**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.*

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

*Petitioners*,

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,

*Respondents.*

On Writ of Certiorari to the North Carolina Supreme Court

## Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners

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## INTERESTS OF *AMICUS CURIAE*[1]

*Amicus curiae* has a significant and long-standing interest in this matter. The Public Interest Legal Foundation ("Foundation") is a 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving the constitutional balance between states and the federal government regarding election administration procedures. The Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the Voting Rights Act and other federal election laws are preserved and followed as the drafters intended. Specifically, the Foundation has filed *amicus* briefs in cases across the country to fight against the growing effort to misapply Section Two of the Voting Rights Act.

## SUMMARY OF ARGUMENT

Petitioners' position is consistent with the allocation of power in the Constitution. The Framers sought to protect ordered liberty by vesting state legislatures as the primary reservoir of power over elections. The Framers rejected placing powers over elections "wholly in the national legislature, or wholly in the State legislatures" and instead allocated power

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, or make a monetary contribution intended to fund the preparation or submission of this brief. All Respondents provided a blanket consent to the filing of any *amicus curiae* briefs. Petitioners consented to the filing of this brief.

"primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59 (Alexander Hamilton). The Framers considered state "legislatures" the wellspring of all federal power — noting "the President of the United States cannot be elected at all. . . . Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures." THE FEDERALIST NO. 45 (James Madison). Article I, Section 2, Clause 1 of the Constitution limited the qualification of electors for House of Representative elections to the same qualifications governing elections for the largest branch of the state legislature. This design vested power with those who "are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State." THE FEDERALIST NO. 57 (James Madison).

The Framers allocated power in this way for sound and significant reasons. They deliberately and unambiguously placed the functional reservoir of power in the body of government closest to the ultimate reservoir of power – the people. The state legislature is the body closest and most responsive to the people, and thereby the most likely to preserve the liberties of the people. This explicit allocation of power to state legislatures preserves ordered liberty. Both the Constitution's explicit allocation of power to state legislatures and this Court's jurisprudence on the question of state powers support Petitioners' position.

## ARGUMENT

### I. The Elections Clause Vests Redistricting Power in the North Carolina General Assembly, not the North Carolina Courts.

The Elections Clause of the United States Constitution provides in relevant part:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State **by the Legislature thereof**; but the Congress may at any time by Law make or alter such Regulations.

U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Thus, the Elections Clause vests in the state legislatures the functional power to prescribe regulations governing the election of Senators and Representatives while vesting in Congress the ultimate ability to amend such regulations the state legislatures enact. Addressing the election of members to Congress, administration of the Elections Clause concerns the political, elected branches of government and confers on those elected branches the power of regulation. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). Because the power to elect Senators and Representatives to Congress "ar[o]s[e] from the Constitution," not from any state authority — indeed such authority did not exist when the Elections Clause was adopted — the Elections Clause is the exclusive source of state regulation over congressional elections. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). To be sure, the

states had no authority prior to the adoption of the Constitution to elect federal officials, and that authority granted to the state legislatures came solely from the Elections Clause. *See id.* at 804. Consequently, any purported authority that contravenes the Elections Clause's unequivocally placing the power to regulate federal elections in the state legislatures or Congress is a nullity.

The Framers specifically envisioned that state legislatures or Congress exercise power regulating congressional elections, and conspicuously absent from the Elections Clause and the Framers' intent is that any state court should possess such authority. *See Rucho*, 139 S. Ct. at 2496. Regulating elections of Senators and Representatives to Congress, therefore, is the exclusive purview of the elected branches of government — the state legislatures and Congress — and that power emanates solely from the Elections Clause.

