

In The
Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*
Respondents.

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

To the Honorable John Roberts
Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, MOTION FOR
LEAVE TO FILE ON 8 ½ BY 11 INCH PAPER,
AND AMICUS CURIAE BRIEF OF
THE REPUBLICAN NATIONAL COMMITTEE,
THE NRCC, &
THE NORTH CAROLINA REPUBLICAN PARTY**

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Republican National Committee, the NRCC, and the North Carolina Republican Party (collectively, “Amici”) respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as amici curiae in support of Applicants Representative Timothy K. Moore, Senator Philip E. Berger, Representative Destin Hall, Senator Warren Daniel, Senator Ralph E. Hise, Jr., and Senator Paul Newton.

IDENTITY AND INTERESTS OF MOVANTS¹

The Republican National Committee manages the Republican Party’s business at the national level, supports Republican candidates and state parties, coordinates fundraising and election strategy, and develops and promotes the national Republican platform.

The NRCC (formerly the National Republican Congressional Committee) supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns. The NRCC also

¹ Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court’s Rule 37.6, counsel for Movant and Amici 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/Amici 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 Respondent Common Cause provided consent, but counsel for the remaining Respondents did not respond before this motion and the accompanying brief were filed.

undertakes voter education, registration, and turnout programs, as well as other party-building activities.

The North Carolina Republican Party is the statewide political organization of the Republican Party, which represents the interests of Republican voters and candidates at all levels throughout the State. It carries out the day-to-day functions of the political party within the state, including recruiting candidates for office and supporting those candidates and party officials elected under its banner.

Amici have a vital interest in the law regarding redistricting since congressional districts and legislative redistricting directly impact their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, the North Carolina Supreme Court's ruling has widespread implications for Amici and their members.

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REASONS TO GRANT LEAVE TO FILE AMICUS CURIAE BRIEF

This case presents issues of critical constitutional importance to proposed Amici. Amici adhere to the view that, under Article I, Section 4 of the Constitution, it is State legislatures, subject to congressional supervision, that are entrusted with the responsibility of redrawing the States' congressional districts. The unwarranted intrusion of the North Carolina Supreme Court into this process threatens to topple this constitutionally imposed order of responsibility. Because Amici 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.

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MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER

Amici respectfully moves for leave of Court to file its 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, Amici assert 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 Amici from being able to properly prepare this brief for printing and filing in booklet form. Nonetheless, Amici desires to be heard on the application and requests the Court grant this motion and accept the paper filing.

Respectfully submitted on this 2nd day of March, 2022,

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INTEREST OF AMICI CURIAE¹

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¹ Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amici 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/Amici 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 Respondent Common Cause provided consent, but counsel for the remaining Respondents did not respond before this brief was filed.

Amici have a vital interest in the law regarding redistricting since congressional districts and legislative redistricting directly impact their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, the North Carolina Supreme Court's ruling and the North Carolina Superior Court's judicially "enacted" map has widespread implications for Amici and their members.

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INTRODUCTION & SUMMARY OF THE ARGUMENT

Some provisions of the Constitution are subject to reasonable debate. Others are not. Article I, Section 4, Clause 1, commonly referred to as the “Elections Clause,” falls into the latter category. Its prescription is incontrovertible; State legislatures have the prerogative to determine “[t]he Times, Places and Manner of Holding Elections for Senators and Representatives.” U.S. CONST. art. I § 4, cl. 1. If a problem arises, “the Congress may at any time by Law make or alter such Regulations.” *Id.*

Absent from the constitutionally mandated order of authority is any role for the state judiciary. Notwithstanding this omission, certain state and commonwealth courts have taken it upon themselves to appropriate the processes that belong to the politically accountable branches of government. The North Carolina courts’ latest usurpations bring this issue back to the Court.

