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 *AMICUS CURIAE* MICHAEL L. ROSIN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Amicus curiae **Michael L. Rosin** is an independent scholar who has conducted extensive historical research and analysis about the interstate apportionment of the United States House of Representatives.[1] *See, e.g., The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46(2) HISTORICAL METHODS 57 (2013); *The Three-Fifths Rule and the Presidential Elections of 1800 and 1824*, 15(1) UNIVERSITY OF ST. THOMAS LAW JOURNAL 159 (2018). For a complete listing of his published scholarship, see https://orcid.org/0000-0001-5029-3073.

Mr. Rosin's research on interstate apportionment—in particular his careful review of the deliberations of the Thirty-Ninth Congress—formed the basis of a merits-stage amicus brief in *Trump v. New York*. *See* Brief of *Amicus Curiae* Michael L. Rosin, *Trump v. New York*, No. 20-366 (Nov. 13, 2020).

He has also conducted extensiveresearch on the Electoral College. Based on that work, Mr. Rosin submitted petition-stage and merits-stage amicus briefs in *Chiafalo et al. v. Washington* and *Colorado Department of State v. Baca et al. See* Brief of *Amici Curiae* Michael L. Rosin et al., *Chiafalo,* No. 19-465 & *Baca*, No. 19-518 (Mar. 6, 2020); Brief of *Amici Curiae*

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[1] All parties have filed written consents to the filing of briefs by amici curiae with the Clerk of the Court. No party nor party's counsel authored this brief in whole or in part, nor made a monetary contribution intended to fund its preparation or submission. No person other than amicus or his counsel made a monetary contribution to its preparation or submission.

Michael L. Rosin & David G. Post in Support of Petition for Certiorari, *Chiafalo,* No. 19-465 & *Baca*, No. 19-518 (Nov. 6, 2019). He also submitted amicus briefs in *Chiafalo* and *Baca* to the Washington Supreme Court and Tenth Circuit Court of Appeals, respectively.

As Congress attended to the *inter*state apportionment of the House it had the opportunity to consider issues related to districting *within* the states, as it did most especially in 1842, 1872, and 1911. Drawing on his detailed research of this history, Mr. Rosin seeks to assist the Court by marshaling key historical evidence concerning Congress's exercise of its power under the Elections Clause.

SUMMARY OF ARGUMENT

On the surface, this case looks like the next step in the precedential line that currently ends with *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), but it is more properly viewed as a successor to *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.*, 576 U.S. 787 (2015) [hereinafter AIRC]. *Rucho* concerned the *content* of a congressional districting plan. *See* 139 S. Ct. at 2506-07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."). This case, like *AIRC*, is about the *process* for adopting one.

In *AIRC*, the Court held that a congressional districting plan drawn by a state's independent districting commission (and not its legislature) is valid and can be implemented by the state. *See* 576 U.S. at 811, 824.

This case requires the Court to answer a question about the other end of the districting process: whether a congressional districting plan drawn by a state legislature

can be subject to review and revision by the state's judiciary under state law.

This question revolves around the powers granted to Congress by the Elections Clause:

> 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 choosing Senators*. U.S. CONST., art. I, § 4 (emphasis added).

Petitioners assert that "[t]he Court's analysis in this case must begin with the Constitution's text, *and it can end there as well*." Pet. Br. at 13 (emphasis added). But the second half of the Elections Clause empowers Congress to act, making the genesis, process, and substance of congressional action over time critical to assessing the scope of any actor's Elections Clause authority. Neither petitioners nor their amici undertake this analysis.

Congress first exercised its Elections Clause power with respect to districting in 1842 when it required states to elect Representatives from single member districts. 5 Stat. 491 (1842). Concerned that a gerrymandered legislature might draw gerrymandered House districts, in 1911 Congress adopted statutory language clarifying that the power to district is not limited to state legislatures. *See* 37 Stat. 13, 14 (1911). Its most recent exercise of its Elections Clause authority yielded the following provision, now codified as 2 U.S.C. § 2c (1967):

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, *there 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. 81 Stat. 581 (1967) (emphasis added; cleaned up).

The plain text of the Elections Clause gives Congress the authority to declare that the requisite number of House districts "shall be established by law." Petitioners' position relies on and requires the illogical and counter-textual view that the first part of the Elections Clause prevents Congress from passing a law that authorizes actors other than a state legislature to participate, even though the second part of the Clause unequivocally says Congress "may make or alter such regulations" (other than the "places of choosing Senators"). The most logical interpretation and application of the Elections Clause is that it gave Congress the authority to do what it did by enacting 2 U.S.C. § 2c: enabling states to create districting processes not limited to their legislatures.