Petitioners' position is consistent with *Smiley v. Holm*, 285 U.S. 355 (1932). In *Smiley,* this Court confirmed that the Elections Clause vested primary authority for redistricting with the state legislatures. In *Smiley*, the Minnesota legislature created a gerrymandered map for purposes of electing representatives to Congress, which the governor of Minnesota promptly vetoed. *See Smiley*, 285 U.S. at 361-62. Contrary to Minnesota law, the Minnesota legislature ignored the governor's veto and sought to use the gerrymandered map. *See id.* The petitioner sought to have the redistricting map declared void because the map failed to comply with state law. *See id.* Affirming dismissal of the petitioner's suit, the Supreme Court of Minnesota held that under the

Elections Clause, "the legislature thereof" meant only "the legislative body of the state," which entailed only the Minnesota house of representatives and the Minnesota senate. *See id.* at 365. Because "legislature thereof" was confined to the state house of representatives and state senate, the gubernatorial authority was excluded and "has no relation to such matters." *Id.* at 364. Concluding that the Framers "did not intend to include the state's chief executive as a part" of the "legislature thereof," the Supreme Court of Minnesota held that the governor's veto had no force and effect in making the law. *Id.* at 365.

Reversing, this Court reasoned that the meaning of the term "legislature" in the Constitution differed based on the "function to be performed" that was at issue in the litigation. *Id.* The *Smiley* Court explained that legislatures serve a lawmaking function, but may also act as "electoral," "ratifying," or "consenting bod[ies]," and this definition varies according to the task the legislature is undertaking. *Id.* To determine the meaning of the term "legislature" courts "consider the nature of the particular action in view." *Id.* at 366. In contrast to electoral, ratifying, or consenting bodies, redistricting "involves lawmaking in its essential features and most important aspect." *Id.* Drawing electoral maps, therefore, is a lawmaking, *i.e.*, legislative, function under the Elections Clause. Such a lawmaking function "must be in accordance with the method which the State has prescribed for legislative enactments," *id.* at 367, and the Minnesota Constitution explicitly made the governor "part of the legislative process," by use of the veto, *id.* at 369. With respect to drawing redistricting maps, "legislature thereof" in the Elections Clause means

the authority to *enact* laws, which under Minnesota law includes enactments by the legislature and vetoes by the executive. Because Congress "conferred" the authority "for the purpose of making laws for the State" and Minnesota law provided for the gubernatorial veto as an essential feature of state lawmaking, the veto was part of state law and had to observed. *Id.* at 367. Given that the Minnesota legislature purported to ignore the executive's veto power, the state legislature's redistricting map was void because it did not comply with state law. *See id.* at 368. According to this Court, the state "legislature[] w[as] exercising the lawmaking power and thus w[as] subject . . . to the veto of the Governor as part of the legislative process." *Id.* at 369. In the lawmaking context of the Elections Clause, therefore, "legislature thereof" means the general power of a state to enact laws and prescribe regulations for those laws. In rendering judgment, this Court observed that the Attorney General of Minnesota conceded that historically, and until that litigation, the governor's veto constituted an element of state lawmaking authority. *See id.* at 370.

Redistricting is an electoral function, which means the general authority of the state to pass legislation and prescribe regulations. For purposes of the Elections Clause in this context, "legislature thereof" does not mean the actual, discrete organs of the state senate and state house of representatives; rather, the term means the state's lawmaking power.

Glaringly absent from *Smiley* and the Elections Clause is **any** mention of courts as "legislature thereof" or as a lawmaking authority. Under *Smiley*, redistricting is a lawmaking function reserved for the

state legislature, and if state law so provides, for the executive.

Unlike state legislatures, courts should not serve an electoral function, so they should not enact legislation drawing electoral maps, and unlike state governors, courts should not veto legislation. Courts do not figure in the calculus for making election laws, and *Smiley* adverted to no such power in discerning the nuances of a state's lawmaking authority. As *Smiley* emphasized, lawmaking power rests with the political, elected branches of government to codify policy by enacting laws.

The very purpose and structure of courts is antithetical to lawmaking: Lawmaking is vested in the elected branches of government to represent the people, debate policy, and enact legislation, and underpinning enacting laws is deciding on policy choices of the peoples' elected representatives. *See Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015); *see also Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) (holding that neither state nor federal courts have "been vested with open-ended lawmaking powers"). Conversely, courts adjudicate discrete disputes between particular litigants and do not exist for the purpose of exercising the general lawmaking of the state. *See Allen v. Wright*, 468 U.S. 737, 751-52 (1984).

