and less fair.

ARGUMENT

I. THE ELECTIONS CLAUSE DOES NOT EXEMPT STATE LEGISLATURES FROM STATE CONSTITUTIONAL LIMITS

A. This Court's Elections Clause Precedent Not Only Approves, But Also Endorses The Involvement Of State Courts In Congressional Districting

For over a century, this Court has repeatedly recognized that state courts may enforce state constitutional mandates in congressional redistricting cases.

For example, in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), this Court affirmed the Ohio Supreme Court's ruling that a congressional districting law enacted by the Ohio legislature was subject to a state constitutional provision authorizing voters to disapprove through popular referendum laws enacted by the legislature, *see id.* at 566. Likewise, in *Smiley* v. *Holm*, 285 U.S. 355 (1932), this Court held that the Minnesota governor could, consistent with the Elections Clause, veto the state legislature's congressional districting plan when authorized to do so by the state constitution and laws, *see id.* at 366. As the Court explained, there is "no suggestion" in the Elections Clause "of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided." *Id.* at 367-368; *see also Koenig* v. *Flynn*, 285 U.S. 375, 379 (1932) (affirming a state court's creation of a redistricting plan where the legislature had failed to enact one); *Carroll* v. *Becker*, 285 U.S. 380, 382 (1932) (same).

More recently, in *Growe* v. *Emison*, 507 U.S. 25 (1993), the Court unanimously reiterated its longstanding "teaching that state courts have a significant role in redistricting," *id.* at 33 (citing *Scott* v. *Germano*, 381 U.S. 407, 409 (1965)), vacating a federal district court's order that enjoined congressional redistricting proceedings in Minnesota state court—proceedings conducted pursuant to jurisdiction provided by state law, *see id.* at 34. The Court explained that those proceedings represented "precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.*

The Court espoused similar principles in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission (AIRC)*, 576 U.S. 787 (2015), which upheld an amendment to the Arizona constitution transferring

congressional redistricting authority from the state legislature to an independent commission. "[I]t is characteristic of our federal system," the Court emphasized, "that States retain the autonomy to establish their own governmental processes." *Id.* at 816. The Court refused to "read[] the Elections Clause to single out federal elections as the one area in which States" were deprived of such autonomy. *Id.* at 817. Even the dissenters agreed that, by virtue of state law, "the state legislature need not be exclusive in congressional districting." *Id.* at 841-842 (Roberts, C.J., dissenting). For the dissenters, the infirmity of Arizona's approach was that it "excluded" the state legislature entirely. *Id.*

The foregoing cases are faithful to the Framers' vision of the Elections Clause. As this Court has explained, the Framers intended the clause "to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," because the Framers understood that "[c]onflict of interest is inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *AIRC*, 576 U.S. at 815 (second alteration in original); *see also* Federalist No. 59 (Hamilton). Indeed, public debates at the Founding emphasized that the clause would function to "ensure to the *people*"—not to state legislators—"their rights of election." Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in 2 *The Founders' Constitution* 253 (Kurland & Lerner eds., 1987). In light of this objective, it would have made little sense for the Framers to craft a constitutional provision that insulated inherently self-interested legislators from the check of their States' own constitutions or judiciaries. Instead, the Framers crafted a provision "to empower Congress to override state election rules," *AIRC*, 576 U.S. at 814-815. The

role of state courts in policing those rules does nothing to disturb that balance. To the contrary, state judicial review vindicates the same interest that animated the Elections Clause. As the state high court explained in this case, judicial review was established in North Carolina "out of concern for the very possibility that the legislature might intercede in the elections for their own office, … in contravention of the constitutional rights of the people to elect their own representatives." Pet. App. 78a.

In short, the North Carolina courts' enforcement of the state constitution in congressional redistricting is fully consistent with this Court's precedent interpreting the Elections Clause.

