No. 21-1271

In The
Supreme Court of the United States

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

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

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

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

Second, NRRT believes redistricting should be conducted primarily through the application of the traditional redistricting criteria States have applies for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the greatest extent possible.

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[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Amicus authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the Amicus and their counsel, make a monetary contribution to preparation or submission of the brief. All parties have consented to the filing of this brief as required by Rule 37.

Such sensible districts are consistent with the principle that legislators represent individuals living within identifiable communities.

Legislators represent individuals and the communities within which those individuals live. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any State. Article I, Section 4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, the state legislatures, and Congress.

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

SUMMARY OF THE ARGUMENT

The power delegated to state legislatures by the Elections Clause of the United States Constitution is an inch wide, but a mile deep. The Clause directly vests state legislatures with lawmaking power over a relatively narrow subject area—"The Times, Places and Manner of holding Elections for Senators and Representatives," a category that necessarily encompasses congressional redistricting—but the authority that it confers within that sphere is immense. U.S. Const., Art. I, § 4, cl. 1. The Elections Clause expressly permits Congress to override state election regulations, see *id.*, but it does not vest state judiciaries with any lawmaking power whatsoever. The Court's handful of precedents interpreting the Clause have consistently affirmed that while States can impose additional procedural hurdles on the

lawmaking process or even reassign all redistricting authority to an independent commission, state courts are not entitled to second-guess legislative enactments that were adopted pursuant to a direct grant of federal constitutional authority because state courts, unlike state legislatures, can only interpret laws—not make them.

Here, the North Carolina Supreme Court contravened that basic principle by weaponizing vague provisions of the State Constitution,[2] invalidating the congressional district plan enacted by the state legislature, and enacting its own preferred policy in its place. This order was repugnant to the traditional understanding of the limited role of the judiciary in our system of government and to the Elections Clause's clear delegation of redistricting power "specifically upon each state's legislature" rather than "to each state as an entity." Morley, The Independent State Legislature Doctrine, 90 Fordham L. Rev. 501, 503 (2021); see also U.S. Const., Art. I, § 4, cl. 1 (dictating that primary authority over redistricting be "prescribed in each State by the Legislature thereof"). In overturning the congressional district map lawfully enacted by the North Carolina General Assembly, the State Supreme Court transformed itself from a *judicial* body—*i. e.*, an institution that

[2] The state trial court in this case actually performed an in-depth historical review and noted that much of this vague language originated in the Virginia Declaration of Human Rights, substantially written by Patrick Henry. *Harper* v. *Hall*, 380 N.C. 317, 374, 868 S.E.2d 499, 542 (N.C. 2022). As this Court has noted, Patrick Henry was accused of gerrymandering Virginia's congressional districts to disadvantage James Madison in the very first congressional election. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2494 (2019).

merely renders impartial judgment and interprets laws—into an ersatz legislature that enacts its policy preferences through sheer force of will. See The Federalist No. 78 (A. Hamilton). Nothing could be more repugnant to the rule of law.

The North Carolina Supreme Court's action was unmoored from the text of both the federal and state constitutions and unsupported by any of this Court's applicable precedents. Allowing this order to stand without correction would ratify the unconstitutional action of the court below and incentivize further encroachments by other state courts on the redistricting authority of state legislatures nationwide, thereby subverting the constitutional separation of powers on a national scale. It appears clear from its recent opinions that the North Carolina Supreme Court does not view the state legislature as an institutional body that is entitled to exercise the full range of its constitutional powers. See *Harper*, 380 N.C., at 322, 868 S.E.2d, at 509 (invalidating the state legislature's redistricting plan in part because the court majority determined that "legislators . . . are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority."); see also *N.C. Conf. of the NAACP* v. *Moore*, 2022-NCSC-99 (N.C. Aug. 19, 2022) (holding that the state legislature lacked the power to initiate constitutional amendments due to a federal court finding that certain districts were racially gerrymandered). Unless this Court stops this dangerous trend in its tracks, state supreme courts will continue to unlawfully withhold redistricting authority from state legislatures in direct violation of the Elections Clause.

Accordingly, NRRT urges this Court to vacate the opinion below and articulate a clear test for federal courts to apply when adjudicating similar redistricting cases in the future. NRRT's preferred test, first suggested in its previous amicus brief at the certiorari stage in this case and elaborated herein, is consistent with this Court's previous pronouncements on this subject, the separation of powers, and due respect for basic principles of federalism.

I. A Decision Affirming Petitioners' Lawmaking Power Over Redistricting is Consistent with This Court's Previous Elections Clause Precedents.