While much ink has been spilled lamenting the chronic practice of some state courts straying far beyond the jurisdictional boundaries set by the Elections Clause, the problem is neither abstract nor formalistic. The North Carolina Supreme Court’s decision to tread over the work of the State’s legislature was motivated by the Court’s assessment of social science offerings that, when placed under any modicum of scrutiny, do not, and cannot, show that North Carolina’s congressional districts “were intentionally constructed to yield a consistent partisan advantage for Republicans.” Opinion, *Harper v. Hall*, 2022-NCSC-17, ¶ 28 (N.C. Feb. 14, 2022) (App. 50a-51a).

Simply put, the North Carolina Supreme Court usurped the North Carolina Legislature's express Article I, Section IV authority, applied new theories put forth by various social scientists, engaged in judicial lawmaking, and imposed its own policy judgments. Each step in this process warrants reversal; taken as a whole, the process cries out for this Court to step in and then reign in the bedlam that is ever-increasingly plaguing the redistricting process (specifically) and election law (more generally).

ARGUMENT

I. USING SHIFTING SOCIAL SCIENCE TO DETERMINE THE CONSTITUTIONALITY OF CONGRESSIONAL-DISTRICT BOUNDARIES VIOLATES ARTICLE I, SECTION 4.

The United States Constitution leaves no room for debate. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," subject to U.S. Congressional oversight. U.S. CONST. art. I § 4, cl. 1. 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)). Plainly, a "Legislature" does not include a "Court." Compare U.S. CONST. art. I with U.S. CONST. art. III.

The Court is well aware of this textual limitation, and several Justices have recently tried to police this unambiguous allocation of power. It bears reiterating, however, at least briefly at the outset of this discussion. As discussed further below, straying from Article I, Section 4's unambiguous command is merely the first mistake that, without fail, creates a cascade of errors.

II. USING THE SOCIAL SCIENCE METRICS EMPLOYED BY THE NORTH CAROLINA SUPREME COURT WAS WRONG AS A MATTER OF FACT.

The North Carolina Supreme Court painstakingly walked through the “circumstantial evidence of partisan intent and effects” that the trial court considered as it assessed the Plaintiffs’ “extreme partisan gerrymandering claims.” App. 50a-51a. Some of the Plaintiffs’ experts “use[d] various computer simulation programming techniques that allow[ed] [them] to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria,” and then compared those maps to the map enacted by the North Carolina Legislature to “determine whether partisan goals motivated the legislature to deviate from these traditional districting criteria.” *Id.* at 23, 25. The experts then “used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans.” *Id.* at 25. Another used “statewide voting data from the 2020 election” to “analyze[] the . . . Congressional Plan [and] the partisan effects of each district’s boundaries.” *Id.* at 24 (second alteration in original) (citation omitted). Each, almost necessarily, had to rely on some form of “historical voting data to evaluate the partisan characteristics” of the North Carolina Legislature’s work. *Id.* at 31.²

After striking the North Carolina Legislature’s maps, the North Carolina trial court assigned three special masters to help with the creation of remedial

² *See also, e.g.*, App. 64a (another expert used “voting data from statewide races between 2016 and 2020” and then “compared expected performance under the enacted maps with performance in the neutral sample maps”).

maps. 248a. The special masters, in turn, hired four individuals with doctoral degrees in political science, mathematics, and the neurosciences. 249a. After rejecting the remedial congressional plan offered by the North Carolina Legislature, the North Carolina trial court adopted a plan drafted by the special masters and their team of academics.

From the moment the trial court began assessing the partisan fairness of the State's congressional maps until it deputized a team of social scientists to play the Legislature's role in creating remedial maps, it committed a fundamental (and rather obvious) error. Congressional races are not statewide races. This means that statewide electoral data says little, if anything, about a party's expected performance in any particular district. And, as noted by the Republican National Committee and the NRCC before this Court in their brief in *Rucho*, voter preferences are subject to constant change, and judicial attempts to predict future election outcomes based on past results have been fraught with failed predictions. *Amicus Brief of the Republican National Committee and the National Republican Congressional Committee in Support of Appellants, Rucho v. Common Cause*, No. 18-422, 6-33 (Feb. 12, 2019). This Court's opinion in *Rucho* reflected the failed attempt to use "political science" to predict election outcomes in the future. *Rucho*, 139 S. Ct. at 2503.

