

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 FOR *AMICUS CURIAE*
PROFESSOR DEREK T. MULLER
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

I. The decennial drawing of single-member congressional districts occurs pursuant to federal regulations enacted by Congress. 3

 A. The statutory phrase “by law” includes state courts. 5

 B. The statutory phrase “by law” includes state constitutions. 5

 C. When Congress enacted 2 U.S.C. § 2c, members of Congress understood that state courts and state constitutions could bind state legislatures under a federal law enacted pursuant to the Elections Clause. 8

II. Section 2c is a constitutional exercise of Congress’s power..... 10

 A. This Court’s precedents recognize Congress’s power under the Elections Clause to direct states to comply with state law..... 10

 B. Section 2c is less intrusive than other exercises of power that this Court has deemed appropriate under the Elections Clause. 16

III. The North Carolina legislature recognized that
it was bound by the state constitution as
interpreted by the state supreme court when it
drew its congressional maps. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

<i>Arizona State Legislature v. Arizona Independent Redistricting Commission</i> , 576 U.S. 787 (2015)	17, 19
<i>Arizona v. Inter Tribal Council of Arizona, Inc.</i> , 570 U.S. 1 (2013)	3
<i>Branch v. Smith</i> , 538 U.S. 254 (2003).....	4, 5, 6, 7
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001).....	2
<i>Dickson v. Rucho</i> , 766 S.E.2d 238 (N.C. 2014).....	18
<i>Dickson v. Rucho</i> , 781 S.E.2d 404 (N.C. 2015).....	18
<i>Ex parte Siebold</i> , 100 U.S. 371 (1879).....	3, 10, 11, 14
<i>Harper v. Hall</i> , 868 S.E.2d 499 (N.C. 2022).....	18
<i>Hawke v. Smith</i> , 253 U.S. 221 (1920).....	13
<i>North Carolina League of Conservation Voters, Inc. v. Hall</i> , 2022 WL 2610499 (N.C. Super. Ct. Feb 23, 2022)	17
<i>Smiley v. Holm</i> , 286 U.S. 355 (1932).....	2, 14
<i>Stephenson v. Bartlett</i> , 562 S.E.2d 377 (N.C. 2002)	18
<i>Stephenson v. Bartlett</i> , 582 S.E.2d 247 (N.C. 2003)	18

Constitution

U.S. CONST. art. I, § 4, cl. 1	passim
--------------------------------------	--------

Statutes

81 Stat. 581 (1967)	3
---------------------------	---

Code

2 U.S.C. § 2a(a).....	4
2 U.S.C. § 2a(c).....	6, 7
2 U.S.C. § 2c	passim
52 U.S.C. § 20102(b)(1)	13
52 U.S.C. § 20104.....	14
52 U.S.C. § 20302(a)(6)	14
52 U.S.C. § 20302(a)(7)	14
52 U.S.C. § 20302(f)(2)	14
52 U.S.C. § 20303(b)(3)	14

Treatises

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)	2
---	---

Articles

Derek T. Muller, <i>Chameleon Congressional Districts</i> , 64 St. Louis U. L.J. 673 (2020).....	1
Derek T. Muller, <i>Electoral Votes Regularly Given</i> , 55 Ga. L. Rev. 1529 (2021)	1
Derek T. Muller, <i>Faith in Elections</i> , 36 Notre Dame J.L. Ethics & Pub. Pol’y 641 (2022)	1
Derek T. Muller, <i>Legislative Delegations and the Elections Clause</i> , 43 FLA. ST. U. L. REV. 717, 737– 38 (2016)	17
Derek T. Muller, <i>Reducing Election Litigation</i> , 90 Fordham L. Rev. 561 (2021).....	1

Derek T. Muller, <i>The Electoral College and the Federal Popular Vote</i> , 15 Harv. L. & Pol’y Rev. 129 (2021)	1
Derek T. Muller, <i>Weaponizing the Ballot</i> , 48 Fla. St. U. L. Rev. 61 (2021).....	1
Legislative History	
113 CONG. REC. 11074 (1967).....	10
<i>U.S. Congressional Serial Set</i> , 90th Cong., 1st Session, House Report No. 191 (1967).....	8
<i>U.S. Congressional Serial Set</i> , 90th Cong., 1st Session, House Report No. 435 (1967).....	8
<i>U.S. Congressional Serial Set</i> , 90th Cong., 1st Session, Senate Report No. 291 (1967).....	8
Arizona State Legislature v. Arizona Independent Redistricting Commission Oral Arg. Tr.....	16
North Carolina Joint Meeting of Committees, Criteria Adopted by the Committees (2021)	18

