No. 21-1271

In the Supreme Court of the United States

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

Petitioners,

v.

REBECCA HARPER, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives … prescribed … by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association with U.S.-citizen members interested in free and fair elections pursuant to constitutional state and federal election procedures. For these reasons, *amicus* APA Watch has a direct and vital interest in the issues before this Court.

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[1] *Amicus* files this brief with the consent of all parties: all respondents have lodged blanket letters of consent with the Clerk, and petitioners have consented in writing. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

Amicus adopts the legislative defendants' factual background. *See* Pets.' Br. at 5-11. The state court—the North Carolina Supreme Court—not only vacated the legislature's enactment of a congressional map, but also imposed its own map, all based on state laws that *do not clearly apply* to the regulation of federal elections. Under the Elections Clause, moreover, the state laws clearly *cannot lawfully apply* to the regulation of federal elections. If allowed to continue, the recently accelerated practice of judicial and administrative amendment of State laws for federal elections will change elections in our democracy from a battle of ideas before the electorate to a battle of lawyers before judges and administrators.

SUMMARY OF ARGUMENT

While courts typically analyze laws that violate the Constitution as "unconstitutional," it may aid this Court to analyze the state laws on which the state court relied as being preempted by the Elections Clause and thus the Supremacy Clause (Section I). Because the Elections Clause regulates federal elections, its power is *delegated to* States—not *reserved by* States—because that power did not predate the Constitution's creation of the federal government, making Elections Clause issues *federal*—not *State*—issues. (Section I.A.1). As such, regulation under the Elections Clause does not carry a presumption that State laws are valid (Section I.A.2). Viewed in this light, the Elections Clause preempts State laws that purport to move substantive authority over federal elections from legislative actors to non-legislative actors (Section I.B).

State legislatures cannot subdelegate the authority over federal elections that the Elections Clause delegates to State legislatures (Section II.A). While non-justiciable in most contexts *as an independent claim*, the Guarantee Clause can come into play to resolve a justiciable case or controversy through the canon of constitutional doubt (Section II.A.1). Under the Elections Clause, only a "legislature" can set laws on the time, place, and manner of federal elections; while that allows States flexibility—*e.g.*, between its legislature and the electorate in a referendum—the standard-setting entity must also be a legislative actor (Section II.A.2). Under the major questions doctrine, the reallocating of legislative authority over federal elections is a significant policy issue that requires a clear statement and cannot be assumed from vague state-law requirements for "free" and "fair" elections (Section II.A.3). Finally, what States cannot delegate to non-legislative actors, those actors *a fortiori* cannot lawfully usurp *sua sponte* (Section II.B).

ARGUMENT

I. THE ELECTIONS CLAUSE PREEMPTS THE STATE-LAW PROVISIONS ON WHICH THE STATE COURT RELIED.

"[A]ll federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause," *Swift & Co. v. Wickham*, 382 U.S. 111, 126 (1965), under which the federal law supersedes inconsistent state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

> or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Here, the Elections Clause itself supersedes the state laws on which the state court relied.

Although federal preemption typically occurs with federal statutes or regulations, the Constitution too can preempt state law:

> [T]here would [be] no need … even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was *ipso facto* regulation of immigration, for the existence *vel non* of federal regulation is wholly irrelevant if the Constitution of its own force requires pre-emption of such state regulation.

De Canas v. Bica, 424 U.S. 351, 355 (1976). While it is more typical to think of state laws in the context as "unconstitutional," it may aid the Court to consider this action under principles of preemption.

A. The Election Clause has neither a reservation of State rights under the Tenth Amendment nor a presumption against preemption.

Although "the States entered the Union with their sovereignty intact," *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (internal quotation marks omitted), and reserved powers "not delegated to the United States

by the Constitution," U.S. CONST. amend. X, that is simply not relevant here. Setting the time, place, and manner of *federal* elections is not a power the States possessed before the Constitution created federal elections in the first place. *United States Term Limits v. Thornton*, 514 U.S. 779, 802 (1995) ("that Amendment could only 'reserve' that which existed before"). Notwithstanding the state-court action below, this is a *federal* case.

