No. _____

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.*,
Petitioners,

v.

REBECCA HARPER, *et al.*,
Respondents,

&

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

v.

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

On Petition for Writ of Certiorari to the North Carolina Supreme Court

PETITION FOR WRITE OF CERTIORARI

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QUESTION PRESENTED

Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

PARTIES TO THE PROCEEDING

This application arises from two cases consolidated in the North Carolina Superior Court.

In the first of the two consolidated cases, Petitioners are Speaker of the North Carolina House of Representatives Representative Timothy K. Moore; President Pro Tempore of the North Carolina Senate Philip E. Berger; Representative Destin Hall, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; Senator Warren Daniel, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; Senator Ralph Hise, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and Senator Paul Newton, in his official capacity as Co-Chair of the North Carolina Standing Committee on Redistricting and Elections. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are Rebecca Harper; Amy Clare Oseroff; Donald Rumph; John Anthony Balla; Richard R. Crews; Lily Nicole Quick; Gettys Cohen, Jr.; Shawn Rush; Jackson Thomas Dunn, Jr.; Mark S. Peters; Kathleen Barnes; Virginia Walters Brien; and David Dwight Brown. Respondents were the plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are North Carolina State Board of Elections and Damon Circosta, in his official capacity as chair of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

In the second of the two consolidated cases, Petitioners are Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Representative Destin Hall, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; Senator Warren Daniel, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; Senator Ralph E. Hise, Jr., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and Senator Paul Newton, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are North Carolina League of Conservation Voters, Inc.; Henry M. Michaux, Jr.; Dandrielle Lewis; Timothy Chartier; Talia Fernos; 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; and Cosmos George. These Respondents were plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are the State of North Carolina; the North Carolina Board of Elections; Damon Circosta, in his official capacity as Chairman of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as Secretary of the North Carolina State Board of Elections; Stacy Eggers

IV, in his official capacity as Member of the North Carolina State Board of Elections; Tommy Tucker, in his official capacity as Member of the North Carolina State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Additionally, the North Carolina Superior Court granted the motion of Common Cause to intervene in the consolidated proceedings below. Common Cause was an intervenor-plaintiff in the North Carolina Superior Court and an intervenor-appellant in the North Carolina Supreme Court.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Denying Temporary Stay and Writ of Supersedeas (entered February 23, 2022).
- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Written Decision Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 14, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 4, 2022).

The following proceedings are also directly related to this case under Rule 14.1(b)(iii) of this Court:

- *Harper v. Hall*, No. 21A455 (U.S. Supreme Court)—Order Denying Application for Stay (entered March 7, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the North Carolina Supreme Court.

The Constitution directs that the manner of federal elections shall "be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. "The Constitution provides that state legislatures"—not "state judges"— "bear primary responsibility for setting election rules," *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 592 U.S. ---, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay), including the rules establishing the shape of congressional districts, *see Smiley v. Holm*, 285 U.S. 355, 373 (1932). As this Court recently explained, "[t]he Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho v. Common Cause*, 588 U.S. ---, 139 S. Ct. 2484, 2496 (2019).

Yet in the decision below, the North Carolina Supreme Court decreed that the 2022 election and all upcoming congressional elections in North Carolina *were not* to be held in the "Manner" "prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, but rather in the manner prescribed *by the state's judicial branch*. In an order entered on February 4, the state supreme court invalidated the North Carolina

General Assembly's congressional map and remanded to state trial court for remedial proceedings. And after Petitioners—North Carolina legislators, including the Speaker of the House of Representatives and the President Pro Tempore of the Senate—engaged in a good-faith effort to craft a congressional map that would be valid under the state supreme court's order, the state trial court *rejected that map too*. Instead, the trial court mandated the use of a new map in the 2022 election that had been created by a group of Special Masters and their team of assistants—who, to make matters worse, designed their own, judicially-crafted map after engaging in *ex parte* communications with experts for the plaintiffs. The North Carolina Supreme Court refused to stay this decision, thereby authorizing this judge-made map to govern the 2022 election cycle.