INTEREST OF AMICUS CURIAE¹

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SUMMARY OF ARGUMENT

The petition for certiorari in this case presents the question whether the phrase “Legislature thereof” in the Elections Clause of the Constitution bars state courts from regulating the contours of Congressional redistricting pursuant to state constitutions. But Congress has spoken, too. It has regulated the manner of drawing congressional districts by federal statute. *See* 2 U.S.C. § 2c. Congressional redistricting

¹ *Amicus* files this brief pursuant to the blanket consents filed by all parties. No party or party’s counsel authored or financially supported this brief in whole or in part. The University of Iowa College of Law provides financial support for faculty members’ research and scholarship activities, support that helped defray the costs of preparing this brief. (The College of Law is not a signatory to the brief, and the views expressed here are those of *amicus*.)

in a State now takes place pursuant to this federal statutory directive, which contemplates a role for state courts applying state constitutions. This case, therefore, can and should be resolved by analyzing § 2c as a proper exercise of Congress’s power under Article I, § 4 of the Constitution. The lower court did not address *that* question, which would obviate the need to address the broader issue raised by the petition. The North Carolina Supreme Court’s decision should be affirmed on this alternative ground.

ARGUMENT

As Justice Joseph Story explained in his *Commentaries*, “states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them.” 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 626 (1833). Therefore, State power to regulate any facet of federal elections must spring from some provision of the Constitution.

State power over the “manner” of holding congressional elections comes from the Elections Clause. U.S. CONST. art. I, § 4, cl. 1; *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). In a State, the “Legislature thereof” may prescribe the “manner of holding elections.” This is a grant of power to adopt procedural rules, a grant that is broad, *see Smiley v. Holm*, 285 U.S. 355, 366 (1932), but not unlimited, *see Cook v. Gralike*, 531 U.S. 510, 523–24 (2001); *U.S. Term Limits*, 514 U.S. at 828–36.

Crucially, however, the Elections Clause “empowers Congress to pre-empt state regulations

governing the ‘Times, Places and Manner’ of holding congressional elections.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013) (opinion of Scalia, J.). “The Clause’s substantive scope is broad.” *Id.* “The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.” *Ex parte Siebold*, 100 U.S. 371, 392 (1879).

It is thus appropriate for this Court to inquire whether Congress has exercised its power and whether the Constitution authorizes that exercise of power. And indeed Congress has given express guidance about how states conduct congressional redistricting, requiring that congressional redistricting take place “by law,” which includes the state courts construing state constitutional provisions. That exercise governs here, it is appropriate under the Constitution, and this Court can resolve the case on this ground.

I. The decennial drawing of single-member congressional districts occurs pursuant to federal regulations enacted by Congress.

In 1967, Congress enacted Public Law 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c). North Carolina—and all States with more than one Representative in the House—now draw congressional districts pursuant to the statutory obligation of 2 U.S.C. § 2c. That law provides:

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 section 2a(a) of this title, 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 (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

This statute places an obligation on States (“shall be established”) to hold congressional elections in a particular manner, i.e., by single-member districts.

The statute also specifies how single-member districts come into being: “*by law*.” This clause has been interpreted as “regulating (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations under Article I, §§ 2 and 4.” *Branch v. Smith*, 538 U.S. 254, 280 (2003) (plurality opinion of Scalia, J.). That is to say, the state must do so “by law”—which encompasses more than action by the legislature.

Congress could have used an alternative phrase. It could have specifically identified the legislature (e.g., “there shall be established in a manner directed by the legislature of each State a number of districts”). Or it could have omitted the phrase entirely (e.g., “there shall be established a number of districts”). Congress did neither, and this Court has carefully attended to that choice.

