No. 21A455

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.*,

Applicants,

v.

REBECCA HARPER, *et al.*,

Respondents,

&

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

Applicants,

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,

Respondents,

&

COMMON CAUSE,

Intervenor-Respondent.

On Emergency Application for Stay Pending Petition for Writ of Certiorari to the North Carolina Supreme Court

HARPER RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP

Burton Craige
Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
ELIAS LAW GROUP LLP

Counsel for Harper Respondents

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no *Harper* Respondent has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

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INTRODUCTION

Less than three years ago, when this Court declared that excessive partisan gerrymandering is "incompatible with democratic principles," it made clear that the solution lies with the states rather than the federal judiciary. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Despite closing the federal courthouse doors, this Court promised that complaints of partisan gerrymandering would not "echo into a void" because "state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering challenges to congressional maps. *Id.*

That is precisely what happened in North Carolina. *Harper* Respondents challenged North Carolina's 2021 congressional map in state court as an extreme partisan gerrymander in violation of multiple provisions of the state constitution. In a February 4 order followed by a February 14 opinion, the North Carolina Supreme Court struck down the map for violating the state constitution and gave the General Assembly an opportunity to redraw the map in the first instance as state law requires. On remand, the three-judge trial court panel appointed by the state's Chief Justice unanimously found that the General Assembly's remedial congressional map was again unconstitutional and, by making careful, minimal adjustments to that map, adopted an interim map to be used in the 2022 elections.

Applicants (legislative defendants below) now ask this Court to unravel this state court process through an emergency stay, on the theory that the federal Constitution's Elections Clause provides state legislatures unchecked authority to disregard state constitutional restrictions when enacting congressional districts. But

Applicants' theory is irreconcilable with *Rucho* and many other decisions of this Court holding that the Elections Clause does not empower state legislatures to evade the strictures of state constitutions, as construed by state courts. Nor can Applicants' theory be squared with federal law mandating that states' congressional districting plans comply with state constitutions and conferring remedial redistricting authority on state courts. Indeed, even an emergency stay on the basis of their theory would call into doubt dozens of state constitutional provisions regulating congressional elections, causing chaos across the country in the runup to the 2022 elections.

Applicants' theory also fails on its own terms. They assert that North Carolina courts have usurped the General Assembly's plenary authority over congressional redistricting. But the North Carolina courts acted in accordance with the judicial review process that the General Assembly itself created for congressional redistricting. The General Assembly enacted a statutory scheme expressly authorizing North Carolina courts to hear challenges to its congressional districting plans, N.C. Gen. Stat. § 1-267.1(a), to invalidate congressional districting plans that those courts determine are unconstitutional, *id.* § 120-2.3, and to "impose an interim districting plan for use in the next general election only" if the General Assembly fails to remedy the defects identified by the state court, *id.* § 120-2.4(a1). Though the Applicants may disagree with the state court result in this case, the judicial review process has played out precisely as these state statutes direct.

The equities also strongly counsel against an emergency stay. Rather than seek a stay of the state supreme court's February 4 order invalidating the 2021

congressional map, Applicants waited nearly a month for the remedial process to play out and filed this application only after the election cycle was in full swing. The State Board of Elections has already begun administering the 2022 elections under the interim map—with the candidate filing window closing less than 48 hours from now—and has made clear that any court order implementing a new map would cause severe administrative difficulties. This Court should decline Applicants' invitation to upend North Carolina's administration of its elections at this late juncture. Where North Carolina courts have enforced North Carolina's Constitution pursuant to North Carolina's statutory procedures to ensure that North Carolina voters are not forced to choose their members of Congress based on a gerrymandered map, this Court should not say otherwise.

BACKGROUND

A. North Carolina's 2021 Congressional Districting Map

1. Since 2010, "[t]he General Assembly's intentional redistricting for partisan advantage has been subject to judicial review in multiple cases." Applicants' Appendix (App'x) 328a ¶ 91. In 2016, federal courts invalidated North Carolina's 2011 congressional and state legislative maps as racial gerrymanders in violation of the U.S. Constitution. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604–05 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117, 176–78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). And in 2019, North Carolina courts invalidated the remedial maps enacted by the General Assembly as partisan gerrymanders in violation of the North Carolina Constitution. *Harper v. Lewis*, No. 19 CVS 12667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct.

Oct. 28, 2019) (congressional maps); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (state legislative maps).

As relevant here, in 2019, a three-judge panel of the North Carolina Superior Court in *Harper v. Lewis* granted a preliminary injunction barring further use of the 2016 remedial congressional map based on the plaintiffs' partisan gerrymandering claims under North Carolina's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. *See* App'x 329a-330a ¶ 97. The legislative defendants in that case, many of whom are also Applicants here, sought no appellate review of that injunction, and North Carolina held its congressional elections in 2020 under a remedial map enacted following the injunction.

2. Following the 2020 census, the General Assembly enacted congressional, House, and Senate maps on November 4, 2021. App'x 324a-326a ¶¶ 74–79. All passed along strict party-line votes. *Id.* at 326a-327a ¶¶ 80–84. As the trial court later found, while North Carolina "gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning . . . areas, the number of anticipated Democratic seats under the enacted map actually decrease[d], with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." *Id.* at 345a ¶ 124. The congressional map accomplished this result in large part by "splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each," despite there being "no population-based reason to divide each of these three Democratic-leaning counties across three districts." *Id.* at 345a-346a ¶ 125.

B. The North Carolina State Court Proceedings

1. *Harper* Respondents are 25 individual North Carolina voters residing in all 14 congressional districts under the 2021 map. Several were plaintiffs in *Harper v. Lewis*, the 2019 case that successfully challenged the 2016 congressional map as a partisan gerrymander prohibited by the North Carolina Constitution. On November 5, 2021—the day after the 2021 congressional map was enacted—*Harper* Respondents filed a proposed supplemental complaint in *Harper v. Lewis* challenging the new map. When the court took no action on their motion to supplement, *Harper* Respondents filed this action on November 18. As in their 2019 case, *Harper* Respondents brought claims exclusively under the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses.