If a redistricting process more starkly contrary to the U.S. Constitution's Elections Clause exists, it is hard to imagine it. By its plain text, the Elections Clause *creates* the power to regulate the times, places, and manner of federal elections and then *vests* that power in "the Legislature" of each State. It does not leave the States free to limit the legislature's constitutionally vested power, or place it elsewhere in the State's governmental machinery, as a matter of *state* law. After all, the Elections Clause "could have said that [federal election] rules are to be prescribed 'by each State,' which would have left it up to each State to decide which [state entity] should exercise that power," but instead, the Constitution's "language

specifies a particular organ of a state government, and we must take that language seriously." *Moore v. Harper*, 595 U.S. ---, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay).

Worse still, the court below did not nullify the General Assembly's duly enacted congressional map pursuant to some specific, judicially manageable rule governing elections, such as a constitutional provision establishing concrete, enforceable criteria for the design of congressional districts. No, the North Carolina Supreme Court read abstract and broadly worded commands such as "[a]ll elections shall be free," N.C. CONST. art. I, § 10, to somehow authorize the court to impose its own policy determinations and rules about the extent to which partisan considerations may affect redistricting. As this Court held in *Rucho*, "[j]udicial review of partisan gerrymandering" under constitutional provisions not expressly and concretely addressing the subject violates the principle that "judicial action" must be "principled, rational, and based on reasoned distinctions found in the Constitution or laws." *Rucho*, 139 S. Ct. at 2507 (cleaned up). For the basic questions in partisan gerrymandering claims are "political, not legal," *id.* at 2500, rendering the entire enterprise a quintessentially legislative one. And if the U.S. Constitution's Elections Clause means anything, it must mean at least this: *inherently legislative* decisions about the manner of federal elections in a State are committed to "the Legislature thereof."

The question presented in this case, concerning whether or to what extent a State's courts may seize

on vague and abstract state constitutional language requiring "free" or "fair" elections to essentially create their own election code, could scarcely be more significant. The question repeatedly arises, like this case, in the context of redistricting. And more broadly, every election cycle, the branches in multiple States vie for authority over important issues implicated by the answer to the question presented here—from ballot receipt deadlines to the scope of curbside voting. Properly interpreting the Elections Clause's allocation of authority over these matters is of the utmost importance, yet the lower federal and state courts have divided over the issue. That split of authority invites "confusion and erosion of voter confidence," threatening to "severely damage the electoral system on which our self-governance so heavily depends." *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ---, 141 S. Ct. 732, 735, 738 (2021) (Thomas, J., dissenting from the denial of certiorari).

The "important" issue presented by this case "is almost certain to keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). And this case presents an ideal vehicle for this Court to "carefully consider and decide the issue" not in an emergency posture but rather "after full briefing and oral argument." *Id.* For while the 2022 congressional elections in North Carolina will take place under a judicially created map, that map is good for 2022 only. This Court should intervene now, resolve this critically important and recurring question, and

ensure that congressional elections in 2024 and thereafter are conducted in a manner consistent with our Constitution's express design.

OPINIONS BELOW

The February 23, 2022 order of the North Carolina Supreme Court is reported at 868 S.E.2d 97 (Mem) and is reproduced at App.243a. The February 23 order of the North Carolina Superior Court is not reported and is reproduced at App.269a. The February 14, 2022 written opinion of the North Carolina Supreme Court is reported at 2022 WL 496215 and reproduced at App.1a. The February 4, 2022 order of the North Carolina Supreme Court is reported at 867 S.E.2d 554 (Mem) and reproduced at App.224a.

JURISDICTION

The North Carolina Supreme Court entered an order on February 4, 2022 and an accompanying written decision on February 14, 2022, striking down Petitioners' original Congressional maps, and on February 23, 2022, the North Carolina Supreme Court denied Petitioners a temporary stay of the remedial maps generated by the Special Masters. This Court has jurisdiction over these final orders under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reproduced at App.310a.

STATEMENT

I. The General Assembly Enacts a New Congressional Map.

After each decennial census, "States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). The Elections Clause of the U.S. Constitution assigns this redistricting responsibility to state legislatures: "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.

Beginning in mid-2021, the General Assembly undertook a transparent public process to draw new congressional districts in response to the 2020 U.S. Census data. Even before receiving the census data (which was substantially delayed as a result of the COVID-19 pandemic), the General Assembly's redistricting committees met in both the House and Senate to agree on line-drawing criteria, including prohibitions on using racial data, partisan considerations, and election results data to draw congressional districts. Once it received the 2020 census data, the General Assembly hosted public hearings throughout North Carolina, including in all thirteen existing congressional districts. Legislators and members of the public submitted map proposals, and the General Assembly held hearings on those proposals.

