No. 21A455

IN THE
Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, ET AL.,
Applicants,

v.

REBECCA HARPER, ET AL.,
Respondents.

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

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

John R. Wester
Stephen D. Feldman
Adam K. Doerr
Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A.
434 Fayetteville St., Suite 1600
Raleigh, NC 27601

Sam Hirsch
Jessica Ring Amunson
Zachary C. Schauf
Counsel of Record
Karthik P. Reddy
Leonard R. Powell
Urja Mittal
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

Counsel for Respondents North Carolina League of Conservation Voters, Inc., Henry M. Michaux, Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernós, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams, Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa & Cosmos George

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

With candidate filing set to close in less than two days and the congressional primary imminent, Applicants make an eleventh-hour request to throw North Carolina's electoral process into disarray. Their radical theory is that this Court should jettison at least half a dozen of its decisions, spanning a century, and hold for the first time that the Elections Clause prohibits state courts from applying state constitutions to state legislation that regulates congressional elections.

For three reasons, the Application should be denied.

The first is that, because of Applicants' tactical delay, a stay would inflict enormous disruption. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The State Board of Elections told the parties and the courts below that it could conduct the May 17 primary without disruption only if candidate filing opened by February 24. The North Carolina Supreme Court tailored its process to that guidance. It issued an order invalidating the General Assembly's congressional redistricting plan on February 4. Then it gave the General Assembly two weeks (until February 18) to conform its congressional plan to the requirements of the state constitution. Had Applicants similarly respected the need to avoid disruption to the primary, they would have sought relief from this Court promptly after the February 4 order. Indeed, that is just what the Pennsylvania legislature (represented by some of the same counsel who represented Applicants below) did in 2018.

But that is not what Applicants did here. They waited to see how the remedial process played out, even dangling the possibility of seeking this Court's review later to

press for acceptance of their preferred map. Now, because of this delay, the State Board's deadline has passed and candidate filing is nearly complete. A stay would mean throwing out all these candidacies and starting over (including for many offices beside Congress). It would also likely mean delaying the May 17 primary, which the state courts carefully structured the remedial process to preserve. And it could condemn millions of North Carolinians to voting under maps that violate the state constitution. This Court held almost a month ago that it was too late for a federal court to grant equitable relief as to a May 24 primary—and it is certainly too late now to grant relief to a party that delayed seeking relief as to a May 17 primary.

Second, this case does not even present the Elections Clause issues Applicants press. That is because the North Carolina courts here acted pursuant to specific authorization from the legislature: The General Assembly authorized a special three-judge court to hear challenges to legislative acts "redistrict[ing] … congressional districts," N.C.G.S. § 1-267.1(a); prescribed that if state courts found a constitutional flaw in a congressional districting plan, they must give the General Assembly two weeks to fix it, *id.* § 120-2.4(a); and specified that if the General Assembly did not timely cure the constitutional flaw, the court could "impose an interim districting plan," *id.* § 120-2.4(a), (a1), (b). Moreover, the General Assembly also enacted all the substantive state constitutional provisions the state courts applied here. Hence, the only issue this case genuinely presents is whether the Elections Clause disables state legislatures from *authorizing* state courts to act in this manner. But that narrow issue does not warrant review—and indeed, Applicants do not even *raise* that uncertworthy issue (perhaps

because even proponents of Applicants' Elections Clause arguments agree such authorizations are permissible). In fact, Applicants failed even to preserve their broader (and unpresented) Elections Clause arguments by not making them at the merits stage at trial, as North Carolina law requires.

Third, on the merits, Applicants are not likely to obtain a reversal. The Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …." U.S. CONST. art. I, § 4, cl. 1. Here, all the rules governing North Carolina's congressional elections reflect exactly what the "Legislature" prescribed in on-point statutes that apply specifically and expressly to congressional redistricting. And even setting those statutes aside, this Court has been clear that "[n]othing in th[e] [Elections] Clause instructs … 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 Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) (*AIRC*), and thus when the legislature "prescribes election regulations, [it] may be required to do so within the ordinary lawmaking process," *id.* at 841 (Roberts, C.J., dissenting). Hence, where a "state Constitution" provides "a check" on the legislature, the legislature must enact districting plans "in accordance with" that check. *Smiley v. Holm*, 285 U.S. 355, 367–69 (1932). And if the legislature fails to do so, "the judiciary of a State" has the "power … to formulate a valid … [redistricting] plan" and remedy violations of "State and Federal Constitutions." *Growe v. Emison*, 507 U.S. 25, 29, 33 (1993) (citations and quotation marks omitted).

Accepting Applicants' argument would not just require overturning all these cases (and several others). It would also betray this Court's recent promise that state courts can apply "state statutes and state constitutions" to remedy "excessive partisan gerrymandering," including in "congressional districting." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Given all this, Applicants cannot show that this Court is likely to grant certiorari and reverse—much less that the "merits are entirely clearcut in [their] favor." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Indeed, given how radical Applicants' arguments are, the disruption from a stay would sweep far beyond North Carolina. State constitutions have long regulated "[c]ore aspects of the electoral process" for federal elections, including the secrecy of ballots, voter registration, absentee voting, vote counting, victory thresholds, voter-identification requirements, and geographic requirements that districts must meet. *AIRC*, 576 U.S. at 823. If Applicants' theory is correct, the constitutionality of all those regulations is in doubt. And if this Court grants a stay, it will invite a flood of challenges—while the 2022 primary season is getting underway and the November general election is approaching. The Court should adhere to settled law and deny the Application.

STATEMENT OF THE CASE

A. The General Assembly by Statute Has Authorized State Courts to Review and Remedy Unlawful Congressional Districting Plans.

In recent years, the North Carolina General Assembly enacted detailed procedures authorizing where, when, and how state courts can review and remedy unconstitutional districting plans—expressly including congressional districting plans.

First, the General Assembly set up a special three-judge process. The General Assembly established that "[v]enue lies exclusively with the Wake County Superior Court in any action concerning any act of the General Assembly apportioning or redistricting State legislative *or congressional districts*." N.C.G.S. § 1-81.1(a) (emphasis added). The General Assembly authorized "action[s] challenging the validity of any act … that apportions or redistricts State legislative *or congressional districts* [to] be filed in the Superior Court of Wake County and [to] be heard and determined by a three-judge panel." *Id.* § 1-267.1(a) (emphasis added).

Second, the General Assembly specifically contemplated that the state courts would evaluate congressional districting plans for noncompliance with the North Carolina Constitution. The General Assembly prescribed that "[e]very order or judgment declaring *unconstitutional* or otherwise invalid, in whole or in part and for any reason, any act … that apportions or redistricts State legislative *or congressional districts* shall find with specificity all facts supporting that declaration [and] shall state separately and with specificity the court's conclusions of law on that declaration." *Id.* § 120-2.3 (emphasis added).

