No. 21A455

In the
Supreme Court of the United States

TIMOTHY MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,
Applicants,

v.

REBECCA HARPER, ET AL.,
Respondents.

On Emergency Application for Stay of Order Invalidating Congressional Districts and Judicially Mandating Congressional Districts Pending Appeal to the Supreme Court of The United States

MOTION FOR LEAVE TO FILE AMICUS BRIEF,
MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, &
AMICUS BRIEF FOR THE NATIONAL REPUBLICAN REDISTRICTING TRUST
AS AMICUS CURIAE IN SUPPORT OF APPLICANTS

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE NATIONAL REPUBLICAN REDISTRICTING TRUST

The National Republican Redistricting Trust ("NRRT") respectfully moves for leave of Court to file the accompanying amicus brief in support of Applicants' Emergency Application for Stay.

IDENTITY AND INTERESTS OF MOVANT[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort that is currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the State legislatures that are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe* v. *Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed in a way that protects the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily through the application of the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the greatest extent possible. Such

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amicus authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and their counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants have consented to the filing of this brief. Counsel for Respondents were asked their position regarding the filing of this brief. Counsel for Respondents Common Cause and the State Board Defendants provided consent, but counsel for the remaining Respondents did not respond before this motion and the accompanying brief were filed.

sensible districts are consistent with the principle that legislators represent individuals living within identifiable communities.

Legislators represent individuals and the communities within which those individuals live. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any state. Article I, Section 4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, the state legislatures, and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

REASONS TO GRANT LEAVE TO FILE *AMICUS CURIAE* BRIEF

This case presents issues of critical constitutional importance to proposed Amicus. Amicus believes that the North Carolina courts' orders impermissibly intrude upon the state legislature's prerogative to set districts for elections to the U.S. Congress.

Amicus represents the view that, under Article I, Section 4 of the Constitution, it is the State legislatures, subject to congressional supervision, that are entrusted with the responsibility of redrawing the States' congressional districts. The unauthorized intrusion of the North Carolina courts into this process threatens to topple this constitutionally imposed hierarchy of responsibility. Because Amicus can provide a unique vantage point into the redistricting process underway throughout the Nation, its submission will materially help the Court as it decides how to resolve this application for an emergency stay.

For the foregoing reasons, the motion should be granted.

March 2, 2022

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER BY THE NATIONAL REPUBLICAN REDISTRICTING TRUST

The National Republican Redistricting Trust ("NRRT") respectfully moves for leave of Court to file its amicus brief in support of Applicants' Emergency Application for Stay on 8 ½ by 11-inch paper rather than in booklet form.

In support of its motion, Amicus NRRT asserts that the Emergency Application for Stay filed by Applicants in this matter was filed on Friday, February 25, 2022. The expedited filing of the application and the resulting compressed deadline for any response prevented Amicus NRRT from being able to prepare this brief for printing and filing in booklet form. Nonetheless, Amicus desires to be heard on the application and requests the Court grant this motion and accept the paper filing.

March 2, 2022

Respectfully submitted,

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AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE NATIONAL REPUBLICAN REDISTRICTING TRUST[1]

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amicus authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and their counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants have consented to the filing of this brief. Counsel for Respondents were asked their position regarding the filing of this brief. Counsel for Respondents Common Cause and the State Board Defendants provided consent, but counsel for the remaining Respondents did not respond before this motion and the accompanying brief were filed.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort that is currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the State legislatures that are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe* v. *Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed in a way that protects the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily through the application of the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the greatest extent possible. Such sensible districts are consistent with the principle that legislators represent individuals living within identifiable communities. Legislators represent individuals and the communities within which those individuals live. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any state. Article I, Section 4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a

matter for deliberation and decision by our political branches, the state legislatures, and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Applicants filed an emergency application to stay the North Carolina Supreme Court's order declaring North Carolina's congressional map, as enacted by the legislature, unconstitutional under generalized sections of the North Carolina Constitution never previously applied to redistricting and the North Carolina Superior Court's order adopting a wholly judicially drawn map as a replacement. These orders are repugnant to the traditional understanding of the role judges play in our system of government and to the U.S. Constitution, which gives *state legislatures*, not *judges*, the power to set the "Times, Places and Manner of holding Elections for" members of the national Congress. U.S. CONST. art. I, § 4, cl. 1. In so doing, the North Carolina courts transformed themselves from *judicial* bodies—that is, institutions that render impartial judgment—into *ersatz* legislatures who enact their policy preferences through their will alone. Nothing can be more repugnant to the rule of law.