On November 4, 202, the North Carolina General Assembly enacted a new map for congressional elections. *See* 2021 N.C. Sess. Laws 174.

II. Respondents Seek To Enjoin the General Assembly's Map.

Despite the public and transparent redistricting process, Respondents filed suit seeking to enjoin the General Assembly's newly enacted congressional map. Respondents claimed the new congressional map violated the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses, and they claimed that the map was an unlawful partisan gerrymander because it failed to reflect the alleged 50-50 split in partisan preference among North Carolinians generally. Respondents did not allege—because they could not allege—that the General Assembly adopted a partisan-data criterion or otherwise announced a partisan purpose behind the new congressional map. Nor did they allege any violation of the United States Constitution.

Petitioners opposed Respondents' claims on multiple grounds, including on the basis of the Elections Clause, which they argued foreclosed Respondents' claims in their brief opposing a preliminary injunction. App.325a–27a. On December 3, 2021, a three-judge panel of the North Carolina Superior Court declined to preliminarily enjoin the challenged maps, based in part on the conclusion that "Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution," but "it

is the federal constitution which provides the North Carolina General Assembly with power to establish such districts." App.266a.

Respondents then sought a preliminary injunction, or immediate discretionary review, from the North Carolina Supreme Court. Petitioners opposed the request, again raising the Elections Clause argument. App.321a–23a. The state supreme court granted a preliminary injunction, during the completion of proceedings in the trial court, without addressing the Elections Clause issue. App.247a–52a.

After further proceedings, the three-judge trial court held, on January 11, 2022, that Respondents' claims were non-justiciable under the political question doctrine; that Respondents lack standing; and that Respondents were unlikely to establish that the General Assembly's congressional map was made with discriminatory intent, given that the evidence showed the General Assembly did not use partisan data in the creation of the congressional map. The court therefore entered final judgment for Petitioners.

Respondents appealed.

III. The North Carolina Supreme Court Strikes Down the Legislature's Congressional Map.

On February 4, 2022, the North Carolina Supreme Court issued an order granting Respondents' request to enjoin the General Assembly's congressional map. The court stated that "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," and although the

General Assembly "has the duty to apportion North Carolina's congressional . . . districts," the "exercise of this power is subject to limitations imposed by other [state] constitutional provisions. App.227a. The court concluded that the General Assembly's congressional map was an unconstitutional partisan gerrymander under four different clauses of the North Carolina Constitution, and the court "enjoin[ed] the use of these maps in any future elections, . . . including primaries scheduled to take place on 17 May 2022." App.228a. While Petitioners again argued that the Elections Clause foreclosed Respondents' requested relief, App.313a–15a, the court did not address the U.S. Constitution's Elections Clause in its February 4 order.

The court's order also set a deadline for parties and intervenors to submit remedial districting plans to the trial court and required the trial court to approve or adopt a compliant congressional districting plan no later than noon on February 23, 2022. The court explained its view that "[t]here are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," including "mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis." App.230a. "If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional." *Id.* The

court further required that the "General Assembly . . . submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating partisan fairness of the plan." App.230a–31a.

On February 14, 2022, the North Carolina Supreme Court supplemented its February 4 order with a written opinion. In that opinion, the North Carolina Supreme Court "disagree[d]" with the General Assembly's assertion that the federal constitution's Elections Clause bars Respondents' claims against the congressional plan. App.121a. The court cited this Court's opinion in *Rucho* for the proposition that "state constitutions can provide standards and guidance for state courts to apply" in addressing partisan gerrymandering, *id.* (emphasis omitted), and claimed "a long line of decisions" by this Court confirms the more general proposition that "state courts may review state laws governing federal elections to determine whether they comply with the state constitution," *id.*