1. State legislation under the Elections Clause exercises federal law.

When a State regulates the time, place, or manner of federal elections, the State acts under a federal delegation of power. Specifically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). As such, this litigation presents a federal question, notwithstanding that it arrived here via the state-court system rather than via a federal district court's federal-question jurisdiction. *See* 28 U.S.C. § 1331. Consequently, the

state court cannot defend its action as resting on an independent and adequate state-law ground.

If it seems odd or counterintuitive that a federal question would arrive here via a state court, "a page of history is worth a volume of logic." *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921). The federal courts did not even have federal-question jurisdiction until 1875, *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986) ("it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction"), and—in any event—state courts have concurrent jurisdiction here. *Haywood v. Drown*, 556 U.S. 729, 734-35 (2009).

2. **<u>This Court does not defer to States under the Elections Clause.</u>**

Because legislation under the Elections Clause has the power exactly—and only—to displace State law, this Court has held that there is no presumption against preemption in Elections Clause cases. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 n.6 (2013). Given the uniquely federal character of State election laws under the Elections Clause, *see* Section I.A.1, *supra*, federal courts should not defer to a State under the Elections Clause itself, just as they would not do for federal legislation.

B. The Elections Clause field- and conflict-preempts the state-law provisions on which the state court relied.

Federal law can preempt state law in three overlapping ways: (1) express preemption; (2) implied or field preemption; and (3) conflict preemption. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). The Elections Clause preempts state law under field and

conflict preemption. Indeed, under the circumstances here, the Tenth Amendment cuts against state law:

> The powers not delegated to the United States by the Constitution, nor *prohibited by it to the states*, are reserved to the states respectively, or to the people.

U.S. CONST. amend. X (emphasis added). Here, the Elections Clause *prohibits* the States' from allowing state courts to set the time, place, or manner of federal elections.

As indicated by *De Canas* with respect to immigration, the federal Constitution itself occupies some fields of potential State law. Similarly, and closer to home, "the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications." *Thornton*, 514 U.S. at 800-01. While the Elections Clause may leave States free to choose the relevant "legislature" and to ensure that that legislature's election laws qualify as valid laws procedurally, the Elections Clause nowhere allows non-legislative actors to regulate the time, place, or manner of federal elections. In other words, the "field" occupied is the entity that has discretion to set election law.

If that leeway is too wide to consider as field preemption, it easily qualifies as *conflict* preemption:

> By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress'

> intent (either express or plainly implied) to exclude state regulation.

English, 496 U.S. at 79 n.5. For state courts to impose substantive criteria for federal elections—especially if they do so via vague and malleable terms—"upsets the balance" that the Elections Clause struck. *Arizona v. United States*, 567 U.S. 387, 403, 406-07 (2012).

II. THE ELECTIONS CLAUSE PROHIBITS DELEGATION TO—AND *A FORTIORI* USURPATION BY—NON-LEGISLATIVE ACTORS.

Our constitutional structure and heritage of divided power and dual federal-state sovereignty protects liberty. *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *United States v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990). Indeed, the "history of liberty has largely been the history of observance of procedural safeguards," *Corley v. United States*, 556 U.S. 303, 321 (2009) (interior quotations omitted), and thus "'procedural rights' are special." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (interior quotations omitted). Just as the Origination Clause requires that taxing legislation begin in the House, U.S. CONST. art. I, §7, cl. 1, the Elections Clause requires that laws setting the time, place, or manner of federal elections at least *originate* in the state or federal legislature.

A. States cannot delegate authority under the Elections Clause to non-legislative actors.

If indeed North Carolina intended to subdelegate the authority than the Elections Clause delegates to its legislature, the subdelegations themselves violate

the Constitution because public offices involving judgment or discretion are prohibited from delegating their duties. *See, e.g.*, Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 567 (1890). This is simply the application to governmental power of the maxim that delegated power may not be subdelegated:

> The well-known maxim "*Delegata potestas non potest delegari*," applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law.