Make no mistake, the rule of law is *exactly* what is at stake. As noted in Chief Justice Newby's dissent, "[a] recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations." *Harper* v. *Hall*, 2022-NCSC-17, ¶ 232 (2022) (App. 172a) (citing N.C. Comm'n on the Admin of L. & Just., Final Report 67 (2017)). It is difficult to imagine anything more affirming of that sentiment than the North Carolina Supreme Court imposing, out of whole cloth, *partisan* criteria adopting mathematical formulas (crafted by academics) that *must* be observed when drawing maps, thereby creating a system in which North Carolina courts become the *de facto* congressional map makers. App.

171a. The North Carolina Supreme Court did this while bemoaning the fact that the legislature and the people have not implemented the court's preferred policy approach by creating a redistricting commission. App. 121a; App. 35a; *see also* App. 170a-171a. This is not a matter of the North Carolina Supreme Court merely interpreting the North Carolina constitution; the consequences here are both far greater and far more dire than that.[2]

This Court has the ability and the obligation to correct this grievous harm for multiple reasons. *First*, the North Carolina courts have usurped the power of the North Carolina General Assembly to redistrict pursuant to Article I, Section 4 of the U.S. Constitution. *Second*, what the North Carolina Supreme Court did was rare in that it exercised its will rather than its judgment, *see* THE FEDERALIST NO. 78 (Alexander Hamilton), by weaponizing state constitutional provisions completely unrelated to redistricting and never previously applied in that context to find a violation. And *finally*, contrary to the North Carolina Supreme Court majority's assertions, nothing in *Rucho* v. *Common Cause* or this Court's other precedents condones what the court has done.

For the above reasons as well as those that follow, this Court should grant a stay and then grant the forthcoming petition for a writ of certiorari. Granting a stay will allow the people of North Carolina to operate under the congressional map chosen by their elected representatives while this Court considers the merits of the decisions below. Accordingly, Amicus respectfully asks that this Court grant the stay application while it resolves the disposition of the appeal.

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[2] As explained *infra*, this is not to say that a state's supreme court has *no* role to play in the redistricting process given a proper mooring in state or federal law.

ARGUMENT

I. THE SUPREME COURT SHOULD STAY THIS CASE PENDING A PETITION FOR WRIT OF CERTIORARI.

> The provisions of the Federal Constitution conferring on state legislatures, *not state courts*, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.

Republican Party of Pa v. *Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite) (emphasis added); *see also Democratic Nat'l Comm.* v. *Wis. State Legis.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("[U]nder the U.S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections."); *id.* at 29-30 (Gorsuch, J., concurring in denial of application to vacate stay) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.").

These opinions are simply an outgrowth of a fundamental principle that has been enshrined since the founding: "The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has . . . neither FORCE nor WILL, but merely judgment." THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis in original). In stark contrast, the North Carolina courts seemingly adopt the view that "[t]heir 'knowing' is *creating*, their creating is a legislation, their will to truth is—*will to power*." FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE

FUTURE 136 (Walter Kaufmann trans., Vintage Books 1989) (emphasis in original). The North Carolina courts' actions are simply intolerable under our constitutional scheme and, therefore, must be stayed pending a full hearing on the merits.

A. The Elections Clause Acts as a Check on Both the State and Federal Judiciary.

The regulation of elections is a power the U.S. Constitution vests not in "[e]ach state as an entity," but instead in "a particular organ of state government"—the state legislature. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 503 (2021). The Constitution does this via the Elections Clause in Article I, Section 4, which states that: "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4, cl. 1. North Carolina, for its part, vests the legislative power with the North Carolina General Assembly. *See* N.C. CONST. art. II, § 1. The only checks placed upon state legislatures are ones that the legislature (or the people) voluntarily imposes upon itself and those adopted by Congress. *Id.*; *see also Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) (hereinafter, *AIRC*). And, as should be of no surprise, redistricting is "a political and legislative process," not one requiring legal judgment. *Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973).