The North Carolina Supreme Court portrayed its decision below as not only consistent with, but mandated by, this Court's previous Elections Clause caselaw, see *Harper*, 380 N.C., at 391, 868 S.E.2d, at 551–52, but it reads the relevant cases for a proposition far broader than that for which they stand. In fact, this Court's analysis of this question point towards a definite, but cabined, role for state courts in adjudicating redistricting disputes.

Congressional redistricting under the Elections Clause "unquestionably calls for the exercise of lawmaking authority," which is a power that the judiciary—state or federal—is *never* authorized to wield. *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 808 n.17 (2015) (hereinafter *AIRC*). The North Carolina Supreme Court's error was in reading something that is *permissible* in the presence of a necessary condition—*i. e.*, a ban on partisan

gerrymandering predicated on explicit constitutional language, see *Rucho*, 139 S. Ct., at 2507–08 (2019)—as *mandatory* even in the absence of that condition, which is not a proposition supported by any precedent of this Court. The majority below simply decided that it would be a better policy choice if North Carolina banned partisan gerrymandering, and then implemented its policy preferences by judicial fiat imposed by a bare majority on the politically elected State Supreme Court. Such unconstrained policymaking is not the constitutional role of the courts.

One scholar has helpfully characterized the appropriate balance of state court authority in redistricting cases as the "procedure/substance dichotomy." See Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, 55 Ga. L. Rev. 1, 70 (2020) (hereinafter Morley 2020). Although state courts can properly enforce state law *procedural* restrictions when a state legislature strays from the defined lawmaking process, they cannot impose *substantive* mandates on the legislature without a specific grant of authority. If a state court *could* make such decisions in the absence of an express grant, it would be effectively transformed into a legislature wielding lawmaking power. In other words, state courts can force state legislatures to respect the rulebook, but they cannot dictate the outcome of the game.

A. This Court's Caselaw Makes Clear That Redistricting Under the Election Clause is an Exercise of Exclusively Legislative Power.

In the tripartite scheme of the American separation of powers, the judiciary has long been recognized as the branch that is "the least dangerous to the political rights of the Constitution." The Federalist No. 78, p. 379 (Dover Thrift ed. 2014) (A. Hamilton). It "has no influence over either the sword or the purse," "can take no active resolution whatever[,]" and "may truly be said to have neither FORCE nor WILL, but merely judgment." *Id.*, at 382. But the foregoing is only true when the judiciary respects "the nature of its functions," which are supposed to consist of pronouncing judgment upon legislative enactments and executive actions rather than operating as a rival center of policymaking. *Id.*, at 379. To the extent that a court throws off the constraints imposed by the separation of powers and takes for itself powers that should only be exercised by the political branches, it is no longer the branch "least in a capacity to annoy or injure" political rights. *Id.* Rather, freed of the primary constraint upon its power—the power to review laws, but not to manufacture them out of whole cloth—the judiciary will be in a unique position to issue authoritative pronouncements adopting new policies to which the political branches are bound to acquiesce without any effective recourse.[3]

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[3] Although the Justices of the North Carolina Supreme Court are elected and therefore not *completely* unaccountable to the people, the danger of judicial policymaking is even more

This Court has offered interpretations of the Elections Clause on relatively few occasions in its history, but its pronouncements on the subject have been consistent and unambiguous. Although several state courts issued opinions reflecting their understanding "that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections" throughout the nineteenth century, see Morley 2020, *supra* at 37–44, the United States Supreme Court did not squarely confront the question of state legislative authority over congressional redistricting until the twentieth. Every time it did, it ratified two related conclusions: (1) congressional redistricting is an exercise of lawmaking power, and (2) courts are limited to enforcing procedural, but not substantive, requirements in the congressional redistricting realm.

First, in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 566 (1916), the Court considered whether the people of a State could, via a popular referendum procedure codified in their state constitution, invalidate a congressional district map adopted by the state legislature. The Court rejected the contention that "to include the referendum with state legislative power for the purpose of

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pronounced in those States where the people have no opportunity to vote on the retention of state supreme court justices. See A. Bannon et al., Choosing State Court Judges, Brennan Ctr. for Justice (Sep. 2, 2022), https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/choosing-state-court-judges (noting that 38 States select their state supreme courts via elections); N.C. Const., Art. II, § 1 (vesting all legislative power in the General Assembly and vesting all judicial power in state judiciary).

apportionment is repugnant to [the Elections Clause] of the Constitution" and thereby affirmed the authority of the people to exercise legislative power in this manner. *Id.*, at 569.[4] Notably, however, *Hildebrant* only ratified the authority of the people of a State to reclaim a measure of the lawmaking power they had previously delegated to the legislature; the case did not present any facts related to the appropriation of lawmaking power by a different branch of state government, and so the Court did not issue a ruling concerning that question.