The historical record confirms the absurdity of this reading. First, the history of both the Constitutional Convention and state ratifying conventions demonstrate that the Framers rejected giving state legislatures exclusive control over elections. Next, the historical

context in which the states were operating as they approached the first House elections in 1788-1789 nullifies the claim that "there is no evidence that anyone suggested the judiciary should draw congressional districts." *Amicus Curiae* Br. of the Am. Legislative Exch. Council at 9 (Sept. 6, 2022) [hereinafter ALEC Br.].

Finally, as explained in Part III, throughout our history Congress has revisited the interstate apportionment of the House repeatedly, providing natural opportunities to address *intra*state districting. The debates and the outcomes each Congress reached—beginning in 1842 and culminating in the 1967 passage of 2 U.S.C. § 2c—together show that Congress consistently understood that the Elections Clause empowers it to authorize *states*, and not just *state legislatures*, to regulate elections *by law*.

In sum, the historical record shows that North Carolina's actions here—including its enactment of statutes allowing for judicial review of districting plans, and its courts' intervention—are consistent with the Elections Clause and authorized by 2 U.S.C. § 2c.

ARGUMENT

I. Constitutional Convention and Ratification

After debate and discussion about the Elections Clause, the Constitutional Convention and the states' ratifying conventions ultimately accepted James Madison's argument that "the Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections." 2 *The Records of the Federal Convention of 1787*, 240 (Max Farrand ed., Yale rev. ed. 1937) [hereinafter Farrand]. Along the way, the notion that state legislatures did (or

should) possess unchecked power over elections was raised and rejected.

During the Constitutional Convention, the Committee of Detail had drafted the following text:

> The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States. *Id.* at 165.[2]

The Convention quickly accepted the first part of this clause. *Id.* at 239. The second part, however, faced some resistance:

> Mr. Pinkney & Mr. Rutlidge moved to strike out the remaining part viz "but their provisions concerning them may at any time be altered by the Legislature of the United States." The States they contended could & must be relied on in such cases. *Id.* at 240.

Madison rebuffed that view, explaining why the Elections Clause should not, and does not, confer an "uncontrolled right" on state legislatures alone:

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[2] Farrand writes "Madison copied the report into his Debates," 2 Farrand at 177 n.3, and presented its text as follows: "The times and places and [the] manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States."

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. *Id.*

As the discussion continued, Madison honed in on the central issue in this case—which government actor(s) should have authority over the House districting process. He identified critical questions like whether the state "*should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district*; these & many other points would depend on the Legislatures. and might materially affect the appointments." *Id.* at 240–41 (emphasis added). And he recognized the potential pitfalls of giving state legislatures the unchecked power Petitioners claim they have:

> Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, *the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the*

> *Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. Id.* at 241 (emphasis added).

Madison and the Convention perceived a fatal defect in the approach now promoted by Petitioners: Petitioners' view would allow an unfairly apportioned state legislature to unfairly apportion its House districts—without any means of redress. That's why their view did not carry the day in the ratification process. As this Court noted in *Wesberry v. Sanders*, "[s]peakers at the [state] ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures . . . and argued that the power given Congress in Art. I, 4, was meant to be used to vindicate the people's right to equality of representation in the House." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964). For example, at the Massachusetts Convention Theophilus Parsons echoed Madison's observation that a malapportioned legislature "might make an unequal and partial division of the states into districts for the election of representatives." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 27 (Jonathan Elliot ed., 1836) [hereinafter Elliot].

Suggestions to limit Congress's authority were raised but not adopted. One concern, for example, was that the "proposed Congress may make the whole state one district." 12 Brutus, *Letter IV*, N.Y. J., Nov. 29, 1787, *reprinted in* 14 *The Documentary History of the Ratification of the Constitution* 297 (Merrill Jensen et al. eds., 1976). At the New York Convention, Melancton Smith and John Lansing suggested that Congress's power be curtailed so that it could mandate election by

district but not on an at-large basis. 1 Elliot at 327–28. But that change was not made. *Id.* at 328.

In the end, the Convention and the ratification process accepted Madison's position and included the second part of the Elections Clause, giving Congress ongoing authority to alter state processes for choosing House representatives. This allocation of power reflects the foundational principles that "[t]he Constitution divides authority between federal and state governments for the protection of individuals" and "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1991) (cleaned up).

