No. 21-1271

In the Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*
Respondents,

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GARY M. LAWKOWSKI
Counsel of Record
Dhillon Law Group, Inc.
2121 Eisenhower Avenue,
Suite 402
Alexandria, VA 22314
703-965-0330
GLawkowski@DhillonLaw.com

MICHAEL BOOS
DANIEL H. JORJANI*
Citizens United
Citizens United Foundation
The Presidential Coalition
1006 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
202-547-5420
MichaelBoos@CitizensUnited.org
DanielJorjani@CitizensUnited.org
*Application for Admission Pending

Counsel for amici curiae Citizens United, Citizens United Foundation, and The Presidential Coalition

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and *amici* in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research,

[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. The parties have either filed blanket consents to the filing of briefs of *amici curiae* in this case or provided written consent to *amici*.

and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization founded to educate the American public on the value of having principled leadership at all levels of government.

INTRODUCTION

"The central question we face today is: Who decides?" *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

"The Constitution provides that state legislatures – not federal judges, not state judges, not state governors, not other state officials – bear primary responsibility for setting election rules. . . . And the Constitution provides a second layer of protection too" by authorizing Congress to serve as a backstop. *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citations omitted).

Yet, in this case, the state courts have functionally usurped the legislature's authority by not only purporting to invalidate the redistricting plans developed by the General Assembly, but acting on their own initiative to hire their own staff of purported experts to develop their own redistricting plan and imposing that plan on people of North Carolina by

judicial fiat. *See North Carolina League of Conservation Voters, Inc. v. Hall*, Nos. 21 CVS 015426 & 21 CVS 500085, 2022 WL 2610501, at *1 (N.C. Super. Feb. 16, 2022) (determining "[a]fter a careful and thorough consideration of each proposed candidate, the Court will instead appoint three highly-qualified candidates of its own selection as Special Masters to assist the Court in this matter."); *North Carolina League of Conservation Voters, Inc. v. Hall*, Nos. 21 CVS 015426 & 21 CVS 500085, 2022 WL 2610499, at *9-10 (N.C. Super. Feb. 23, 2022) (rejecting the General Assembly's Congressional remedial districting plans and adopting the plans drawn by the court's "own selection" of special masters).[2]

"Like most provisions of the Constitution, the Elections Clause reflected a compromise. . . . This Court has no power to upset such a compromise simply because we now think that it should have been struck differently." *See Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 837 (2015) (Roberts, C.J., dissenting). "[I]f the language of

[2] In striking down the General Assembly's redistricting map, the North Carolina Supreme Court reassured "[t]his case does not ask us to remove all discretion from the redistricting process" because "[t]he General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts in accordance with traditional neutral districting criteria that will require legislators to exercise their judgment." *Harper v. Hall*, 380 N.C. 317, 364 (2022). Subsequent events belied these claims. The Superior Court effectively cut the General Assembly out of the Congressional redistricting process by choosing and hiring its own outside experts and imposing its own redistricting map.

the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections." *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from denial of application for stay); *see also Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting) ("[T]o be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts."). If there is any limit to the authority of State courts to countermand the will of State legislatures in redistricting for federal elections, it should apply here.

Based on the text, history, and purpose of the Elections Clause, the state court's actions in this case are an *ultra vires* intrusion upon the authority constitutionally committed to the State Legislature. Accordingly, the decision of the court below should be reversed.

SUMMARY OF THE ARGUMENT

This case is about who gets to decide how members of Congress are elected: state courts or state legislatures.

The election of federal officeholders is governed by the federal constitution. As sovereign entities, the States had substantial powers prior to the adoption of the Constitution and retained much of this authority, even after the Constitution was adopted. *See generally* U.S. Const. amend. X. However, the election

of federal officers was not one of the States' inherent powers. The existence of federal offices derives from the Constitution, and it is only through the delegation of authority in the Constitution that states (or the organs thereof) have the power to regulate federal elections. Accordingly, state courts do not have an inherent power to opine on federal elections as they would over other subject matter, such as limitations on the general police power.