Pursuant to a North Carolina statute authorizing "action[s] challenging the validity of . . . congressional districts" in North Carolina courts, North Carolina Supreme Court Chief Justice Paul Newby appointed a panel of three trial-court judges to hear the case. N.C. Gen. Stat. § 1-267.1. *Harper* Respondents' case was then consolidated with *N.C. League of Conservation Voters v. Hall*, No. 21 CVS 015426, and Respondent Common Cause was later granted intervention. The consolidated cases presented claims only under the North Carolina Constitution. The trial court denied Respondents' motions for preliminary injunction on December 2, but on December 8 the North Carolina Supreme Court reversed, granted a preliminary injunction, stayed the candidate filing period, and postponed the state's primaries to

May 17, 2022. The state high court directed the trial court to conduct further proceedings and issue a final judgment by January 11. Applicants did not seek a stay or further review of that decision.

2. Following a four-day bench trial, the trial court issued a final judgment finding that all three of the state's 2021 maps were extreme partisan gerrymanders in violation of the North Carolina Constitution. Based on the analyses of *Harper* Respondents' experts, which the trial court adopted, the court found that the 2021 congressional map was an "intentional, and effective, pro-Republican partisan redistricting" that locked in ten Republican congressional seats. App'x 351a ¶ 140, 445a ¶ 423. Both the plan as a whole and each individual district was "the product of intentional pro-Republican partisan redistricting." *Id.* at 351a ¶ 140 (statewide); *see id.* at 462a-483a ¶¶ 484–566 (district-by-district).

For example, the trial court found that the enacted map was "more carefully crafted to favor Republicans than at least 99.9999%" of all possible North Carolina district maps following the legislature's criteria. *Id.* at 361a-362a ¶ 175. Likewise, the court found that "[t]he enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8." *Id.* at 351a ¶ 140. The court credited Respondents' experts, and recognized that even though the "experts employed different methodologies, each

expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage." *Id.* at 445a ¶ 423.

The trial court further found that the enacted map "reduce[d] the anticipated number of Democratic seats, disadvantaging Democratic voters, by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." *Id.* at 345a-346a ¶ 125. This "'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.'" *Id.* at 347a ¶ 127. The extreme pro-Republican bias could not be explained by either North Carolina's political geography or the General Assembly's supposed adherence to non-partisan criteria. *Id.* at 457a, 460a-461a ¶¶ 466, 478–82.

Applicants "offered no defense of the 2021 Congressional Plan." *Id.* at 445a ¶ 424. Nevertheless, after finding that the maps were partisan gerrymanders, the trial court entered judgment for Applicants, principally on the theory that Respondents' partisan gerrymandering claims were nonjusticiable under the North Carolina Constitution. *Id.* at 540-47a. The trial court's final judgment did not address whether invalidating the congressional plan would violate Article I, Section 4 the U.S. Constitution—an argument Applicants did not raise in their post-trial briefing.[1]

3. The North Carolina Supreme Court reversed. In a February 4 order that it supplemented with an opinion on February 14, the state high court "adopted in full"

[1] *See* Leg. Defs.' Proposed Findings of Fact & Conclusions of Law (Dec. 31, 2021), https://www.nccourts.gov/assets/inline-files/21.12.31%20-%20Legislative%20Defendants%20Proposed%20Findings%20and%20Conclusions.pdf?sbo1wXaotX2p.2FcimmEkrQDX4Tm.C_Z.

the trial court's "extensive and detailed factual findings" regarding the partisan intent and effect of all three 2021 maps. *Id.* at 150a ¶ 182; *see id.* at 13a. But the state's highest court found the trial court was wrong to reject Respondents' claims as nonjusticiable under North Carolina law. The state supreme court reaffirmed that, as a matter of law, such claims are justiciable under both North Carolina's Free Elections Clause (which has no federal counterpart) and its Equal Protection Clause and Free Speech and Assembly Clauses (which the North Carolina Supreme Court has long interpreted to provide "greater protections" than their federal counterparts, *id.* at 123a ¶ 146). *See id.* at 123a, 150a, 127a-128a. Thus, based on the trial court's factual findings, the state supreme court held "the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power" under the above enumerated provisions in the North Carolina Constitution. *Id.* at 150a ¶ 183.

In reaching this conclusion, the North Carolina Supreme Court canvassed the history of North Carolina's Free Elections Clause, explaining that it was "included in the 1776 Declaration of Rights" and "derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688." *Id.* at 115a-116a. The Clause "reflect[ed] the principle of the Glorious Revolution that those in power shall not attain 'electoral advantage' through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be 'free and lawful.'" *Id.* at 118a ¶ 137 (quoting Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 250 (2007)).

Under these constitutional protections, the court held that North Carolina's redistricting plans must give "voters of all political parties substantially equal opportunity to translate votes into seats across the plan. . . ." *Id.* at 15a-16a ¶ 163. And though the court did "not believe it prudent or necessary to . . . identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander," it identified "multiple reliable ways of" evaluating these claims, including "mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis." *Id.* at 135a.