Third, the General Assembly expressly authorized state courts to craft a valid remedial congressional districting plan if the General Assembly failed timely to do so. The General Assembly provided that a court must "first give[] the General Assembly" at least two weeks "to remedy any defects" in its "plan apportioning or redistricting State legislative *or congressional districts*." *Id.* § 120-2.4(a) (emphasis added). But if "the General Assembly does not act to remedy any identified defects to its plan …, *the court*

may impose an interim districting plan for use in the next general election only." *Id.* § 120-2.4(a1) (emphasis added). The General Assembly barred the State Board of Elections from using "any plan apportioning or redistricting State legislative *or congressional districts* other than *a plan imposed by a court* under this section or a plan enacted by the General Assembly." *Id.* § 120-2.4(b) (emphasis added).

B. The General Assembly Enacted Extreme Partisan Gerrymanders that Violated the State Constitution.

On November 4, 2021, the General Assembly enacted new districting plans for the state legislature and Congress. Just 12 days later, Respondents invoked the specific process the General Assembly had created to challenge these plans in state court. Separate groups followed suit within days. Per the statutory procedure, the actions were assigned to a three-judge panel of the Wake County Superior Court and consolidated. The panel denied the plaintiffs' motion for a preliminary injunction. On December 8, the North Carolina Supreme Court reversed, issued a preliminary injunction, postponed the primary election from March 8 until May 17, and remanded for trial on an expedited basis. At that point Applicants could have sought a stay from this Court, but they did not do so.

On remand, the General Assembly publicly claimed that "[p]artisan considerations and election results data [had] not be[en] used in the drawing of districts" in 2021, App'x 42a; that its process was "just about as transparent" as "humanly" possible; and that lawmakers had not relied on "maps drawn outside of th[e] building," Pls.' Tr. Ex. 79 at 5, 61–62. But after a weeklong trial in January 2022, the three-judge panel—a bipartisan panel designated by North Carolina's Republican Chief Justice and composed of two

Republicans and one Democrat[1]—found as fact that those claims were false. The panel concluded that the maps were the product of "intentional, pro-Republican partisan redistricting." App'x 50a. Indeed, the evidence at trial showed that legislative leaders had relied on "concept maps" drawn by undisclosed individuals that were then destroyed in violation of state public-records laws. App'x 44a & n.5.

The panel found that the maps were "extreme partisan outliers," App'x 36a, 50a, and that the congressional map was more carefully crafted for Republican partisan advantage than 99.9999% of neutral maps. App'x 60a–61a. These extreme gerrymanders, the panel found, were "designed to systematically prevent Democrats from gaining a tie or majority" of seats, even if their candidates won a significant majority of votes. App'x 370a; *see* App'x 367a–369a. The panel nonetheless held that North Carolina's Constitution provides no remedy for even extreme partisan gerrymandering. App'x 523a–547a.

The plaintiffs appealed, and the North Carolina Supreme Court reversed. Citing *Rucho*'s guidance that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," the court held that partisan-gerrymandering claims are justiciable, and that partisan gerrymandering can violate the state constitution. App'x 97a (quoting *Rucho*, 139 S. Ct. at 2507).

The court began with the North Carolina Constitution's Free Elections Clause. This clause, the court emphasized, "has no analogue in the federal Constitution" and is

[1] North Carolina employs partisan elections for both trial and appellate courts; hence, judges' affiliations are matters of public record.

one of the "provision[s] that makes the state constitution 'more detailed and specific … in the protection of the rights of its citizens.'" App'x 115a (quoting *Corum v. Univ. of N.C. ex rel. Governors*, 413 S.E.2d 276, 290 (N.C. 1992)). Looking to history, the court observed that this clause ultimately "derived from a clause in the English Bill of Rights of 1689," which "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage.'" App'x 116a. The court concluded that this clause protects the people's "right … to fair and equal representation in the governance of their affairs." App'x 117a.

North Carolina's Equal Protection Clause, too, "provides greater protection of voting rights than the federal Constitution." App'x 123a. The North Carolina Supreme Court has repeatedly construed that clause more broadly than its federal counterpart, including to guarantee "substantially equal voting power" and "substantially equal legislative representation." *Id.* (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 394 (N.C. 2002)). The court held that this guarantee "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials," and that partisan gerrymandering violates this guarantee "by diminishing or diluting the[] votes" of the "disfavored party." App'x 125a. The court reached similar conclusions as to the North Carolina Constitution's Free Speech and Free Assembly Clauses. App'x 127a–131a.

Applying these four provisions to the General Assembly's districting plans, the North Carolina Supreme Court held the plans unconstitutional. These plans, the court emphasized in affirming the trial court's findings, were "designed [to] safeguard[]

Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins." App'x 62a (quotation marks omitted). And the court found it "abundantly clear" that the General Assembly's districting plans unconstitutionally diluted Respondents' voting power. App'x 150a–163a. To assist the General Assembly, the parties, and the trial court on remand, the Supreme Court identified specific quantitative measures of partisan skew that could help evaluate compliance with the North Carolina Constitution. App'x 15a–16a, 136a–139a.

The North Carolina Supreme Court addressed Applicants' argument that the federal Elections Clause "forbids state courts from reviewing a congressional districting plan." App'x 146a. The court noted, first, that this argument "was not presented at the trial court." *Id.* The court also explained that this argument "is inconsistent with nearly a century of precedent of the [U.S.] Supreme Court"; is "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts"; and "would produce absurd and dangerous consequences." *Id.*

Throughout this case, the North Carolina Supreme Court acted with speed befitting the imminent start of the primary calendar, and it followed the specific guidance of the State Board of Elections on how to avoid interfering with the May 17 primary. The State Board of Elections had explained that, to hold the primary without undue difficulties, candidate filing under new maps needed to begin by February 24. R-App'x 12a–13a, 129a–130a. So the North Carolina Supreme Court set an expedited schedule for briefing and argument pegged to that deadline.

On February 4, two days after argument, the court issued a detailed order (followed by a full opinion on February 14) invalidating the General Assembly's legislative and congressional districting plans, explaining the standards that lawful districting plans must meet, and setting forth procedures and deadlines for the trial court to follow on remand, consistent with the state statutory scheme. App'x 12a–18a. That order made clear that the remedial process would conclude quickly and that, when it did, candidate filing would begin. Consistent with state statute, the General Assembly was allowed two weeks, until February 18, to prepare remedial districting plans. Proposed remedial plans from the plaintiffs were likewise due on February 18; the trial court was ordered to assess all remedial plans by 12:00 noon on February 23; and any party aggrieved by the trial court's judgment had until just 5:00 p.m. to seek an emergency stay in the state Supreme Court. App'x 17a–18a. Candidate filing would commence the next morning. App'x 82a.

C. A Bipartisan Trial-Court Panel, Aided by Bipartisan Special Masters, Applied State Law, Assessed Remedial Plans, and Unanimously Ordered an Interim Congressional Plan.

After the February 4 order, Applicants publicly discussed seeking relief from this Court.[2] But they opted instead to proceed with the remedial process. They were

[2] *See, e.g.*, Interview of Rep. Tim Moore, Speaker of N.C. House of Representatives, by Peter Kaliner 0:57–1:16 (Feb. 8, 2022), https://wbt.com/237704/tim-moore-we-were-told-to-re-draw-fair-maps-which-we-thought-we-had ("We're going to work to try to do something that we think the court would uphold but we also are looking at an appeal to the U.S. Supreme Court. There was a decision that came down yesterday where they upheld the maps in Alabama, and we think that that would certainly embolden our case." (statement of Rep. Moore)).

forthright that they intended to seek this Court's review if, but only if, the North Carolina courts rejected the congressional map they preferred.[3]

On February 17, the General Assembly enacted a remedial state House plan with overwhelming bipartisan support. As to the state Senate and U.S. Congress, however, Applicants rammed remedial plans through the General Assembly on party-line votes.