Initially, the term "legislature" was not one "of uncertain meaning when incorporated into the Constitution." *Smiley* v. *Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke* v. *Smith*, 253 U.S. 221, 227 (1920)). "[E]very state constitution from the Founding era" defined the "legislature . . . as a distinct multimember entity

comprised of representatives." *AIRC*, 576 U.S. at 828 (Roberts, C.J., dissenting) (internal citations omitted). This Court, even when expanding the legislative power to *the people* of a state through the referendum process, acknowledged that the power at issue was fundamentally legislative. *Id*. at 805. Lest it be up for debate, the term legislature today means exactly what it did when the nation was founded: "a body of persons having the power to legislate." *Merriam-Webster*, "legislature" https://www.merriam-webster.com/dictionary/legislature; *see also* Black's Legal Dictionary, 9th ed., "legislature" ("The branch of government responsible for making statutory laws.").

Put simply, "[t]he Elections Clause grants to the [North Carolina General Assembly] 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001). The North Carolina General Assembly would not have this "broad power" but for a specific grant of authority by the U.S. Constitution. *Id*. at 522; *see also United States Term Limits* v. *Thornton*, 514 U.S. 779, 805 (1995) ("[A]s the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself."). The term "legislature" itself "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *McPherson* v. *Blacker*, 146 U.S. 1, 25 (1892). The Framers, for their part, never considered that state *courts* would have an active role in setting state policy, let alone setting redistricting policy. *See* THE FEDERALIST NO. 59 (Alexander Hamilton); THE FEDERALIST NO. 78 (Alexander Hamilton).

This Court's interpretations of a textually similar provision—the Electors Clause, U.S. CONST. art. II, § 1, cl. 2—confirms this reading. *E.g., McPherson*, 146 U.S. at 25 ("[T]he legislature possesses plenary authority to direct the manner of appointment."); *Bush* v. *Gore*, 531 U.S. 98, 112-13 (2000) ("[T]he State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution."). Thusly, "from a plain meaning, original understanding, and intratextual approach, a state's . . . legislature is the only state entity that may regulate federal elections without relying on a statutory delegation of authority." Morley, *supra* at 550.

All of this is not to say that State courts have *no* role to play in evaluating a legislature's redistricting scheme. A state court may interpret *specific* or *explicit* provisions under a state's constitution or statutes.[3] A state court may review a legislature's redistricting scheme for compliance with the federal constitution. *See, e.g., Wesberry* v. *Sanders*, 376 U.S. 1 (1964) (mandating equal population for congressional districts); *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017) (invalidating state redistricting for violating the Fourteenth Amendment because the consideration of race predominated); Voting Rights Act of 1965, 52 U.S.C. §§ 10301, *et seq*. A state,

[3] Many states have constitutional provisions or statutes that specifically constrain the discretion of their legislatures when redistricting. *E.g.,* FLA. CONST., art. III, § 20(a); MO. CONST., Art. III, § 3; DEL. CONST. tit. xxix, § 804; Iowa Code § 42.4(5). Under this Court's precedents there is nothing repugnant to the U.S. Constitution in the people restraining their state legislature through their constitutions or from a legislature constraining itself through its lawful acts.

through its people or legislature, may even assign its redistricting authority to an "independent" commission. *AIRC*, 576 U.S. 787. What cannot be permitted is exactly what the North Carolina courts did here: Invent requirements under generalized provisions of the North Carolina Constitution, assert specific policy preferences (such as proportional representation by political party or race) as constitutional dictates, arrogate to itself the ability to reapportion, and then create a system that enshrines the North Carolina judiciary as the *de facto* map drawers in perpetuity. Everything hinges on this because the law cannot be "whatever judges choose to do." *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.) Instead, "judicial action" must be "governed by *standard*, by *rule*." *Cf. id.* (emphasis in original) (discussing the role of the federal judiciary under Article III).