IV. The General Assembly Enacts a Remedial Congressional Map.

In response to the North Carolina Supreme Court's February 4 order and February 14 opinion, the General Assembly developed a remedial congressional map, which it enacted on February 17. 2022 N.C. Sess. Laws 3. The General Assembly timely submitted its remedial map to the North Carolina Superior Court,

with an explanation of its constitutionality. According to the General Assembly's expert's calculations, the remedial congressional plan scored within the North Carolina Supreme Court's guidance for presumptive constitutionality according to key statistical metrics, *see* Legislative Defs.' Objs. to Pls.' Prop. Remedial Plans and Mem. in Further Supp. of the General Assembly's Remedial Plans at 5–6, *North Carolina League of Conservation Voters v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct. Feb. 21, 2022), *available at* https://bit.ly/3HIsp6u, and it would have been one of the most competitive congressional plans in the nation, *id.* at 23–24. In enacting its remedial map, the General Assembly made clear that its original map would once again govern were this Court to reverse the North Carolina Supreme Court's decision invalidating it. *See* 2022 N.C. Sess. Laws 3, § 2 (providing that if this Court "reverses" the North Carolina Supreme Court decision "the prior version of G.S. 163-201(a) is again effective"); 2021 N.C. Sess. Laws 174, § 1 (amending N.C. Gen. Stat. § 163-201(a) to read: "For purposes of nominating and electing members of the House of Representatives of the Congress of the United States in 2022 *and periodically thereafter*, the State of North Carolina shall be divided into 14 districts as follows") (emphasis added).

V. The North Carolina Superior Court Implements a Congressional Map of Its Own Making.

On February 16, the North Carolina Superior Court appointed three Special Masters to assist in the

remedial process. Those Special Masters, in turn, hired two political scientists, a mathematician and a professor of neuroscience to "assist in evaluating the Remedial Plans." App.273a. The Special Masters and their team of assistants produced a proposed remedial congressional map for the court's consideration, as did the parties (including the General Assembly's enacted remedial map).

On February 23, the North Carolina Superior Court issued an order rejecting the General Assembly's remedial congressional map and adopting the map proposed by the Special Masters. App.269a. The court concluded, "based upon the analysis performed by the Special Masters and their advisors," that the General Assembly's remedial congressional map "is not satisfactorily within the statistical ranges set forth in the Supreme Court's full [February 14] opinion" and determined that it therefore failed to meet the North Carolina Supreme Court's standards. App.280a. Instead, the court adopted the remedial plan proposed by the Special Masters, which it held satisfied the North Carolina Supreme Court's standards. While Petitioners had presented their Elections Clause argument again on remand, in a February 21 brief objecting to the Plaintiffs' proposed plans, App.229a, the court did not address the Elections Clause issue. The Superior Court's order makes clear that its remedial map applies only to the 2022 congressional election cycle. App.293a.

At the same time, the North Carolina Superior Court denied Petitioners' motion to disqualify two of

the Special Masters' assistants after these individuals were discovered to have engaged in substantive *ex parte* communications with Respondents' experts. The court denied the motion despite no opposition being filed.

On the same day that the North Carolina Superior Court issued its decision, Petitioners sought a stay or writ of supersedeas from the North Carolina Supreme Court. Petitioners once again argued, in their stay motion, that the trial court's actions violated the Elections Clause. App.317a–19a. The state supreme court denied Petitioners' requests without analysis. App.243a–46a.

VI. Petitioners Seek a Stay from this Court.

Two days later, Petitioners sought a temporary stay pending a writ of certiorari (or, in the alternative, a grant of certiorari and a stay pending a merits decision), from this Court, which was denied. *Moore*, 142 S. Ct. 1089. While the Court denied the stay application, four Justices acknowledged the importance of the issue presented and expressed interest in granting certiorari upon timely filing of a petition. *Moore* 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay); *id.* at 1089, 1091 (Alito, J., dissenting from the denial of application for stay).

REASONS FOR GRANTING THE WRIT

The North Carolina Supreme Court's actions nullify the North Carolina General Assembly's regulations of the manner of holding federal elections in the State and replace them with new regulations of the

judiciary's design. Those actions are fundamentally irreconcilable with the Constitution's Elections Clause. To secure self-government, that provision vests the power to regulate federal senate and congressional elections *in each State's legislature*, subject only to supervision by Congress. The state supreme court's usurpation of that authority—pursuant to vague and indeterminate state constitutional provisions securing free speech, equal protection, and free and fair elections—simply cannot be squared with the lines drawn by the Elections Clause. The state judiciary's actions raise profoundly important issues that have divided the lower courts, that have been repeatedly presented to this Court for review, and that will continue to recur until this Court finally resolves them. The Court should grant the writ.

I. The Lower Courts Have Divided over the Recurring and Critically Important Question Presented.

A. Whether State Entities Other than "the Legislature Thereof" Have Authority To "Make or Alter Regulations" Governing the "Times, Places, and Manner" of Congressional Elections Is a Question of the Highest Importance.