The trial-court panel then assessed whether the plans "remed[ied] [the] defects" the state Supreme Court had found. N.C.G.S. § 120-2.4(a1). To assist it, the bipartisan panel appointed as special masters a bipartisan group of highly respected jurists—two retired state Supreme Court Justices and one retired Superior Court Judge (one Republican, one Democrat, and one unaffiliated). App'x 248a. The special masters, in turn, appointed four expert assistants. Those experts included Professor Bernard Grofman—one of the nation's foremost redistricting experts, whose work has been cited in six opinions of this Court[4]—as well as professors from Princeton and Brigham Young Universities. App'x 249a.

[3] *See, e.g.*, Interview of Rep. Tim Moore, *supra* note 2, at 1:17–2:57 ("[W]e're hoping that the [trial] court will be fair with what we do … but certainly if we feel like the court is not, then we reserve the right to take this before the U.S. Supreme Court as well…. [W]e feel really good about that." (statement of Rep. Moore)).

[4] *See AIRC*, 576 U.S. at 798; *Vieth v. Jubelirer*, 541 U.S. 267, 283 (2004) (plurality opinion); *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003); *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994); *Shaw v. Reno*, 509 U.S. 630, 636 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 47 & n.13, 48 & n.14, 49, 52–54 & nn.20, 22, 62, 68 (1986); *see also Holder v. Hall*, 512 U.S. 874, 895 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Davis v. Bandemer*, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part and dissenting in part), *abrogated by Rucho*, 139 S. Ct. 2484.

The bipartisan trial-court panel and bipartisan special masters approved the bipartisan state House plan. They also approved the state Senate plan (over the objections of all plaintiffs). Invoking the need to "give appropriate deference to the General Assembly," App'x 253a, 270a, the court rejected the plaintiffs' arguments that the Senate plan failed to fully remedy the unlawful gerrymandering, App'x 263a–265a.[5]

Neither the trial court nor the special masters could reach the same conclusion as to the congressional plan. The court unanimously agreed with the special masters and ruled that, even "giving appropriate deference to the General Assembly," the plan was unconstitutional and did not remedy the defects the state Supreme Court had identified. App'x 253a, 271a. In the words of Professor Grofman, the plan was still "very lopsidedly Republican." R-App'x 202a.

The trial court, however, declined to adopt any of the alternative plans proposed by plaintiffs. App'x 262a, 265a. It explained that because "the ultimate authority and directive is given to the Legislature to draw redistricting maps, … the appropriate remedy is to modify the Legislative Remedial Congressional Plan to bring it into compliance" with state law. App'x 265a. The special masters thus worked with Professor Grofman "to amend the Legislative Defendants' plan to enhance its consistency with the [North Carolina Supreme Court's] opinion." App'x 271a–272a. The trial court found that the special masters' amendments to Applicants' plan remedied the defects and, pursuant to the process the General Assembly authorized in N.C.G.S. § 120-2.4(a1), ordered this

[5] The trial court unanimously adopted the special masters' findings in full. App'x 253a.

plan to be used as an "interim" plan solely for the 2022 congressional elections. App'x 265a–266a.

D. The North Carolina Supreme Court Declined to Stay the Bipartisan Trial Court's Judgment and Allowed Candidate Filing to Commence.

All plaintiffs moved the state Supreme Court for an emergency stay of the order accepting the state Senate map; one plaintiff moved for a stay of the order accepting the state House map. Applicants moved for a stay on the congressional map. The state Supreme Court, with no noted dissents, denied all stay motions late on February 23.

The next morning, February 24, candidate filing under the new maps commenced at 8:00 a.m., just as the state Supreme Court's February 4 order had contemplated. Candidate filing will close at 12:00 noon on Friday, March 4.

As of March 2, 2022, at 12:00 noon, the State Board of Elections had received 2,348 candidate filings, including 67 for Congress, 91 for state Senate, and 215 for the state House. N.C. State Board of Elections, Candidate Lists (Mar. 2, 2022), https://bit.ly/3MhGzze.

REASONS FOR DENYING THE 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), and "[d]enial … is the norm," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). "To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's*

Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (citation omitted). In a case, like this one, on the Court's discretionary docket, the applicant also "must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, [and] (2) 'a fair prospect' that the Court will then reverse the decision below." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (quoting *Conkright*, 556 U.S. at 1402 (Ginsburg, J., in chambers)); *see Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) (observing that the applicant's likelihood of success on the merits turns in part on "a discretionary judgment about whether the Court should grant review in the case").

Two Justices recently concluded that when an applicant seeks federal-court equitable relief "close to an election," relief is available only if "(i) the underlying merits are entirely clearcut …; (ii) the [applicant] would suffer irreparable harm absent the [relief]; (iii) the [applicant] has not unduly delayed bringing the complaint to court; and (iv) the changes … are … feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring, joined by Alito, J.).

I. Because of Applicants' Undue Delay, North Carolina Voters Would Be Irreparably Harmed by a Stay, and the Changes Applicants Seek Are Not Feasible Without Significant Cost, Confusion, and Hardship.

The Court should deny the Application for the threshold reason that Applicants unreasonably delayed in seeking relief and, due to their tactical delay, a stay would inflict significant disruption on North Carolina's impending primary and cause irreparable harm to North Carolina's voters. As a result, the principles underlying *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (*per curiam*), foreclose granting the Application.

A. Applicants' Delay Forecloses the Relief They Seek.

Applicants' delay in seeking review was extreme—and now, their belated stay application threatens enormous disruption to election administration in North Carolina. On Applicants' theory, the North Carolina Supreme Court violated the Elections Clause with its February 4 Order. As Applicants concede, "[t]hat order … constitute[s] a final judgment of [the State's] highest court with regard to Applicants' original Congressional map," which Applicants claim state courts lacked authority to invalidate. App. 3. Indeed, Applicants could have sought relief as early as December 8, 2021, when the North Carolina Supreme Court issued a preliminary injunction and postponed the congressional primary. But at minimum, Applicants could have sought a stay after February 4.

Notably, when the Pennsylvania Supreme Court invalidated that State's congressional map in 2018, the legislature immediately sought a stay—on the same Elections Clause theory (and represented by some of the same lawyers who represented Applicants below). The legislature filed four days after the state supreme court issued its order (with a full opinion to follow), while the remedial phase proceeded. Stay App. at 5–6, *Turzai v. League of Women Voters of Pa.*, No. 17A795 (U.S. Jan. 26, 2018).

Applicants have no excuse for not acting with similar dispatch. They knew (because the state Supreme Court's order said) that the candidate-filing period would commence immediately after the remedial process ended, on February 24. *Supra* pp. 9–10; App'x 14a. They also knew (because the State Board of Elections said) that any

further delay would interfere with the state's May 17 primary. *Supra* p. 9.[6] Had Applicants promptly sought a stay, proceedings in this Court likely would have ended before the state courts finished their own remedial process and before candidate filing began.

