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 OF AMERICA FIRST LEGAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ADAM K. MORTARA
Lawfair LLC
40 Burton Hills Boulevard
Suite 200
Nashville, Tennessee 37215
(773) 750-7154
mortara@lawfairllc.com

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

GENE P. HAMILTON
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

Counsel for Amicus Curiae

QUESTION PRESENTED

The Elections Clause of the United States provides:

> 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*, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1 (emphasis added). One of the congressional enactments that regulates the manner of electing representatives is 2 U.S.C. § 2a(c), which provides, in relevant part:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . .
>
> (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;

2 U.S.C. § 2a(c). When the North Carolina state judiciary concluded that the congressional map enacted by the state legislature violated the state constitution, it remedied this supposed constitutional violation by imposing a new congressional map of its own choosing, without regard to 2 U.S.C. § 2a(c)(2) or the constraints it imposes on the rem-

edial discretion of courts in congressional redistricting disputes. The question presented is:

> Whether the North Carolina Supreme Court violated the Elections Clause by disregarding the remedial constraints imposed by 2 U.S.C. § 2a(c) when it imposed a congressional map in response to an alleged state constitutional violation.

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INTEREST OF AMICUS CURIAE[1]

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution. America First Legal has a substantial interest in this case because the state judiciaries have been repeatedly flouting the Elections Clause and 2 U.S.C. § 2a(c) when involving themselves in congressional

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

redistricting disputes. And the North Carolina Supreme Court's insouciance toward the Elections Clause presents an ideal vehicle for this Court to use 2 U.S.C. § 2a(c) to cabin the remedial discretion of state judiciaries when drawing congressional maps in response to a state constitutional violation or a legislative impasse.

SUMMARY OF ARGUMENT

The Court should reverse the decisions of the North Carolina Supreme Court and the state trial court even if it is unwilling or reluctant to embrace the petitioners' ambitious and far-reaching theory of the Elections Clause. And there is no need to go as far as the petitioners propose to reject the remedial map imposed by the North Carolina Superior Court. Pet. App. 269a.

Regardless of whether or to what extent the Elections Clause limits a state court's ability to review or reject a legislatively approved congressional map under the state constitution, it undoubtedly compels adherence to the federal statutes that govern the congressional redistricting process. *See* U.S. Const. art. I, § 4, cl. 1 ("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, except as to the Places of chusing Senators."). And 2 U.S.C. § 2a(c) spells out in clear and unambiguous terms what must happen when a state court concludes that the legislature has failed to redistrict "in the manner provided by the law thereof":

Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:

(1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;

(2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;

(3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State;

(4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or

> (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a(c). North Carolina falls within subsection (2), as it gained one congressional seat in the last decennial census. So the North Carolina Superior Court, upon concluding that the remedial map adopted by the General Assembly violated the state constitution,[2] was in fact holding that North Carolina had not been "redistricted in the manner provided by the law thereof"—and at that point 2 U.S.C. § 2a(c)(2) presented the only available remedy. And if the remedy compelled by 2 U.S.C. § 2a(c)(2)'s second clause (mandating the use of the previous districts) presents malapportionment problems under *Wesberry v. Sanders*, 376 U.S. 1 (1964), then the courts may remedy those malapportionment problems—but principles of equity demand a remedy that makes the fewest changes to the state's congressional map.

ARGUMENT

It is hard to understand exactly what the petitioners think the Elections Clause requires with respect to the allocation of authority among the competing institutions of state government. Many statements in their brief insist that the state legislature is the *only* institution of state government that may participate in the congressional

2. Pet. App. 280a.

redistricting process,[3] a notion that is incompatible with *Smiley v. Holm*, 285 U.S. 355 (1932), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Yet elsewhere in their brief the petitioners accept the holding of *Smiley*, claiming that a state's constitution "may properly govern such procedural questions as . . . whether the legislation is subject to gubernatorial veto." Pet. Br. 24. But if the Elections Clause allows a state to subject a legislatively approved congressional map to a gubernatorial veto, then how can it simultaneously forbid the state to confer a similar veto power on its judiciary in the form of judicial review? The petitioners' brief has no answer to this, and it is hard to think of an answer if one accepts the holding of *Smiley*.[4] If anything, one should more troubled by the free-wheeling veto power of the governor, who can nix the legislature's preferred congressional redistricting plan for any reason whatsoever, than by the veto-like power wielded by the state judiciary, which (at least in theory) can be invoked only in response to actual or perceived violations of the state constitution.