The allocation of authority to determine the times, places, and manner of electing federal Senators and Representatives is a matter of the most vital importance to our system of government. "Undoubtedly, the right of suffrage is a fundamental matter in a free

and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). The Founders bequeathed to us the precious inheritance of a "strictly republican" form of government—based on the conviction that "no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." THE FEDERALIST NO. 39, at 240 (James Madison) (C. Rossiter ed., 1961). And our Nation's commitment to republican principles of self-government renders the design of "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved" a matter of "lawmaking in its essential features and most important aspect." *Smiley*, 285 U.S. at 366.

The question presented in this case, at root, is who is vested with the power to decide the when, what, where, and how of the American people's exercise of self-government: state legislatures or state judges? "There can be no doubt that this question is of great national importance." *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from the denial of application for stay). Indeed, the answer will carry implications for every aspect of what happens every two years on Election Day. At stake is the allocation of the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of

voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. In the last two years alone, state legislatures have vied with other state branches or entities over such pivotal matters as the deadline for receipt of mail-in ballots, *see Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ---, 141 S. Ct. 1 (2020) (statement of Alito, J.), witness requirements for absentee voting, *see* Emergency Application for Stay Pending Appeal, *Berger v. North Carolina All. for Retired Ams.*, No. 20A74 (Oct. 27, 2020), and—as in this case—the determination of the shape of congressional districts in the first place, *see* Emergency Application for Stay Pending Pet. for Writ of Cert., *Moore v. Harper*, No. 21A455 (Feb. 25, 2022); Emergency Application for Writ of Inj., *Toth v. Chapman*, No. 21A457 (Feb. 28, 2022).

The Constitution is far from silent on the proper allocation of authority to decide these important issues. Article I, Section 4 dictates, in unambiguous prose, that "[t]he 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 (emphasis added). And this clear demarcation of powers is not an empty formality. No, the Clause is a structural provision designed to preserve liberty. The Elections Clause is an embodiment of the security afforded by our federalist system, ensuring that the States' most representative bodies have primacy in regulating elections. THE FEDERALIST

NO. 51 (James Madison) (C. Rossiter ed., 1961); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 253, 254 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting "state legislatures" come "nearest to the people themselves"). This Court should vindicate the authority of state legislatures under this provision—and thus vindicate the liberty endowed by our Constitution's structural commands. *See* this Court's Rule 10(c); Antonin Scalia, *Foreword: The Importance of Structure In Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418–19 (2008) ("Structure is everything . . . . Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril.").

B. The Question Presented Has Divided the Lower Courts.

Despite the clarity of the Elections Clause's text—and, as discussed below, its original meaning and this Court's precedent interpreting it—the lower courts have divided over the ability of state courts and other state entities to make or alter the election rules enacted by "the Legislature thereof." U.S. CONST. art I, § 4, cl. 1. That split in authority—over a matter of such fundamental import to our system of self-government—has become increasingly intolerable.

1. The Eighth Circuit has interpreted the scope of the legislature's authority under the Electors Clause—the substantially-identically worded constitutional provision governing the choosing of *presidential* electors—correctly. In 2020, the Minnesota

Secretary of State entered a consent decree with plaintiffs who had challenged the legislatively prescribed deadlines for mail-in ballots in the 2020 Minnesota presidential election that effectively "extended the deadline for receipt of ballots without legislative authorization." *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020). The Eighth Circuit invalidated this revision of the ballot deadline under the Electors Clause. "By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the Legislature of each state," and "a legislature's power in this area is such that it cannot be taken from them or modified even through their state constitutions." *Id.* at 1060 (quotation marks omitted).

A long line of earlier state-court precedents likewise reject state law authority to negate statutes enacted by their state legislatures under the Elections and Electors Clauses. In *State ex rel. Beeson v. Marsh*, for example, the Nebraska Supreme Court rejected a claim by prospective presidential electors for the Progressive Party that the state statutes governing the appointment of electors—which the court had "construed so as not to permit the nomination" of the Party's elector candidates—violated the Nebraska Constitution's guarantee that "All elections shall be free." 34 N.W.2d 279, 245, 246 (Neb. 1948). The court found it "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision" because it

concluded, on the authority of this Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), that the Electors Clause gave "plenary power to the state legislatures in the matter of the appointment of electors," and that the Nebraska Constitution "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States." *Beeson*, 34 N.W.2d at 246; *see also Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (similar).