B. Petitioners' Distinction Between "Procedural" And "Substantive" State Laws Is Baseless and Irrelevant

Petitioners dismiss the consistent case law just discussed as involving "state-constitutional *procedural* requirements," Br. 25 & n.1, whereas North Carolina's Free Elections Clause is "substantive." According to petitioners (Br. 24), "each State's constitution may properly govern … procedural questions" but may not "impose *substantive* limits, enforceable by state courts." That reading of the Elections Clause is invented out of thin air in a transparent effort to circumvent *Hildebrant*, *Smiley*, and *AIRC*. This Court should reject it.

1. The claim that "substantive" state-law provisions are inapplicable in this context cannot be squared with this Court's decision just three years ago in *Rucho*. There, all nine Justices agreed that "[p]rovisions in state statutes and state constitutions

can provide standards and guidance for state courts to apply" in congressional redistricting cases. 139 S.Ct. at 2507; *see also id.* at 2524-2525 & n.6 (Kagan, J. dissenting). And as its principal example of an applicable state-law standard, the Court cited the Fair Districts Amendment to the Florida Constitution, *id.* at 2507, which provides that '[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party of an incumbent," Fla. Const. art. III, §20(a). That is indisputably a "substantive" provision. And without a hint of concern, the Court observed that the Florida Supreme Court had invoked that provision to "str[ike] down that State's congressional districting plan." *Rucho*, 139 S.Ct. at 2507 (citing *League of Women Voters of Florida* v. *Detzner*, 172 So.3d 363 (Fla. 2015)). If that decision by the Florida Supreme Court comports with the Elections Clause—as *Rucho* plainly believed—the decision below must as well.

2. Even apart from *Rucho*, there is no basis for petitioners' carve-out of substantive state rules. The text of the Elections Clause does not distinguish between substantive and procedural rules. Nor do this Court's precedents. To the contrary, *AIRC* stated broadly that "[n]othing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may prescribe regulations in defiance of provisions of the State's constitution." 576 U.S. at 817-818.

Petitioners nonetheless argue (Br. 23) that substantive state-law provisions are governed not by *Hildebrant*, *Smiley*, or *AIRC* but by *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *McCulloch*, petitioners say, insulates state legislatures from substantive state-law restraints when the legislatures perform a "federal function" (Br. 23), like the drawing of con-

gressional districts. For starters, however, the notion that congressional redistricting is a purely "federal function" is wrong; rather, "[t]he Elections Clause authorizes federal involvement in what might otherwise be deemed a purely *state* prerogative," Non-State Resp. Br. 56 (emphasis added). That aside, *McCulloch* nowhere suggested that a state legislature performing such a function would be exempt from the state constitution to which the legislature owes its very existence. *McCulloch* invalidated Maryland's attempt to tax the Second Bank of the United States, a federal entity established by Congress. *See* 17 U.S. (4 Wheat.) at 437. Nothing in the Court's holding extended to entities established not by Congress but by state constitutions. To the contrary, Chief Justice Marshall explained that "[t]he sovereignty of a state extends to *everything which exists by its own authority, or is introduced by its permission*." *Id.* at 429 (emphasis added). *McCulloch* itself, that is, disclaims any suggestion that the limitation the Court recognized on state authority to regulate *federal* institutions implicates a State's authority to regulate its *own* legislature. Conversely, *Hildebrant*, *Smiley*, and *AIRC* make plain that state constitutions *do* constrain state legislatures when it comes to congressional districting.

Even if the federally created bank in *McCulloch* were analogous to a state legislature, the Court's decision would not support petitioners because it does not preclude the enforcement of any and all "substantive" state laws. Rather, *McCulloch* and its progeny hold that the Supremacy Clause preempts "state laws that conflict with federal law." *E.g.*, *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 479-480 (2013) (citing, *inter alia*, *McCulloch*, 17 U.S. (4 Wheat.) at 427). *McCulloch* invalidated Maryland's tax under that rule

because the tax could "be exercised so as to destroy" the bank, which was necessarily "hostile to, and incompatible with [Congress's] powers to create and to preserve" the bank. 17 U.S. (4 Wheat.) at 426-427. Application of the North Carolina Constitution has no comparable effect here, not least because Congress retains the express constitutional authority to "alter" state regulations of congressional elections. U.S. Const. art. I, §4. Accordingly, North Carolina's actions in this case do not conflict with any federal prerogative, and *McCulloch* is inapposite.