3. Pet. Br. at 2 ("[T]he Committee of Detail deliberately changed the Constitution's language to specify that *state legislatures* were to exercise that power, not any other state entity and not the State as a whole."); *id.* at 11 ("[T]he power to regulate federal elections lies with state legislatures *exclusively*."); *id.* at 18 ("[N]o *other* state organ is authorized to exercise that power.").

4. *See, e.g.*, Vikram David Amar and Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 31–33.

At the same time, the petitioners are absolutely right to fault the North Carolina judiciary for overstepping its role. This Court should hold that the state judiciary infringed on *Congress's* Elections Clause power by imposing a congressional map of its own choosing in its efforts to remedy a perceived violation of the state constitution. Whenever a state court finds a congressional redistricting plan unconstitutional or deficient for any reason, the remedy is set forth in 2 U.S.C. § 2a(c), which dictates the maps to used when a state has failed to redistrict itself "in the manner provided by the law thereof." It is the maps required by 2 U.S.C. § 2a(c)—and not a court-selected map—that must be imposed when a state court pronounces a congressional redistricting plan unconstitutional. And if the map required by 2 U.S.C. § 2a(c) runs afoul of *Wesberry v. Sanders*, 376 U.S. 1 (1964), or some other provision of federal law, then the court must remedy those problems while hewing as closely as possible to the map required by section 2a(c). The North Carolina courts did not do that, and this Court should vacate their court-imposed map and remand for a remedy consistent with the Elections Clause and 2 U.S.C. § 2a(c).[5]

5. The same reasoning extends to 2 U.S.C. § 2a(c)(1), which applies to states with no change in the number of Representatives. A state court cannot find that the legislature's redistricting efforts ran afoul of state law and then proceed to start from scratch. The court must instead implement the remedy required by section § 2a(c)(1), by working from the pre-existing districts and remedying any *Wesberry* problem in the most modest way possible, as equity demands.

I. THE ELECTIONS CLAUSE AND 2 U.S.C. § 2a(c) CONSTRAIN THE REMEDIAL DISCRETION OF THE STATE JUDICIARY WHEN IT IMPOSES CONGRESSIONAL MAPS IN RESPONSE TO A CONSTITUTIONAL VIOLATION

The judicial freewheeling displayed by the North Carolina Superior Court reflects a failure to honor not only the Elections Clause but also 2 U.S.C. § 2a(c), a federal statute that spells out exactly what must happen when a legislature fails to enact a new (and lawful) congressional map in response to the decennial census:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:
>
> (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;
>
> (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;
>
> (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of

> Representatives, they shall be elected from the districts then prescribed by the law of such State;
>
> (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or
>
> (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a(c). Section 2a(c) is an Act of Congress that regulates the "manner" of electing Representatives, and the states (and the judiciary) are constitutionally obligated to follow this statute under the Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1 ("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" (emphasis added)).

Of course, section 2a(c) was enacted before *Wesberry v. Sanders*, 376 U.S. 1 (1964), which announced an equal-population rule for congressional districts. It was also enacted before Congress imposed a single-member district requirement in 2 U.S.C. § 2c. *See* 2 U.S.C. § 2c ("[T]here

shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative"). So the provisions of section 2a(c)—which are triggered as soon as an "apportionment" occurs, and which last "until" the state is "redistricted in the manner provided by the law thereof"—will often generate maps that are malapportioned or that violate the single-member districting requirement of section 2c. In these situations, the state judiciary may prevent the violations of the Constitution (or the violations of section 2c) that would result from implementing the fallback regime prescribed by section 2a(c). It does not violate the Elections Clause for a court to re-draw an unconstitutional map required by section 2a(c) if the state legislature is unwilling or unable to do so; to deny this would put the Elections Clause at war with the rest of the Constitution. And it does not violate the Elections Clause for the state judiciary to enforce section 2c, as the Elections Clause specifically allows Congress to "make or alter" regulations governing the manner of electing Representatives, and the Elections Clause requires the states to comply with those congressional enactments.

But the state judiciary's map-drawing authority in these situations comes from the fact that it is attempting to remedy or prevent a violation of the Constitution (or a violation of section 2c) that would occur if it implemented the congressionally mandated redistricting plan described in section 2a(c). And the judiciary's remedial discretion in these situations is limited by Elections Clause,

which requires the state courts to hew as closely as possible to the congressionally required plans in section 2a(c) even as the state courts devise a remedy that will avoid violations of *Wesberry* or section 2c.