In concluding that challenges to partisan gerrymandering brought under these provisions are justiciable under North Carolina's political question doctrine, the court also explicitly held that North Carolina's doctrine differs from the federal doctrine. *See id.* at 88a-89a ¶ 101 (holding "federal cases" interpreting the "[f]ederal justiciability doctrines" are "not controlling"). The court observed that in several prior decisions it had enforced state constitutional provisions, including North Carolina's Equal Protection Clause, to strike down redistricting plans that would not have violated the corresponding provisions of the U.S. Constitution. *Id.* at 98-99a. And the court explained that it had identified "several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation," such that partisan gerrymandering claims "do not require the making of 'policy choices and value determinations'" as a matter of North Carolina law. *Id.* at 145a ¶ 174 (quoting *Bacon v. Lee*, 353 N.C. 696, 717 (2001)).

The state high court also rejected Applicants' argument that the word "Legislature" in the Elections Clause, U.S. Const. art. I, § 4, categorically forbids state courts from reviewing and remedying a state legislature's violation of the state constitution in congressional redistricting. App'x 146a. The court highlighted that this argument "was not presented at the trial court," *id.* at 146a ¶ 175; while Applicants raised the Elections Clause argument in opposing a preliminary injunction, they did not raise it during the merits phase. But, in any event, the argument was "inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015," and was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." *Id*. The state high court cited "a long line of decisions" from this Court holding that "state courts may review state laws governing federal elections to determine whether they comply with the state constitution," including *Smiley v. Holm*, 285 U.S. 355 (1932); *Growe v. Emison*, 507 U.S. 25 (1993); and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Applicants' theory, the court held, also "contradicts the holding of" this Court in *Rucho v. Common Cause*, which declared that "'[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply'" when evaluating partisan gerrymandering challenges to congressional districting plans. App'x 146a ¶ 176 (alteration and emphasis in original) (quoting 139 S. Ct. at 2507).

Justice Morgan, joined by Justice Earls, wrote separately to emphasize the "dispositive strength of the Free Elections Clause." *Id.* at 169a ¶ 224.

Chief Justice Newby, joined by Justices Berger Jr. and Barringer, dissented, expressing the view that partisan gerrymandering does not violate the North Carolina Constitution. *Id.* at 170a. The dissenters did not, however, dispute any of the trial court's factual findings, *see id.* at 37a, and did not disagree with the majority's determination that its decision was consistent with the federal Elections Clause.

4. The North Carolina Supreme Court's February 4 order remanded the case to the trial court for a remedial phase that gave the General Assembly two weeks to enact and submit new maps satisfying the North Carolina Constitution; authorized the other parties to propose their own proposed remedial maps at the same time; and instructed the trial court to adopt compliant maps by noon on February 23. *Id.* at 17a. Applicants did not ask the North Carolina Supreme Court to stay that order and did not seek review in this Court. The trial court appointed a bipartisan trio of former North Carolina judges as special masters, who in turn hired assistants experienced with quantitative analysis of redistricting plans. App'x 247a-248a.

The General Assembly proceeded to enact a remedial congressional map that passed on strict party-line votes and replicated key unconstitutional features of the invalidated 2021 map. For example, the trial court had found that one feature of the 2021 plan's extreme partisan gerrymandering was the "creation of three safe Republican districts in the Piedmont Triad area"—by placing the heavily Democratic cities of Greensboro, High Point, and Winston-Salem in separate districts—was

"designed in order to accomplish the legislature's predominant partisan goals." *Id.* at 459a ¶ 473, 460a ¶ 480. The enacted remedial map did the same thing.

5. On February 23, the trial court issued a final order adopting the General Assembly's enacted remedial state legislative maps but finding that the enacted remedial congressional map again violated the North Carolina Constitution. App'x 255a-265a. The court and its special masters explained that the congressional map failed relevant tests identified by the state supreme court, including the mean-median difference and efficiency gap. *Id.* at 271a. The court accordingly adopted an interim congressional map proposed by the special masters. *Id.* at 265a. To comply with North Carolina's statute governing the remedial process in redistricting challenges, the special masters and an assistant began with Applicants' map and "modif[ied] [it] … to bring it into compliance with the Supreme Court's order," rather than drawing an entirely new map or adopting one of the parties' proposed alternatives. *Id.* at 265a ¶ 8 (citing N.C. Gen. Stat. § 120-2.4(a1)); *see id.* at 271a-272a.[2]

6. On February 23, Applicants appealed and moved to stay the trial court's order adopting the remedial interim congressional map; Respondents did the same for the remedial state legislative maps. The North Carolina Supreme Court denied all stay motions the same day, with no noted dissents. App'x 1a-2a.

[2] The special masters explained that the two assistants whom Applicants sought to disqualify played no role in the drawing of the interim map. *Id.* at 272a.

The candidate filing period for congressional and state legislative elections opened the following morning, Thursday, February 24, at 8 a.m. and will close on Friday, March 4 at noon. *Id.* at 556a.

On February 25, Applicants sought emergency relief in this Court.

REASONS TO DENY THE STAY APPLICATION

"Stays pending appeal to this court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "[A]n applicant must show (1) a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants fail this standard.

I. The Court is unlikely to grant certiorari and Applicants have no likelihood of success on the merits.

A. The Elections Clause does not negate state court judicial review of congressional districting plans under state constitutions.

For over 100 years, this Court has repeatedly held that nothing in the Elections Clause alters a state court's unreviewable authority to invalidate a congressional districting plan that violates a state's constitution. Applicants' unsupported theory to the contrary—that the Elections Clause bars a state court from hearing a state constitutional challenge to any law regulating federal elections, including a congressional plan—runs headlong into at least half a dozen of this Court's decisions, federal statutes, another provision of the U.S. Constitution, and numerous North Carolina statutory and constitutional provisions. It is also repugnant to the

sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd consequences. Applicants' argument does not warrant review, much less an emergency stay, because the Elections Clause does not preclude state courts from striking down a congressional map that violates a state's constitution and adopting an interim remedial map pursuant to state law.