3. Finally, petitioners' distinction is not even a coherent one, because legal requirements the operation of which may be characterized as "procedural" will in practice, frequently have "substantive" effects. Thus, the goal petitioners ascribe to the Elections Clause—safeguarding state legislatures' performance of their "federal function"—is not served by their proposed distinction. If anything, the supposedly "procedural" requirements allowed to stand in *Hildebrant*, *Smiley*, and *AIRC* risked far greater intrusion into state legislative autonomy than enforcement of the North Carolina Constitution does here. In *AIRC*, for example, the State was permitted to "*supplant* the legislature altogether" and allow an independent commission to draw districts based on its own substantive considerations. 576 U.S. at 841 (Roberts, C.J., dissenting). And the laws at issue in *Hildebrant* and *Smiley* allowed the legislatures' maps to be rejected without the initiation of a lawsuit, and for any reason (including "substantive" reasons) or even no reason. *See Smiley*, 285 U.S. at 363; *Hildebrant*, 241 U.S. at 566. Here, by contrast, the General Assembly's original map was set aside because of a specific defect, one the Assembly had the opportunity to remedy, *see* N.C. Gen. Stat. §120-2.4(a1). It is difficult

to see how that poses a greater threat to state legislatures' autonomy (or their carrying out of the "federal function" of congressional redistricting) than that posed in *Hildebrant*, *Smiley*, or *AIRC*. Yet according to petitioners, the Elections Clause prohibits States from subjecting congressional maps to state judicial review under defined legal standards, while leaving the States free to engage in the significant "procedural" intrusions at issue in *Hildebrant*, *Smiley*, and *AIRC*. It is entirely unclear why the Framers would have designed such a regime.

Nor does petitioners' substantive-procedural distinction make sense from the perspective of States themselves, which would find their ability to structure their own governments strangely constrained. In particular, petitioners' position would require every State to either adopt popular referendum (as in *Hildebrant*) or gubernatorial veto (*Smiley*) as "check[s]" on the grant of "legislative authority," *Smiley*, 285 U.S. at 368, or else forgo any check whatsoever (including the much *less* intrusive check of judicial review) on the legislature's redistricting power. That makes no sense. North Carolina has made the eminently sensible choice to subject redistricting to judicial review under defined legal standards, *see* N.C. Const. art. IV, §12; N.C. Gen. Stat. §1-267.1, rather than subjecting it to a policy-based, open-ended gubernatorial veto, *see* N.C. Const. art. II, §22. There is no reason the Elections Clause should deny the State that choice.

C. The North Carolina Supreme Court Has Authority Both To Interpret So-Called "Open-Ended" State Constitutional Provisions And To Remedy Violations Of Them

Petitioners and some of their amici argue that because the Free Elections Clause is supposedly "open-ended" and provides no "judicially discernable standards," the North Carolina Supreme Court exceeded its authority in reading the clause to prohibit partisan gerrymandering. Pet. Br. 46-47; *see also* LDF & State Legs. Br. 3, 6, 7, 13; RNC Br. 21-22. That is meritless. A constitutional provision is not "judicially [in]discernable," Pet. Br. 46, merely because it requires judicial interpretation. To the contrary, this Court has long recognized that "those who apply [a legal] rule to particular cases[] must of necessity expound and interpret that rule." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). In other words, judges must "decide by [their] best lights what the Constitution means … one case or controversy at a time." *McDonald* v. *City of Chicago*, 561 U.S. 742, 812-813 (2010) (Thomas, J., concurring). The North Carolina Supreme Court has recognized this as well, *see*, *e.g.*, *Committee to Elect Dan Forest* v. *Employees Political Action Committee*, 853 S.E.2d 698, 705 (N.C. 2021), and accordingly has long interpreted other "open-ended" provisions of that state's constitution. *See*, *e.g.*, *Osborn* v. *Leach*, 47 S.E. 811, 815 (N.C. 1904) (interpreting the mandate that "[a]ll courts shall be open" to forbid legislation impairing the right of individuals to recover for libel).