Even a cursory look at the 2020 North Carolina electoral returns brings the problem into sharp focus. In the 2020 presidential election, Donald Trump received 50.1 percent of the North Carolina statewide vote while Joe Biden received 48.7

percent. In the gubernatorial contest, Governor Roy Cooper, a Democrat, received 51.5 percent of the statewide vote that same year while Dan Forest, a Republican, received 47 percent. Examining these statewide races, then, would suggest to someone using statewide results as a basis for the allocation of congressional districts between two parties that Democrats and Republicans should split evenly among North Carolina's thirteen congressional districts.

This assumption, however, ignores the self-evident fact that the North Carolina political landscape is not homogenous. In fact, based on the regional differences throughout the State, the 2020 North Carolina congressional returns differ dramatically from the ostensible political balance if one considers only the returns in statewide elections:

Congressional District	Republican Percentage	Democrat Percentage	CD Republican Performance from 2020 Trump Statewide Result	CD Democratic Performance from 2020 Biden Statewide Result
First	45.8 percent	54.2 percent	-4.3%	+5.5%
Second	34.8 percent	63 percent	-15.3%	+14.3%
Third	63.4 percent	36.6 percent	+13.3%	-12.1%
Fourth	32.7 percent	67.3 percent	-17.4%	+18.6%
Fifth	66.9 percent	31.1 percent	+16.8%	-17.6%
Sixth	37.7 percent	62.3 percent	-12.4%	+13.6%
Seventh	60.3 percent	39.7 percent	+10.2%	-9%
Eighth	53.3 percent	46.7 percent	+3.2%	-2%
Ninth	55.6 percent	44.4 percent	+5.5%	-4.3%

Congressional District	Republican Percentage	Democrat Percentage	CD Republican Performance from 2020 Trump Statewide Result	CD Democratic Performance from 2020 Biden Statewide Result
Tenth	68.9 percent	31.1 percent	+18.8	-17.6%
Eleventh	54.5 percent	42.3 percent	+4.4%	-6.4%
Twelfth ³	0 percent	100 percent	N/A	N/A
Thirteenth	68.2 percent	31.8 percent	+18.1%	-16.9%

So, in North Carolina, the “average” Republican congressional candidate outperformed Donald Trump’s statewide performance by 3.4%. In North Carolina, the “average” Democratic congressional candidate under-performed Joe Biden by 2.8%. Using statewide results consistently fails to account for regional differences in voting patterns for statewide candidates versus district-level candidates. Of course, this “average” does not compare the performance of any congressional candidate to the presidential candidate’s performance in any particular district. But this demonstrates how the various assumptions—and the Plaintiffs’ political scientists’ baseline assumptions about statewide proportional representation for congressional seats based on statewide results—can skew any analysis of past elections.

No matter how many times a social scientist creates test maps using an algorithm, the algorithm will only perform as well as the data and assumptions

³ The Democratic candidate for North Carolina’s twelfth congressional district ran unopposed in 2020.

used by the social scientist. The record created in this case is no exception. By using statewide election results to assess the “partisan fairness” of regional voting-district boundaries, the Plaintiffs’ experts, the North Carolina trial court, and the North Carolina Supreme Court did their level best to prove the “garbage in, garbage out” principle. It is also a well-known fact that “political groups . . . tend to cluster (as is the case with Democratic voters in cities)” which leads to a “natural packing effect.” *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality op.).