The Rhode Island Supreme Court has likewise held that state laws allowing the election of Members of Congress by plurality vote could not be invalid under a state constitutional provision requiring majority vote in all elections in the State. That state constitutional provision, the court concluded, would be "manifestly in conflict" with the Electors Clause "if it be construed to extend to elections of representatives to congress; for, so construed, it assumes to impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint, so long as and to the extent that congress refrains from making regulations in the same matter." *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *see also, e.g.*, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. App. 1944) (concluding that state laws authorizing absentee voting in federal elections for state citizens serving abroad in World War II was valid under the Elections and Electors Clauses despite state constitutional provision requiring in-person voting); *In re Opinions of Justices*, 45

N.H. 595, 601 (1864) (similar), *called into doubt in part on other grounds*, *In re Opinion of the Justices*, 113 A. 293, 298–99 (N.H. 1921).

Finally, several federal appellate judges have also embraced this interpretation of the constitution's plain text in separate opinions. In *Wise v. Circosta*, for instance, Judges Wilkinson and Agee, joined by Judge Niemeyer, dissented from the Fourth Circuit's denial (on standing grounds, as relevant here) of a temporary injunction barring the North Carolina Board of Elections from changing "the statutory receipt deadline for mailed absentee ballots." 978 F.3d 93, 106 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting). The dissenting judges reasoned that the Elections and Electors Clauses' "clear, direct language" vested "[t]he power to regulate the rules of federal elections [in] a specific entity within each State: the 'Legislature thereof,' " and that the Board's re-write of the State's ballot-receipt deadline effectively "commandeered the North Carolina General Assembly's constitutional prerogative to set the rules for the upcoming federal elections within the State." *Id.* at 111.

Similarly, in *Hotze v. Hudspeth*, Judge Oldham dissented from the majority's refusal (on the basis of mootness) to enjoin Harris County, Texas from altering "the Legislature's express instructions" governing "drive-through voting" by making it available to "all voters." 16 F.4th 1121, 1128, 1129 (5th Cir. 2021) (Oldham, J., dissenting). Under the Elections Clause, Judge Oldham reasoned, the place for the policy debate "about the wisdom or folly of drive-through

voting . . . is in the Legislature," and Harris County had "wholly ignored" that body's resolution of the question. *Id.* at 1128, 1130.

2. The North Carolina Supreme Court's decision below, by contrast, split with these authorities and asserted the power to *override and replace* the General Assembly's determinations concerning the manner of congressional elections based on its alleged *state* constitutional authority "to protect the democratic processes through which the political power of the people is exercised." App.120a. Allowing the General Assembly to actually exercise the exclusive authority vested in it by the Elections Clause to determine the time, place, and manner of congressional elections would, the court below concluded, be "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." App.121a.

The Supreme Court of Florida reached a similar conclusion in 2015. In *League of Women Voters of Florida v. Detzner*, that court struck down the state legislature's 2012 congressional redistricting plan as violating "the Florida Constitution's prohibition on partisan intent" in redistricting. 172 So.3d 363, 370 (Fla. 2015). In doing so, the court rejected "the Legislature's federal constitutional challenge" to the application of that state constitutional provision under the Elections Clause. *Id.* at 370 n.2.

In other States, too, the courts have blessed—or engaged in—open rewriting of "important statutory

provision[s] enacted by the [state] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania*, 141 S. Ct. 1 (statement of Alito, J.). The Pennsylvania Supreme Court, like the North Carolina Supreme Court below, has asserted the power under its "Free and Equal Elections Clause" to nullify and replace the legislature's congressional map, in the teeth of the federal Elections Clause. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821–24 & n.79 (Pa. 2018). And that court again, in the run-up to the 2020 general election, relied on the same state constitutional provision to assert a "broad authority to craft meaningful remedies" in federal elections, which it employed to blue-pencil the legislature's deadline for the receipt of mail-in ballots, extending it by three days. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020); *North Carolina All. for Retired Ams. v. North Carolina State Bd. of Elections*, 20-CVS-8881 (N.C. Super. Ct. Oct. 5, 2020), *injunction pending appeal denied sub nom. Berger v. N.C. State Bd. of Elections*, 141 S. Ct. 658 (2020) (upholding similar, wholesale changes to election deadlines by non-legislative entities).