A. The statutory phrase “by law” includes state courts.

This Court interpreted 2 U.S.C. § 2c in *Branch v. Smith*, 538 U.S. 254 (2003). In an opinion by Justice Antonin Scalia, the Court held: “The clause ‘there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled’ could, to be sure, be so interpreted that the phrase ‘by law’ refers only to legislative action. Its more common meaning, however, encompasses judicial decisions as well.” *Branch*, 538 U.S. at 271 (opinion for the Court).² The Court continued, “We think, therefore, that while § 2c assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming.” *Id.* at 272.³

Section 2c speaks of single-member districts and does not offer other contours or conditions on how districts should be drawn. But the Court’s decision in *Branch* recognized that state courts may need to draw districts in some cases, and that Congress has expressly authorized them do so through this statute.

B. The statutory phrase “by law” includes state constitutions.

A plurality of the Court in *Branch* also made clear that § 2c, construed in connection with a parallel

² Justice Scalia’s opinion was partially for the Court and partially for a plurality. This brief specifies which portion it cites.

³ Although here, unlike the Mississippi legislature in *Branch*, the North Carolina legislature enacted a redistricting plan, that changed circumstance does not alter the meaning of “by law” in § 2c.

statutory provision, 2 U.S.C. § 2a(c), also contemplates the establishment of single-member districts by courts in accordance with non-preempted state law. Some background is helpful.

Section 2a(c) directs that, in certain circumstances, Representatives should be elected at-large “[u]ntil a State is redistricted in the manner provided by the law thereof.” In other words, while Section 2c requires that single-member districts be established “by law,” § 2a(c) provides for at-large districts, but only if the State has not yet been “redistricted in the manner provided by the law thereof.” Reconciling the apparent tension between the two sections was a critical aspect of resolving the dispute in *Branch*.

The plurality’s solution focused on the fact that the two sections use similar phrases—Section 2a(c)’s “by the law” mirrors Section 2c’s “by law.”

Beginning with Section 2a(c), Justice Scalia explained that, “when a federal court redistricts a State in a manner that complies with that State’s *substantive* districting principles, it does so ‘in the manner provided by the law thereof.’” *Branch*, 538 U.S. at 278 (emphasis added). “In our view,” the plurality added, “the word ‘manner’ refers to the State’s substantive policies and preferences for redistricting, as expressed in a State’s statutes, *constitution*, proposed reapportionment plans, or a State’s traditional districting principles.” *Id.*, at 277–78 (citations and quotation marks omitted) (emphasis added). Further, the plurality contrasted the reference to redistricting “in the manner provided *by the law*” of the State to earlier versions of § 2a(c) that

expressly referred to the legislature. *See id.* at 274. The upshot is that § 2a(c)'s provision for at-large elections does not apply if redistricting has been done *either* by the legislature *or* by the courts. *See id.* (“‘Until a State is redistricted’ can certainly refer to redistricting by courts as well as by legislatures.”).

The *Branch* plurality then returned to § 2c, which it found to have a complementary structure. The condition of § 2a(c)—that a State has not been redistricted “in the manner provided by the law thereof”—“can be met,” thus suspending § 2a(c)'s requirement of at-large elections, “by the very court that follows the command of § 2c” to establish single-member districts. *Id.* at 274. That is because “when a court, state or federal, redistricts pursuant to § 2c, it necessarily does so ‘in the manner provided by [state] law.’” *Id.* (alteration in original). And in doing so, the court “must follow the ‘policies and preferences of the State, as expressed in statutory *and constitutional* provisions or in the reapportionment plans proposed by the state legislature,’ except, of course, when adherence to state policy detracts from the requirements of the Federal Constitution.” *Id.* at 274–75 (citation, certain alterations, and quotation marks omitted) (emphasis added).

Thus, the phrases “by law” in § 2c and “by the law thereof” in § 2a(c) both contemplate redistricting done through the decisions of state courts. They also include the “policies and preferences” embraced in the state constitution. Accordingly, when state courts invoke the state constitution to redistrict, they establish districts “by law” as § 2c requires.

C. When Congress enacted 2 U.S.C. § 2c, members of Congress understood that state courts and state constitutions could bind state legislatures under a federal law enacted pursuant to the Elections Clause.