1. Applicants' Elections Clause theory ignores over a half-dozen of this Court's precedents dating back a century.

Applicants' theory that the Elections Clause bars state courts from reviewing and remedying congressional districting legislation under a state's own constitution contradicts a mountain of this Court's decisions. Most recently, the Court declared in *Rucho v. Common Cause* that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering challenges to congressional districting plans enacted by state legislatures. 139 S. Ct. at 2507 (emphases added). *Rucho* concerned North Carolina's 2016 congressional plan, and as an example of state courts' power in this realm, the Court pointed to another state supreme court's decision striking down the state's legislatively enacted congressional plan under the state's constitution. *Id.* (citing *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (2015)). This Court's recognition that state courts can apply state constitutional provisions to rein in partisan gerrymandering was essential to *Rucho*'s holding. It enabled the Court to foreclose federal partisan gerrymandering claims while promising that "complaints about districting" would not "echo into a void." *Id.*

Even before *Rucho*, an unbroken line of precedent dating back a century confirmed that state courts may review state laws governing federal elections to determine whether they comply with state constitutions and that state courts may adopt court-drawn remedial plans. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "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," which may include the participation of other branches of state government. *Id.* at 368. *Smiley* made clear that congressional districting legislation must comport with state constitutional requirements, explaining that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369. In two companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans that violate "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *see also Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (same). Even before *Smiley*, the Court held that state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

The Court recently reaffirmed this principle, holding that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may

prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Leg.*, 576 U.S at 817-18. While the Court split over the definition of "Legislature," no justice asserted that the Elections Clause immunizes congressional redistricting legislation from the "ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting). In other words, the Court has repeatedly rejected Applicants' theory that the Elections Clause shields state legislatures from complying with their state constitutions in enacting congressional districting laws. Instead, the Court has consistently held the opposite: a state legislature's enactments must comply with the state constitution.

In short, it is well settled that state legislatures may not enact congressional districting plans that violate the state's constitution. And in North Carolina, one of the conditions that attaches to the making of state laws is compliance with the North Carolina Constitution, as interpreted by the North Carolina Supreme Court. *E.g.*, *Bayard v. Singleton*, 1 N.C. 5, 7 (1787) (exercising power of judicial review over state statute under state constitution even before *Marbury v. Madison*).

Not only are state courts authorized to evaluate a congressional districting plan's compliance with state constitutional provisions, this Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), makes clear that state courts have a greater role to play than federal courts in adjudicating congressional redistricting claims. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33

(quotations omitted). Writing for a unanimous Court, Justice Scalia expressly recognized state courts' role in redistricting—not only to review legislative enactments, but also to craft remedial plans on their own—and held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id.* at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Court affirmed that congressional reapportionment may be conducted "though [a state's] legislative *or* judicial branch." *Id.* at 33 (emphasis in original). As a result, the Court found that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan)" by a date certain was "precisely the sort of state judicial supervision of redistricting [the Court] has encouraged." *Id.* In *Growe*, the district court erred in "ignoring the . . . legitimacy of state *judicial* redistricting." *Id.* at 34 (emphasis in original). Applicants make the same error here.

Applicants' view that the Elections Clause confines congressional redistricting authority exclusively to state legislatures and Congress also conflicts with *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Court rejected the plurality opinion in *Colgrove v. Green*, 328 U.S. 549 (1946), which had concluded that the Elections Clause's reference to "Congress" deprives federal courts of power to review congressional maps. *Wesberry*, a seminal redistricting decision, explained: "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S.

at 6. In other words, this Court refused to allow voters "to be stripped of judicial protection" by Applicants' restrictive "interpretation of Article I." *Id.* at 7.

To the extent there is any textual ambiguity about whether state legislative enactments regulating federal elections are subject to compliance with state constitutions, the Court recently reiterated in the election context that "[l]ong settled and established practice" can have "great weight in a proper interpretation of constitutional provisions." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020). Since the founding of the country there has been an unwavering practice of state constitutions regulating federal elections—a practice that has been accepted by this Court and others, Congress, the public, and state legislatures themselves, including North Carolina's General Assembly, discussed *infra* at I.A.3 and I.B.

Much of the authority Applicants rely on stands for the unremarkable and uncontested proposition that redistricting in North Carolina is primarily the province of the North Carolina General Assembly. *See, e.g.,* Application (Appl.) at 12 (noting that "state legislatures . . . bear primary responsibility for setting election rules"). But when the General Assembly violates the State's constitution, it is the obligation of North Carolina courts to exercise their "most fundamental [] sacred dut[y]" to "protect the [state] constitutional rights of the people of North Carolina from overreach by the General Assembly," and remedy the General Assembly's transgression. App'x 36a-37a. In doing so, North Carolina courts have fulfilled their constitutional duty to "interpret[] the laws and, through [their] power of judicial review, determine[] whether they comply with the [state's] constitution." Appl. at 18

(citing *State v. Berger*, 368 N.C. 633, 635 (2016)). North Carolina courts do not supplant legislative prerogatives when they enforce state constitutional limits any more than this Court supplants congressional prerogatives when it invalidates federal statutes for violating the U.S. Constitution. Federal courts regularly invalidate statutes Congress enacts pursuant to its Article I, section 8 powers, *e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), and even statutes Congress enacts pursuant to its Elections Clause powers, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010). When legislatures legislate, they must do so consistently with constitutional as interpreted and applied by courts.

In short, nothing in the Elections Clause restricts North Carolina courts' authority to determine whether the 2021 congressional plan—a statute enacted by the General Assembly—is valid *solely* under the North Carolina Constitution.

2. Congress has independently exercised its Elections Clause power to mandate compliance with state constitutions and to authorize state court remedial plans.