Equally baseless is petitioners' related argument (Br. 45-46) that the state high court's remedy in this case exceeded its authority. Relief in redistricting cases is "fashioned in the light of well-known principles of equity." *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

And in North Carolina (as elsewhere), "the unique role of the courts to fashion equitable remedies," *Lankford* v. *Wright*, 489 S.E.2d 604, 607 (N.C. 1997), requires the discretion to "shape relief as necessary to achieve equitable results," *Kinlaw* v. *Harris*, 702 S.E.2d 294, 297 (N.C. 2010). As this Court has explained, "[t]he essence of equity jurisdiction" is "the power … to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). In redistricting cases, that often means drawing a remedial map. Indeed, this Court unanimously concluded in *Growe* that the "'power of the judiciary of a State to … formulate a valid redistricting plan has not only been recognized,'" but also "'specifically encouraged.'" 507 U.S. at 33 (quoting *Scott*, 381 U.S. at 409).

Consistent with these longstanding principles, the North Carolina Supreme Court interpreted the state constitution's Free Elections Clause, determined the clause had been violated, and remedied that violation. That creates no basis for federal intervention. In fact, petitioners and their amici do not identify how federal courts should (or even could) police the line between supposedly "specific" state constitutional provisions (like the ones state courts were permitted to enforce in *Hildebrant* and *Smiley*) and supposedly "open-ended" ones. Any such line-drawing by federal courts, moreover, would offend the principle that federal courts are bound by state high courts' construction of their own State's laws. *See Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997); *Memphis & Charleston Railroad Co.* v. *Pace*, 282 U.S. 241, 244 (1931). The notion that this Court should disregard the North Carolina Supreme Court's construction of the State's own Free Elections Clause

thus invites unprecedented federal intrusion into state affairs.[2]

II. EVEN IF THE ELECTIONS CLAUSE GAVE STATE LEGISLATURES THE AUTHORITY PETITIONERS CLAIM, THE DECISION BELOW WOULD STAND BECAUSE NORTH CAROLINA'S GENERAL ASSEMBLY HAS ITSELF AUTHORIZED STATE JUDICIAL REVIEW FOR COMPLIANCE WITH THE STATE CONSTITUTION

Every step of the redistricting process at issue in this case—including the North Carolina courts' invalidation of an unconstitutional district plan and replacement with an interim remedial plan—was expressly authorized by the General Assembly. The redistricting, in other words, proceeded exactly as the state legislature "prescribed," U.S. Const. art. I, §4, cl. 1. Hence, even if petitioners' unduly expansive reading of the Elections Clause were right, that would provide no basis to reverse. That is because reversal here would require this Court to hold not only that the Elections Clause makes state legislative prescriptions regarding federal elections all-powerful under state law, but also that state legislatures *themselves* are barred from authorizing other organs of the State to assist the legislatures in regulating federal elections. Far from *vindicating* the authority conferred on state legislatures by the Elections Clause, such a holding would *deprive* state legislatures of the ability to "prescribe[]" the "Manner of holding Elections" as they see fit, *id.* That

[2] For the same reasons, this Court should reject the alternative argument offered by amici that the North Carolina Supreme Court's interpretation of the state constitution was "plainly erroneous," American Legislative Exchange Council Br. 22. As the cases just cited in the text make clear, this Court has no power to overturn a state court's interpretation of state law.

restriction on state legislative authority finds no justification in the Elections Clause (or elsewhere) and would seriously undermine the administrability of elections.