In delegating authority to regulate federal elections, the Constitution explicitly commits determinations about the "time, place, and manner" of federal elections to "the legislature" of the state. This textual commitment is significant. First, the term "legislature" was a commonly understood term at the time of the Framers, and at minimum meant the body that exercises legislative authority in the State. Second, a review of the text of the Constitution shows that the Framers drew deliberate and meaningful distinctions between the "legislature" and other branches of state government, such as the judicial or executive branch. Third, the significance of these distinctions is confirmed by the history of the Constitution and Articles of Confederation, which both reflect careful consideration and deliberate choices to assign authority to the "legislature," rather than the State as a whole or another branch of the government thereof. Finally, the Court's decision in *Arizona Independent Redistricting Commission*, 576 U.S. 787, does not compel a different result; however broadly the "legislature" is defined, it does not include the state courts of North Carolina.

The process of redistricting is an inherently political process that the Framers properly assigned to the political branches of government. Some have sought to characterize this case as a conflict between a substantive State constitutional provision and a State legislature. The issue is better framed as a question of who gets to decide? Who gets to decide initially what the best map is; who gets to decide if a violation of the state constitution has occurred; and, if so, who gets to decide the proper remedy? The Framers were far more comfortable than many today with the idea that not every provision of the Constitution would have a judicial remedy. Some provisions would need to be enforced by the political branches. To that end, the Framers assigned the task of regulating the time, place, and manner of elections to the governing institutions with the greatest institutional competence to handle an inherently political task, the state and national legislatures. The proliferation of election litigation that has become common place today is a comparatively modern innovation and should not color interpretations of the original meaning of the Elections Clause.

Finally, the central role of federal courts in election disputes today, particularly relative to state institutions, does not invalidate a textualist interpretation of the Elections Clause on originalist grounds. The current role of federal courts in election disputes derives its authority from post-ratification amendments, particularly the Fourteenth Amendment, and largely came into its own through shifts in the Court's jurisprudential approach to districting cases in the middle of the Twentieth

Century. Thus, it is not properly attributable to a textualist interpretation of the Elections Clause. If interpretating the Elections Clause to limit the role of state courts elevates the role of federal courts vis-à-vis the States, it is a consequence of intervening events, not the original meaning of the Elections Clause.

What the state courts have done in this case is truly extraordinary. They have not only rejected the map approved by the General Assembly, they have also taken it upon themselves to hire their own team of experts, drawn their own map, disregarded the General Assembly's input, and purported to impose their map on the State of North Carolina by judicial fiat. "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the state legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., Statement of Justice). If the word "legislature" in the Elections Clause is to have any practical meaning, the decision of the state court must be reversed.

ARGUMENT

I. State Authority Over Federal Elections Derives from the Constitution

"For more than a century, this Court has recognized that the Constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' to regulate federal elections." *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from the denial of certiorari) (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). This is because the ability to regulate elections for federal office is a power that was delegated to the States under the Constitution; it is not a power reserved to the States to be exercised in the any manner they see fit. *See*, *e.g.*, *Cook v. Gralike*, 531 U.S. 510 (2001); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

"[A]s the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself." *United States Term Limits, Inc.*, 514 U.S. at 805. "It is no original prerogative of state power to appoint a representative, a senator, or a president for the union." *Cook*, 531 U.S. at 522 (quoting 1 Story § 627); *see also generally Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, 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" under the federal Constitution). Accordingly, "[t]his case is governed . . . by the Federal Constitution. The States do not . . . 'retain autonomy to establish their own governmental processes' . . . if those 'processes' violate the United States Constitution." *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 827 (Roberts, C.J., dissenting).

"By process of elimination, the States may regulate the incidents of [congressional] elections . . . only within the exclusive delegation of power under the Elections Clause." *Cook*, 531 U.S. at523. Thus, "[t]he question presented is one of federal not state law because the state legislature, in promulgating rules for congressional elections, acts pursuant to a constitutional mandate under the Elections Clause." *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from the denial of application for stay).

II. The Text of the Constitution Assigns Regulating the Manner of Elections to State Legislatures, Not State Courts

"The Framers' actual words put these cases in proper perspective." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 56 (2012) ("As Justinian's *Digest* put it: *A verbis legis non est recedendum* ('Do not depart from the words of the law')." (quoting Digest 32.69 pr. (Marcellus))).

The Elections Clause of the Constitution states: "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). This "language specifies a particular organ of state government, and [the Court] must take that language seriously." *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay).