The following chart illustrates the state judiciary's remedial authority after concluding that a legislatively approved congressional map violates the state constitution:

	State Gains Seat(s)	**No change**	**State Loses Seat(s)**
Requirement of 2 U.S.C. § 2a(c) if new map is found unconstitutional	Use old map; elect new representatives at large. *See* 2 U.S.C. § 2a(c)(1).	Use old map. *See* 2 U.S.C. § 2a(c)(2).	Elect all representatives at large. *See* 2 U.S.C. § 2a(c)(5).
Legality?	Unconstitutional under *Wesberry*.	Unconstitutional under *Wesberry*.	Violates 2 U.S.C. § 2c.
May state judiciary remedy the violation?	Yes. *See Growe v. Emison*, 507 U.S. 25 (1993).	Yes. *See Growe v. Emison*, 507 U.S. 25 (1993).	Yes, but only if there is time to impose a new map "without disrupting the election process." *Branch v. Smith*, 538 U.S. 254, 274–75 (2003) (plurality op. of Scalia, J.)
How should state judiciary remedy the violation?	Fix malapportionment problem, while deviating as little as possible from the previous legislatively-approved map	Fix malapportionment problem, while deviating as little as possible from the previous legislatively-approved map	Impose new map, while following the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in

			the reapportionment plans proposed by the state legislature." *Branch*, 538 U.S. at 274 (plurality op. of Scalia, J.)

As can be seen from the chart, the first question to ask after a state court finds a congressional redistricting plan unconstitutional is what section 2a(c) requires, because section 2a(c) governs when a state has failed to redistrict "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). When a state gains seats or stands pat, the map required by section 2a(c) will almost always result in a *Wesberry v. Sanders* violation—except in the borderline-miraculous scenario in which each of the state's previous congressional districts has precisely equal populations after 10 years of comings and goings. And the state judiciary may draw a new map to remedy this constitutional violation if the legislature is unable or willing to do so in a manner consistent with the state constitution. *See Growe v. Emison*, 507 U.S. 25 (1993). But the state judiciary cannot impose whatever it map it wants; it must honor the Elections Clause by hewing as closely as possible to map required by 2 U.S.C. § 2a(c)—in this case, the map that had been previously been used for the 2020 elections cycle. That map carries the imprimatur of both the state legislature and Congress, and the Elections Clause requires a court to preserve the enactments of those institutions to the maximum possible extent—even when those enactments favor a map that falls short of *Wesberry*'s equal-population rule.

North Carolina gained a single seat in the reapportionment, so section 2a(c)(2) requires the state to use its congressional map from the 2020 election cycle, with a single additional representative elected by the state at large, unless and until the state is redistricted "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). The at-large election of the new representative does not violate *Wesberry v. Sanders*, as every person's vote carries the same weight in the election of this at-large representative. Nor does it violate 2 U.S.C. § 2c, as this state-wide "district" elects no more than one representative. *See* 2 U.S.C. § 2c (requiring states to "establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative."). The only problem is that the old district lines from the 2020 election will (almost certainly) result in malapportioned districts, but the state judiciary can (and must) remedy that problem by adjusting the district lines to ensure equal population among the 13 extant districts, while providing for at-large election of the new 14th representative. *That* is the remedy that the North Carolina judiciary was obligated to impose under the Elections Clause and 2 U.S.C. § 2a(c).

So even if this Court concludes that the Elections Clause allows congressional maps to be subject to judicial review in state courts, it should *still* vacate the remedial map selected by the North Carolina judiciary for its disregard of 2 U.S.C. § 2a(c)—and for its disregard of the Election Clause, which compels state courts to impose the maps required by 2 U.S.C. § 2a(c) after concluding that

the congressional redistricting plan violates the state constitution.

* * *

For too long, state judiciaries have ignored the Elections Clause and refuse acknowledge the limits that it imposes on their congressional map-drawing powers. Worse, they have acted as though a constitutional violation or a legislative impasse allows them to impose whatever congressional map they want, without any need to derive their map-selection powers from a legislative enactment or federal constitutional provision. It is long past time for this Court to rein in these lawless and unconstitutional practices.

CONCLUSION

The remedial map selected by the North Carolina Superior Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

ADAM K. MORTARA
Lawfair LLC
40 Burton Hills Boulevard
Suite 200
Nashville, Tennessee 37215
(773) 750-7154
mortara@lawfairllc.com

(additional counsel listed
on following page)

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

GENE P. HAMILTON
America First Legal
Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

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