II. Districting in the First Congressional Election

Districting for the First Congressional Election was a rushed and novel affair. As states prepared to elect the First Congress in 1788-1789, drawing a fixed number of legislative districts was an unfamiliar task for ten of the eleven states to which multiple representatives were apportioned in the First Congress.[3] At that time, Virginia was the only state with functional experience at this task. Specifically, the Virginia Senate was the only state legislative body at the time whose state constitutional apportionment began with a fixed total number of seats that were then apportioned into single-member districts. *See* Virginia Constitution of 1776 *in* 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3816 (Francis Newton Thorpe ed., Government Printing Office 1909) [hereinafter Thorpe]. Virginia's 1776

[3] For the initial apportionment *see* U.S. Const., art. I, § 2, cl. 3.

"Ordinance to arrange the counties into districts, for electing senators" formed 24 single member senate districts from the state's 76 counties. 9 *The Statutes at Large*, 128–30 (William Waller Hening ed., 1822), available at https://babel.hathitrust.org/cgi/pt?id=hvd.hw2scx&view=1up&seq=136 (last visited Oct. 20, 2022).

The other ten states did not have any experience to draw on.[4] They had to learn on the job, and do so quickly.

Four of them—Connecticut, New Hampshire, New Jersey, and Pennsylvania—elected multiple representatives on a statewide basis with districts playing no role.[5] Virginia and the other six employed districts:

- Massachusetts, New York, and South Carolina, elected their representatives from single-member districts without residence requirements.[6]

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[4] Massachusetts' 1780 Constitution apportioned a fixed total of 40 state senators among thirteen districts, twelve of which were formed from individual counties with the thirteenth formed by combining Dukes (Martha's Vineyard) and Nantucket Counties, a much simpler task than Virginia's senate apportionment. *See* Mass. Const. of 1780, Ch. I, Sec. II, Art. I, *in* 3 Thorpe, at 1895.

[5] For Connecticut *see*, 2 *The Documentary History of the First Federal Elections* 24 (Merrill Jensen, Robert A. Becker, and Gordon DenBoer eds., Wisconsin 1976–1989). (Hereinafter cited as *DHFFE*.) For New Hampshire *see* 1 *id.* at 790. For New Jersey *see* 3 *id.* at 16–17. For Pennsylvania *see* 1 *id.* at 300.

[6] For Massachusetts *see* id. at 509–10. For New York *see* 3 *id.* at 361. For South Carolina *see* 1 *id.* at 167.

- North Carolina and Virginia, elected their representatives from single member districts with a requirement that the representatives be an inhabitant of the district.[7]
- Georgia and Maryland, elected their representatives on a statewide basis but drew districts to impose a residence requirement.[8]

Only one of those states divided an existing political subdivision between House districts. New York's geography forced it to divide its largest county once it decided to elect its six representatives by district. Albany County, with roughly thirty percent of its population, straddled the Hudson River. Only lightly populated Montgomery County, with less than one-fourth Albany County's population, lay to its west. The bulk of Albany County lay west of the Hudson River. That portion was joined with Montgomery County to form one district. The part of Albany County east of the Hudson was joined with Clinton, Columbia, and Washington counties and other parts of New York to form another district. 3 *id.* at 361.[9] Every other state that drew districts left all of their counties undivided as did New York with every county other than Albany County.

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[7] For North Carolina *see* 4 *id*. at 347. For Virginia *see* 2 *id*. at 293–94.

[8] For Georgia *see id*. at 457. For Maryland *see id*. at 138.

[9] For the districtings in the other states *see* the state by state citations just given or Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts*, 1789–1983, 224, 234, 235, 247, 256, 267, 274 (Free Press 1982).

Even Delaware, which elected a single representative, utilized its three counties as districts for electing its lone representative. Its 1788 statute gave each voter *two* votes for candidates "one of whom at least shall not be an Inhabitant of the same County with themselves." 2 DHFFE at 71.

In sum, districting was a novel task for all but one state legislature in 1788. For the most part, those states opting to draw districts for their House elections sensibly and understandably chose a path of least resistance, using existing county lines (other than the New York exception described above).

Petitioners and their amici ignore these historical facts and overplay this Court's observation in *Rucho* that "there is no evidence that anyone suggested the judiciary should draw congressional districts. 'Nor was there any indication that the Framers had ever heard of courts doing such a thing.'" *See, e.g.,* ALEC Br. at 9 (quoting *Rucho*, 139 S. Ct. at 2496). Given the historical context and the novelty of apportioning representatives for the First Congress, it is hardly surprising that the courts had yet to weigh in. Therefore, the absence of robust discussion around the judiciary's role is not probative of an affirmative intent to completely *exclude* the courts from the process.

Viewed holistically, the historical record undercuts Petitioners' enthusiastic embrace of the notion that the Framers somehow implicitly established that the judiciary had no role. And as explained below, Congressional action for most of the Nation's history reflects a settled understanding that ordinary state judicial review would be part of state districting processes.