This Court addressed the Elections Clause in the redistricting context again in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ("*AIRC*"). Like *Smiley, AIRC* also supports Petitioners' position here. Arizona voters adopted Proposition 106, which

amended the Arizona constitution in a fundamental manner. This Proposition divested from the legislature the power to draw redistricting maps and reposed that power in the Arizona Independent Redistricting Commission ("Commission"). *See AIRC*, 576 U.S. at 791. Proposition 106 became law because "the Arizona Constitution 'establishes the electorate [of Arizona] as a coordinate source of legislation' on equal footing with the representative legislative body." *Id.* at 795 (quoting *Queen Creek Land & Cattle Corp. v. Yavapai Cty. Bd. Of Supervisors*, 501 P.2d 391, 393 (Ariz. 1972)) (alteration in original). As specifically provided in the Arizona constitution, "the power of the 'legislature' include[s] the people's right . . . to bypass their elected representatives and make laws directly through the initiative.'" *Id.* at 796 (*quoting* J. Leshy, *The Arizona State Constitution* xii (2d ed. 2013)). Pursuant to Arizona law, therefore, the people are an equal lawmaking authority with the legislature, and by Proposition 106, the people placed that authority in the Commission. When the Commission drew new redistricting maps, the Arizona legislature contended that the maps violated the Elections Clause because "legislature thereof" meant solely and exclusively "'the representative body'" that constitutes the Arizona legislature. *See id.* at 792. A divided three-judge district court affirmed dismissal of the complaint for failure to state a claim. *See id.* at 799. The district court majority held that "legislature thereof" in the Elections Clause meant the "legislative process" of a state's "'lawmaking power.'" *Id.* (quoting *Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1054, 1056 (D. Ariz. 2014)). As a matter of Arizona constitutional law, this lawmaking power included

the people, so the Arizona legislature was not the sole organ for lawmaking.

In affirming, this Court agreed that "legislature thereof" in the Elections Clause "did not mean the representative body alone," but included the people acting through Proposition 106 that amended the Arizona constitution. *Id.* at 805. This Court explained that historically the term "legislature" meant "'the power that makes laws.'" *Id.* at 814 (quoting various sources identically defining "legislature"). By constitutional amendment, in Arizona, the people explicitly have the power to make laws. As a lawmaking authority, the people chose specifically to vest redistricting in the Commission. Because the people are a lawmaking authority on equal parity with the legislature, the Elections Clause was not offended. *See id.* Indeed, the Arizona constitution expressly provided the people the right to operate with the same power and with equal authority as the legislature, and the people decided to repose that authority in the AIRC.

In so ruling, this Court observed that a purpose of the Elections Clause is that the political power to make laws should spring from the people and their elected representatives. *See id.* at 824. This is consistent with the Framers' design vesting the reservoir of power closest to the people in the state legislature and consistent with Petitioners' position here. As in *Smiley*, the *AIRC* Court also recognized that the Arizona legislature did not and could not question the use of propositions like Proposition 106 "to control state and local elections." *Id.* at 819. The Arizona legislature effectively conceded, therefore, that Proposition 106 was lawfully enacted.

As in *Smiley, n*othing in *AIRC* contemplates that state courts in any manner play any role in the exercise of raw political power that is lawmaking, particularly something as political as drawing electoral maps. *AIRC* simply holds that the Arizona constitution confers on the people the same power as on the legislature, and exercising that legislative power, the people expressly chose to create the Commission to tackle the thorny problem of gerrymandering. State law equating the people's direct lawmaking power with the legislature's lawmaking power does not offend the Elections Clause. *AIRC* does not suggest, much less hold, that a single state trial judge — or, dare say, majority on a state supreme court — enjoys lawmaking power or can draw redistricting maps. On the contrary, *AIRC* contemplates that lawmaking power is committed to elected branches of government, namely the state legislatures and Congress. Further distinguishing *AIRC* from Petitioners' case, the people placed the authority for drawing electoral maps in the Commission, and conversely here, the people of North Carolina *did not* place authority for drawing electoral maps in a single, state trial judge.