In arriving at this conclusion, the Court interrogated three separate sources of law (although it reviewed them in what might be called reverse order). First, it rejected the argument that Ohio's redistricting scheme was somehow "repugnant" to the Elections Clause. *Id.* Second, it confirmed that Congress had not exercised its own Elections Clause authority to override state election regulations to bar the popular exercise of legislative authority via

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[4] Note that the Court sidestepped the Elections Clause question in this case because it construed the appellants' challenge to the rejection of the Ohio map as a claim fundamentally concerning the Constitution's Guarantee Clause, Article IV, Section 4, but the decision is still helpful for discerning what kinds of alternative redistricting schemes the early-twentieth-century Court found constitutionally unobjectionable. *Hildebrant*, 241 U.S., at 569. This Court should also carefully consider whether the action of the North Carolina Supreme Court below by legislating its own policy preferences violated the Guarantee Clause. But see *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (holding that "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights").

referenda; instead, the Court found that Congress had in its most recent pronouncement on the subject enacted statutory language "plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id.*, at 568. And what Congress had left open to state discretion, the State of Ohio in this case had decided to unambiguously bless: According to state law, "the referendum constituted a part of the state constitution and laws and was contained within the legislative power." *Id.* Therefore, Ohio's scheme was deemed permissible because it was barred by neither the Elections Clause nor federal statute and had been specifically codified in the State Constitution.

Hildebrant therefore supplies a reviewing court with a simple three-item checklist: (1) First confirm that the federal constitution does not prohibit the challenged redistricting plan; then (2) consider whether Congress has acted to restrict the procedure consistent with its Elections Clause authority, and finally (3) if federal law is silent on the question, determine whether state law has expressly authorized the State's choice. Significantly, at no point in the *Hildebrant* saga did any state court attempt to commandeer lawmaking power to impose its own preferred redistricting policy upon the State; if it had, the outcome would likely have been different.

A decade and a half after *Hildebrant*, the Court addressed an interbranch dispute concerning the division of lawmaking authority over redistricting in

Minnesota. In *Smiley* v. *Holm*, 285 U.S. 355, 361 (1932), the Court was faced with a situation in which the governor vetoed a congressional map enacted by the state legislature, and yet the map was filed with the Secretary of State and became law regardless. The State Constitution clearly required a gubernatorial signature (or, in lieu of executive approval, passage by a two-thirds majority in each legislative chamber, which did not happen) for any bill to become law; it contained no exception pertaining to redistricting. *Id.*, at 363. Nevertheless, the legislature plowed forward and enacted its map even without the governor's approval in a clear violation of state law.

Based upon these facts, the Court held that "in the absence of an indication of a contrary intent, . . . the exercise of the [redistricting] authority must be in accordance with the *method* which *the State has prescribed for legislative enactments*," and decided that requiring gubernatorial approval in the usual course for a congressional map to become law did not transgress the state legislature's Elections Clause authority over redistricting. *Id.*, at 367 (emphasis added). Under the Court's interpretation, the Elections Clause conveys real power, but not power liberated from all external constraint; it does not vest state legislatures "with power to enact laws in any manner other than that which the constitution of the State has provided that laws shall be enacted." *Id.*, at 368. Hence, the *Smiley* Court drew clear boundaries around the scope of the Elections Clause power and explained that the authority it confers, while meaningful, does not give a state legislature the power to ride roughshod over the state

constitution's procedural requirements for lawmaking.

Most significantly for separation of powers purposes, the Court answered the question of whether redistricting is encompassed within the state legislature's lawmaking power in the affirmative. *Id.*, at 366. The Court explained that the constitutional phrase "Time, Places and Manner of holding Elections" sweeps in a broad range of substantive policy decisions about how to best run congressional elections; in brief, the Elections Clause contains "comprehensive words [that] embrace authority to provide a *complete code* for congressional elections" and "involv[e] *lawmaking* in its essential features and most important aspect." *Id.* (emphases added). The Court also noted that there is no alternative source of substantive rules to govern congressional elections beyond the two expressly identified in the Elections Clause: "[I]f there be no overruling action by the Congress, [the rules] may be provided by the legislature of the State upon the same subject." *Id.*, at 367. *Smiley* acknowledges that a redistricting plan must adhere to the same state lawmaking process as any other law, but it does not grant a state's supreme court *lawmaking* powers like the ones the N.C. Supreme Court took for itself here.