A. The Term "Legislature" Was Commonly Understood to Mean the Body that Exercised Legislative Power

In *Arizona Independent Redistricting Commission*, the Chief Justice laid out the how the text and history of the Constitution confirms that "legislature" means just that, the body in the state that exercises legislative power. *See Arizona Indep. Redistricting Comm'n*, 576 U.S. at 824 (Roberts, C.J., dissenting). The text of the Constitution, as well as the original public meaning of the term "legislature," confirm that the Elections Clause means exactly what it says: "state legislatures – not federal judges, not state judges, not state governors, not other state officials – bear primary responsibility for setting election rules." *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

The term "legislature" "was not a term of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). Rather, "[a] Legislature was then the

representative body which made the laws of the people." *Id.* To wit, "Noah Webster's heralded American Dictionary of the English language defines 'legislature' as '[t]he body of men in a state or kingdom, invested with power to make and repeal laws" and notes that "[t]he legislatures of most of the States in America . . . consist of two houses or branches." *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 828 (Roberts, C.J., dissenting) (quoting 2 An American Dictionary of the English Language (1828)). State courts generally are not the body invested with power to make or repeal laws, nor do they typically consist of "two houses."

This view is confirmed by the fact that "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Id.* (quoting Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 147, n. 101 (2015)).

Moreover, this differentiation between branches of State governments is reflected in other contemporary writings. For example, Federalist 22 states "[t]he treaties of the United States, under the present Constitution, are liable to the infractions of *thirteen different legislatures*, and *as many different courts of final jurisdiction*, acting under the *authority of those legislatures*." Alexander Hamilton, Federalist 22 (Dec. 14, 1787), available at https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493335, (emphasis added).

B. The Framers Drew a Distinction Between the "Legislature" and Other Branches of State Government

i. The Text of the Constitution Distinguishes Between the "Legislature" and Other Branches of State Government

For the Framers, the term "legislature" was not synonymous with "State;" it meant then, as it means now, the legislative branch of the State government, distinct from the other branches of State government.

It is a general contextual canon of construction that "[a] word or phrase is presumed to bear the same meaning throughout a text" while "a material variation in terms suggests a variation in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 170 (2012). "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 829 (Roberts, C.J., dissenting).

"The Constitution includes seventeen provisions referring to a State's 'Legislature.' . . . Every one of those references is consistent with the understanding of a legislature as a representative body," while "many of them are only consistent with an institutional legislature." *Id*. (citations omitted).

For example, six provisions explicitly distinguish the State legislature from either the State executive or judiciary:

- " . . . if Vacancies happen by Resignation, or otherwise, during the Recess of *the Legislature* of any State, *the Executive* thereof may make temporary Appointments until the next Meeting of *the Legislature*, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2 (emphasis added);

- "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of *the Legislature*, or of *the Executive* (when *the Legislature* cannot be convened), against domestic violence." U.S. Const. art. IV, § 4 (emphasis added);

- "The Senators and Representatives before mentioned, and the Members of the several *State Legislatures*, and *all executive and judicial Officers*, both of the United States and of the Several States shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. Const. art. VI, cl. 3 (emphasis added);

- "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, *the Executive and Judicial officers of a State*, or *the members of the Legislature thereof*, is denied to any of the male inhabitants

of such State . . .” U.S. Const. amend. XIV, § 2 (emphasis added);

- “No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an office of the United States, or as *a member of the State Legislature*, or as *an executive or judicial officer of any State*, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.” U.S. Const. amend. XIV, § 3 (emphasis added);

- “When vacancies happen in the representation of any such State in the Senate, *the executive authority of such State* shall issue writs of election to fill such vacancies; *Provided*, [emphasis in original] That *the legislature* of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as *the legislature* may direct.” U.S. Const. amend. XVII, cl.2 (emphasis added).

“This juxtaposition of different branches suggests that, just as references to a state’s executive are best construed as referring to its governor, references to a state’s legislative branch are best construed as referring to its main lawmaking body comprised of elected representatives.” Morely, *The Intratextual*

Independent 'Legislature' and the Elections Clause, 109 Nw. U. L. Rev. Online at 140 (2015). .