Regardless of the meaning of "Legislature" in the first part of the Elections Clause, the second part allows Congress "at any time" to make its own regulations related to congressional redistricting. U.S. Const. Art. I, § 4. Pursuant to this authority, Congress has mandated that states' congressional districting plans comply with substantive state constitutional provisions and it has authorized state courts to adopt remedial plans. Accordingly, Applicants' Elections Clause theory, even if accepted, would get them nowhere in the context of congressional redistricting.

Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting unless a state, "after any apportionment," has redistricted "in the manner provided by the law thereof." As this Court explained in *Arizona State Legislature*, a predecessor to § 2a(c) had mandated those default procedures "unless 'the legislature' of the State drew district lines." 576 U.S. at 809 (quoting, *inter alia*, Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided by [state] law." *Id.* at 809–10. Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the very serious evils arising from gerrymanders." *Id.* at 810 (quotation marks omitted). And critically, as Justice Scalia explained for the plurality in *Branch v. Smith*, the phrase "the manner provided by state law" encompasses substantive restrictions in state *constitutions*: "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.'" 538 U.S. 254, 277–78 (2003) (citations omitted). Thus, unless a state's congressional plan complies with the substantive provisions of the state's constitution, § 2a(c)'s default procedures kick in.

In addition to mandating compliance with state constitutions, Congress has authorized state courts to establish remedial congressional districting plans. *Branch* held that 2 U.S.C. § 2c, which requires single-member congressional districts, authorizes both state and federal courts to "remedy[] a failure" by the state legislature

"to redistrict constitutionally," and "embraces action by *state and federal courts* when the prescribed legislative action has not been forthcoming." 538 U.S. at 270, 272 (emphasis added). Section 2c "is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—*federal or state*—as it is on legislatures." *Id.* at 272 (emphasis added). Section 2a(c) also recognizes state courts' power to adopt congressional plans. Its default procedures apply "[u]ntil a State is redistricted in the manner provided by [state] law," and the *Branch* plurality explained that this "can certainly refer to redistricting by courts as well as by legislatures," and "when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by [state] law.'" *Id.* at 274 (emphasis added).

The Court reaffirmed this interpretation in *Arizona State Legislature*. Under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." 576 U.S. at 812 (citing *Branch*, 538 U.S. at 274; emphasis added).

In short, any question whether the first part of the Elections Clause permits state courts to review and remedy congressional districting laws under state constitutions is academic because Congress has declared that state courts can do so.

3. Applicants' Elections Clause theory cannot be reconciled with the Fourteenth Amendment's Reduction Clause.

The Fourteenth Amendment's Reduction Clause confirms that the U.S. Constitution not only permits but *requires* states' congressional districting plans to

comply with state constitutional provisions protecting voting rights. The Reduction Clause provides that "when the right to vote at any election for . . . Representatives in Congress" is "denied . . . or in any way abridged," the state's representation in Congress "shall be reduced" proportionally. U.S. Const. art. XIV, § 2. In *McPherson v. Blacker*, 146 U.S. 1 (1892), this Court held that, for purposes of this clause, "[t]he right to vote intended to be protected refers to the right to vote *as established by the laws and constitution of the state*." *Id.* at 39 (emphasis added); *see also id.* at 38 ("The right to vote in the States comes from the States . . . ."). *McPherson* thus held that "the right to vote" in federal elections—meaning the right to vote *under the state's own constitution*—"cannot be denied or abridged without invoking the penalty" of reducing the state's representation in Congress. *Id.* These statements were essential to *McPherson*'s holding: this Court rejected the argument that the Fourteenth Amendment's Reduction Clause guarantees a *federal* constitutional right to vote in federal elections on the ground that the "right to vote" referenced in the clause instead refers to *state* constitutional (and statutory) rights.

This Court therefore has made clear that state constitutional provisions protecting voting rights *do* apply to voting in congressional elections. The North Carolina Supreme Court is the final arbiter of whether a state law denies or abridges a state constitutional right, and it held that the General Assembly's 2021 congressional map violated the "right to vote" of the state's Democratic voters—roughly half of the electorate—under multiple provisions of the North Carolina Constitution. App'x 122a ¶ 142, 125a ¶ 148, 132 ¶ 160. The federal Elections Clause

does not require North Carolina to conduct its congressional elections in a manner that would trigger the loss of half of North Carolina's seats in Congress under the Reduction Clause.

4. The North Carolina General Assembly has authorized state courts to hear challenges to the validity of congressional plans and to adopt court-drawn remedial maps.

Even if Applicants were right that—contrary to practice and precedent—the state legislature is the lone authority on all congressional redistricting matters, and even if Congress had not exercised its Elections Clause power to authorize state judicial review, Applicants' theory would still fail because North Carolina's legislature has prescribed the very protections and processes to which Applicants now object. Specifically, the General Assembly has enacted statutes and constitutional provisions that assign state courts a formal role in the redistricting process. The North Carolina judiciary's role in this matter thus was not only "in accordance with the method which the state has prescribed," *Smiley*, 285 U.S. at 367; it was in accordance with the method which the *state legislature* itself has prescribed.

The General Assembly enacted a roadmap for state courts to follow in discharging their duty to ensure congressional districting plans comport with applicable law. Notably, actions challenging the General Assembly's congressional districting plans are not presumptively nonjusticiable; rather, they "*shall be heard* and determined by a three-judge panel of the Superior Court of Wake County. . . ." N.C. Gen. Stat. § 1-267.1 (emphasis added). And the General Assembly expressly authorized courts to declare congressional districting plans "unconstitutional or

otherwise invalid," so long as the court's findings of fact, conclusions of law, and identified defects are stated with specificity. *Id.* § 120-2.3. In fact, the General Assembly did not merely empower state courts to deem redistricting plans invalid—where the General Assembly is unable to timely correct the defects identified by the court, the court is authorized by law to "impose an interim districting plan." *Id.* § 120-2.4(a1). Thus, the process that transpired here was precisely the process prescribed by the General Assembly itself. Under Applicants' own argument, it would be inappropriate for a federal court to second guess—let alone displace—the General Assembly's own arrangement.