Amicus recognizes that legislative history is often considered weak evidence, especially legislative history about bills that were never enacted. However, to the extent members of the Court may rely on legislative history, it bears noting that members of the Congress that enacted § 2c recognized that state courts, acting pursuant to state constitutions, would play a role in redistricting. Two aspects of the legislative history illustrate the point.

First, Congress considered legislation premised on the expectation that Congress could rely on sources of law other than state legislation in “making or altering regulations” for “the manner of holding elections.” Const. Art. I., § 4, cl. 1. Specifically, a House Judiciary Committee report for H.R. 2508 considered a proposed amendment to the Act of 1929 pertaining to redistricting. The bill expressly provided, “There shall not be more than one redistricting between decennial censuses unless a particular *State constitution* requires otherwise.” *U.S. Congressional Serial Set*, 90th Cong., 1st Session, House Report No. 191, at 1, 6 (1967) (emphasis added). A Senate Judiciary Committee Report in 1967 considered the same, *U.S. Congressional Serial Set*, 90th Cong., 1st Session, Senate Report No. 291, at 7 (1967), as did the House Conference Report. *U.S. Congressional Serial Set*, 90th Cong., 1st Session, House Report No. 435, at 4 (1967).

Although the bill was never enacted, the bill that included § 2c would be adopted later that year instead. The salient point is that members of Congress recognized its authority under the Elections Clause to constrain state legislative power with an explicit reference to a state constitution.

Second, legislative history demonstrates an awareness that the decision to include or omit the word “legislature” in a statute would have consequences. Word choice mattered. Consider an exchange in Congress on April 27, 1967:

Mr. KASTENMEIER. Mr. Chairman, I rise on a slightly different point.

I recall the gentleman from New York saying in response to the question as to what compromises were made in committee, particularly as to compactness, he recited that the language now is in as reasonably a compact form as the legislature finds practicable. Actually, what the bill says is “as the State finds practicable.”

I believe there may be a view that the word “State” is a broader entity than the legislature. The point I would make to my chairman is that the word “State” may include the legislature, and it may include a court; it may include the decision of a court.

Mr. CELLER. I thank the gentleman, and I am glad he is making legislative history on that.

. . .

Mr. KASTENMEIER. Yes, the gentleman is correct. A broad construction of the word “State” would include at least a remedy for the action of a

State legislature inasmuch as an aggrieved person may go to the State court on the question of “as compact a form as practicable” if he feels aggrieved, under this bill.

Mr. CELLER. I think the gentleman is right.

113 CONG. REC. 11074 (1967). To whatever extent these floor statements are probative, then, they bolster the common-sense inference—recognized by the *Branch* plurality—that the word choice of “State” over “legislature” matters.

II. Section 2c is a constitutional exercise of Congress’s power.

Having established that in § 2c Congress authorized participation of state courts in redistricting, the Court can avoid the constitutional question raised by the petition. Instead, the constitutional question that would remain is whether that Congressional authorization is a proper exercise of Congress’s power to “make or alter such Regulations,” *i.e.*, those addressing the “manner of holding elections for . . . Representatives.” Art. I. § 4.

A. This Court’s precedents recognize Congress’s power under the Elections Clause to direct states to comply with state law.

1. This Court has said that Congress may exercise its power under the Elections Clause “to *any* extent which it deems expedient.” *Ex parte Siebold*, 100 U.S. at 392 (emphasis added). Section 2c’s incorporation of state courts and state constitutional law falls within the power as described by *Siebold*.

The holding of *Siebold* is instructive. There, the Court considered Congress's authority to impose criminal penalties for committing fraud in federal elections based on violations of state law. *Id.* at 388. This Court's holding affirmed Congress's authority to do so:

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

Siebold, 100 U.S. at 388–89.

Thus, *Siebold* recognized that Congress, in exercising its own authority under the Elections Clause, can and does incorporate state law.

2. Similarly, in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Court recognized that an action taken by an actor other than the legislature was a permissible exercise of state lawmaking authority under the Elections Clause and did not trammel the legislature's prerogative. In doing so, the Court recognized that Congress had authorized a role for such non-legislative actors.