An additional two clauses refer to "branches" of the State legislature, which only make sense as a reference to an institutional legislative body. *See* U.S. Const. art. I, § 2 cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous *Branch of the State Legislature*." (emphasis added)); U.S. Const. amend. XVII, cl. 1 ("The electors in each State shall have the qualifications requisite for electors of the most numerous *branch of the State legislatures*." (emphasis added); *see also Arizona Indep. Redistricting Comm'n*, 576 U.S. at 830 (Roberts, C.J., dissenting) (noting that Article I, section 2, clause 1's "reference to a 'Branch of the State Legislature' can only be referring to an institutional body . . . .").

Finally, there is the specific example of the Seventeenth Amendment and the direct election of U.S. Senators. Article I, section 3, clause 1 reads "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote." U.S. Const. art. I, § 3 cl. 1. As the Chief Justice has noted, reading "Legislature" in this clause as anything other than the institutional branch of state government makes the proponents of the Seventeenth Amendment "chumps" and "renders the Seventeenth Amendment [providing for the direct election of U.S. Senators] an 86-year waste of time." *Arizona Indep.*

Redistricting Comm'n, 576 U.S. at 825, 832 (Roberts, C.J., dissenting); *see also Hawke*, 253 U.S. at 228 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.").

ii. The History of the Constitution Confirms that Distinguishing the "Legislature" from the Other Branches of State Government was a Deliberate Choice

The history of the Constitution confirms that the Framers made a deliberate choice to distinguish the "legislature" from the other branches of state government and from the "State" more broadly.

As the Chief Justice has observed, "[t]he first known draft of the [Elections] Clause to appear at the Constitutional Convention provided that 'Each state shall prescribe the time and manner of holding elections.'" *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 836 (Roberts, C.J., dissenting) (quoting 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836)). This "insertion of 'the legislature' indicates that the Framers thought carefully about which entity within the State was to perform congressional districting." *Id.*

The history of the development and adoption of the Articles of Confederation further confirm that this allocation of authority was the product of careful

deliberation. As scholars have noted, "[t]he 'legislature' language adopted by the Framers for the Elector Appointment and Elections Clauses closely resembles the 'legislature' language of Article V of the Articles of Confederation." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 481 (2022) (citations omitted). "Given the textual similarities, the Framers' decision to use the 'legislature' language again in the new Constitution should be viewed in light of their prior experience under the Articles." *Id.* at 482 (citations omitted).

In preparing the Articles of Confederation, the Framers confronted the same problem that the Elections Clause is designed to address: how to select members of the national legislature. In 1775, Benjamin Franklin submitted a "Sketch of Articles of Confederation" to the Continental Congress. *See Sketch of Articles of Confederation*, National Archives at Philadelphia, https://www.archives.gov/philadelphia/exhibits/franklin/articles.html (Accessed Aug. 26, 2022). This document served as the "framework" for John Dickinson, who is generally believed to have drafted much of the Articles of Confederation, and the committee that submitted the final version of the Articles of Confederation. *Id.*; *see also* Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. at 465-66 (2022). Franklin proposed that delegates to the "General Congress" be elected "at such Time and Place as shall be agreed on in [] the next preceding Congress." *Id.* at 466 (quoting 2 Journals of the

Continental Congress 1774-1789, at 196 (Worthington C. Ford ed., Gov't Prtg. Off. 1905)).

The first draft of Dickinson in the summer of 1776 built on Franklin's framework, but provided that instead of being appointed at a time and place set by Congress, delegates would be "Annually appointed by Each Colony." *Id.* at 466 (quoting 4 Letters of Delegates to Congress, 1774-1789, at 252 (Paul H. Smith et al eds., Lib. Of Cong. 1979)). It further granted "a power reserved in Each Colony to supersede the Deligates [*sic*] thereof at any time within the year and to send new Deligates [*sic*] in their Stead for the Remainer of the year." *Id.* at 467.

The next draft prepared by Dickinson shifted to something more familiar to modern readers, providing "Delegates shall be annually appointed by Legislature of each Colony or such Branch thereof as the Colony shall authorize for that purpose" with "a Power reserved to those who appointed the said Delegates, to supersede them, or any of them, at any Time within the Year, and to send new Delegates in their stead for the Remainder of the Year." *Id.* at 467 (quoting 4 Letters of Delegates to Congress, 1774-1789, at 241 (Paul H. Smith et al eds., Lib. Of Cong. 1979)).