Hence, the authority delegated to state legislatures by the Elections Clause could be described as an inch wide, but a mile deep: Limited only to those areas of law encompassed under the umbrella of "Time, Place and Manner of holding Elections," but embracing near total control over the substance of decisions within that limited universe and yielding only to superseding commands of the United States Congress. This idea was once

uncontroversial. As recently as 2000, a *per curiam* Court announced that while "[a]s a general rule th[e] Court defers to a state court's interpretation of a state statute," this general rule does not control "in the case of a law enacted by a state legislature applicable not only to elections to state offices," but also federal elections. *Bush* v. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*) (interpreting the related Electors Clause). The exception is justified because, in such instances, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under" the federal constitution. *Id.*

Bush involved the appropriate application of the Article II *Electors* Clause rather than the Article I *Elections* Clause, but the same principle applies here because the direct grant of authority in both instances is derived from the federal constitution. Any time that a state legislature performs congressional redistricting, it wields lawmaking power pursuant to the authority conferred upon it by the Elections Clause. See *Smiley*, 285 U.S., at 366–67. A state supreme court is fully empowered to enforce state constitutional procedural requirements throughout that redistricting process (and the people of the state, through their legislature or by popular referendum, are free to add or alter such procedural requirements as they see fit), but state courts are constrained in their ability to second-guess decisions consigned to state legislative discretion by the federal constitution. Because such instances of direct federal delegations to specific state governmental bodies are so rare, they are entitled to the utmost judicial respect.

B. The Court Below Engaged in Impermissible Lawmaking, which the Recent Precedents It Purported to Rely Upon Do Not Support.

Nothing has changed in the Court's subsequent caselaw; if anything, the conclusion that redistricting under the Elections Clause is fundamentally an exercise of the state legislature's lawmaking power—and hence beyond the constitutional province of the judiciary—has only been strengthened by recent decisions. First, the Court extended the *Hildebrant* rule and held that the people of a State, consistent with their recognized authority to reclaim delegated lawmaking power for themselves via popular referendum, could reallocate that redistricting power to an independent commission using the same state constitutional mechanism (in States where such a mechanism exists). *AIRC*, 576 U.S., at 824. Second, the Court held that the federal constitution does not prohibit partisan gerrymandering, even as it opined in dicta that state constitutions could lawfully pursue a different course (and even cited examples of some state constitutional provisions that apparently evidenced such a choice). *Rucho*, 139 S. Ct., at 2507–08. But the Court's recognition of the valid lawmaking power of the people acting collectively does not confer analogous authority upon the state judiciary, and an acknowledgement that States *can* pursue different policies consistent with their function as laboratories of democracy does not mean that every State *must*.

In *AIRC*, the Court held that an independent redistricting commission's exercise of lawmaking

authority over redistricting did not violate the Elections Clause, noting that "the Clause surely was not adopted to diminish a State's authority to determine its own *lawmaking* processes." 576 U.S., at 824 (emphasis added). Quite so—that proposition follows directly from the Court's decision a century early in *Hildebrant*, which permitted a State to alter its own constitutional processes to allow the people to reclaim lawmaking power over congressional redistricting for themselves, 241 U.S., at 569, and in *Smiley,* which required a state legislature to obey state constitutional procedural regulations of the lawmaking process when enacting a redistricting plan, 285 U.S., at 367–68. But this decision, like all Elections Clause decisions, was necessarily fact-specific; the people were empowered to reallocate redistricting authority in this way only because "the Arizona Constitution 'establishe[d] the electorate [of Arizona] as a coordinate source of legislation' on equal footing with the representative legislative body." *AIRC*, 576 U.S., at 795 (internal quotation omitted). The Court did not find that state law vested the state judiciary with any similar authority over the work of lawmaking, nor is there an analogous provision in the North Carolina Constitution that would justify such a conclusion here.[5]

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[5] In fact, the North Carolina Constitution goes in the opposite direction by removing the Governor from the redistricting lawmaking process entirely. N.C. Const., Art. II, § 22(5)(d). North Carolina is the only State with a legislatively enacted map that entirely bypasses the Governor. F. Kniaz, Governors and the Redistricting Process, Rutgers Univ. Eagleton Cntr. On the Am. Governor (Sep. 2, 2022), https://governors.rutgers.edu/governors-and-the-redistricting-process/.