J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405-06 (1928). Under separation of powers, "the rule is that in the actual administration of the government … the Legislature should exercise the legislative power," and "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch." *Id.* at 406.[2] If North Carolina laws say what the state courts claim, that merely means that those North Carolina law are void.

While there can be no quarrel with having a state governor or state voters *void* the legislature's election

[2] Strictly speaking, the "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States," *Whalen v. United States*, 445 U.S. 684, 689 (1980); *accord Dreyer v. People of State of Illinois*, 187 U.S. 71, 84 (1902), but the Elections Clause recognizes State legislatures as holders of the delegated power to set the time, place, or manner of federal elections.

laws, *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932) (veto); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916) (referendum), that differs from having non-legislative actors *set or enact* law for federal elections:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

J. W. Hampton, Jr., 276 U.S. at 507 (interior quotation marks omitted).[3] Here, even assuming *arguendo* that the state courts could *void* an election law, they could not *set* one.

1. <u>The Guarantee Clause can help resolve claims under the doubt canon.</u>

When asked what form of government the Framers had given us, Benjamin Franklin reportedly replied "A republic … if you can keep it." Terence Ball, "*A Republic - If You Can Keep It*", in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 137 (Terence Ball & J.G.A. Pocock eds., 1988). The Guarantee Clause memorializes that promise: "The United States shall guarantee to every State in this Union a Republican

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[3] *J. W. Hampton* involved delegation to the executive branch, with the delegation acceptably ministerial because "perfectly clear and perfectly intelligible." *Id.* at 404.

Form of Government." U.S. CONST. art. IV, § 4, cl. 1. It falls to this Court to keep it.

Although the "Court has several times concluded … that the Guarantee Clause does not provide the basis for a justiciable *claim*," *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019) (emphasis added), that does not end the inquiry for two reasons. First, some Guarantee Clause cases may be justiciable. *New York v. United States*, 505 U.S. 144, 185 (1992) ("perhaps not all claims under the Guarantee Clause present nonjusticiable political questions"). Second, the legislative defendants do not bring a *claim*—or even necessarily a defense—under the Guarantee Clause. Instead, they need only invoke the Clause under the canon of constitutional doubt. *See*, *e.g.*, *Rust v. Sullivan*, 500 U. S. 173, 190-191 (1991).[4]

Because an Article III case or controversy exists here,[5] the legislative defendants can rely on any basis in the Constitution to defend their enactment from the plaintiffs' challenge and state-court encroachment. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) ("once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its

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[4] Although constitutional avoidance often involves construing *federal* statutes, the issue here is a federal question. *See* Section I.A.1, *supra*.

[5] The legislative defendants clearly have standing not only to defend state law in the form of their congressional map, *Diamond v. Charles,* 476 U.S. 54, 62-63 (1986), but also to defend the legislative prerogatives under the Elections Clause from state-court encroachment. *Karcher v. May,* 484 U.S. 72, 82 (1987).

statutory mandate"). This is because—outside of taxpayer standing, there is no "nexus" requirement in this Court's Article III decisions. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 78-79 (1978). As such, unless barred as a non-justiciable political question, the legislative defendants can assert the Guarantee Clause as a basis to reject the state court's usurpation of legislative power, even if one cannot assert the Guarantee Clause as support for an independent claim or defense.

Even without rising to the level of an independent "claim," the Guarantee Clause can inform rejecting the proposed resolution of other claims and interpretations. *See Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 830 (2015) (Roberts, C.J., dissenting). With respect to state laws generally, federal courts lack power to adopt a narrowing construction to avoid unconstitutionality unless the construction is both reasonable and readily apparent. *See Stenberg v. Carhart*, 530 U.S. 914, 944-45 (2000). And with respect to state laws generally, federal courts "have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). This Court will need to decide whether *Morales* applies here, given the federal nature of Election Clause cases. But the choice is between accepting the state court's interpretation and holding it unconstitutional on the one hand versus merely finding the state-law interpretation as doubtful on the other. Either way, the legislative defendants prevail.