Applicants, however, did not promptly seek a stay. Worse, they refused to do so, quite clearly, to influence the remedial process. Even though Applicants maintained that the North Carolina Supreme Court had *already* violated the Elections Clause, Applicants conveyed to all who would listen that they would seek this Court's intervention if—but only if—North Carolina's courts did not approve their preferred map. *Supra* pp. 10–11 & nn.2–3. The North Carolina courts declined to accede.

Now, due to Applicants' delay, enormous disruption looms. Candidate filing is nearly over (ending at noon this Friday, March 4), and more than 2,248 candidates have filed for Congress and other offices. Granting a stay would require throwing out many or all of those filings. The disruption would sweep far beyond the congressional campaigns, as many candidates consider different offices—including U.S. Congress, state Senate, state House, or statewide office—and select one in reliance on the governing maps.[7] A stay would upend those calculations and create a domino effect that could

[6] In particular, the State Board of Elections explained that, prior to May 17, it must "geocode" all addresses by assigning them to districts (which takes at least 21 days); prepare and proof ballots (at least 17 days); and mail absentee ballots (45 days before May 17). Because these steps must proceed sequentially, the State Board of Elections calculated that filing needed to open by February 24. R-App'x 6a–8a, 13a, 129a–130a.

[7] *E.g.*, Will Wright, *Jeff Jackson Says He May Run for Congress in New Mecklenburg District*, Charlotte Observer (Feb. 24, 2022), https://www.charlotteobserver.com/news/politics-government/election/article258730408.html (current state Senator considering run

require reopening candidate filing for *all* offices. A stay, moreover, would also likely make it impossible to hold primaries as scheduled on May 17. R-App'x 13a.

This Court's February 7, 2022 decision holding that it was too late for a federal court to stay maps for Alabama's May 24 primary, *see Merrill*, 142 S. Ct. at 879–80 (Kavanaugh, J., concurring), compels the same conclusion as to any stay by this Court of the map for North Carolina's May 17 primary. That primary is now *30 days* closer than the Alabama primary was when the Court considered the application in *Merrill*. And the facts that Justice Kavanaugh in *Merrill* identified as foreclosing equitable relief are present here: Applicants "unduly delayed," and granting a stay would impose "significant cost, confusion, or hardship." *Id.* at 881.

B. Applicants Turn *Purcell* on Its Head.

Applicants get it exactly backwards with their argument that *Purcell* supports staying the North Carolina state courts' decisions.

1. To begin, *Purcell* does not even apply to the actions of the North Carolina state courts. *Purcell* is based on principles of "federal court" equity practice rooted in this Court's supervisory authority over lower "federal courts." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay application); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31–32 (2020) (Kavanaugh, J., concurring

for U.S. Congress under court-approved maps); Dan Bishop (@jdanbishop), Twitter (Feb. 23, 2022, 4:07 PM), https://twitter.com/jdanbishop/status/1496592527499182081/photo/1 (statement from current Member of Congress explaining that he was "actively exploring running for statewide judicial office" in lieu of Congress under the new map).

in denial of stay application); *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). *Purcell* thus governs *this Court*'s consideration of Applicants' request for a federal-court stay.

But Applicants have not cited, and Respondents have not located, a decision of this Court applying *Purcell* to interfere with relief granted by a state court, much less relief granted based on specific state statutory authorization. That is for good reason: This Court does not exercise the same supervisory authority over state courts as it does over lower federal courts. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345 (2006) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States." (quotation marks omitted)). Indeed, opinions applying *Purcell* have expressly distinguished "federal courts" from "States," of which state courts are an integral part. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Applicants nonetheless offer not one word of argument on why *Purcell* applies to the actions of state courts.

2. Even if Applicants could invoke *Purcell* to displace relief granted by a state court, *Purcell* could never support a stay that would *inflict* disruption when the state courts followed state law and the State Board of Elections' guidance to *avoid* disruption. Applicants point to the supposedly "late hour at which the North Carolina courts" acted. App. 25. But the courts below acted with extraordinary speed—and they completed their work exactly when the State Board of Elections told them they *needed* to act to avoid disrupting the May 17 primary. R-App'x 129a–130a. In doing so, moreover, they also acted exactly in accordance with the remedial process prescribed by the General Assembly, which required them to provide the General Assembly two full weeks to draw

a remedial map. N.C.G.S. § 120-2.4(a)(1). Applicants cannot claim *Purcell* supports staying state-court decisions that follow the guidance of both the legislative and the executive branches on how to act *without* disrupting upcoming elections.[8]

II. The Court Is Unlikely to Grant Review Because This Case Does Not Present the Elections Clause Issues Applicants Raise and Because Applicants Forfeited Their Arguments on the Issues This Case Does Raise.

Applicants argue that the Elections Clause empowers state legislatures to violate state constitutions when regulating congressional elections. Accepting this argument would require overruling multiple decisions of this Court, as detailed below. But regardless of the merits, this Court is unlikely to grant certiorari here.

A. This Case Does Not Present Applicants' Question Presented.

This case simply does not implicate Applicants' broad Elections Clause arguments. That is because, in the statutes detailed above, the General Assembly expressly and comprehensively authorized North Carolina's courts to do just what they did here. To recap: The General Assembly expressly authorized a special three-judge court to hear "actions challenging the validity of any act … that … redistricts … congressional districts," N.C.G.S. § 1-267.1(a); provided for "judgment[s] declaring unconstitutional … any act … that … redistricts … congressional districts," *id.* § 120-2.3; and specified that

[8] Applicants also cannot establish the irreparable harm a stay requires. State officials like Applicants suffer no cognizable irreparable harm from being unable to enforce a statute that is unconstitutional under state law. That is especially true when the General Assembly—the state body in which Applicants are officials—authorized state courts to do exactly what they did below. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (an injunction "barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature" would constitute "irreparabl[e] harm" "[*u*]*nless that statute is unconstitutional*" (emphasis added)).

if the General Assembly does not "remedy any defects" in "a plan … redistricting … congressional districts" within 14 days, "the court may impose an interim districting plan," *id.* § 120-2.4(a), (a1).

What is more, the General Assembly also approved the substantive constitutional provisions the courts below applied. In 1969, the General Assembly enacted each of these provisions (the Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses) pursuant to its normal lawmaking power, before presenting the constitution to the people of North Carolina for ratification. Act of July 2, 1969, ch. 1258, § 1, 1969 N.C. Sess. Laws 1461, 1461–62; *see* N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL 2001–2002, at 120 (2002). Thus, the General Assembly prescribed not only the procedures for judicial review, but also the substance of that review.

Hence, the only question this case presents is whether the Elections Clause *disables* state legislatures from enacting limitations on their own districting power and authorizing state courts to review and remedy districting plans that violate those limitations. But even proponents of Applicants' Elections Clause arguments have found no problems with legislative authorizations like those at issue here. *E.g.*, *Bush v. Gore*, 531 U.S. 98, 121 (2000) (Rehnquist, C.J., concurring) (accepting that the Florida legislature "empowered the courts of the State to grant 'appropriate' relief" in federal election cases); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 554 (2021) (accepting that Elections Clause allows legislatures to authorize "executive officials *or others* … to establish rules for federal elections"

(emphasis added)).[9] Because Applicants' broad Elections Clause arguments are not even presented, this Court is not likely to grant certiorari.