III. Congressional Implementation of Single-Member Districting Over Time

A. The Twenty-Seventh Congress

As early as 1800, Rep. John Nicholas [DR-VA] proposed a constitutional amendment requiring that representatives be elected from single member districts. *See* Herman V. Ames, *The Proposed Amendments to the Constitution Of The United States During the First Century of Its History* 56 (GPO 1897).[10] Between 1816 and 1826, twenty-two such amendments were proposed. *Id.* at 57.

Eventually, the Whig leadership in the Twenty-Seventh Congress recognized that a constitutional amendment was unnecessary. Exercising its Elections Clause power, Congress included a single-member district requirement in the Apportionment Act of 1842. 5 Stat. 491 (1842).

The process began on April 27, 1842, when the House took up a bill expanding the House to 306 members. Committee of Elections member William Halsted, a New Jersey Whig, proposed the following addition:

> That each State shall be divided, *by the Legislature thereof*, into as many districts, composed of contiguous territory as shall be equal to the number of Representatives to which said State may be entitled in the House of Representatives of the Congress of the United States; and that each

[10] In 1832 Daniel Webster explained that the Representation Clause did not mandate election by district. S. Doc. No. 22-119 at 8 (1832) ("It goes not at all into these subdivisions of the population of a State.").

> of the said districts shall elect one Representative. Cong. Globe, 27th Cong., 2d Sess., 446 (1842) (emphasis added).

Immediately thereafter, the House agreed to South Carolina Democrat John Campbell's proposal which, among other things, deleted Halsted's explicit reference to state legislatures:

> That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said States may be entitled; no one district electing more than one Representative. *Id.*

The House spent most of the next five days debating whether Congress had the power to require House election by district, whether it had to draw the districts itself, or whether it could leave that matter to the states and, if the latter, how Congress would enforce such a mandate.[11]

Ultimately the House approved the bill calling for 306 members elected from single-member districts, containing the Campbell language quoted above. Cong. Globe, 27th Cong., 2d Sess., 471 (1842).

In the Senate, the Judiciary Committee proposed a fine-grained but significant change, referencing districts made "under the laws thereof":

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[11] For the debates *see* Cong. Globe, 27th Cong., 2d Sess., at 446–48, 451–54, 463–65, 469–71, App'x 316–22, 340–44, 347–54, 360–62, 371–73, 379–82, 397–400, 407–09 (1842).

> That in every case when a State is entitled to more than one Representative, and the election in such State shall, *under the laws thereof*, be made by districts, such districts shall be composed of contiguous territory, and each shall contain a representative population equal to the number which, by the existing ratio, shall be required for one member, as nearly as may be; and no one district shall elect more than one member. *Id.* at 496 (emphasis added).

The Committee eliminated the single-member district mandate from the House version and added text mandating that any state whose laws called for electing representatives by single-member districts must choose them from fairly apportioned districts. But the Senate soon rejected this conditional proposal, *Id.* at 563,[12] leaving Campbell's passive voice, text mandating single-member districts in place. 5 Stat. 491 (1842).

In 1842 Congress could have explicitly allocated the power to district a state to the state's legislature (as in Halsted's proposal) but it chose not to. Instead, federal law authorized districts made pursuant to "the laws" of each State, with certain conditions set by Congress.

B. The Thirty-First Congress

In 1850, during his final speech to the Senate, John Calhoun highlighted the growing population disparity

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[12] For the debate see Cong. Globe, 27th Cong., 2d Sess., at 551, 561-63 (1842). For the full Senate debate on the single-member district provision see *id.* at 555–57, 561–63, 566–68, 571–74, 576–79, 583–85, 588–91, 595–98, 601, App'x 422–24, 449–51, 457–60, 465–75, 490–93, 512–13, 583–86, 495–96, 748–50, 788–90, 792–94.

between the free states and the slave states and hinted at the very real possibility that congressional action on a post-census apportionment bill might reach an impasse if the census data happened to break on sectional lines. Cong. Globe, 31st Cong., 1st Sess., 451 (1850).[13]

Concerned that the 1850 census was already behind schedule, on April 30, 1850, Representative Samuel Vinton [Whig-OH] proposed that the census bill under consideration be made permanent, remaining in force until altered or repealed. *Id.* at 862. He also suggested choosing a size—ultimately 233—for the next House, making that size permanent until altered or repealed. *Id.* at 862–63.