But even if the social scientists behind the North Carolina courts’ respective errors had used perfect data (and they most certainly did not), the problems with their predictive analyses would persist for a more fundamental reason. Voter preferences change all the time. Indeed, “[e]very election sees some change in the distribution of the vote between the parties,” which occurs when “[a] Democrat who dislikes his party’s candidate or is attracted by the Republican nominee may vote Republican, or vice versa.” JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF THE POLITICAL PARTIES* 4 (Brookings Instit. Press 2011). In other words, “[a] party’s record in office, or its stand on particular issues, will attract or repel at least some voter, in every contest.” *Id.* Indeed, “[i]n every election cycle a substantial portion of partisan voters defect and cast their ballots for candidates from the other party.” Paul S. Herrnson and James M. Curry, *Issue Voting and Partisan Defections in Congressional Elections*, vol. 36, no. 2 *LEGIS. STUDIES QUARTERLY* 281, 282-83 (2011).

That people change their political preferences is self-evidently true. So too, is it borne out by the data. For instance, more than one in ten Bernie Sanders primary voters ended up casting ballots for Donald Trump in 2016, Danielle Kurtzleben, *Here's How Many Bernie Sanders Supporters Ultimately Voted for Trump*, NPR (Aug. 24, 2017, 2:53 PM).⁴ About 8.4 million voters voted for President Barack Obama in 2012 and then cast a ballot for Donald Trump in 2016. See Geoffrey Skelly, *Just How Many Obama 2012-Trump 2016 Voters Were There?*, Sabato's Crystal Ball, University of Virginia Center for Politics (June 1, 2017).⁵ And in West Virginia, Donald Trump received nearly 70 percent of the vote in both 2016 and 2020 while Democrat Joe Manchin won his Senate contest by 3 points in 2018. To put it another way, to accept the "social science" used in this case is to accept that partisanship is an immutable, almost taxonomic fact about a person. History, common sense, and this Court's precedents dictate that this is simply not true. See *Vieth*, 541 U.S. at 287 ("Political affiliation is not an immutable characteristic, but may shift from one election to the next[.]"). The North Carolina electorate (and the American electorate as a whole) are much too complex to attempt to distill them down to a single partisan box. To do otherwise is to insult their intelligence, which is always folly.

⁴ <https://www.npr.org/2017/08/24/545812242/1-in-10-sanders-primary-voters-ended-up-supporting-trump-survey-finds>.

⁵ <https://centerforpolitics.org/crystalball/articles/just-how-many-obama-2012-trump-2016-voters-were-there/>.

Furthermore, the North Carolina trial court accepted, and the North Carolina Supreme Court endorsed, use of data that cannot be considered reliable, under any broad interpretation of the word, for assessing the partisan fairness or future performance of congressional districts. Data which, it must be said, has the effect of infantilizing the electorate. In fact, this Court has already recognized that trying to assess the partisan fairness of congressional districts is a fool's errand. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. See *Rucho*, 139 S. Ct. at 2507 (“[J]udicial action must be governed by *standard*, by *rule*,’ and must be ‘principled, rational, and based upon reasoned distinctions’ found in the Constitution or laws. . . . Judicial review of partisan gerrymandering does not meet those basic requirements.” (quoting *Vieth*, 541 U.S. at 278, 279)).

And even had the state courts used more appropriate data (should such data even exist), it would be of little to no value in assessing how North Carolina voters might vote in the future, given the inherent mutability of the electorate's voting practices. And even if these two problems were (or could be) remedied, the fact remains that none of these empirically flawed social science models were used by the North Carolina Legislature to create these congressional maps. Simply put, the North Carolina Supreme Court took it upon itself to graft its own policy preferences onto the most generic of language in the state's constitution under the guise of “social science.”

For these reasons, all of the mistakes committed by the North Carolina courts amount to a violation of Article I, Section 4, that this Court must correct.

CONCLUSION

For the foregoing reasons, the Court should grant the application for a stay pending the forthcoming petition for a writ of certiorari.

March 2, 2022

Respectfully submitted,

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