B. Applicants Raise Only State-Law Arguments on the Narrow Issue This Case Presents.

As to the only issue this case does present, the Application mounts no argument at all under the federal Elections Clause. Applicants do acknowledge the possibility that state legislatures might "delegate" authority conferred by the Elections Clause. App. 18–19. But they do not claim that such a delegation would violate the Elections Clause. Instead, they raise only state law arguments—that (1) the General Assembly would violate the *state* constitution by authorizing other entities to review and remedy unlawful districting plans; and (2) in any event, the General Assembly in fact has not authorized "state courts" to undertake those tasks. App. 18.

This Court is not likely to grant certiorari to entertain state-law arguments. "[S]tate courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and they "interpret[] their state constitutions" "free and unfettered by" this Court, *Florida v. Powell*, 559 U.S. 50, 56 (2010); *cf. Ohio ex rel. Davis v. Hildebrandt*,

[9] The recent applicants in *Toth v. Chapman*, No. 21A457, also concede that state courts may invalidate and remedy unlawful congressional districting plans if the legislature so authorizes. Emergency App. at 1, *Toth v. Chapman*, No. 21A457 (U.S. Feb. 28, 2022) ("[T]he Supreme Court of Pennsylvania has no authority to impose a congressional map *unless 'the Legislature' has authorized it to do so*." (emphasis added)); *id.* at 19 ("The Supreme Court of Pennsylvania is not part of 'the Legislature,' and the General Assembly has not delegated any of its map-drawing powers to the state judiciary *or authorized the state courts to involve themselves in the redistricting process*." (emphasis added) (footnote omitted)). Particularly given the *Toth* applicants' specific concession that state courts may act when authorized to do so by the legislature, and the unjustified delay of Applicants here, there is no reason to hold the Application here for the *Toth* application.

241 U.S. 565, 567–68 (1916) (declining to address claim that referendum disapproving legislature's districting plan was invalid under state law). Indeed, Applicants did not even raise these arguments below. Thus, North Carolina courts did not have an opportunity to—and did not—address Applicants' state-law nondelegation arguments.

These arguments are, in any event, meritless. Applicants' argument that the General Assembly *has not* authorized state courts to involve themselves in redistricting is impossible to square with the statutes doing just that. Meanwhile, North Carolina courts have reviewed and remedied unlawful districting plans dozens of times, refuting any claim that doing so is inconsistent with the state's separation of powers.[10] They have readily done so because, in North Carolina as elsewhere, statutes empowering courts to review and remedy unlawful government action are not invalid "delegation[s] of legislative and administrative authority." *In re Wright*, 46 S.E.2d 696, 698 (N.C. 1948); *cf. Sanderlin v. Luken*, 68 S.E. 225, 225–27 (N.C. 1910) (creating a special taxing district was an exercise of "judicial or quasi-judicial" power).

Nor could Applicants revive a *federal-law* challenge to the statutory authorizations here at this late stage. They never raised any such challenge below or in

[10] *E.g.*, *Stephenson v. Bartlett*, 582 S.E.2d 247, 249 (N.C. 2003) (trial court drew 2002 legislative plans after General Assembly's "revised redistricting plans failed to satisfy the constitutional requirements specified in *Stephenson I*"); *see Harper v. Lewis*, No. 19-CVS-12667, 2019 N.C. Super. LEXIS 122 (Oct. 28, 2019) (enjoining congressional plan); *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (enjoining legislative plans); *N.C. State Conf. of NAACP v. Lewis*, No. 18-CVS-002322 (N.C. Super. Ct. Nov. 2, 2018) (assessing legislative districts); *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009) (assessing House districts); *Stephenson*, 562 S.E.2d at 394 (assessing legislative districts).

their Application. And this Court "will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 140 n.2 (2014).

C. Applicants Forfeited Their Elections Clause Argument Entirely.

As discussed above, this case does not present the broad Elections Clause argument advanced by Applicants. But even if it did, the Court is unlikely to grant certiorari because Applicants never raised their Elections Clause argument below in the manner North Carolina law requires. Under North Carolina's Rules of Appellate Procedure, "a party must have presented *to the trial court* a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1) (emphasis added). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.* These requirements are "not simply a technical rule of procedure"; a failure to comply is a complete bar to appellate review absent "fundamental error." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 657 S.E.2d 361, 363–64 (N.C. 2008).

Here, Applicants did not raise their Elections Clause argument at any point during the merits stage of trial. They never moved to dismiss the complaints against the congressional plan, or otherwise raised any Elections Clause issues, including in their 110-page proposed findings of fact and conclusions of law. App'x 146a; R-App'x 15a–134a. And when Applicants raised their Elections Clause argument in the North Carolina Supreme Court, the Court emphasized that "[t]his argument … was not presented at the trial court." App'x 146a. That statement is best read as a forfeiture holding and an

"adequate and independent ground of decision barring review." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). This Court treats as "forfeited" any argument not properly "raise[d] … below." *United States v. Jones*, 565 U.S. 400, 413 (2012).

The forfeitures do not stop there. At the remedial phase, Applicants argued only that "[c]hoosing [o]ne of Plaintiffs['] [r]emedial [p]lans" would "likely" violate the Elections Clause. R-App'x 174a. That did not preserve Applicants' current argument that any decision that did not adopt Applicants' congressional map in full would violate the Elections Clause. The trial court could reasonably have understood Applicants to have no objection to the court modifying Applicants' plan and adopting that plan as its own, particularly given that doing so was consistent with the General Assembly's statute authorizing such action. N.C.G.S. § 120-2.4(a). Thus, the court had no reason to address the Elections Clause argument Applicants now press.

III. Because Text, Precedent, and History Foreclose Applicants' Arguments, the Court Is Not Likely to Reverse the Judgment Below.

All these points aside, Applicants cannot show a fair prospect that five Members of this Court will vote to reverse the judgment below, much less that the merits are "entirely clearcut in the[ir] favor." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Applicants' argument finds no support in the Constitution's text, would require abrogating multiple decisions of this Court spanning a century, disrespects basic principles of federalism, and would throw election administration nationwide into chaos.

A. The Decisions Below Accord with the Elections Clause's Plain Text and This Court's Longstanding Precedent.

1. The Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. Applicants argue that "Legislature" means solely the standing legislative body. App. 12–13. This Court has rejected that argument, *see AIRC*, 576 U.S. at 813—but even on Applicants' reading, North Carolina's system comports with the letter of the Elections Clause. The General Assembly prescribed the original districting plan; prescribed the statutes authorizing a special state court to review and remedy an unconstitutional "plan … redistricting … congressional districts"; prescribed that a state court could impose an interim congressional districting plan; and even prescribed the specific state constitutional provisions by which the court measured the congressional districting plan. *Supra* pp. 4–6, 20. Applicants may be unhappy with the cure their prescriptions produced. But from beginning to end, the process played out exactly as "the Legislature" "prescribed."