Vinton understood his proposal to have two key advantages. "The first and greatest of all is, it completes the organization of the Government, and puts it beyond the reach of accident or faction from this cause." *Id.* at 863. The second was that the new apportionment could be transmitted to the states while their legislatures were still in session, avoiding the need for special legislative sessions to draw districts as had been necessary in many states following the apportionment of 1842. *Id.* One recent commentator has suggested "[t]he Democrats in Congress forced the district provision of the 1842 law to be dropped from the 1850 law." Stephen Calabrese, *An Explanation of the Continuing Federal Government Mandate of Single Member Congressional Districts*, 130 Public Choice 23, 35 (Jan. 2007). To the contrary, there simply was no debate on districting in the proceedings on this census bill (which President Taylor signed into law on

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[13] David Kaufman, a Texas Democrat, made exactly this argument during the House debate. Cong. Globe, 31st Cong., 1st Sess., 927 (1850).

May 23—just 23 days after Vinton's initial proposal). 9 Stat. 428 (1850). In fact, there was little debate on much of anything other than *the census and its contents*. *See* Cong. Globe, 31st Cong., 1st Sess., 855–63, 923–30, 939–40, 989–94 (1850). Consequently, there was neither debate nor statutory text addressing the power to district.

C. The Thirty-Seventh, Forty-Second, Forty-Seventh, Fifty-First, and Fifty-Sixth Congresses

Between 1862 and 1901 Congress continued to expand the size of the House—ready-made opportunities to address the districting issue.

For example, on June 24, 1862, Election Committee Chairman Henry Dawes [R-MA] reported H.R. 525 to the House floor. Cong. Globe, 37th Cong., 2d Sess., 2910 (1862). He told his colleagues "[t]he object of the bill is to carry out precisely the law of 1842. . . . It provides merely that members of Congress shall be elected by single districts. There is nothing else in it." *Id.* Recognizing how late in the election cycle it was, the Senate added a provision allowing Illinois to elect the additional member apportioned to it recently by the Supplemental Apportionment Act of 1862, 12 Stat. 353, "at large . . . unless the legislature of said State should otherwise provide before the time fixed by law for the election of representatives therein." 12 Stat. 572 (1862).[14]

Over the next four decades, Congress passed legislation reimplementing the single-member district requirement. While some particulars varied, those enactments shared two key characteristics: (1) They

[14] California was given an exemption to elect all three of its representatives to the Thirty-Eight Congress at large. 12 Stat. 572.

required states that did not lose seats and failed to redistrict in time for the next Congressional election to elect representatives from existing districts as "provided by law" or as "prescribed by law," with any newly added representative(s) elected at-large; and (2) They required states that lost seats and failed to redistrict in time to elect all representatives at-large.

For example, the Forty-Second Congress enacted the following provision:

> *Provided*, That in the election of Representatives to the forty-third Congress in any State which by this law is given an increased number of Representatives, the additional Representative or Representatives allowed to such State may be elected by the State at large, and the other Representatives to which the State is entitled by the districts as now prescribed by law in said State, unless the legislature of said State shall otherwise provide before the time fixed by law for the election of Representatives therein.

§ 2, 17 Stat. 28 (1872) (42nd Congress). *See also* § 3, 22 Stat. 5, 6 (1882) (47th Congress); § 4, 26 Stat. 735, 736 (1891) (51st Congress); § 4, 31 Stat. 733, 734 (1901) (56th Congress).

This consistent pattern, in turn, evinces two critical aspects of the Nation's enduring understanding about the Elections Clause's allocation of the authority to draw House districts. First, that power is shared between Congress and state legislatures—consistent with the plain language of the Clause. Second, Congress's consistent and unchallenged use of terminology like "prescribed/provided *by law*" reflects the general understanding and acceptance of the fact that laws setting

House districts were (and remain) subject to the same state-law inter-branch checks and balances as any other laws.

D. The Sixty-Second Congresses

In 1911, the Sixty-Second Congress made it crystal clear that the power to draw congressional districts was not limited to state legislatures. After restating the contiguous, fairly apportioned single-member district requirement,[15] Congress located the redistricting power *without mentioning state legislatures*.

> That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted *in the manner provided by the laws thereof* and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now

[15] *See* § 3, 37 Stat. 13, 14 (1911) ("That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.")

> prescribed by law *until such State shall be redistricted as herein prescribed*. § 4, 37 Stat. 13, 14 (1911) (emphases added).

A review of the debates shows that Congress chose advisedly to remove any reference to state legislatures, and why.