The third (and final) draft prepared by Dickinson before the draft Articles were read to Congress provided "Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct," with "a Power reserved to those who appointed the said Delegates, respectively to recal [*sic*] them or any of them at any time within the year,

and to send new Delegates in their stead for the Remainer of the Year." *Id*. at 468 (quoting 5 Journals of the Continental Congress 1774-1789, at 549-50 (Worthington C. Ford ed., Gov't Prtg. Off. 1906)).

During debate, Congress made two additional non-substantive changes to Dickinson's draft: "First, 'should be annually appointed' was changed to 'shall be annually appointed.' Second, the power to 'recal [*sic*]' delegates was now reserved 'to each State,' as opposed to 'those who appointed the said Delegates.'" *Id*. at 469 (quoting 5 Journals of the Continental Congress 1774-1789, at 680 (Worthington C. Ford ed., Gov't Prtg. Off. 1906)). This later change was intentional and specifically meant to draw a distinction between the "legislature" and the "State" writ large: "According to John Adams' notes of the debates on July 26, 1776, the second change occurred after Francis Hopkinson of New Jersey moved 'that the power of recalling delegates be reserved to the State, not to the Assembly, because that may be changed.'" *Id*. at 469 (quoting 6 Journals of the Continental Congress 1774-1789, at 1077 (Worthington C. Ford ed., Gov't Prtg. Off. 1906)).

The end result was that, under the Articles of Confederation, "delegates [to Congress] shall be annually appointed in such manner as the legislature of each state shall direct." U.S. Articles Of Confederation, art. V.

The Framers experience drafting and living under the Articles of Confederation show that reference to the "legislature" in the Elections Clause

is neither a quirk of history nor a shoddy shorthand for referring to the State as a political entity. The drafters of the Articles of Confederation took the distinction between assigning powers and responsibilities to the "legislature" versus the "State" seriously and, as John Adams' notes suggest, made specific changes to the language of the Articles of Confederation to effectuate their preferences in this regard.

Based on the temporal proximity, textual similarity, and history of the Elections Clause itself, it is clear that there is no hidden meaning in the Elections Clause. When the Framers used the word "legislature," they meant the legislature. They did not mean state courts.

C. Arizona Independent Redistricting Commission Does Not Compel an Alternative Result in this Case

For the reasons set forth in the Chief Justice's dissent, *amici* believe that *Arizona Independent Redistricting Commission* was wrongly decided. Nevertheless, it is not necessary to revisit that decision to resolve this case: however broadly the term "legislature" is defined, it does not include the state courts of North Carolina.

In *Arizona Independent Redistricting Commission*, the Court held that the creation of an "Independent Redistricting Commission" by ballot initiative to create maps for Congressional elections did not violate the Elections Clause. In doing so, the Court acknowledged that redistricting is a "legislative

function." *See*, *e.g.*, *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 808. It further concluded that, under Arizona law, the people of the State were duly authorized to perform legislative functions. *See*, *id.* at 795, 796 ("[T]he Arizona Constitution 'establishes the electorate [of Arizona] as a coordinate source of legislation' on equal footing with the representative legislative body. . . . 'General references to the power of the "legislature" in the Arizona Constitution 'include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through initiative.'" (citations omitted)).

Put differently, the Court acknowledged that the Elections Clause assigns redistricting exclusively to the "legislature," but concluded that under State law, the entire electorate of Arizona was part of the "legislature" because it was authorized to exercise legislative power.

Nothing in the Court's syllogism is contrary to Petition's claims in this case. State courts are generally not "legislatures;" while there may be some state-specific exceptions, unlike the electorate of Arizona, they generally do not perform "legislative functions."

This is particularly true in North Carolina. Unlike the Constitution of Arizona, the Constitution of North Carolina vests the legislative power of the State in the General Assembly. *Compare* NC 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.") *with* AZ

Const. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."); *see also Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief) ("Everyone agrees . . . that the North Carolina Constitution expressly vests all legislative power in the General Assembly.").

Moreover, like the people of Arizona, the people of North Carolina knew how to divide authority between branches of government when they so choose. To wit, the "judicial power of the State" is generally vested in the state courts, except that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." NC Const. art. IV, §§ 1, 3. They did not do so for the legislative power.