2. Even if those statutes did not exist, Applicants' position would not improve. They cannot prevail just by showing that "the Legislature" means "the Legislature." App. 12–13. They must *also* show that the Elections Clause authorizes the legislature to act free of the constraints of the state constitution to which the legislature owes its existence. This Court, however, has squarely held that "[n]othing in the [Elections] Clause instructs … 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." *AIRC*, 576 U.S. at 817–18. And even as the Court divided over whether "the Legislature" can encompass "the people," no Justice so much as suggested that state legislatures are not bound by state constitutions. To the contrary, the Chief Justice agreed that the legislature, "when it prescribes election regulations, may be required to do so within the ordinary lawmaking process," so long as the legislature is "not … cut out." *Id.* at 841 (Roberts, C.J., dissenting). Thus, "the state legislature need not be exclusive in congressional districting" (though it cannot "be excluded"). *Id.* at 841–42.

In *Rucho*, too, every Justice endorsed that same proposition. The Court emphasized that its nonjusticiability holding did not "condemn complaints about districting to echo into a void." *Rucho*, 139 S. Ct. at 2507. That was so, it explained, because state courts could employ "state statutes and state constitutions" to remedy "excessive partisan gerrymandering." *Id.* The Court cited with approval the decision of the "Supreme Court of Florida str[iking] down that State's *congressional districting plan* as a violation of … the Florida Constitution." *Id.* (emphasis added). The dissent, too, agreed that state courts could do so. *Id.* at 2524 (Kagan, J., dissenting). If Applicants are right, every Justice in *Rucho* was wrong, and this Court's promise was a mirage.

3. The Court was unanimous on this point because a century of law holds that the Elections Clause does not authorize state legislatures to enact state election laws in defiance of state constitutions. In *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), the Court held that because the Ohio Constitution granted voters the power to "approve or disapprove" a districting plan by referendum, a congressional map voted down by

referendum had "no effect whatever." *Id.* at 566–68. And in *Smiley*, the Court held that, "where the state Constitution … provided" for a gubernatorial veto as "a check in the legislative process," the state legislature was required to enact a districting plan "in accordance with" that requirement. 285 U.S. at 367–69.

Applicants admit that the gubernatorial veto in *Smiley* did "*precisely* what the North Carolina Supreme Court's … order did here." App. 19. Trying to make lemonade out of lemons, Applicants insist that *Smiley* differed because the veto was "a check in the legislative process." App. 20. But that argument, first, does not square with the Constitution's text. The Elections Clause does not say that states may regulate elections via "legislative" power. It vests authority in "the Legislature." U.S. CONST. art. I, § 4, cl. 1. And whatever else governors might be, they are not "the Legislature" under Applicants' definitions. App. 13. So if Applicants were right that the Elections Clause confers unchecked and unreviewable authority on that body, this Court would have to abrogate both *Smiley* and *Hildebrandt*.

The better reading is the one endorsed by both opinions in *AIRC*: *Smiley* and *Hildebrandt* establish that redistricting must "be performed in accordance with the State's prescriptions for lawmaking," and that nothing in the Elections Clause prevents States from "imposing some constraints on the legislature." *AIRC*, 576 U.S. at 841 (Roberts, C.J., dissenting) (quoting *AIRC*, 576 U.S. at 808 (majority opinion)). As in *Smiley*, North Carolina's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses are "check[s] in the legislative process." 285 U.S. at 368; *cf. Nixon v. United States*, 506 U.S. 224, 233 (1993) ("judicial review [i]s a check on the Legislature's

power"); *Nixon v. Fitzgerald*, 457 U.S. 731, 761 (1982) ("Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances."). And the General Assembly has no "power to enact laws" governing redistricting "in any manner other than that in which the Constitution of the state has provided." *Smiley*, 285 U.S. at 368.[11]

4. This Court has also long recognized that if state legislatures fail to act lawfully, "the judiciary of a State" has the "power … to formulate a valid redistricting plan" and remedy violations of "State and Federal Constitutions." *Growe*, 507 U.S. at 29, 33 (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*)). Thus, when a federal district court enjoined state-court proceedings aimed at formulating a valid congressional districting plan, this Court stayed that injunction as "clear error." *Id.* at 34. As Justice Scalia explained for the unanimous Court in *Growe*, that injunction was "based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Id.* And that view, Justice Scalia emphasized, improperly "ignor[ed] the … legitimacy of state *judicial* redistricting" of congressional plans. *Id.* (emphasis in the original). Indeed, *Growe* explained that this Court has "prefer[red] *both* state branches [*i.e.*, legislative and judicial] to federal courts as agents of apportionment" based on "elementary principles of federalism and comity." *Id.* at 34–36.

[11] Applicants (at 16) cite *McPherson v. Blacker*, 146 U.S. 1 (1892). That case, however, concerned whether the Federal Constitution permits a state legislature to provide for selection of presidential electors district by district, rather than statewide; it raised no question about whether a state legislature can regulate federal elections in contravention of the state constitution. *Id.* at 25–26.

Myriad other cases testify to this Court's longstanding "teaching that state courts have a significant role in redistricting," including for Congress. *Id.* at 33; *see Scott*, 381 U.S. at 409 (affirming the "power of the judiciary of a State … to formulate a valid [legislative] redistricting plan"); *Branch v. Smith*, 538 U.S. 254, 261–62 (2003) (reaffirming that congressional redistricting "is primarily the duty and responsibility of the State through its legislature or other body," including the judiciary); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (relying on *Smiley* to affirm the New York Court of Appeals' decision to strike down the state's congressional redistricting law because it violated "the requirements of the Constitution of the state in relation to the enactment of laws" and to impose a court-crafted remedial plan); *Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (similar, as to a congressional districting plan imposed by the Missouri Supreme Court). Those holdings apply with double force where, as here, the legislature has specifically authorized state courts to review and remedy unlawful congressional districting plans.

B. Applicants' Argument Is Unmoored from the Constitution's Text, Founding-Era Practice, and Principles of Federalism.

1. Applicants' core argument—that when the Elections Clause empowers state "Legislature[s]," it frees them from their own constitutions—finds no support in the Constitution's text. State legislatures are *creatures* of their constitutions. *E.g.*, *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795) (Patterson, J.) ("What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void."). So the

Framers would hardly have believed that, by conferring power on "Legislature[s]," the Constitution would unleash those legislatures from their organic documents.

The Federal Constitution bears that point out and confirms that, when it confers powers, those powers are presumptively bounded by law, unless the Constitution's text or structure clearly shows otherwise. Consider, for example, the Commerce Clause, which confers on Congress authority "[t]o regulate Commerce … among the several States." U.S. CONST. art. I, § 8, cl. 3. No one believes that provision confers authority free from the normal constraints of judicial review. *E.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). Or take the Elections Clause itself. If Applicants were correct that the Elections Clause makes the state legislature's discretion "subject to check only by Congress," App. 14, it would follow that neither state courts *nor* federal courts could review congressional districting plans. Yet in *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court squarely held that "nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* at 6. Applicants cannot square their textual argument here with this Court's rejection of the same argument in *Wesberry*.