As reported to the House on April 27, 1911, the apportionment bill, H.R. 2983, stated—like its 1891 and 1901 predecessors—that its requirements were in force "until such state shall be redistricted by the legislature thereof." 47 Cong. Record 673 (1911). Indiana Republican Edgar Crumpacker registered his concern about "a temptation in all the States for the party in power to take a little advantage in constituting congressional districts, a little party advantage." *Id.* at 673–74. He pointed out that, as a practical matter, until relatively recently "there had been no other method established by any State in the Union for the redistricting, except by the legislature thereof." *Id.* at 673. State ballot initiatives and referendum processes had enabled states to "redistrict their territory for congressional purposes without the aid or assistance of the legislature." *Id.* Retaining statutory language that assigned (or purported to assign) redistricting authority specifically to the state legislature would "prevent those States from exercising that great function of redistricting their States for congressional purposes by the initiative and referendum altogether." *Id.* Accordingly, Crumpacker offered an amendment excising the italicized words from the phrases "until such state shall be redistricted *by the legislature thereof*." *Id.* at 701.[16] The House, however, rejected Crumpacker's

[16] Missouri Republican Representative Richard Barthold did not mince words in supporting Crumpacker, noting

amendment, *see* 47 Cong. Record 704 (1911), and the bill moved over to the Senate with the "legislature thereof" language intact.

On the first day of Senate debate, Ohio Republican Theodore Burton proposed replacing "by the legislature thereof in the manner prescribed," with "In the manner *provided by the laws thereof* and in accordance with the rules enumerated in section 3 of this act." *Id.* at 3436 (emphasis added). He described "the effect of the

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that the Missouri "legislature which is to do the redistricting is itself elected in badly gerrymandered districts. How, then, can you secure pure water when the spring is poisoned?" 47 Cong. Record 702 (1911). The previous Congress had considered a bill, H.R. 30566, whose text simply stated "until such State be redistricted" unadorned by any reference to the state legislature. 46 Cong. Record 2224 (1911). Rep. Barthold objected to a proposal to insert the words "by the legislature thereof" after "redistricted":

> There are quite a number of States where the people are willing to exercise their sovereign right with regard to redistricting their States. *The question of redistricting is not one reserved to the legislature by the Constitution of the United States, but it is a sovereign right of the people and the several States.* Consequently the people, if they desire to redistrict their States according to their own wish and will, without consulting the legislature, can do so by the initiative and referendum, and this amendment would take away from the people of the State the right to redistrict by that method; and for that reason I hope the amendment will be voted down. *Id.* at 2228. (emphasis added).

expression, 'by the legislature thereof'" as "a distinct and unequivocal condemnation of any legislation by referendum or by initiative." *Id.* Burton concluded: "A due respect to the rights, to the established methods, and to the laws of the respective States requires us to *allow them to establish congressional districts in whatever way they may have provided by their constitution* and by their statutes." *Id.* (emphasis added). The Senate agreed to Burton's amendment on an almost straight party line vote. *Id.* at 3556.

Immediately thereafter Missouri Democratic Senator James Reed offered an amendment narrowing the application of Burton's amendment by calling for states to "be redistricted by the legislature thereof, or by the people thereof." *Id.* The Senate defeated this amendment on an almost straight party line vote. *Id.* Ultimately, the Burton version became law. § 4, 37 Stat. 13, 14 (1911).

The vote against Reed's amendment demonstrates that Congress chose not to limit redistricting to state legislatures, and its actions respecting referenda and other means of redistricting reflect Congress's understanding that the districting power can reside in any actor provided for by the laws of the state, including an independent commission, the voters, or the courts.

As this Court recognized in *New York v. United States*, "[t]he Constitution does not protect the sovereignty of States . . . for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." 505 U.S. at 181. By the actions and debates described above, Congress made it clear that the people of each state should enjoy the benefits flowing from distributing power among the

branches and actors comprising their state governments if they so choose.

E. The Seventieth, Seventy-First, Seventy-Sixth and Seventy-Seventh Congresses

With little recorded debate or discussion, the Seventieth and Seventy-First Congresses allowed the single-member district, fair apportionment, and "by law" provisions of the 1911 Act to "expire[] by their own limitation" in 1929. *Wood v. Broom*, 287 U.S. 1, 7 (1932).[17]

The Apportionment Act of 1940 contained little more than fixes to conform the apportionment timetable to the Twentieth Amendment. 54 Stat. 162 (1940).[18] As Representative Ed Gossett [D-TX] explained to the Senate Commerce Committee a year after the Act's passage, "rather than go into technical, almost metaphysical calculations of these [two contending apportionment] methods, we concluded to change merely the dates in order to cure the hiatus left by the 'lame duck' amendment." *Apportionment of Representatives in Congress:* Hearings Before the United States Senate Committee on Commerce, Subcommittee on H.R. 2665, Seventy-Seventh Congress, First Session, on Feb. 27, 28,

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[17] Six months earlier, the Court recognized that this provision "ha[d] not been expressly repealed" as it upheld the legitimacy of a gubernatorial veto of a redistricting bill. *Smiley v. Holm*, 285 U.S. 355, 373 (1932).