As detailed by the *Harper* dissent, the North Carolina Supreme Court's decision was results-oriented jurisprudence of the worst type in contravention of both the North Carolina and U.S. Constitutions. *See* App. 171a (Newby, C.J., dissenting). How then is this Court to balance the federalism concerns inherent in a state supreme court overstepping its own authority under the guise of a state constitution? The answer is less complicated than it might seem. There are exactly two instances when a state supreme court may intrude upon the legislature's redistricting function. The *first* is when the legislature itself (or the people) have *expressly* authorized such an intrusion. *See, e.g.,* FLA. CONST. art. III, § 20; *AIRC*, 576 U.S. 787. A state court may not take generic state constitutional provisions and "interpret" (really, in this case, "amend" is a more appropriate term) them to apply to redistricting, but they are free to interpret specific provisions of state law that

apply to redistricting such as the specific redistricting requirements and prohibitions found in Florida or Colorado. The *second* instance when a state court may intrude upon the redistricting function is when there is a true deadlock between the branches of state government expressly given authority to redistrict under state law.[4] Such a scenario would be both rare and, in any event, an instance of a state court enforcing the provisions of the *federal* constitution, *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964),[5] because the right to redistrict congressional seats is a right granted by the federal, not state, constitution, *see Thornton*, 514 U.S. at 805. State courts around the country have been conducting deadlock litigation for years without federal challenge. *See, e.g.*, *Hippert* v. *Ritchie*, 813 N.W.2d 391, 393 (Minn. 2022) (special redistricting panel); *Guy* v. *Miller*, 2011 Nev. Dist. LEXIS 32, *2-3 (Nev. 1st Judicial Dist. Oct. 14, 2011); *Egolf* v. *Duran*, No. D-101-CV-2011-02942 (N.M. 1st Judicial Dist. Jan. 17, 2012).[6]

A rule announced by this Court like the one outlined herein would bring much-needed clarity to the law, address federalism concerns while protecting the proper constitutional order, and ensure that the states remain the primary

[4] This typically arises when a legislature and a governor are "deadlocked" and cannot reach an agreement on passing a map (and the legislature lacks the votes necessary to override a veto). In North Carolina, this scenario would only arise when the North Carolina Senate and House of Representatives cannot agree on a map because the Governor of North Carolina has *no role* in approving redistricting enactments. N.C. CONST. art II, § 22(5)(d).

[5] "[J]udicial relief becomes appropriate *only when* a legislature fails to reapportion according to *federal constitutional requisites* in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586 (emphases added).

[6] https://www.nmlegis.gov/Redistricting/Documents/Judgment%20and%20Final%20Order%20-%20Congress.pdf.

redistricting entity. This Court should grant a stay to be afforded the time to consider this issue without disrupting the redistricting process across the country.

B. The North Carolina Supreme Court Has Acted Without Precedent to Require the Consideration of Partisanship in Redistricting.

The North Carolina Supreme Court invalidated the General Assembly's adopted congressional map based upon a novel interpretation of the North Carolina Constitution's Free Elections Clause, which requires *in toto* that "[a]ll elections shall be free." N.C. CONST. art. I, § 10. Into these five words of unadorned text that have appeared in one form or another in North Carolina's Constitution since 1776, the state supreme court read a never-before-recognized right to partisan proportionality and imposed a standard that—whether the court realizes it or not—will require the state legislature to affirmatively consider partisanship in redistricting. App. 217a-226a (discussing the long history of the Free Elections Clause); *see also* App. 207a-217a (discussing the long history of the North Carolina Declaration of Rights). This interpretation is completely unmoored from the textual and historical evidence and finds no support in the other constitutional provisions cited by the court concerning the rights of assembly, free speech, and equal protection of the laws. *See* App. 38a (quoting N.C. CONST. art. I, §§ 10, 12, 14, and 19). Unless this Court grants the requested stay, other state supreme courts will be encouraged to travel even farther down this path and create from whole cloth additional legislative-style redistricting principles that do not appear on the face of their state constitutions.