Fundamentally, the *AIRC* Court affirmed *Smiley*'s holding that "redistricting 'involves lawmaking in its essential features and most important aspect.'" *Id.*, at 807 (quoting *Smiley*, 285 U.S., at 366). The Elections Clause only governs one redistricting-related subset of lawmaking, and therefore congressional redistricting must proceed "in accordance with the method which the State has prescribed for legislative enactments." *Id.*, at 807 (quoting 285 U.S., at 367). In both *Smiley* and *AIRC*, this holding was reason to circumscribe the authority of institutional state legislatures that had attempted to hoard lawmaking power that had been lawfully divested by the people. Here, by contrast, the people of North Carolina have *not* divested their state legislature of its lawmaking power over redistricting; the State Supreme Court acknowledged as much when it conceded that partisan gerrymandering has not been banned by the legislature and therefore, in the court's opinion, "the only way that partisan gerrymandering can be addressed is through the courts." *Harper*, 380 N.C., at 322, 868 S.E.2d, at 509.

Hence, the North Carolina Supreme Court began with a policy conclusion—that a statewide ban on partisan gerrymandering was desirable and unlikely to be enacted by the political branches of state government—and then hunted through the State Constitution for a textual hook on which it could plausibly hang its hat. Finding none, it settled for identifying a never-before-discovered partisan gerrymandering ban concealed within the bare five words "[a]ll elections shall be free." *Id.*, at 324, 868 S.E.2d, at 510 (quoting N.C. Const., Art. I, § 10). The fact that North Carolina is "a state without a citizen

referendum process and where only a supermajority of the legislature can propose constitutional amendments" is entirely irrelevant to the question presented; that the State Supreme Court thought otherwise betrays the fundamentally nonjudicial nature of the decision it rendered. *Id.*, at 322, 868 S.E.2d, at 509.

None of the cases discussed so far—not *AIRC*, *Smiley*, or *Hildebrant*—authorized state courts to engage in lawmaking. They said nothing about the role of state courts in adjudicating disputes over the substantive content of redistricting plans because that question was not previously before this Court. Each of the foregoing cases presented disputes confined to actors operating within the political branches of state government or otherwise exercising fundamentally lawmaking power (as in *AIRC*, where the people of Arizona lawfully chose to vest an independent commission with legislative redistricting power in accordance with the State Constitution, see 576 U.S., at 824). In most states, the legislative and executive branches each play some role in the lawmaking process.[6] The state judiciary, by contrast, plays a different role entirely—it does not enjoy lawmaking authority in *any* state, because while "[i]t is emphatically the province and authority of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch

[6] "Whether the Governor of the State, through the veto power, shall have a part in the making of state laws is a matter of state policy." *Smiley*, 285 U.S. at 368. In North Carolina, unlike most other States, the State Constitution gives the Governor no role in the redistricting process, but the people of North Carolina could easily alter this scheme if they so desired. N.C. Const. art. II, § 22(5)(d).

137, 177 (1803), courts are not similarly empowered to dictate what the law *should* be. If redistricting truly "involves lawmaking in its essential features and most important aspect" as this Court has consistently held, then it involves a power that state courts are not empowered by any legal authority to wield. *AIRC*, 576 U.S., at 807 (quoting *Smiley*, 285 U.S., at 367).

Some legal scholars have claimed that the Court's decision in *AIRC* forecloses *any* limits on the ability of state courts to exercise judicial review over congressional redistricting plans. See, *e.g.*, Amar & Amar, Eradicating Bush-League Arguments Root and Branch: The Article II Independent State Legislature Notion and Related Rubbish, 2021 S. Ct. Rev. 1, 33–35 (2022). But as described, *AIRC* does not represent a radical departure from the trend of earlier Elections Clause precedents. The Elections Clause might not "diminish a State's authority to determine its own lawmaking processes," *AIRC*, 576 U.S., at 824, but that recognition does not entitle a state supreme court to devise entirely new laws under the guise of constitutional interpretation. The *AIRC* Court recognized that there are only two lawful avenues through which the people of a State may attempt to control the legislature's power over redistricting: By "control[ling] the State's lawmaking process in the first instance" via a popular referendum that reclaims or reallocates redistricting authority, or by "seek[ing] Congress' correction of regulations prescribed by state legislatures." *Id.* The possibility that state supreme courts could operate as a separate locus of lawmaking power was never mentioned by the Court, presumably because the

very idea flouts the most basic principles of our governmental scheme of separation of powers.