[18] Section 1 contained the timetable fix for delivering the apportionment results to Congress. Section 2 amended the 1929 Census Act by giving Congress only 60 days to override an automatic reapportionment of the House. *Compare* § 2, 54 Stat. 162 (1940), with § 22(b), 46 Stat. 21, 26 (1929).

Mar. 1, 1941, 5 (G.P.O. 1941). The 1940 Act, 54 Stat. 162, was passed in such haste that no one noticed that it failed to amend that part of the 1929 Act calling for the new apportionment to go into effect with "*second succeeding Congress*." § 22(b), 46 Stat. 21, 26–27 (1929) (emphasis added). That would be the Seventy-Ninth Congress in 1945.. Further legislation would be needed.

On January 8, 1941, President Roosevelt transmitted to Congress the two apportionments of a 435 member House by the methods specified in Section 22(a) of the 1929 Census Act. House Committee on the Census, *Message from the President of the United States Transmitting a Statement Prepared by the Director of the Census,* H. Rep No. 77-45, 1 (Washington 1941). The "technical, almost metaphysical" differences between the two apportionment methods the previous Congress had decided not to delve into now became very real: If Congress did nothing, the last seat in the House would go to Republican-leaning Michigan. If Congress adopted the Method of Equal Proportions (the statutory alternative to the prevailing Method of Major Fractions) the last seat would go to reliably Democratic Arkansas. *See Dep't of Commerce v. Montana*, 503 U.S. 442, 464 n.42 (1992).

Not surprisingly, most of the debate on the Apportionment Act of 1941, § 2, 55 Stat. 761, 762 (1941), focused on apportionment methods. The Senate Commerce Committee, however, inserted a provision addressing redistricting, resuming the lineage broken in 1929. *See* 87 Cong. Record 8051 (1941). This provision, codified at 2 U.S.C. § 2a(c), uses "the districts then prescribed by the law of such State" as its starting point, without mentioning state legislatures specifically. *E.g. id.* § 2a(c)(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"). First-year Senator Harold Burton [R-OH], a member of the subcommittee that had handled the bill and a future Associate Justice of this Court, offered the sole comment on subsection 2a(c), observing that it "merely writes into the law the situation as it seems to be now settled by decisions of the courts. It clarifies and lends authority to the existing practice." 87 Cong. Record 8056 (1941).

F. The Ninetieth Congress

When this Court handed down its ruling in *Wesberry v. Sanders,* 376 U.S. 1 (1964), Representative Emanuel Celler [D-NY] had been trying for over a decade to pass legislation requiring districting based on fair apportionment. Emanuel Celler, *Congressional Apportionment-Past, Present, and Future*, 17 Law & Contemp. Probs. 268 (1952).[19] In 1965 Celler finally got a bill, H.R. 5505, through the House.[20] It required districts to be compact to prevent gerrymandering and prohibited

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[19] The account of the legislative history given here expands on the one given by Justice Stevens in his concurrence in *Branch v. Smith*. *See* 538 U.S. 254, 285–92 (2003) (Stevens, J., concurring in part and concurring in the judgment).

[20] For the committee hearings *see Congressional Redistricting.* Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-eighth Congress, second session, on H.R. 699 [and others] ... March 18-19, 1964 (Washington, U.S. Govt. Print. Off., 1964). For the floor debate see 111 Cong. Record 5080–5101 (1965).

district sizes more than fifteen percent away from a state's average district population. *Federal Standards for Congressional Redistricting*, H. REP. No. 89-140, 2–3 (1965). It also "eliminate[d] existing provisions for Representatives at Large." *Id.* at 2.

After striking Harold Burton's 1941 addition [to § 22(c) of the 1929 Census Act, *see id.* at 5, H.R. 5505 added:

> In each State entitled in the Ninetieth Congress or in any subsequent Congress to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this section, *there 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. *Id.* at 3 (emphasis added).

The Senate referred the bill to the Judiciary Committee, from which it never emerged. 111 Cong. Record 5386 (1965). In 1967, the House passed a similar bill, H.R. 2508, containing the language above. An amended version passed the Senate. Ultimately, the House but not the Senate agreed to a conference committee report and Celler's bill was not enacted.[21]

Following the Senate's rejection of the conference report its next calendar item was H.R. 2275, "A bill for the relief of Doctor Ricardo Vallejo Samala." *Id.* at 31718. It had already been reported by the Judiciary Committee.

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[21] For the House vote see 113 Cong. Record 30251 (1967). For the Senate vote see *id.* at 31712.