The North Carolina decision is only the most extreme example of an

emerging trend: The increasing tendency of state supreme courts to creatively interpret state constitutional provisions to impose additional unwritten requirements on redistricting processes. In *League of Women Voters of Pennsylvania* v. *Commonwealth*, 645 Pa. 1 (2018), the Pennsylvania Supreme Court invalidated that state's enacted congressional district map that had been in use for half a decade under a similar state constitutional theory. The Pennsylvania Supreme Court determined that Pennsylvania's congressional map violated the Free and Equal Elections Clause of the state constitution, a provision similar in form (and in brevity) to the North Carolina constitutional provision relied upon in this case. [7] *Id.* at 8.

To evaluate the compliance of the adopted plan with that provision, the Pennsylvania Supreme Court relied upon several traditional redistricting criteria, including "compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions[.]" *Id.* at 120-21. In other words, the failure of the Pennsylvania congressional map to satisfy the court's neutral criteria was determined to be evidence of the map's partisan intent. *Id.* at 123. Hence, even though that decision was characterized as one about partisan gerrymandering, the Pennsylvania state legislature could presumably satisfy the state supreme court's standard with reference only to traditional redistricting criteria (albeit criteria that had never been interpreted as part of that provision before).

[7] The North Carolina decision also reversed years of precedent holding that the state constitution simply did not address Congressional redistricting. App. 204a-205a.

The North Carolina Supreme Court's decision here makes *League of Women Voters* look mundane. In the 2021 redistricting process, the North Carolina General Assembly unequivocally prohibited legislators from using partisan or electoral data to construct maps. *See* App. 40a-43a (noting that the criteria used to design North Carolina's congressional map included a requirement that "[p]artisan considerations and election results data *shall not* be used in the drawing of districts"); *id.* at 43a (noting that the software used to design maps did not even include political data). Nevertheless, the state supreme court determined that the enacted congressional map was an unconstitutional partisan gerrymander based upon a variety of statistical analyses reviewed by the trial court that indicated the map was "a statistical partisan outlier." *Id.* at 150a-153a. Based upon these projections, the court concluded that "[t]he General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship," despite identifying no indicia of partisan intent within the redistricting process itself. *Id.* at 154a.

In short, the North Carolina General Assembly was unable to escape the invalidation of its map as a partisan gerrymander even though it expressly prohibited the use of political data in the 2021 redistricting process. It is worth considering how remarkable that is: The North Carolina Supreme Court has determined—from a mere five words in the state constitution never previously applied in this way—that it is not enough to exclude partisan data from consideration if the effect of the enacted map is determined to be skewed based upon the latest academic theories or whatever social science analyses the court

finds persuasive in a given case. In future redistricting cycles, the state legislature will effectively be *forced* to consider partisan data and the kinds of statistical projections the court found convincing to design a map that comports with the court's interpretation of the Free Elections Clause. Ironically, despite the North Carolina Supreme Court's expressed belief that partisan gerrymandering is "a form of viewpoint discrimination and retaliation," *id.* at 131a, it will henceforth mandate the use of partisan data to defeat the perceived evil of partisan gerrymanders. To satisfy the court, the legislature will have to keep the proportional strength of political parties in the front of their minds when redistricting and discriminate against voters on the basis of their partisan affiliation in order to reach those preordained district quotas. Should the legislature "fail" at that task, as ordained by the North Carolina courts, the courts themselves will be compelled to use the same discriminatory criteria.

As discussed, Amicus does not assert that anti-gerrymandering state constitutional provisions or statutes *cannot* exist and be properly interpreted or applied by a state Supreme Court, only that one does not exist here. *See supra* note 4. Here, the state supreme court searched the constitution in vain for an analogous command and the closest simulacrum it could find was the Free Elections Clause. Hence, although North Carolina is not prohibited from adopting an anti-partisan gerrymandering law similar in form to those enacted in other states, it has not done so yet. And, if the people of North Carolina were to eventually decide that such a provision were necessary, they would have to effectuate that desire through their representatives in the General Assembly rather than the state supreme court. The