A. The General Assembly Has Authorized State Courts To Review And Remedy Unconstitutional Redistricting Plans

1. The legislature in North Carolina has itself expressly prescribed state judicial review of congressional districting. In particular, the General Assembly has enacted legislation specifically authorizing state-court participation in districting and prescribing detailed rules governing when, where, and how state courts may review and remedy unconstitutional districting plans.

First, the General Assembly has provided by statute that "[a]ny action challenging … congressional districts" shall be "heard and determined by a three-judge panel of the Superior Court of Wake County." N.C. Gen. Stat. §1-267.1(a). It has further directed any state court that holds "congressional districts" "unconstitutional or otherwise invalid" to state its factual findings and legal conclusions "with specificity" and "identify every defect found by the court, both as to the plan as a whole and as to individual districts." *Id.* §120-2.3. This provision unquestionably authorizes such judicial rulings, i.e., rulings holding districts "unconstitutional or otherwise invalid," *id.*

As for the remedial process, the General Assembly has provided that a court must "give[] the General Assembly" at least two weeks "to remedy any defects identified by the court." N.C. Gen. Stat. §120-2.4(a). If "the General Assembly does not act … within that period of time," the legislature has further provided, "the

court may impose an interim districting plan"—but "that interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects," and it is to be used "in the next general election only." *Id.* §120-2.4(a1). This constitutes unambiguous legislative authority for state judicial involvement in districting.[3]

2. Petitioners offer a grab bag of arguments for why the foregoing enactments do not require affirmance here. None has merit.

a. Petitioners argue (Br. 47) that "none of the [statutory] provisions" discussed above even "purports" to authorize what the state courts did in this case. But this Court lacks "authority to place a construction on a state statute different from the one rendered by the highest court of the State," *Johnson*, 520 U.S. at 916, and the North Carolina Supreme Court has construed North Carolina General Statutes section 120-2.4(a1) to allow state courts to "impose[] a substitute plan" where, as here, the General Assembly has failed to correct defects in its own plan, *Stephenson* v. *Bartlett*, 595 S.E.2d 112, 115 (N.C. 2004). In any event, the state high court's construction of the statute is manifestly correct; section 120-2.4(a1) explicitly authorizes

[3] The General Assembly also prescribed the substantive constitutional provisions the state courts applied in this case. Specifically, the legislature enacted the State's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses pursuant to its ordinary lawmaking power before presenting those provisions to the people for addition to the state constitution. 1969 N.C. Sess. Laws 1461, §1. As this Court has explained, a "constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens … who voted for it." *Gregory* v. *Ashcroft*, 501 U.S. 452, 471 (1991).

state courts to "impose an interim districting plan" under the circumstances described.

Petitioners similarly contend (Br. 48) that the statutes at issue are "best read" as contemplating only "*federal*"—not state—"constitutional challenge[s]" to redistricting plans. That argument is foreclosed for the reasons just discussed: The North Carolina Supreme Court has (in this very case) deemed the relevant statutes applicable to challenges based on "provisions of the North Carolina Constitution," Pet. App. 123a. And again, that conclusion is unassailable. General Statutes section 120-2.3 refers *without limitation* to state-court judgments declaring plans "unconstitutional." Petitioners' request to read a "federal only" limitation into that provision violates the principle that "[w]ithout some indication to the contrary, general words … are to be accorded their full and fair scope" and "are not to be arbitrarily limited," Scalia & Garner, *Reading Law* 101 (2012).[4]

b. Petitioners next argue (Br. 44-46) that the relevant state statutes constitute impermissible delegations of authority by the General Assembly. But to the extent this argument relies on North Carolina's nondelegation doctrine, *see* Br. 45 (citing *Adams* v. *North Carolina Department of Natural & Economic Resources*, 249 S.E.2d 402, 410 (N.C. 1978)), this Court is,