Id. at 30029. Almost immediately, Indiana Democrat Birch Bayh proposed adding the following text to the Samala bill:

> Sec. 2. (a) In each State (other than the States of New Mexico and Hawaii) which is entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the [1929 Apportionment Act] . . . , *there shall be established* 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. *Id.* at 31718 (emphasis added).[22]

Tennessee Republican Howard Baker then proposed a slimmer alternative:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the [1929 Apportionment Act] . . . , as amended, *there 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. *Id.* (emphasis added).

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[22] Additional text, denoted 2(b), prohibited any mid-decade redistricting "unless alteration thereof is required by a statewide special census of the United States conducted before 1970." *Id.*

It eliminated any exemptions to allow at-large election[23] and it employed Celler's phrase "there shall be established *by law*" in place of Bayh's "there shall be established." Baker explained that his purpose was

> to adopt the language of the original, amended Senate version of the redistricting bill relating to the prohibition against election of Representatives to the U.S. House of Representatives at large. . . . It has nothing to do with gerrymandering. It has nothing to do with compactness. 113 Cong. Record 31718 (emphasis added) (1967).

Gerrymandering and compactness would be left to the states to address by state law as they chose.

With Baker's amendment replacing Bayh's, *see id.* at 31719, the two of them engaged in a dialogue about the phrase "there shall be established by law":

> [BAYH] I would interpret "by law" to mean if the reapportionment is done either by the State legislatures *or by the court*. I should like to know whether the Senator from Tennessee agrees with that interpretation.
>
> [BAKER] Mr. President, in the ordinary course of events, it is clearly the province of the State legislature to establish the number, the size, and the location of congressional districts. It would be only if State legislatures failed in their performance of that duty that there would be any derivative right of the judiciary, Federal or State, to intervene. So, in answer to the question, this

[23] New Mexico and Hawaii were ultimately given reprieves for the Ninety-First Congress only. *See* 81 Stat. 581 (1967).

language would imply, to me, without equivocation, that it would be the duty of the State legislature by law to create these districts.

[BAYH] I am not making myself clear. Suppose a State legislature does not do it. Does the Senator not think that, to be consistent, we should say that *the Federal court* should not be permitted to reapportion a State and let all the legislators run at large?

[BAKER] With respectful deference to my colleague, I think not; because I believe that you are then running afoul of the very problem that is created by occasional failure of State legislatures to adhere to the provisions of article I of the Constitution.

It seems to me that the only thing we need to do or that properly should be done at this point is to provide that legislative districts shall be created. The law already exists to direct that the State legislature shall do it, and I see no reason to go any further nor to make any elaboration or extension of that language.

[BAYH] Let me rephrase the question. Take a hypothetical situation in which the State legislature has been ordered by *the court* to reapportion, and the State legislature, for reasons which I believe all of us who have sat through this discussion during the past several months can understand, would not come to agreement. Then *the court* would take it upon itself to do one of two things-to carve up the districts or to say that the Congressmen shall run at large.

…

If we are going to be sincere about this matter, if it is bad government for the legislature to say that Congressmen should run at large, then it is bad government for *the court* to have an entire group of Congressmen running at large in a State.

[BAKER] In response to that point, I agree, and I would point to my own situation in Tennessee, where the legislature was not able to agree on redistricting, and *the Federal judiciary* undertook to redistrict, did so, established boundaries by counties, and designated the areas from which Members would run.

If we should fall on those unhappy circumstances, I would greatly prefer that *the judiciary, State or Federal*, designate individual single-Member districts; running at large never really accommodates the principle of equal representation. It never really accommodates the idea that the House of Representatives is properly made up of Representatives of districts of varying interests.

[BAYH] Let me rephrase the question in light of the colloquy. When we say "as amended, there *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," we are talking about either of two situations-whether the legislature reapportions or whether *the court reapportions*.

[BAKER] The Senator is correct.

Id. at 31719–20.

When the dialogue ended the Senate agreed to Baker's proposed text. *Id.* at 31720. That language is now codified at 2 U.S.C. § 2c.[24]

The statute in force today thus reflects and is consistent with the actions of multiple Congresses for a century and a half, which have recognized and authorized House districts to be established by state law—a concept that necessarily includes ordinary state judicial review.

* * *

[24] In enacting 2 U.S.C. § 2c in 1967, Congress neglected to repeal 2 U.S.C. § 2a(c), even though its use of at-large elections directly conflicts with Baker's clearly articulated intent to eliminate the at-large option. Section 2a(c) remains today, though subordinate to § 2c. *Branch v. Smith*, 538 U.S. 254, 266–72 (2003) (Scalia J., writing for a four Justice plurality). *See id.* at 285-92 (Stevens, J., concurring in part and concurring in the judgment) (arguing that § 2a(c) had been repealed by implication).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted.

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