In addition to legislatively enacted statutes, the legislatively enacted North Carolina Constitution also specifically provides for the state judiciary's role in matters like this one. Unlike the 1776 and 1868 North Carolina Constitutions, which were promulgated by independent conventions, the operative 1971 Constitution was enacted by the General Assembly itself before being approved by voters. *See* H.B. 231 (1969 Session). In crafting this new constitution, the General Assembly clarified, strengthened, and readopted the liberty-preserving provisions that the state judiciary applied to the congressional districting plans at issue. *Compare* N.C. Const., art. I, § 10 (1968) ("All elections ought to be free."), *with id.*, art. I § 10 (1971) ("All elections shall be free."). The purpose of these changes was to "make it clear" that rights secured to the people by the Declaration of Rights are "commands and not mere admonitions" to proper conduct on the part of the government. *N.C. State Bar v.*

DuMont, 304 N.C. 627, 635, 639, 286 S.E.2d 89, 97 (1982) (quoting Rep. of the N.C. State Const. Study Comm'n to the N.C. State Bar and the N.C. Bar Ass'n 75 (1968)).

To maintain the force of these constitutional commands, the General Assembly ratified the judicial authority to review legislative enactments. The General Assembly provided that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate branch of government." N.C. Const. art. IV, § 1. And "[e]xcept as otherwise provided by the General Assembly, the Superior Court shall have original jurisdiction throughout the State." *Id.*, art. IV, § 12. North Carolina's judiciary could not have usurped the General Assembly's authority by interpreting constitutional provisions enacted by the General Assembly, according to powers conferred by the General Assembly, pursuant to the procedures ordered by the General Assembly.

Even if there were any ambiguity about North Carolina's institutional redistricting assignments, what constitutes the state's legislative process is itself a matter of state law, on which the North Carolina Supreme Court's interpretation is conclusive and unreviewable. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("State courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) ("[i]t is fundamental . . . that state courts be left free and unfettered by us in interpreting their state constitutions."); *Hildebrant*, 241 U.S. at 567-568 (recognizing as "obvious" that a state court's interpretation of its constitutional provisions was "conclusive on that subject"). This foundational rule that federal courts lack authority to review whether a state court has correctly interpreted the

state's own laws reflects an American federalism that "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). Because the North Carolina Supreme Court—not this Court—is the final arbiter on questions of state law, further review of that question by this Court would be both unnecessary and unwarranted.

B. Applicants' Elections Clause theory would jeopardize dozens of state constitutional provisions and cause electoral chaos.

Additionally, construing the Elections Clause to foreclose state court judicial review of state election legislation under state constitutions, as Applicants urge, would upend this nation's federalist system and threaten to nullify dozens of state constitutional provisions across the country.

For example, nearly every state's constitution contains provisions affording citizens the affirmative right to vote if they meet specified qualifications. In addition, at least 24 state constitutions guarantee that "all elections"—including the state's congressional elections—shall be "free," "free and open," or "free and equal."[3] Other states have more recently adopted state constitutional provisions guaranteeing voting rights in all elections, in reliance on the settled principle that state

[3] Ariz. Const. art. II, § 21; Ark. Const. art. 3, § 2; Cal. Const. art. II, § 3; Colo. Const. art. II, § 5; Conn. Const. art. VI, § 4; Del. Const. art. I, § 3; Idaho Const. art. I, § 19; Ill. Const. art. III, § 3; Ind. Const. art. 2, § 1; Ky. Const. § 6; Md. Decl. of Rts. art. 7; Mass. Const. pt. 1, art. IX; Mo. Const. art. I, § 25; Mont. Const. art. II, § 13; Ne. Const. art. I, § 22; N.H. Const. pt. 1st, art. 11; N.M. Const. art. II, § 8; N.C. Const. art. I, § 10; Okla. Const. art. III, § 5; Ore. Const. art. II, § 1; Pa. Const. art. I, § 5; S.C. Const. art. I, § 5; S.D. Const. art. VII, § 1; Tenn. Const. art. I, § 5; Tex. Const. art. VI, § 2(c); Utah Const. art. I, § 17; Vt. Const. ch. 1, art. 8; Va. Const. art. I, § 6; Wash. Const. art. I, § 19; Wyo. Const. art. I, § 27.

constitutions can provide broader or more specific protections for voting rights than the U.S. Constitution. For instance, in 2010 California adopted a constitutional amendment that eliminated partisan primaries for congressional elections and instead provided that the top two candidates advance to the general election, regardless of party. Cal. Const. art. II, § 5(a). In 2018, Michigan amended its state constitution to guarantee "[t]he right . . . to vote a secret ballot in all elections," "[t]he right to a 'straight party' vote option on partisan general elections ballots," and "[t]he right . . . to vote an absent voter ballot without giving a reason." Mich. Const. art. II, § 4. Until now, nobody had even thought to suggest that the state legislatures could enact statutes countermanding these state constitutional provisions on the theory that they are null and void in congressional elections. But Applicants' Elections Clause theory would take us there and raise similar questions about the consequences for procedural requirements in state constitutions. May state legislatures ignore constitutional provisions that require a gubernatorial signature for legislation to be enacted? May they ignore quorum requirements? Completely freed of the ordinary checks and balances that are essential to liberty, the legislature's power would be unfathomable. It is hard to imagine a more direct affront to federalism.