North Carolina Supreme Court finds the State's existing separation of powers unsatisfactory and argues on prudential grounds that "the only way that partisan gerrymandering can be addressed is through the courts" due to state legislators being elected from districts that a majority of the court finds illegitimate. App. 35a. The court assumes for no clear reason that partisan gerrymandering is a policy problem that demands a response, that the state legislature has in the court's opinion not offered a response commensurate to the scale of the problem, and that the state judiciary is therefore required to act. There is no limiting principle to the court's logic. Under the state supreme court's expressed rationale, whenever the state legislature proves unable or unwilling to adopt the policies that the court prefers, it can simply take matters into its own hands to ensure that the "right" policy gets enacted.

State supreme courts are entrusted with the authority to interpret state constitutional provisions applicable to redistricting, but they are not entitled to operate as "backup legislatures" when a state legislature adopts a map the court does not like for reasons unenumerated in state law. The North Carolina Supreme Court does indeed have the authority to "interpret[] state constitutional provisions more expansively than their federal counterparts," *id.* at 33a-34a, but even state constitutions must be interpreted consistent with the requirements of federal law. Article I, Section IV of the federal constitution applies to *every* state, no matter whether they have an express anti-gerrymandering provision in their state constitution or a more vaguely worded "free elections clause" like North Carolina and Pennsylvania. As explained *supra*, state legislatures hold the default authority

over prescribing rules for holding elections within their state, subject to regulation by the United States Congress. U.S. CONST. art. I, § 4, cl. 1. The increasing trend of state supreme courts identifying heretofore unrecognized anti-gerrymandering clauses concealed within the interstices of their state constitutions endangers the redistricting authority of state legislatures and rides roughshod over the express terms of the U.S. Constitution.

It is understandable that state supreme courts do not want to "condemn complaints about districting to echo into a void," *Rucho* v. *Common Cause*, 139 S. Ct. 2482, 2507 (2019), but that is what they *must* do in the absence of a clear constitutional or statutory provision prohibiting or purporting to limit partisan gerrymandering. A state supreme court cannot manufacture anti-gerrymandering provisions that it thinks ought to exist, and a contest between the express terms of the federal constitution and a state supreme court's exegesis of the unexpressed aspirations of a state constitution is really no contest at all.

C. Nothing in *Rucho v. Common Cause* or this Court's Previous Jurisprudence Supports the North Carolina Courts' Power Grab.

This Court in *Rucho* v. *Common Cause*, 139 S. Ct. 2482, noted that "[t]he States . . . are actively addressing [partisan gerrymandering] on a number of fronts" and then goes on to list examples in Florida, Colorado, Michigan, Missouri, Iowa, and Delaware. In fact, the majority opinion of the North Carolina Supreme Court relied upon *Rucho* and "a long line of decisions of the Supreme Court" to incorrectly disregard the North Carolina General Assembly's authority under the Elections

Clause. App. 146a. The North Carolina Supreme Court misread and then misapplied this Court's precedents.[8]

First, the North Carolina Supreme Court asserted that *Rucho* supports their power grab because *Rucho* stated that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply." *Id.* at 176 (quoting *Rucho*, 139 S. Ct. at 2507) (emphasis added by the North Carolina Supreme Court). This is a deliberately obtuse reading of *Rucho*. The examples this Court cites in *Rucho* are all state constitutional or statutory provisions that expressly concern redistricting. The best example is the one this Court used: Florida. Florida has a constitutional provision called the "Fair Districts Amendment."[9] The Florida Constitution requires that the Florida Legislature follow several specific criteria, from the novel requirement that *no* partisan considerations are permitted to the more pedestrian requirements that districts be contiguous, compact, and so forth. FLA. CONST. art. III, § 20. The same is true for the other states referenced by this Court. *See, e.g.*, COLO. CONST. art. V, §§ 44, 46 (creating a redistricting commission); MICH. CONST., art. IV, § 6 (same); MO. CONST., art III, § 3 (creating a state demographer to draw district lines); MO. CONST. art. III, § 20 (mandating specific redistricting criteria); Iowa Code § 42.4(5) (2016) (same); Del. Code tit. xxix, §804 (2017) (same). As the

[8] It is with no small bit of irony that the North Carolina Supreme Court used a case about the non-justiciability of partisan gerrymandering claims arising from North Carolina to support their creation of a *de facto* partisan gerrymandering requirement in the North Carolina Constitution.