The alternate interpretations of the Elections Clause relied upon by these decisions cannot be reconciled with the correct understanding of the provision adopted by the Eighth Circuit and the other state supreme courts cited above. This Court has the solemn responsibility to intervene and resolve the

disagreement over this issue "of the most fundamental significance under our constitutional structure." *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from the denial of certiorari); *see* this Court's Rule 10(b).

C. The Question Presented Will Continue To Recur Until this Court Resolves It.

The question whether a State's courts or other entities may nullify, alter, or replace the election regulations enacted "by the Legislature thereof" is not going to go away. Simply by virtue of the issue's significance for American elections and the variety of contexts that raise it, *see supra*, Part I.A, "[t]he issue is almost certain to keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in the denial of application for stay).

Take the underlying issue in this case: the authority to draw a State's congressional districts. That question has been presented to this Court before, *see, e.g.*, Petition for Writ of Cert., *Turzai v. Brandt*, No. 17-1700 (June 25, 2018), it was presented to the Court twice this Term already, *see Moore*, *supra*, No. 21A455; *Toth*, *supra*, No. 21A457, and it will be presented to the Court again and again if the Court does not grant review now. After all, the States engage in redistricting every ten years. Moreover, some 30 state constitutions contain a "free and fair elections"

clause[1]—and *they all* contain some guarantee of free speech, equal protection, or both.[2] The North Carolina Supreme Court was not the first to divine in these open-ended clauses the heretofore undiscovered power to alter or amend the State's congressional districts, and unless this Court intervenes, it will assuredly not be the last.

And redistricting is just the beginning. As noted above, the Elections Clause governs—and state intra-branch disputes have arisen over—the whole waterfront of voting issues, from absentee voting deadlines to witness requirements, voter ID to curbside voting. The whole purpose of the Elections Clause is to establish a clear and definite allocation of the authority to set the rules of the road for federal elections before the voting starts. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 816 (1833) ("A discretionary power over elections must be vested somewhere."). Yet until this Court clearly enforces the Constitution's express selection of each State's legislature as the repository of this power, subject only to a check by Congress, the continued lack of "clear rules" settling this fundamental question will "invite further confusion and erosion of voter confidence." *Degraffenreid*, 141 S.

[1] *Free & Equal Election Clauses in State Constitutions*, NATIONAL CONF. OF STATE LEGISLATURES, https://bit.ly/3MzzOJb (last accessed Mar. 15, 2022).

[2] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 92, 133 (2018).

Ct. at 738 (Thomas, J., dissenting from the denial of certiorari).

D. This Case Is a Particularly Suitable Vehicle for Resolving the Scope of a State Legislature's Authority Under the Elections Clause.

While this Court has previously "not yet found an opportune occasion to address" the division of authority over this fundamental and recurring issue, this case presents a uniquely suitable vehicle for doing so. *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). The Elections Clause issue was squarely and repeatedly presented to both courts below, and the state supreme court directly passed upon it, *see supra*, pp. 7–10, 12–13—so despite Respondents' feeble protestations to the contrary at the stay stage,[3] there can be no plausible dispute that the issue was preserved below and is squarely presented for this Court's review. And the issue is the only determinative one left in the case, so there is little risk that the case, once granted, will end up being decided on some narrower grounds, with the Elections Clause issue once again left as a loose end.

Finally, and critically, this case presents the Court with the opportunity to consider and resolve this important issue on plenary review, with full

[3] Respondent Common Cause's Opp'n at 5–8, *Moore*, *supra*, No. 21A455 (Mar. 2, 2022); Respondent North Carolina League of Conservation Voters' Opp'n at 23–24, *Moore*, *supra*, No. 21A455 (Mar. 2, 2022).

briefing and argument in the ordinary course. Most of the previous cases presenting the Elections Clause question have arisen in applications for emergency relief, where the Court is necessarily deprived of the fulsome briefing it ordinarily receives in cases raising important questions of constitutional law. In this case, by contrast, events will not compel the Court to act until the 2024 election cycle approaches—ensuring that the Court will benefit from a full ventilation of the Elections Clause issue by the parties' counsel and amici.

* * * * *

This case finally presents the Court with "an opportune occasion" to resolve, once and for all, the festering issue of a state legislature's authority, under the Elections Clause, to regulate the times, places, and manner of federal elections free from interference by other state branches and entities. *Moore*, 142 S. Ct. at 1090. (Alito, J., dissenting from the denial of application for stay). The Court should grant the writ and end the conflict in the lower courts over this critical question of nationwide importance.