When the Framers wanted to give a body unreviewable discretion, they typically spoke clearly. *E.g.*, U.S. CONST. art. I, § 2 ("The House … shall ch[oo]se their [s]peaker and other [o]fficers; and shall have the *sole* [p]ower of impeachment." (emphasis added)); *id.* art. I, § 3 ("The Senate shall have the sole Power to try all Impeachments."); *cf. id.* art.

I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ...."). This Court has deemed such language significant. *E.g.*, *Nixon*, 506 U.S. at 230. Here, Applicants ask the Court to—in effect—blue pencil the Elections Clause to add language the Framers declined to include.[12]

2. Founding-era understandings also counsel against Applicants' position. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2326–27 (2020). As *Smiley* explained, it was "well known" at the Founding that state legislatures were subject to "restriction[s]" and "limitation[s]." 285 U.S. at 368. The Framers also had "an understanding that the state judiciaries had asserted, and were properly endowed with, the power to refuse to enforce unconstitutional statutes." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933–35 (2003); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A] legislative act contrary to the constitution is not law...."). But despite all those well-known limits, there is no "suggestion" in the Elections Clause or early historical practice that state laws regulating federal elections were exempt from the ordinary "conditions which attach to the making of state laws," including judicial review by state courts. *Smiley*, 285 U.S. at 365, 368. To the contrary, state constitutions

[12] To be sure, the Constitution in some places gives state legislatures powers or duties outside their ordinary roles in enacting legislation. Article V, for example, gives "the Legislatures ... of the several States" a role in ratifying constitutional amendments. U.S. CONST. art. V; *see also*, *e.g.*, *id.* art. IV, § 4; *id.* art. VI; *id.* amend. XIV, § 2. This Court, however, has held that the Elections Clause is not like that: "Article I, [§] 4, plainly gives authority to the [S]tate *to legislate* within the limitations therein named. Such legislative action is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required." *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (emphasis added). The Elections Clause thus empowers state legislatures to legislate but does not displace the state-law limits that apply to all legislation.

in the Founding era imposed both procedural and substantive restrictions on federal elections.[13] *See generally* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. ___, at 9, 28–34 (forthcoming 2022) (reviewing state constitutional provisions that regulated federal elections in the Republic's early years), https://bit.ly/3hrRCrl.

Applicants' position is also badly out of step with two values the Framers rightly regarded as fundamental: constitutionalism and federalism. Constitutionalism—the principle that governments are limited by fundamental laws transcending ordinary legislation—was a key American innovation and a point on which the United States parted company from its British forebearers. Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. __, at 24 (forthcoming 2022), https://bit.ly/3hwvj3y; *accord, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) ("Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner."). The Federal Constitution also

[13] For example, the Delaware Constitution of 1792 provided rules for electing "representatives … in Congress." DEL. CONST. OF 1792, art. VIII, § 2. The constitutions of Georgia, Pennsylvania, Kentucky, Tennessee, and Ohio required elections for all offices, including Representatives in Congress, to be by ballot. GA. CONST. OF 1789, art. IV, § 2; PA. CONST. OF 1790, art. III, § 2; KY. CONST. OF 1792, art. III, § 2; TENN. CONST. OF 1796, art. III, § 3; OHIO CONST. OF 1803, art. IV, § 2. And the Virginia Constitution of 1830—approved by James Madison and John Marshall—regulated the apportionment of congressional seats. VA. CONST. OF 1830, art. III, § 6. Many Founding-era constitutions included free-elections clauses. *E.g.*, MD. CONST. OF 1776, Declaration of Rights, art. V; MASS. CONST. OF 1780, art. IX; N.H. CONST. OF 1784, art. XI; N.H. CONST. OF 1792, art. XI; KY. CONST. OF 1792, art. XII, § 5; KY. CONST. OF 1799, art. X, § 5; DEL. CONST. OF 1792, art. I, § 3; VT. CONST. OF 1793, ch. 1, art. VIII; *id.*, ch. 2, § 34; TENN. CONST. OF 1796, art. XI, § 5.

jealously guarded state sovereignty, emphasizing that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Absent a clear statement, the Court should not conclude that the Framers intended to undermine both constitutionalism and federalism by prohibiting States from restraining their legislatures via state constitutions. *Cf. McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.").

3. If any doubt remained, 2 U.S.C. § 2a(c) would remove it. Final authority under the Elections Clause lies with Congress. *See Rucho*, 139 S. Ct. at 2496; *see* App. 12. And in 2 U.S.C. § 2a(c), Congress provided that a State must be "redistricted in the manner *provided by the law thereof* after any apportionment" (emphasis added). This Court has explained that the words "the law thereof" encompass all of a State's procedures for lawmaking, including "judicial decisions." *Branch*, 538 U.S. at 271, 274. Thus, Congress has "left the question of redistricting to the laws and methods of the States." *AIRC*, 576 U.S. at 811. Under 2 U.S.C. § 2a(c), then, state legislatures' congressional redistricting authority is subject to the restraints of the state constitution as interpreted and applied by state courts, just like other state legislation.

4. There is nothing to Applicants' half-hearted effort to assert a split of authority. App. 22–23. They cannot claim lower courts are divided on the only issue this case actually presents—whether the Elections Clause bars state legislatures from expressly authorizing state courts to review and remedy congressional districting plans that violate

the state constitution. *Supra* pp. 19–21. Applicants principally rely on *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (*per curiam*). But *Carson* did not address state courts: There, Minnesota's "Secretary [of State] extended the deadline for receipt of ballots *without* legislative authorization." *Id.* at 1054. And the Eighth Circuit emphasized that it was not addressing "a court order … declar[ing] [a] statute invalid." *Id.* at 1060.[14]

Nor does Applicants' string cite of cases decided 70 to 160 years ago establish a split even on the broader Elections Clause issues that this case does *not* implicate. *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948), and *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936), were Presidential Electors Clause cases, not Elections Clause cases. The same is true of *In re Opinion of the Justices*, 113 A. 293 (N.H. 1921), which also considered the Elections Clause but found it much more difficult than the Presidential Electors Clause question and declined to decide it. *Id.* at 299. *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. Ct. App. 1944), discussed the Elections Clause but decided the case on a different ground. And in *In re Opinion of the Justices*, 45 N.H. 595 (1864), the relevant statute and the state constitution were not in conflict. The decision in *In re Plurality Elections*, 8 A. 881 (R.I. 1887), does contain one sentence of dicta—since called into doubt, *see In re Opinion to the Governor*, 103 A. 513, 516 (R.I. 1918)—supporting Applicants' position. But 130-year-old dictum is not the stuff of a cert-worthy

[14] Equally off point is Applicants' citation (at 22) to *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020). The opinion Applicants cite—a dissent—did not address a court remedying unconstitutional action by a legislature. Instead, *Wise* concerned the State Board of Elections' decisions to override the deadline set by the state legislature for receiving mailed absentee ballots and to effectively eliminate the witness requirement established by statute for absentee ballots. *Id.* at 106 (Wilkinson & Agee, JJ., dissenting).

split. Indeed, Applicants acknowledge that this Court has recently declined to take up petitions raising similar arguments (and invoking these same cases). App. 23–24; *see, e.g.*, Pet. at 20–22, *Turzai v. Brandt*, 139 S. Ct. 445 (2018) (No. 17-1700), 2018 WL 3122294.