There, the Ohio Constitution vested the "legislative power" in "the people," who could act by referendum to approve or disapprove of laws enacted in the Ohio General Assembly. 241 U.S. at 566. In 1915, the legislature enacted a congressional redistricting statute, which then faced a referendum, and the people rejected the law. *Id.* The case thus presented the question: Could Ohio exercise its constitutional power to determine Congressional districts by referendum (consistent with the state constitution), or not?

The Court started with federal statutory law. It recognized that Congress had replaced an 1891 statute, which contained the phrase "until the legislature of such state, in the manner herein prescribed, shall redistrict such state," with a 1911 statute, which contained the phrase "in the manner provided by the laws thereof." *Id.* at 568. The latter statutory language, the Court held, meant that "by the *state* Constitution and laws, the referendum was treated as part of the legislative power." *Id.* (emphasis added).

The federal statute so construed, the Court addressed the constitutional issue—whether the use of a referendum to control redistricting according to the Ohio Constitution was “void, even if sanctioned by Congress.” *Id.* at 569. And the Court concluded that, in fact, Congress does have the power to “sanction[]” redistricting via referendum. The *Hildebrant* Court explained: “In so far as the proposition challenges the power of Congress, as manifested by the clause in the act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which, from the point of view of § 4 of article 1, previously considered, the Constitution expressly gave the right to do.” *Id.* And the Court rejected that proposition and found that Congress was exercising “the authority vested in it by the Constitution.” *Id.*; accord *Hawke v. Smith*, 253 U.S. 221, 230 (1920) (summarizing *Hildebrant*: “Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated”).

In short, Congress’s phrase “in the manner provided by the laws thereof” incorporated the state’s constitution, which included the referendum power, and that incorporation was constitutionally permissible.

3. *Siebold* and *Hildebrant* reflect Congress’s actual practice. From at least the late nineteenth century to the present, Federal election laws have routinely adopted state policies. See, e.g., 52 U.S.C. § 20102(b)(1) (polling places need not be accessible to handicapped and elderly voters “in the case of an

emergency, as determined by the chief election officer of the State”); *id.* § 20104 (“medical certification may be required when the certification establishes eligibility, under State law,” two conditions for handicapped voters to receive absentee ballots); *id.* § 20302(a)(6) (creating federal absentee voter registration or absentee ballot registration procedures “in addition to any other method of registering to vote or applying for an absentee ballot in the State”); *id.* § 20302(a)(7) (requiring procedures for transmitting absentee ballots “in addition to any other method of transmitting blank absentee ballots in the State”); *id.* § 20302(f)(2) (“the State shall transmit the ballot by any delivery method allowable in accordance with applicable State law”); *id.* § 20303(b)(3) (prohibiting counting of Federal write-in absentee ballots if they miss “the deadline for receipt of the State absentee ballot under State law”). *Accord Siebold*, 100 U.S. at 388 (“The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.”).

If Congress’s power may be exercised “to *any* extent which it deems expedient,” *Siebold*, 100 U.S. at 392 (emphasis added), its incorporation of state substantive law is consistent with that power. As shown below, even if there is a tighter parameter around Congress’s power than *Siebold* suggests, the exercise here falls within that limit.

4. Although arising in a different context, this Court’s decision in *Smiley v. Holm* is also noteworthy because this Court again rejected the notion that the participation of other branches of state government in redistricting violated the Elections Clause. In *Smiley*, the Minnesota legislature passed a bill providing for

new congressional districts that was returned without the Governor's approval; the state proceeded to use the redrawn congressional districts. 285 U.S. at 361–62. A challenge was brought to the districting plan on the basis that, among other things, the Governor's veto rendered it a “nullity” under the Minnesota constitution. Notwithstanding the veto, the Minnesota Secretary of State defended use of the maps “by virtue of the authority conferred upon the Legislature by article 1, s4 of the Federal Constitution.” *Id.*

This Court held that the Minnesota legislature's refusal to follow the state's own constitution put it in violation of Article 1, § 4: “As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be *in accordance with the method which the state has prescribed for legislative enactments.*” *Id.* at 367 (emphasis added). The Court found “no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.” *Id.* at 368. The Court thus reversed.