The interpretation of laws and the making of laws are different duties traditionally assigned to different branches of government, because "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, p. 254 (Dover Thrift ed. 2014) (J. Madison). The North Carolina General Assembly has the necessary motive to resist the encroachments of the state judiciary in the redistricting realm, but it cannot effectively repel this intrusion upon its prerogatives unless this Court clarifies that the Elections Clause supplies it with "the necessary constitutional means." *Id.* Few would object to the uncontroversial observation that "States retain autonomy to establish their own governmental processes," *AIRC*, 576 U.S. at 816, but state constitutional rules must yield to federal mandates in the handful of realms where the U.S. Constitution delegates specific substantive authority to state legislatures. Most importantly for the purpose of resolving the instant case, a decision vacating the lower court opinion here would be entirely consistent with *AIRC* because the court below strayed beyond its limited role "to say what the law is" and into the constitutionally problematic realm of judicial lawmaking. *Marbury*, 1 Cranch, at 177. For the foregoing reasons, Amicus does not believe that any of the cases discussed herein need to be overruled for the Court to decide this case correctly in favor of Petitioners.

II. The Court Should Announce a Clear Test That Will Prevent State Courts from Engaging in Similar Lawmaking in the Future.

In NRRT's previous amicus brief submitted at the certiorari stage of this litigation, it suggested that the Court adopt a straightforward test that will disincentivize further state court lawmaking to govern similar Election Clause cases in the future. National Republican Redistricting Trust as *Amicus Curiae* 10–11 (Mar. 2, 2022) (hereinafter NRRT Amicus). NRRT renews that recommendation here, and advances one potential test the Court could adopt consistent with its previous pronouncements upon this subject.

Assuming that Congress has not exercised its own Elections Clause power to impose substantive redistricting criteria upon the States (and it has not other than a requirement for single member districts and the Voting Rights Act), there are two—and only two—instances in which a state supreme court may intrude upon the state legislature's redistricting function consistent with the Elections Clause. The first involves instances when the legislature itself (or the people of the State acting through a referendum procedure contained within their state constitution) have *expressly* authorized such an intrusion. These "express authorizations" are the kinds of state constitutional provisions favorably cited in the Court's majority opinion in *Rucho*, 139 S. Ct., at 2508,[7] or the New York constitutional provision that

[7] Because this discussion was not necessary to the holding in *Rucho* it is dicta, but it still provides a useful guide to the

expressly prohibits districts "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or parties." N.Y. Const., Art. III, § 4(c)(5).

Such express authorizations as exist in New York and as the *Rucho* Court identified in Missouri,[8] Iowa,[9] and Delaware[10] law codify clear anti-partisan gerrymandering standards that state courts are empowered to enforce. But it does not logically follow from the Court's recognition that "[p]rovisions in state statutes and state constitutions *can* provide standards and guidance for state courts to apply" in redistricting cases that *all* state court attempts to review a state legislature's redistricting authority are automatically constitutionally permissible. *Rucho*, 139 S. Ct., at 2507 (emphasis added). A state court cannot jump the gun and devise its own anti-partisan gerrymandering standard simply because it

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Court's thinking on the kinds of state anti-gerrymandering provisions that are constitutionally permissible.

[8] "District shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness, but the standards established by subdivisions (1) to (4) of this subsection shall take precedence over partisan fairness and competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency. 'Competitiveness' means that parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences." *Rucho*, 139 S. Ct., at 2508 (quoting Mo. Const., Art. III, § 3).

[9] "No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group." *Rucho*, 139 S. Ct., at 2508 (quoting Iowa Code § 42.4(5)).

[10] See *Rucho*, 139 S. Ct., at 2508 (quoting Del. Code Ann. Tit. xxix, § 804) (prohibiting the creation of state legislative districts "so as to unduly favor any person or political party").

has grown impatient with the political process as the North Carolina Supreme Court did here. See *Harper*, 380 N.C., at 322, 868 S.E.2d, at 509 (expressing pessimism about the prospects for passage of an anti-gerrymandering amendment). Nothing but an absence of political will prevents North Carolina from adopting an unambiguous anti-gerrymandering amendment like the ones favorably cited in *Rucho*, and political will must be supplied by the people and their elected representatives rather than state or federal courts.

Second, state courts may intervene in a redistricting process when the state's political branches that are entrusted with constitutional authority over redistricting have arrived at a "true deadlock."[11] Situations of true deadlock are, by definition, rare, and in any event would present an instance of the state court *enforcing provisions of the federal constitution* rather than redistricting-related provisions of state law. See *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964) ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to *federal constitutional requisites* in a timely fashion after having had an adequate opportunity to do so") (emphases added). The power to reapportion congressional seats "is not a reserved power of the States," in which case state courts could exercise uninhibited judicial review of state legislative enactments, "but rather is delegated by the Constitution" and therefore subject to federal constitutional constraints. *U.S. Term Limits* v.