[4] Petitioners' preferred reading is particularly implausible given that the General Assembly enacted section 120-2.3—with its general reference to "unconstitutional[ity]"—just one year after the North Carolina Supreme Court invalidated redistricting plans adopted by the General Assembly "[]on the basis that these plans violate[d] provisions of the *North Carolina Constitution*," *Stephenson* v. *Bartlett*, 562 S.E.2d 377, 381 (N.C. 2002) (emphasis added); *see also* 2003 N.C. Sess. Laws 434, §8 (enacting section 120-2.3).

again, not a proper forum. "State courts are the ultimate expositors of state law," *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975), and the North Carolina Supreme Court has already rejected (in this case) the argument that "reapportionment is committed to the sole discretion of the General Assembly" so as to "foreclose[] the other branches of government from undertaking that task," calling such argument "flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority," Pet. App. 73a-74a.

Nor do this Court's (federal-law) cases on non-delegation support petitioners' position. As a threshold matter, the federal non-delegation doctrine is inapposite because the federal "Constitution does not impose on the States any particular plan for the distribution of governmental powers," *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 615 n.13 (1974). In any event, this Court confirmed in *AIRC* that redistricting authority under the Elections Clause *can* be delegated to non-representative entities. Specifically, the Court explained that "the people may delegate their legislative authority over redistricting to an independent commission *just as the representative body may choose to do*." *AIRC*, 576 U.S. at 814 (emphasis added).

Petitioners suggest, however (Br. 45), that the statutes at issue here impermissibly delegate authority "*to courts*, as opposed to executive officials." But the two cases on which petitioners rely each *approved* congressional delegations of authority to the judicial branch, one of authority to enact rules of judicial procedure, *see Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42 (1985), and the other of authority to enact sentencing-related rules, *see Mistretta* v. *United States*, 488

U.S. 361, 412 (1989). Petitioners' position, moreover, cannot be squared with this Court's "teaching that state courts have a significant role in redistricting," *Growe*, 507 U.S. at 33, not to mention this Court's express recognition of the "legitimacy of state judicial redistricting," *id.* at 34 (emphasis omitted). Indeed, even other proponents of petitioners' reading of the Elections Clause have acknowledged that state legislatures may vest state courts with remedial authority in federal-election cases. For example, Chief Justice Rehnquist reasoned in *Bush* v. *Gore*, 531 U.S. 98 (2000), that the Florida legislature had permissibly "empowered the courts of the State to grant 'appropriate' relief" in such cases, *id.* at 121 (concurring opinion). All this may explain why, at an earlier stage in this litigation, petitioners called the issue of whether "a state legislature could willingly delegate away the substantive power conferred upon it by the Elections Clause" a "question which this Court should avoid if possible." Reply in Support of Emergency Application for Stay at 18-19, *Moore* v. *Harper*, No. 21A455 (U.S. Mar. 3, 2022) (emphasis omitted).

Finally, petitioners contend (Br. 46) that the General Assembly's authorization of state-court participation in redistricting "exceeds the limits of permissible delegation" because it permits state courts to engage in "unfettered policymaking." That severely mischaracterizes the statutory scheme. To begin with, state courts are not authorized to engage in "policymaking," but rather to exercise traditional *judicial* functions, *see supra* Part I.C. And far from "unfettered," the authority the legislature conferred on state courts is circumscribed. As noted, *see supra* pp.14-15, the General Assembly requires courts to "identify," "with specificity," "every defect found" in a districting plan, N.C. Gen.

Stat. §120-2.3, and, before imposing any remedy, to "first give[] the General Assembly" at least two weeks "to remedy any defects," *id.* §120-2.4(a). As the North Carolina Supreme Court has explained, by "giv[ing] the General Assembly a first, limited opportunity to correct plans that courts have determined are flawed," these statutes "decrease the risk that the courts will encroach upon the responsibilities of the legislative branch." *Stephenson*, 595 S.E.2d at 119. Moreover, in the event the General Assembly fails to act, any remedial plan imposed by a court "may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects," and any court-drawn map is effective "in the next general election only." N.C. Gen. Stat. §120-2.4(a1). Petitioners do not even acknowledge these limitations, perhaps because the limitations thoroughly belie petitioners' claim of "unfettered policymaking" by North Carolina's courts.