Regardless of whether the people of a state are part of the "legislature" for purposes of the Elections Clause, the state courts, particularly in North Carolina, are not. It is not necessary to revisit *Arizona Independent Redistricting Commission* to resolve this

case: there is only one state "legislature" in North Carolina and it is the General Assembly.

III. Redistricting is an Inherently Political Act that the Framers Properly Assigned to the Political Branches

Many critics of Petitioners' position have sought to frame the issue as one of whether state legislatures are bound by state constitutions when engaged in congressional districting. *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*, Supreme Court Review (2022), https://www.journals.uchicago.edu/doi/abs/10.1086/720128; Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445 (2022). This framing misstates the question. "The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy." *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004).

Redistricting is an inherently political process. To wit, "[t]he one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests." *Colegrove v. Green*, 328 U.S. 549, 554 (1946); *see also Vieth*, 541 U.S. at 285 (noting "unsurprisingly [districting] turns out to be root-and-branch a matter of politics."); *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in

judgment) ("[T]he legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out-by the very parties that are responsible for this process-present a political question in the truest sense of the term."). This is because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), and "in most cases will implicate a political calculus in which various interests compete for recognition." *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

Given the political nature of the redistricting process, "the Framers' decision to entrust districting to political entities," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019), makes sense. "[A]s a Justice with extensive experience in state and local politics" noted, *Id.* at 2498, the courts are the wrong place to resolve these types of highly political questions: "[t]o turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues." *Davis*, 478 U.S. at 145 (O'Conner, J., concurring in judgment). "Legislators can be held accountable by the people for the rules they write or fail to write[,] . . . make policy and bring to bear the collective wisdom of the whole people when they do, . . . enjoy far greater resources for research and factfinding[,] . . . [and] must compromise to achieve the broad social consensus necessary to enact new laws . . . ." *Democratic Nat'l Comm.,*141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay). State courts generally cannot and do not. Given their institutional

competencies, the Framers' decision to vest regulating the time, place, and manner of federal elections in legislatures, rather than state courts, makes tremendous sense.

This does not mean that the Framers were oblivious to the potential problems that might arise if the legislatures engaging in redistricting. *See Rucho*, 139 S. Ct. at 2496 ("The Framers were aware of electoral districting problems . . . .").

As the Court has observed, "[p]olitical gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives." *Vieth*, 541 U.S. at 274. For example, in 1732 several officials reported that the Governor of North Carolina "had proceeded to 'divide old Precincts established by Law, & to enact new Ones in Places'" in order to either "'endeavour by his means to get a Majority of his creatures in the Lower House' or to disrupt the assembly's proceedings." *Id.* at 274 (quoting 3 Colonial Records of North Carolina 380-81 (W. Saunders ed. 1886)).

Likely aware of these potential issues (among others), the Framers "considered what to do about" districting concerns. *Rucho*, 139 S. Ct. at 2496.

Unlike today, the Framers were far more comfortable with the idea that not every problem had

a judicial solution, and that certain constitutional questions would be decided by the political branches of government. As scholars have noted, "[a]t the time of the Founding, the court litigation that we see today concerning election design, such as redistricting, was just not a thing." Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. at 501-02 (2022).

This was in part because "[t]he notion that judges could invalidate all governmental actions inconsistent with their interpretation of the constitution . . . would have been considered far beyond the scope of legitimate judicial power." *Id.* at 503 n. 253 (quoting G. Alan Tarr, *Understanding State Constitutions*, at 72 (1998)); *see also generally* Sylvia Snowiss, *Judicial Review and the Law of the Constitution*, at 1 (1990) (Asserting that from Independence through *Federalist 78* "judicial authority over unconstitutional acts was often claimed, but its legitimacy was just as often denied."). Tellingly, even as the Court asserted "[i]t is emphatically the province and duty of the judicial department to say what the law is," it recognized that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this Court." *Marbury v. Madison*, 5 U.S. 137, 170, 177 (1803).