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[11] In North Carolina, because the State Constitution gives the Governor no role in the redistricting process, such a situation would only occur when the state legislature fails to adopt a map. N.C. Const., Art. II, § 22(5)(d).

Thornton, 514 U.S. 779, 805 (1995); see also *id.*, at 848 (Thomas, J., dissenting) (explaining that under the Tenth Amendment, "[i]t is up to the people of each State to determine which 'reserved' powers their state government may exercise"). State courts have routinely adjudicated this kind of deadlock litigation without presenting any federalism problems, and nothing articulated herein would require them to stop.[12]

This test might appear familiar because it is essentially the one applied by the Supreme Court in *Hildebrant*, although the Court there did not characterize its informal checklist as a mandatory test. The *Hildebrant* Court explored three separate sources of law[13] on its way to determining that the people of Ohio lawfully overturned their state legislature's congressional redistricting plan: The U.S. Constitution, federal statutory law, and the relevant state constitution. See 241 U.S., at 567. Each source is relevant to analyzing whether a state supreme court has the lawful authority to invalidate a congressional redistricting plan adopted by the state legislature.

The first (and most obvious) question in any Elections Clause case is whether, based upon the specific facts presented, the Elections Clause itself shields the challenged state legislative enactment from state court judicial review. If the Elections

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[12] See*, e.g.*, *Hippert* v. *Ritchie*, 813 N.W.2d 391, 393 (Minn. 2022) (special redistricting panel); *Guy* v. *Miller*, 2011 Nev. Dist. LEXIS 32, at *2–3 (Nev. 1st Jud. Dist., Oct. 14, 2011); *Egolf* v. *Duran*, No. D-101-CV-2011-02942 (Nev. 1st Jud. Dist., Jan. 17, 2012).

[13] Ideally, these three sources of law should be considered in the descending order presented here rather than the inverse order in which the *Hildebrant* Court assessed them.

Clause is silent, then the reviewing court must inquire whether Congress has prohibited the challenged state legislative enactment using its own Elections Clause override authority. If the court answers both preceding questions in the negative, only then do the two scenarios identified herein become relevant: Does state law expressly authorize judicial review by providing specific substantive redistricting criteria for state courts to apply, or have the political branches of state government arrived at a true deadlock that requires state courts to intervene to enforce federal constitutional guarantees? If the answer to *every* one of these questions is "no," then a state court attempting to exercise judicial review is flying blind without constitutional authority or enforceable legal standards (or lawmaking power, which it *never* has).

Beyond the two limited scenarios of express authorizations and true deadlock, the Elections Clause prohibits state court intrusion into the redistricting process, which "involves lawmaking in its most essential features and most important aspect." *AIRC*, 576 U.S., at 807 (quoting *Smiley*, 285 U.S., at 366). Contrary to the fears expressed by the North Carolina Supreme Court majority in the opinion below, a decision from that body reinterpreting long-dormant and vague provisions of the State Constitution is not "the only way that partisan gerrymandering can be addressed" in North Carolina. *Harper*, 380 N.C., at 322, 868 S.E.2d, at 509. The "problem" of partisan gerrymandering, if there is one, can be addressed by the people of North Carolina, who are fully empowered by their State Constitution to enact constitutional amendments through either a convention of the people or

legislative initiative. *See* N.C. Const., Art., XIII, §§ 2–4. They could also vote out legislators who they feel do not share their values, or simply follow the lead of other States and amend state law to permit the Governor to veto redistricting plans, a procedural hurdle that the Supreme Court has specifically blessed. *See Smiley*, 285 U.S., at 367–68. Gerrymandering might also be addressed by Congress, to which the Elections Clause expressly delegates the authority to override state election regulations and thereby "do something about partisan gerrymandering." See *Rucho*, 139 S. Ct., at 2508; see also *AIRC*, 576 U.S., at 814–15 ("The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules").