In *Rucho v. Common Cause*, this Court again confronted a challenge to allegedly gerrymandered electoral maps as violating various provisions of the Constitution, including the Elections Clause. 139 S. Ct. 2484. In one of the *Rucho* companion cases, North Carolina plaintiffs averred that the North Carolina legislature drew gerrymandered electoral maps designed to give the Republican party an electoral advantage in electing Republicans to office. *See Rucho*, 139 S. Ct. at 2491. According to the plaintiffs,

the maps that the legislature drew "violated the Elections Clause by exceeding the States' delegated authority to prescribe the 'Times, Places, and Manner of holding Elections' for Members of Congress." *Id.* at 2492 (quoting Elections Clause). A three-judge district court ruled that the legislatively drawn maps violated the Elections Clause among other provisions of the Constitution and enjoined the North Carolina legislature from using the maps. *See id.* at 2493.

Vacating the judgments, this Court concluded that a legislature's drawing partisan gerrymandered electoral maps not based on unlawful racial discrimination or violation of the one-person, one-vote principle presented a non-justiciable "political question" over which courts had no jurisdiction. *See id.* at 2507-08. In concluding that such claims present political questions that deprive courts of jurisdiction to resolve them, this Court observed that the Elections Clause committed to the political, elected branches of government — both state legislatures and Congress — the power to resolve such electoral disputes, and this allocation of power was hotly contested in adopting the Elections Clause. *See id.* at 2494-95. That power to regulate the "Times, Places, and Manner of holding elections" is principally vested in the state legislatures with ultimate oversight in Congress. *Id.* at 2495. The Framers struck this division of power to prevent either state legislatures or Congress from exercising omnipotence in prescribing rules for elections. *See id.* at 2495-96. Under that division of power, state legislatures primarily prescribe the rules for elections, but Congress may alter or amend those rules, and this division of power between the elected branches of

government constituted a "characteristic" compromise in allocating power in a federal system of government. *See id.* at 2496. During adoption of the Elections Clause, "[a]t no point was there a suggestion that the federal courts had a role to play. **Nor was there any indication that the Framers had ever heard of courts doing such a thing**." *Id.* (emphasis added).

One reason that partisan gerrymander claims like those in *Rucho* divest courts of jurisdiction is because states to a degree "may engage in constitutional political gerrymandering.'" *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). That which is permissible does not provide a basis for liability. For courts to hold that partisan, elected legislators close to the people themselves cannot engage in some partisan map-drawing nullifies "the Framers' decision to entrust districting to political entities." *Id.* The political branches are necessarily partisan to a degree to effectuate the will of the people. To strip the people's representatives in the state legislature of that power and repose it in a single judge is the very essence of judicial tyranny over the political branches.

Yet here, in violation of the Elections Clause, a single judge has usurped the political lawmaking power of the North Carolina legislature to draw redistricting maps that this Court has concluded can be partisan to a degree. The Supreme Court of North Carolina's affirming that judgment contradicts over 200 years of Elections Clause authority and jurisprudence and cannot be condoned.

A second reason state courts should not resolve political questions that the Constitution vests with

the state legislature and Congress is because resolving such claims is not subject to principled application "grounded in a 'limited and precise'" set of rules. *Id.* at 2498 (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment)). Untethered by legal rules, such claims evade "'clear, manageable, and politically neutral,'" standards — the very standards on which courts are constructed. *Id.* (quoting *Vieth*, 541 U.S. at 306-08 (Kennedy, J., concurring)). There are simply no standards to determine the proper degree of partisanship that is legally acceptable, and more fundamentally, there is no constitutional authority to repose such power in courts. For courts to have the power to usurp political power from the political, elected branches "would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.'" *Id.* (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring)). Furthermore, appeals to proportional representation or "fairness" do not fill the gaps that an absence of judicial standards creates: "[F]ederal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* at 2499. "Fairness" is not "a judicially manageable standard." *Id.* (quoting *Vieth*, 541 U.S. at 291) (plurality opinion)). The Supreme Court of North Carolina's holding to the contrary cannot be reconciled with this principle; "fairness," especially electoral fairness, is far too vague a qualifier on which to premise legal rules.

Far from debating policy and engaging in lawmaking, courts are properly confined to adjudicating particular controversies between

discrete parties. As such, courts are "not responsible for vindicating generalized partisan preferences." *Rucho*, 139 S. Ct. at 2501 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)). The Elections Clause is demonstrably clear that state legislatures and Congress alone have the power to enact electoral maps: "Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2507. After much debate, the Framers vested regulating elections in the elected branches of government and envisioned no role for the courts in prescribing regulations to govern elections. That decision being debated and decided, courts "have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards . . . in the exercise of such authority." *Id.* at 2508. Accordingly, "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. Petitioners' position is fully consistent with *Rucho*.