The *Smiley* Court further illustrates, then, that the role of redistricting is not an exclusive function of state legislatures but rather must be done in accordance with the state's laws. Consistent with that holding, the Elections Clause's explicit grant of power to Congress must also include the authority of Congress to require that a redistricting plan be enacted in a manner consistent with a state's laws.

5. At oral argument ahead of this Court’s decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), one member of this Court posited that Congressional authorization might well obviate the constitutional concerns petitioners raise. See Oral Arg. Tr. at 34 (Justice Alito: “It would be one thing if Congress passed a law that said a State may apportion congressional districts in any manner consistent with the law of this State.”). That is *precisely* what 2 U.S.C. § 2c has done.

B. Section 2c is less intrusive than other exercises of power that this Court has deemed appropriate under the Elections Clause.

There remains the question whether the Constitution puts a meaningful limit on Congress’s power under the Elections Clause. This Court’s description of that power in *Siebold*—“to *any* extent which it deems expedient”—may well be broader than the Court would accept in practice. Even if there is a tighter limit than *Siebold* seemed to suggest, however, enforcing state constitutional requirements in the way that state courts typically do should fall within that limit.

1. Here, the North Carolina legislature retains the ultimate power to draw districts. It merely must operate within the confines of the state supreme court’s interpretation of the state constitution, just as it must with respect to any other legislation. Indeed, the redistricting maps are an interim measure for the 2022 congressional election only. See *North Carolina League of Conservation Voters, Inc. v. Hall*, 2022 WL

2610499, *10 (N.C. Super. Ct. Feb 23, 2022) (“The Interim Congressional Plan as recommended by the Special Masters is hereby ADOPTED by the Court and approved for the 2022 North Carolina Congressional elections.”).

Thus, Section 2c does not assign control over redistricting to an entity other than the legislature. State legislatures still maintain such control, but they are bound in doing so by state constitutions, and they may be checked by state courts interpreting state constitutions. To the extent there exists a non-delegation principle under the Elections Clause, it appears to be limited to those places where the legislature has been entirely cut out of the process or wholly abdicated its responsibility. *See Muller, Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 737–38 (2016).

2. Indeed, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), this Court held that the people of state, by initiative, could transfer power from the state legislature to an independent redistricting commission. Here, of course, Congress has exercised its own Elections Clause authority to instruct that state courts play a role far less intrusive than the role Arizona assigned to an independent commission. Although amicus recognizes that there were several forceful dissents in *Arizona State Legislature*, affirming here would not require the Court to go any farther than it did in that case. Indeed, this Court would not even need to go as far and could leave for another day what the limits are—based on non-delegation principles or otherwise—on Congress’s authority under the Elections Clause.

III. The North Carolina legislature recognized that it was bound by the state constitution as interpreted by the state supreme court when it drew its congressional maps.

The North Carolina legislature’s own approach to redistricting further weighs against the constitutional claim petitioners advance in this case.

When the redistricting committees of each chamber of the North Carolina legislature convened in 2021, they developed criteria that would govern redistricting. The committees recognized that they were “required” to adhere to State judicial decisions interpreting the state constitution:

Counties, Groupings, and Traversals. The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Harper v. Hall, 868 S.E.2d 499, 512 (N.C. 2022). See also North Carolina Joint Meeting of Committees, Criteria Adopted by the Committees, August 12,

2021, *available at* <https://webservices.ncleg.gov/ViewDocSiteFile/38467>.⁴

Thus, the legislature acknowledged that it “shall” draw districts “as required by” state supreme court precedent, in cases that interpreted and placed a gloss upon the state constitution. This recognition should counsel special hesitation before this Court involves itself in an intrastate dispute about the application of state law. *Cf. Arizona State Legislature*, 576 U.S. at 859 (Scalia, J., dissenting) (“Quite to the contrary, I think [the Framers] would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.”).

CONCLUSION

Congress has regulated the manner of drawing congressional districts by federal statute. Congressional redistricting occurs pursuant to congressional directive under 2 U.S.C. § 2c, which is that single-member districts be drawn “by law,” which includes the state courts and state constitution. The North Carolina Supreme Court’s decision should be affirmed.

⁴ The North Carolina Supreme Court decisions referred to in the block quote prohibited, in reliance on the state’s constitution, the splitting of counties except under limited circumstances.

Respectfully submitted,

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