Gerrymandering cannot, however, be addressed by a state supreme court unless it is applying clear substantive rules supplied by an express state law authorization or operating in a situation of true deadlock to enforce federal constitutional guarantees. If neither of those two conditions are present, then a court exercises only "Force [o]r Will," having long since abandoned the strictures of "mer[e] judgment" because it believes that judicial review alone is somehow unequal to the political moment. See The Federalist No. 78 (A. Hamilton). If the North Carolina Supreme Court is to be believed, it was required to fashion its own partisan gerrymandering ban for the simple reason that North Carolina legislators currently have the authority to draw their own districts—a condition that is true in a majority of American States and that the U.S. Supreme Court has held does not violate the federal constitution. *See* Nat'l Conf. of

State Legislatures, Redistricting Commissions: Congressional Plans (Dec. 10, 2021) https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx (listing only ten States where independent commissions possess primary authority over congressional redistricting); *see also Rucho*, 139 S. Ct., at 2508. The court correctly noted that the North Carolina Constitution "guard[s] against not only abuses of executive power but also the tyrannical accumulation of power . . . in the legislative branch," but it curiously ignored the existence of any similar limits on the power of the judicial branch. *Harper*, 380 N.C., at 367, 868 S.E.2d, at 536.

There is no limiting principle to the North Carolina Supreme Court's logic, as that court has already demonstrated in a subsequent decision. In *NAACP*, decided on August 19, 2022, the court imposed "limits on . . . legislators' authority to initiate the process of amending the constitution" based on a federal district court's previous determination that North Carolina's state legislative districts were racially gerrymandered at the time the relevant amendments were adopted.[14] 2022-NCSC-99, ¶ 5. It is worth making explicit what this means: Because a federal court previously held that certain state legislative districts were racially

[14] In yet another troubling sign, the lawyer who represented the plaintiffs in that earlier federal litigation, now an elected member of the State Supreme Court, drafted the majority opinion in *NAACP* v. *Moore* and provided the decisive vote in favor of appellants' position. See E. Whelan, North Carolina Supreme Court's Gerrymandered Reasoning, National Review (Aug. 22, 2022), https://www.nationalreview.com/bench-memos/north-carolina-supreme-courts-gerrymandered-reasoning/.

gerrymandered, the State Supreme Court has unilaterally decreed that the state legislature should be stripped of some of its lawmaking powers based upon standards that the court devised out of whole cloth. Cf. N.C. Const., Art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives"). This is preposterous. Either "[a] governmental official has the authority to act, or he does not;" there is no in-between disposition in which legislators can only exercise *some* of their lawmaking power so long as they obtain permission from their state supreme court. *NAACP*, 2022-NCSC-99, ¶ 115 (Berger, J., dissenting).

The State Supreme Court clearly no longer views the North Carolina General Assembly as a valid source of substantive law, and it will not permit the state legislature to exercise lawmaking power until the districts from which its members are elected satisfy the court's preferences. "In framing a government to be administered by men over men, . . . you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, p. 254 (Dover Thrift ed. 2014) (J. Madison). The North Carolina Supreme Court is out of control; it no longer recognizes any valid limits on its power, and has proven itself unable or unwilling to control itself. Contrary to the lofty language about protecting democracy that permeates the decision below, see *Harper*, 380 N.C., at 371, 868 S.E.2d, at 536 the court has succeeded only in instituting judicial tyranny.

This radical theory of institutional legitimacy in which the State Supreme Court serves as the

ultimate policy setter and overseer for the coordinate branches of state government would give almost every state high court in the country the power to declare their state legislature illegitimate and thereby strip it of *all* lawmaking power. To affirm such an expansive claim of state judicial authority would be to bless an aggrandizement of core lawmaking power that has only ever been assigned to the state legislature itself. "The judiciary," Hamilton recognized, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78, p. 382 (Dover Thrift ed. 2014) (A. Hamilton). Likewise, under the U.S. Constitution, the state judiciary has no influence over congressional redistricting unless state law or Congress expressly says otherwise. This Court should explain that clearly, or risk additional institutional legitimacy crises like the one the court below has instigated in North Carolina.

CONCLUSION

The lawmaking power to draw congressional districts that is delegated to state legislatures by the Elections Clause is extensive, which means that state court authority to override legislative enactments premised on Elections Clause authority is necessarily limited. North Carolina citizens who are concerned about partisan gerrymandering are still left with a variety of options for addressing it, but a state court override of a legislative redistricting plan premised on a theory that the state legislature is an illegitimate source of

lawmaking power is not one of them. The North Carolina Supreme Court's decision below unconstitutionally intrudes upon the state legislature's Election Clause authority over redistricting and makes clear that the court believes the legislature is not entitled to redistrict unless the map it produces satisfies the court's preferred academic experts and its uncodified anti-partisan gerrymandering standard. That decision must be vacated by this Court and a clear alternative test announced, or other state supreme courts will also be tempted to unconstitutionally claim lawmaking power for themselves.

Respectfully submitted,

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