That claim also ignores that the General Assembly itself prescribed the substantive state constitutional provisions it has authorized state courts to enforce. *See supra* p.15 n.3. Petitioners say (Br. 48) that the General Assembly did not "delegate its Elections Clause authority to the judiciary when it enacted the 1971 state constitution," because "while the 1971 Constitution was *proposed* by the General Assembly, it was not effective until it was ratified by the voters." That is a red herring. Affirmance does not require this Court to conclude that the 1971 constitution represented a delegation of authority to the judiciary, because the General Assembly has *by statute* authorized state judicial review of districting plans (under legal standards that include state constitutional provisions). In any event, the fact that the state constitution was ratified by the

people does not change the fact that the provisions of that constitution were first prescribed by the General Assembly and thus "reflect[] … the considered judgment of the state legislature," *Gregory* v. *Ashcroft*, 501 U.S. 452, 471 (1991). And even if the legislature had *not* first prescribed these constitutional provisions, petitioners' argument would *still* be foreclosed, as this Court held in *AIRC* that the people of a State are part of the State's lawmaking apparatus and thus may delegate authority granted by the Elections Clause, 576 U.S. at 814.

In sum, the General Assembly has expressly authorized and carefully prescribed a role for state courts in redistricting. Even under petitioners' improperly broad reading of the Elections Clause, nothing forbids that choice.

B. A Ruling For Petitioners Would Improperly Diminish The Authority Of State Legislatures And Threaten The Administrability Of Elections

As just explained, state-court participation is an explicit part of the redistricting process prescribed by North Carolina's General Assembly. That being so, a ruling for petitioners would, in petitioners' own words, "nullify the General Assembly's chosen 'Regulations' of the 'Manner of holding Elections,'" Br. 50 (quoting U.S. Const. art. I, §1, cl. 1). Hence, the very authority that petitioners purportedly seek to vindicate—the authority of state legislatures to prescribe rules governing federal elections—requires affirmance.

Reversal, in fact, would not just diminish the authority of state legislatures under the guise of vindicating that very authority, but would do so in a way that

could seriously undermine the manageability, reliability, security, and fairness of federal elections. Understanding that its members lack the expertise and resources to regulate and oversee elections on their own, the legislature in North Carolina has—in addition to authorizing state-court participation in redistricting—authorized the State Board of Elections "to make … reasonable rules and regulations with respect to the conduct of primaries and elections," including federal elections, "so long as they do not conflict" with other state-law provisions, N.C. Gen. Stat. §163-22(a). To name just a few specific examples, the General Assembly has authorized the board to promulgate rules for certifying voting machines, *id.* §163-165.7(a), registering voters and maintaining a voter database, *id.* §163-82.11(d), counting (and recounting) ballots, *id.* §§163-166.10, -182.2(b), -182.7(d), and adjudicating election protests, *id.* §163-182.10(e). The General Assembly has similarly authorized the State's county boards of elections to "make and issue such rules, regulations, and instructions" as they "deem necessary for the guidance of election officers and voters." *Id.* §163-33(1).

Petitioners offer no principled distinction between these authorizations and the General Assembly's supposedly impermissible authorization of state-court participation in the redistricting process. And, of course, the Elections Clause applies not only to redistricting, but to *any* regulation of the "Times, Places and Manner" of congressional elections. U.S. Const. art. I, §4, cl. 1. A ruling that prevents state legislatures from enlisting the help of other state organs with such regulation would unquestionably result in elections that are less orderly, less reliable, less secure, and less fair. That is all the more reason why, as Chief Justice Rehnquist recognized, "the court must be … deferen-

tial to those bodies expressly empowered by the legislature to carry out its constitutional mandate," *Bush*, 531 U.S. at 114 (concurring opinion).

CONCLUSION

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

Respectfully submitted,

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OCTOBER 2022