In light of the institutional competencies, when considering what to do about redistricting challenges, the Framers looked to another political institution, the national legislature, as the primary check on the state legislatures. As the Court has noted, "[w]hether to

give that supervisory authority to the National Government was debated at the Constitutional Convention." *Rucho*, 139 S. Ct. at 2495. "During the subsequent fight for ratification, the provision remained a subject of debate," with Federalists defending the Elections Clause in part on the grounds that "the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment." *Id.* (citing M. Klarman, *The Framers' Coup: The Making of the United States Constitution*, at 340-42 (2016)).

The result is that "[t]he Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action" and instead "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." *Colegrove*, 328 U.S. at 556. For example, the Court has consistently held that the Guaranty Clause, which formed the basis of many election challenges prior to the mid-Twentieth Century, is non-justiciable. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 218-26 (1962) (describing the history of the non-justiciability of the Guaranty Clause). The reason is not that the Guaranty Clause is unimportant. Rather, it is because "[u]nder this article of the Constitution it rests with Congress to decide what government is the established one in a State. . . . [T]he right to decide is placed there, and not in the courts." *Luther v. Borden*, 48 U.S. 1, 42 (1849).

With limited exceptions, such as challenges under the Federal constitution such as "one man, one vote" challenges, *see Baker v. Carr*, 369 U.S. 186 (1962), and challenges based on race, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court has recognized that redistricting presents political questions that are properly resolved by the political branches of government. *See, e.g.*, *Rucho*, 139 S. Ct. at 2495. Just as the federal courts "do[] not intervene" when "the Constitution assigns a particular function wholly and indivisibly to another department," *Baker*, 369 U.S. at 246 (Douglas, J., concurring), the state courts lack authority to intervene where there Elections Clause has assigned determining the time, place, and manner of elections to another department, the state legislature.

The question in this case is "who decides?" Is it the state legislature, or the state court that draws legislative districts? The federal constitution assigns this responsibility to the state legislature. It assigns responsibility to the national legislature as a backstop to prevent abuses. Through subsequent amendments, it authorizes the federal courts to step in where there are equal protection violations. What it does not do is carve out a role for the state courts, particularly where, as in this case, they are superseding the determination of the legislature.

IV. The Shift of Election Cases to Federal Courts Does Not Render this Interpretation Un-Originalist

Some have criticized an interpretation of the Elections Clause that limits state court authority as un-originalist based on the assertion that it "gives near carte blanche to *federal* judges, when the key point of Article II's election language (and the companion language of Article I) was to empower *states*." Vikram David Amar and Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, Supreme Court Review (2022), https://www.journals.uchicago.edu/doi/abs/10.1086/720128. This critique conflates the consequence of comparatively recent developments in the Court's election jurisprudence with the original meaning of the Elections Clause.

Prior to the mid-Twentieth Century, substantive redistricting questions were generally held to be nonjusticiable political questions. *See Colegrove v. Green*, 328 U.S. 549 (1946). That began to change by the early 1960s, as the Court began to interpret post-ratification amendments, particularly the Fourteenth Amendment, as creating a new justiciable avenue for challenging redistricting decisions. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that Petitioners stated a cause of action under the Fourteenth and Fifteenth Amendment to challenge local districting decisions); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that

districting decisions were justiciable under the Fourteenth Amendment).

To the extent that the effect of a proper reading of the Elections Clause is to place greater authority in the hands of federal judges relative to state courts, it is a consequence of the development of the Court's approach to election cases since at least the mid-twentieth century. A proper reading of the Elections Clause as an empowerment of state legislatures (but not state courts) is fully consistent with the idea that the Elections Clause was originally intended to bolster states.

CONCLUSION

The Constitution clearly assigns state legislatures authority and responsibility to regulate the time, place, and manner of elections. In doing so, it does not contemplate a role for the state courts. Accordingly, the decision of the state court should be vacated.

Respectfully submitted,

GARY M. LAWKOWSKI
Counsel of Record
Dhillon Law Group, Inc.
2121 Eisenhower Avenue,
Suite 402
Alexandria, VA 22314
703-965-0330
GLawkowski@DhillonLaw.com

MICHAEL BOOS
DANIEL H. JORJANI*
Citizens United
Citizens United Foundation
The Presidential Coalition
1006 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
202-547-5420
MichaelBoos@CitizensUnited.org
DanielJorjani@CitizensUnited.org
*Application for Admission Pending

Counsel for amici curiae Citizens United, Citizens United Foundation, and the Presidential Coalition

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