Applicants' position would wreak particular havoc for redistricting. At least 12 state constitutions have provisions that *substantively* restrict the drawing of congressional districts by providing criteria with which state legislatures must

comply in drawing districts.[4] All of these state constitutional provisions require that congressional districts be contiguous and compact; most require the legislature to preserve political subdivisions or communities of interest; and some preclude partisan considerations or efforts to protect incumbents. *See, e.g.*, *Rucho*, 139 S. Ct. at 2507-08 (highlighting examples). Any holding (or even suggestion) that state legislatures could now disregard these state constitutional constraints in drawing new congressional districts, pursuant to some unchecked power supposedly granted by the Elections Clause, would, again, cause chaos.

And what about where state legislatures fail to redistrict at all? *Growe* ordered deference to state courts on matters of state constitutional compliance in the course of impasse litigation, where the judiciary is called upon to adopt new redistricting maps in the wake of a breakdown in the legislative process. 507 U.S. at 1077-78. This Court has long endorsed non-legislative map-drawing in this context, *see, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (affirming map adopted by a bipartisan commission after legislative impasse), and it is a regular feature of every redistricting cycle.[5] Applicants have no answer for how their reading of the Elections Clause could

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[4] Ariz. Const. art. IV, § 1(14); Cal. Const. art. XXI, § 2(d); Colo. Const. art. V, § 44.3c; Fla. Const. art III, § 20; Iowa Const art. III, § 37; Mich. Const. art. IV, § 6(13); Mo. Const. art. III, § 45; N.Y. Const. art. III, § 4(c); Ohio Const. art. XIX, §§1–2; Wash. Const. art. II, § 43(5); W. Va. Const. art I, § 4; Wyo. Const. art. III, § 49.

[5] For examples from the 2010 and 2000 redistricting cycles, *see, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012); *Favors v. Cuomo*, No. 1:11-cv-05632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *Colleton Cnty. Council v. McConnell*, No. 3:01-CV-3581, 201 F. Supp.2d 618 (D.S.C. Mar. 20, 2002); *Balderas v. State*, No. 6:01-CV-158 (E.D. Tex. Nov. 14, 2001), *aff'd* 536 U.S. 919 (June 17, 2002) (No. 01-1196) (mem.);

allow the adoption of constitutionally apportioned districts where the state legislature fails to enact lawful maps itself. The better reading of the Elections Clause, then, is to recognize that state legislatures maintain *primary* redistricting authority, but the map-drawing pen may pass when a legislature—as here—fails to timely adopt lawful plans in advance of regularly scheduled elections. This Court should reject Applicants' request to upend settled state law across the country on an emergency basis without the benefit of full briefing and argument.

C. There is no division in authority regarding the ability of state courts to review congressional plans under state constitutions.

Contrary to Applicants' assertion (at 22–24), there is no "division in authority" as to whether state courts can invalidate state laws governing congressional elections for violating the state constitution. Every lower court to have considered the issue since *Smiley* has concluded that the Elections Clause does not bar state courts from doing so. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 & n.2 (Fla. 2015). And this case is hardly the first time a state court has applied a state constitutional provision to invalidate a congressional map. *E.g.*, *Moran v. Bowley*, 179

Hippert v. Ritchie, 813 N.W.2d 391 (Minn. 2012); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. Dist. Ct., Santa Fe Cnty. Dec. 29, 2011); *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011); *Alexander v. Taylor*, No. 97836, 51 P.3d 1204 (Okla. June 25, 2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002); *Avalos v. Davidson*, No. 01 CV 2897 (Dist. Ct. Denver Co. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos,* No. 02SC87, 42 P.3d 642 (Colo. Mar. 13, 2002) (en banc); *Jepsen v. Vigil-Giron*, No. D0101 CV 2001 02177 (1st Jud. Dist. Santa Fe Co. Jan. 2, 2002); *Perrin v. Kitzhaber*, No. 0107-07021, (Dist. Ct. Multnomah Co., Or. Oct. 19, 2001).

N.E. 526, 531-32 (Ill. 1932) (citing cases and applying the Illinois Constitution's Free and Equal Elections Clause, pre-*Wesberry*, to require one-person one-vote).

Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020)—the principal case on which Applicants rely—is not to the contrary. Indeed, that case did not even involve a state court's invalidation of a state election law under the state constitution. Instead, *Carson* concerned a consent decree entered by the Minnesota Secretary of State that extended the statutory deadline for receipt of mail-in ballots, which a state court approved without deciding the statute's constitutionality. *Id.* at 1055–56. In defending the consent decree against collateral attack in federal court, the Minnesota Secretary of State "argue[d that] the Minnesota Legislature [] delegated its authority to the Secretary by means of a general statute in the election code," which "allows the Secretary to 'adopt alternative election procedures[,]' but only '[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court." *Id.* at 1060 (alterations in original) (quoting Minn. Stat. § 204B.47). The Eighth Circuit's conclusion that the consent decree violated the Elections Clause hinged on the applicability of that statute—and nothing more. The court expressly noted that it "d[id] not reach" whether "the Legislature's Article II powers concerning presidential elections can be delegated in this manner," *id.*, and it never addressed whether a state court would be empowered to invalidate the challenged ballot-receipt deadline under the Minnesota Constitution. Accordingly, *Carson* has no relevance to Applicants' claims here—and it certainly does not stand for the proposition that the

U.S. Constitution bars state courts from invalidating state elections laws under state constitutions.

Nor do any of Applicants' other cases establish a conflict. Several pre-date *Smiley*. Appl. at 23 (citing state court decisions from 1864, 1887, and 1921). And the post-*Smiley* cases do not remotely support Applicants' Elections Clause theory. *Commonwealth v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), stated that the "legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment," *id.* at 694, and held that the statute at issue did not violate any state constitutional provision, *id.* at 696. *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936), did not even involve a claim that a state law violated the state constitution. And the remaining cases did not involve congressional elections or the Elections Clause.