## II. The Judgment of the Supreme Court of North Carolina Violates the Elections Clause.

The judgment of the Supreme Court of North Carolina contravenes the precedent of this Court and cannot stand. By its plain text and as illuminated by opinions of this Court, the Elections Clause specifically vests drawing redistricting maps with state legislatures and Congress — the political branches of government. The Constitution makes no provisions for courts injecting themselves into this

electoral process, which is uniquely suited for the political branches. Here, the legislature of North Carolina did not enact the maps in question. Rather, a single judge usurped the authority of the North Carolina legislature and engaged in raw, political lawmaking by drawing political maps in violation of the Elections Clause. Worse, that single trial judge delegated that usurped authority to Special Masters, who in turn hired purported experts to aid in drawing the maps. Authority for drawing legislative maps drifted far away from the people's representatives. The Supreme Court of North Carolina enabled that drift. Such an unconstitutional power-grab is as far removed from the Elections Clause's mandate that the North Carolina legislature "prescribe the Times, Places, and Manner" of an election as can be divined. The Elections Clause squarely places the power to draw redistricting maps with the North Carolina legislature, and the Supreme Court of North Carolina flouted that clear constitutional mandate.

The Supreme Court of North Carolina's judgment contradicts *Smiley*: Drawing electoral maps is a lawmaking function, and the lawmaking function is vested in the elected branches of government. *Smiley* did not envision that courts play any role in the lawmaking process of drawing redistricting maps. In the Elections Clause context, courts do not serve a lawmaking function. Because the Elections Clause confers regulating the "Times, Places, and Manner" of elections with the political branches of government, courts are necessarily excluded from this power.

Similarly, the Supreme Court of North Carolina's judgment conflicts with *AIRC*, which simply recognized that the Arizona constitution provides

that the Arizona electorate enjoys the same lawmaking authority as the Arizona legislature. The *AIRC* Court explained that the Clause reserves to Congress and state legislatures the power to regulate elections, and not by text or historical practice did courts ever figure into the allocation of power. Prescribing regulations for drawing political redistricting maps is a lawmaking power and because lawmaking belongs to the elected branches of government, courts play no role in that governance.

*Rucho* explicitly held that "[t]he only provision in the Constitution that specifically addresses" redistricting "assigns [that power] to the political branches," and not to the judiciary. *Rucho*, 139 S. Ct. at 2506. The judgment of the Supreme Court of North Carolina violates the Elections Clause by supplanting that power from the state legislature and reposing it in a judge, which is antithetical to the plain language of the Clause. The reservoir of the people's liberty is for the people to elect their political representatives, who will debate policy and enact those policy choices into law; these are precisely the functions of the elected branches of government.

The lower judgment also offends the precept that the partisan gerrymandering claims are not justiciable and confer no jurisdiction in courts. *Rucho* concluded that federal courts have no jurisdiction to adjudicate a political question such as a partisan gerrymandering claim that alleges no unlawful racial discrimination or violation of the one-person, one-vote claims. Propelling that conclusion is that the Elections Clause commits to the political branches of government the power to prescribe regulations for drawing electoral maps; courts are adjudicative

bodies and ill-equipped to engage in lawmaking. That rationale applies equally to state courts: State courts have no more expertise or authority to decide political questions reserved for the elected branches of government. In this connection, there are no judicially manageable standards and no principled set of rules to moor courts in drawing political maps. Disregarding these dictates, the Supreme Court of North Carolina not only stripped lawmaking from the legislature but conferred it on a body incompetent to exercise the power and assigned that power to a body with no jurisdiction to exercise the power.

## CONCLUSION

The Supreme Court of North Carolina's violation of the Elections Clause and the usurpation of the power of state legislatures and Congress to prescribe rules for drawing redistricting maps cannot be sustained. This Court's precedents unequivocally forbid the reallocation of power in which the Supreme Court of North Carolina brazenly engaged. The lower judgment not only violates the Elections Clause, but there is no jurisdiction to support it. The judgment must be vacated.

Respectfully submitted,

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