[9] Florida's Fair Districts Amendment was approved by a vote of the people. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 597, 597 n.1 (Fla. 2012).

Rucho majority explained at length, this Court was addressing "States [that] are restricting partisan considerations in districting *through legislation*." *Rucho*, 139 S. Ct. at 2507 (emphasis added). These examples are not analogous to the present case.

None of the referenced states have completely upended the constitutional order (both state and federal) by just now discovering redistricting criteria in a general constitutional provision that has existed for over 200 years. App. 210a. The reason why this Court should reject the North Carolina Supreme Court's reasoning is the same reason it rejected the *Rucho* dissent's reasoning: "there is no 'Fair Districts Amendment' to the [North Carolina] Constitution." *See Rucho*, 139 S. Ct. at 2507. *Rucho* simply does not support the proposition that a state supreme court can create for itself the power to redistrict (or set the criteria therefor) in contravention of the Elections Clause.

Second, the decisions of this Court confirm redistricting is "a matter for legislative consideration and determination." *Reynolds*, 377 U.S. at 586. Nearly every opinion from this Court reaffirms the basic tenet that those exercising the legislative function have the primary authority to redistrict. The most recent case to address this question is *Arizona Independent Redistricting Commission*. The Court in *AIRC* held that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." 567 U.S. at 808. The Court then concluded that a citizen referendum creating an independent redistricting commission was a constitutional use of legislative authority because it is part of Arizona's prescriptions for lawmaking. *Id*. at 813-14. While this Court

acknowledged that "States retain autonomy to establish their own governmental processes," the "deference" accorded to a state is only "to state lawmaking." *Id.* at 816-17.[10]

The majority's statement in *AIRC* that this Court has never 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" cannot carry the weight the North Carolina Supreme Court attempts to pile upon it. *See id.* at 817-18. To support the above statement, the Court used a single case involving a *specific* provision of the Oregon constitution setting forth the time for an election to be held and making the rather pedestrian assertion that a specific state constitutional provision prevails over a mere legislative enactment. *Id.* at 818. Again, the majority opinion in *AIRC*, over a strong dissent, is *at most* supportive of the idea that redistricting must be enacted in "accordance with a State's prescriptions for lawmaking." *Id.* at 808; *but see id.* at 824-62. For the North Carolina Supreme Court to rely upon *AIRC* in support of its position is to admit that it has engaged in lawmaking, not legal interpretation. Similarly, interpreting an over 200-year-old provision of the state constitution totaling *five* words to now say that redistricting must be done in accordance with various judicially crafted criteria is also a tacit admission of legislating. *See* N.C. CONST. art. I, § 10 ("All elections shall be free.").

[10] The *AIRC* majority devotes an entire subsection to state initiatives to curb partisan gerrymandering. *AIRC*, 567 U.S. at 822-24. It is interesting, to say the least, that the North Carolina Supreme Court used this opinion to support their own attempts at using partisanship in redistricting when the North Carolina General Assembly did not. *See* App. 146a-147a.

Finally, consistent with Supreme Court precedent, state governors may exercise the veto power as part of the normal legislative process (when condoned by state law) because the veto power is a *legislative* function granted to governors, typically under a state's constitution. *See AIRC*, 567 U.S. at 841 (Roberts, C.J. dissenting). The judiciary, unless specifically granted legislative authority by constitution or statute, *see, e.g.,* VA. CONST. art. II, §§ 6, 6-A; Va. Code § 30-399, *never* exercises a legislative function. To find otherwise is to subvert the will of the people through their elected representatives, destroy the separation of powers within a state, and contravene an express provision of the federal constitution.

CONCLUSION

For the foregoing reasons, this Court should issue a stay of all proceedings before the three-judge panel in the North Carolina Superior Court including the implementation of any "remedial" maps issued by that Court pending this Court's disposition of Applicants' Writ of Certiorari.

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