C. Accepting Applicants' Argument Would Wreak Havoc on Election Administration Nationwide.

Finally, breaking with a century of precedent by accepting Applicants' position would wreak havoc upon election administration nationwide. If there is an Elections Clause problem in this case, then *every* state constitutional provision that touches on congressional elections is potentially void. But state constitutions have long regulated "[c]ore aspects of the electoral process" for federal elections. *AIRC*, 576 U.S. at 823. That includes whether "voting occurs by ballot or secret ballot,"[15] "voter registration,"[16] "absentee voting,"[17] "vote counting,"[18] and "victory thresholds."[19] It also includes prohibitions on "party tickets" on ballots, voter-residency requirements, and requirements to present identification. Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L. J. 689, 716–17 (2016). And it includes requirements for the shapes of congressional districts, including contiguity and compactness requirements, and requirements that districts

[15] *AIRC*, 576 U.S. at 823 (internal quotation marks omitted).

[16] *E.g.*, MISS. CONST. art. XII, § 249; N.C. CONST. art. VI, § 3; VA. CONST. art. II, § 2; W. VA. CONST. art. IV, § 12; WASH. CONST. art. VI, § 7.

[17] *E.g.*, HAW. CONST. art. II, § 4; LA. CONST. art. XI, § 2; N.D. CONST. art. II, § 1; PA. CONST. art. VII, § 14.

[18] *E.g.*, ARK. CONST. art. III, § 11; LA. CONST. art. XI, § 2.

[19] *E.g.*, ARIZ. CONST. art. VII, § 7; MONT. CONST. art. IV, § 5; OR. CONST. art. II, § 16.

follow existing geographic and political-subdivision boundaries. *Id.* at 713–14. Indeed, "[n]early all state constitutions" have provisions that regulate congressional elections in some manner or other. *Id.* at 720.

Applicants' theory would potentially call all those provisions into question. It would do so, moreover, for congressional elections *but not* other elections. So, if Applicants are right, States would have to run two sets of elections, subject to two sets of rules, and follow state constitutions in one set but not the other. Nothing in our Federal Constitution's text, history, or precedent compels that chaos-inducing result.

CONCLUSION

The Court should deny the Application.

Dated: March 2, 2022

Respectfully submitted,

John R. Wester
Stephen D. Feldman
Adam K. Doerr
Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A.
434 Fayetteville St., Suite 1600
Raleigh, NC 27601

Sam Hirsch
Jessica Ring Amunson
Zachary C. Schauf
Counsel of Record
Karthik P. Reddy
Leonard R. Powell
Urja Mittal
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

Counsel for Respondents North Carolina League of Conservation Voters, Inc., et al.

Supreme Court of the United States

Applicants

Respondents.

Counsel for Timothy Moore, et al.

N.C.G.S. § 1-81.1

§ 1-81.1. Venue in apportionment or redistricting cases; certain injunctive relief actions

(a) Venue lies exclusively with the Wake County Superior Court in any action concerning any act of the General Assembly apportioning or redistricting State legislative or congressional districts.

(a1) Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1-267.1(a1) and G.S. 1-1A, Rule 42(b)(4), claims described in this subsection that are filed or raised in courts other than Wake County Superior Court or that are filed in Wake County Superior Court shall be transferred to a three-judge panel of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.

(b) Any action brought concerning an act of the General Assembly apportioning or redistricting the State legislative or congressional districts shall be filed in the Superior Court of Wake County.

N.C.G.S. § 1-267.1

§ 1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts; claims challenging the facial validity of an act of the General Assembly

(a) Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section.

(a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

(b) Whenever any person files in the Superior Court of Wake County any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, a copy of the complaint shall be served upon the senior resident superior court judge of Wake County, who shall be the presiding judge of the three-judge panel required by subsection (a) of this section. Upon receipt of that complaint, the senior resident superior court judge of Wake County shall notify the Chief Justice, who shall appoint two additional resident superior court judges to the three-judge panel of the Superior Court of Wake County to hear and determine the action. Before making those appointments, the Chief Justice shall consult with the North Carolina Conference of Superior Court Judges, which shall provide the Chief Justice with a list of recommended appointments. To ensure that members of the three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to the three-judge panel one resident superior court judge from the First through Third Judicial Divisions and one resident superior court judge from the Fourth through Fifth Judicial Divisions. In order to ensure fairness, to avoid the appearance of impropriety, and to avoid political bias, no member of the panel, including the senior resident superior court judge of Wake County, may be a former member of the General Assembly. Should the senior resident superior court judge of Wake County be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint another resident superior court judge of Wake County as the presiding judge of the three-judge panel. Should any other member of the three-judge panel be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

(b1) Any facial challenge to the validity of an act of the General Assembly filed in the Superior Court of Wake County, other than a challenge to plans apportioning or redistricting State legislative or congressional districts that shall be heard pursuant to subsection (b) of this section, or any claim transferred to the Superior Court of Wake County pursuant to subsection (a1) of this section, shall be assigned by the senior resident Superior Court Judge of Wake County to a three-judge panel established pursuant to subsection (b2) of this section.

(b2) For each challenge to the validity of statutes and acts subject to subsection (a1) of this section, the Chief Justice of the Supreme Court shall appoint three resident superior court judges to a three-judge panel of the Superior Court of Wake County to hear the challenge. The Chief Justice shall appoint a presiding judge of each three-judge panel. To ensure that members of each three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to each three-judge panel one resident superior court judge from the First or Second Judicial Division, one resident superior court judge from the Third or Fourth Judicial Division, and one resident superior court judge from the Fifth Judicial Division. Should any member of a three-judge panel be disqualified or otherwise unable to serve on the three-judge panel or be removed from the panel at the

discretion of the Chief Justice, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

(c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section. In the event of disagreement among the three resident superior court judges comprising a three-judge panel, then the opinion of the majority shall prevail.

(d) This section applies only to civil proceedings. Nothing in this section shall be deemed to apply to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to civil proceedings filed by a taxpayer pursuant to G.S. 105-241.17.

N.C.G.S. § 120-2.3

§ 120-2.3. Contents of judgments invalidating apportionment or redistricting acts

Every order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.4

§ 120-2.4. Opportunity for General Assembly to remedy defects

(a) If the General Assembly enacts a plan apportioning or redistricting State legislative or congressional districts, in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law. That period of time shall not be less than two weeks, provided, however, that if the General Assembly is scheduled to convene legislative session within 45 days of the date of the court order that period of time shall not be less than two weeks from the convening of that legislative session.

(a1) In the event the General Assembly does not act to remedy any identified defects to its plan within that period of time, the court may impose an interim districting plan for use in the next general election only, but that interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court.

(b) Notwithstanding any other provision of law or authority of the Bipartisan State Board of Elections and Ethics Enforcement under Subchapter III of Chapter 163A of the General Statutes, the Bipartisan State Board of Elections and Ethics Enforcement shall have no authority to alter, amend, correct, impose, or substitute any plan apportioning or redistricting State legislative or congressional districts other than a plan imposed by a court under this section or a plan enacted by the General Assembly.