In short, Applicants fail to identify a single case holding that the Elections Clause bars state courts from invalidating and remedying a congressional map enacted by the state legislature under the state's own constitution.

D. Applicants have forfeited their right to seek reinstatement of the original 2021 congressional map.

Applicants purport to seek a stay not only of the trial court's February 23 order adopting a remedial congressional map, but also of the North Carolina Supreme Court's February 4 order and February 14 opinion invalidating the original 2021 congressional map as an unconstitutional partisan gerrymander. But they cannot seek a stay of the February 4 order and February 14 opinion in this Court because they never sought such relief before the North Carolina Supreme Court. This Court's

Rule 23(3) provides that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Applicants never sought a stay from the North Carolina Supreme Court of its February 4 order and February 14 opinion. And no extraordinary circumstances justify their failure to seek such a stay.

To the contrary, the impending election deadlines that form the basis of Applicants' claim of irreparable imminent injury, Appl. at 25-26, would not be so pressing had they sought a stay immediately following the Supreme Court's February 4 order. Applicants instead consciously chose to let the remedial process play out, seeking no relief from the North Carolina Supreme Court or this Court as the clock ticked toward the primary. The fact that Applicants turned out not to like the result of the remedial process does not entitle them to retroactively seek a stay of the North Carolina Supreme Court's original decision striking down the congressional map. Accordingly, Applicants' request for reinstatement of the original congressional map fails on forfeiture grounds alone.

II. There is no likelihood of irreparable harm, and the balance of equities weighs against a stay.

It is in no party's interest to grant a stay in this case. The 2022 election process is now proceeding under the state trial court's interim congressional map. Requiring a different map at this time is not only unwarranted for the reasons described above, but also would throw North Carolina's election machinery into chaos. The state would need to postpone the May 17 congressional primaries, imposing an enormous

financial burden and risking disorderly elections, especially in light of North Carolina's rules governing second primaries. The balance of equities is not even close given the extreme and irreparable harm of forcing millions of North Carolina voters to choose their members of Congress based on a gerrymandered map that the state's highest court has declared invalid under the state's own constitution.

Applicants point to the "late hour," noting "the necessity for clear guidance" "[i]n view of the impending election." Appl. at 25–26 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)). But these principles weigh against a stay here. The state trial court's interim remedial map, not the invalidated 2021 map or the General Assembly's unconstitutional remedial map, is currently governing the 2022 election process. It is Applicants who now seek federal intervention by asking this Court to change the map.

The election process under the interim remedial map is already well underway. As Applicants acknowledge (at 2, 24), as of 8 a.m. on February 24, congressional candidates from both parties began filing their papers to run in the districts under the interim map. Dozens of candidates have filed to run in all 14 of the interim remedial districts. And the candidate filing period *closes* on March 4 at noon—*less than 48 hours from the filing of this opposition brief*.

Changing the map now would require major changes to the election schedule. The State Board of Elections would need to throw out all of the candidate filings thus far and open an entirely new candidate filing period using different districts. The State Board has made clear in court filings that, if this happens now, it may not be possible to hold the congressional primaries on May 17, as currently scheduled.

Instituting a new map thus would almost certainly require North Carolina to postpone the 2022 congressional primaries and conduct them at a later date. This, in turn, would likely require either conducting the congressional primaries separately from the state legislative and other primaries now scheduled for May 17, or delaying all of those other primaries as well. Either approach would be disruptive and costly for the state. Indeed, the State Board has explained that moving the congressional primary to a date after May 17 could interfere with absentee voting for the general election given candidates' ability to demand a second primary in certain circumstances. *See* N.C. Gen. Stat. § 163-111(b); State Defs.' Br. at 5-6, No. 413PA21 (N.C. Jan. 28, 2022).

This Court has declined to order changes to elections at the eleventh hour. But the case against a stay is even stronger here. The eleventh hour has passed and the election process is already underway. And, as noted, Applicants have themselves contributed to the crunch by refusing to seek an immediate stay of the North Carolina Supreme Court's February 4 order invalidating the congressional map. Such a disruption should not be ordered.

Notably, Applicants do not claim that the state trial court's adoption of the interim map will result in voter confusion, or depressed turnout, or disorderly elections—nothing like that. Instead, Applicants assert only that they will be "irreparably harmed" because the 2022 congressional elections will not proceed under either their original 2021 map or their proposed remedial map. Appl. at 24–25. But

as the state courts held, both of those maps violated the state constitution. An inability to enforce an unconstitutional law is not a cognizable injury.

As for the other side of the balance of equities, voting is a "fundamental political right" because it is "preservative of all rights," and "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 562, 585 (1964). *Harper* Respondents and millions of other North Carolinians should not be forced to vote under an unconstitutional map.

Applicants insist that the state's citizens should be forced to vote under either a map that the state's supreme court has invalidated as unconstitutional or a remedial map that the state trial court likewise found violates the state constitution. They should not. Federalism and the integrity of North Carolina's elections will be best served by denying a stay and allowing the state to hold its 2022 elections under the interim remedial map adopted by the trial court in accordance with the state statutes governing state court challenges to redistricting plans under the state constitution.

CONCLUSION

For the foregoing reasons, the emergency application for stay pending petition for writ of certiorari should be denied.

DATED: March 2, 2022

Respectfully submitted,

s/ Abha Khanna

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
ELIAS LAW GROUP LLP
10 G Street N.E.,
Suite 600
Washington, D.C. 20002
(202) 968-4490
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. N.W.
Washington, DC 20001
(202) 942-5000
Elisabeth.Theodore@arnoldporter.com
Stanton.Jones@arnoldporter.com
Sam.Callahan@arnoldporter.com

Burton Craige
Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: (919) 942-5200
BCraige@pathlaw.com
NGhosh@pathlaw.com
PSmith@pathlaw.com

Counsel for Harper Respondents