2. **The entity exercising power under the Elections Clause must be a "legislature."**

Under the Election Clause's plain terms, only a "legislature" may set the laws for federal elections. If there is room for defining "legislature" broadly, the term has outer limits under the plain language of the Elections Clause. "Whenever the States may choose to substitute *other republican forms*, they have a right to do so." THE FEDERALIST No. 43, at 275 (J. Madison) (emphasis added). While flexible, that does not extend to *non-republican* forms of government. For example, Georgia could commit redistricting to the Regents of the University of Georgia, *see* GA. CONST. art. viii, § iv, ¶ 1(a), but could not do so to the University's political science department, even if that department might know more about the subject.

In *Arizona State Legislature*, 576 U.S. at 797, this Court upheld an Arizona ballot initiative that created an independent commission of appointees to set congressional districts. While the voters may qualify as the "legislature" for purposes of enacting a law about how election laws will be enacted, the commission does not qualify as a "legislature" for purposes of enacting election laws. Under the Guarantee Clause, therefore, *Arizona State Legislature* was wrongly decided. Indeed, the majority expressly did not reach the Guarantee Clause issue, *id.* at 795 n.3 (acknowledging that the Guarantee Clause *may* be justiciable, but not resolving the issue), over the Chief Justice's dissent. *Id.* at 830 (Roberts, C.J., dissenting). Indeed, with respect to the Guarantee Clause issue, the Court held merely that

the voters could be the legislature, without resolving or even considering whether the *unelected commission* could set election law under the Guarantee Clause. *Id.* at 795 n.3; *see* Section II.A.1, *supra* (power under the Elections Clause cannot be subdelegated).

3. The state-law provisions on which the state court relied do not clearly give state courts the power that the state court claims.

As the legislative defendants explain, Pets.' Br. at 39, the state laws on which the state court relied are amenable to being interpreted as applying only to *state* elections. Under the "major-questions doctrine," those laws must be interpreted that way.

The major-questions doctrine covers statutory interpretation generally under "a practical understanding of legislative intent," but the doctrine has added force—under federal law—when agencies claim power (especially *new* power) through modest or vague statutory language. *West Virginia v. EPA*, 142 S.Ct. 2587, 2607-09 (2022). This special force derives from separation-of-powers doctrine and statutory interpretation generally, *id.*, which includes the federalism canon. *Id.* at 2620-2622 (Gorsuch, J., concurring); *Alabama Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2489 (2021). Moreover, although the issue has arisen often in cases of massive economic impact, the doctrine also applies to "major social … policy decisions" and ones with "political significance." *West Virginia*, 142 S.Ct. at 2613. Without a clear statement of legislative intent, neither this Court nor any federal court should assume that state legislation takes the

constitutionally doubtful step of assigning substantive, non-ministerial duties under the Elections Clause to non-legislative actors. As indicated in Section I, *supra*, that legislation would be unconstitutional in any event, but the recognition that federal courts should even *consider* such an interpretation would streamline the resolution of these contentious and increasingly biennial issues.

If reviewing the asserted state-law authorization for the state court's action on a blank slate, this Court or a lower federal court easily could reject a claim by non-legislative actors to set the time, place, or manner of federal elections. Now a State's highest has read its laws in an unconstitutional manner, this Court should either reject that interpretation as constitutional doubtful or void the underlying state laws on which the court relied.

B. Courts cannot usurp authority under the Elections Clause.

Given that States cannot assign substantive, non-ministerial Elections Clause duties to non-legislative actors, those actors *a fortiori* cannot usurp those duties *sua sponte*.

With respect to both state and federal courts, this Court has readily recognized the judiciary's role as arbiter, not author, of our laws: "it is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.,* 468 U.S. 137, 153 (1984) (interior quotations omitted). That is what the state courts did here.

With respect to administrative or other executive actors, legislative delegation is both a "precondition to

deference," *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), and unconstitutional. *See* Section I, *supra*. Indeed, all authority in our constitutional republic comes from the legislature and Constitution:

> His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring). For the setting of election rules in federal elections, authority rests with those legislatures, subject only to neutral laws about the procedures for legislatures to act.

CONCLUSION

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

September 6, 2022 Respectfully submitted,

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