II. The Decisions Below Plainly Violate the Elections Clause.

Not only did the North Carolina Supreme Court split with the Eighth Circuit and the other state-court precedents cited above on the question presented, it got the answer to the question wrong. For the text and history of the Elections Clause, and this Court's precedent interpreting it, leave no doubt that a State's

judicial branch has no power to nullify and replace the legislature's duly chosen congressional map on the basis of broad generalities in the State's constitution.

A. The Elections Clause Vests State Legislatures with Authority To Set the Rules Governing Elections, not State Courts.

The text of the Elections Clause is clear: "[t]he 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 (emphasis added). "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Wisconsin State Legislature*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, THE FEDERALIST NO. 27, at 174–175 (Alexander Hamilton) (C. Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); *Legislature*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (Noah Webster) ("The body of men in a state or kingdom, invested with

power to make and repeal laws."); *Legislature*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Samuel Johnson) ("The power that makes laws."); 2 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (same); AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763) ("[T]he Authority of making Laws, or Power which makes them.").

"Any ambiguity about the meaning of 'the Legislature' is removed by other founding era sources." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 828 (2015) (Roberts, J., dissenting). For instance, "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives with the authority to enact laws." Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U.L. REV. ONLINE 131, 147 (2015). In Federalist 59, Hamilton "readily conceded that there were only three ways in which" the power to regulate elections "could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (C. Rossiter ed., 1961); *accord* 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, at § 816 (1833). The absence from that list of any role for the judiciary reflects that assigning such a political role and delegating legislative power to the judiciary would threaten its independence, as " 'there is no liberty if the power

of judging be not separated from the legislative and executive powers.' " THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961).

The Constitution thus grants the state "Legislature" primacy in setting the rules for federal elections, subject to check only by Congress. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884). And there can be no question that this specific delegation of power to state legislatures encompasses the authority to draw the lines of congressional districts. The design and selection of congressional maps is a core part of the "Regulation[ ]" of the "Manner of holding Elections." U.S. CONST. art. I, § 4, cl. 1. Consistent with the plain meaning of the text, this Court has squarely and repeatedly held that the lines drawn in Article I, Section 4 govern the authority of "districting the state for congressional elections." *Smiley*, 285 U.S. at 373. As the Court recently put the point, "The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, *assigning the issue to the state legislatures*, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496 (emphasis added); *accord Arizona Indep. Redistricting Comm'n*, 576 U.S. at 804–08.

Accordingly, "[t]he only provision in the Constitution that specifically addresses" the crafting of congressional districts "assigns [the matter] to the political branches," not to judges. *Rucho*, 139 S. Ct. at 2506. What is more, the Elections Clause is the *sole* source of state authority over congressional elections.

Regulating elections to federal office is not an inherent state power. Instead, the offices of Senator and Representative "aris[e] from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 522 (2001). And because any state authority to regulate election to federal offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc.*, 514 U.S. at 804; *cf.* 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, at § 627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the Union"). Thus, whatever power a state government has to craft congressional districts *must* derive from—and be limited by—the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

Precedent from this Court and others is in accord with these principles. While the majority and dissenting opinions in *Arizona Independent Redistricting Commission* disagreed over the question whether the "legislature," under the Elections Clause, is limited to a specific legislative body or "the State's lawmaking processes" more generally, *all* Justices agreed at a minimum that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking" 576 U.S at 808, 824, 841; *cf. id.* at 827–29 (Roberts, C.J., dissenting).[4] Nearly a

[4] To the extent the Court were to find that some portion of the *Arizona Independent Redistricting Commission* opinion is

century ago, the Court reached the same conclusion: the drawing of congressional districts "involves lawmaking in its essential features and most important aspect," and "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 366, 367.

Similarly, this Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—that the state legislatures' power to prescribe regulations for federal elections "cannot be taken." *McPherson*, 146 U.S. at 35. And as noted above, other courts have long recognized this limitation on the power of States to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *Beeson*, 34 N.W.2d at 286–87; *Dummit*, 181 S.W.2d at 695; *In re Plurality Elections*, 8 A. at 882.

B. The State Courts' Invalidation of the Legislatively Chosen Map and Imposition of a Map of Their Own Making Violates the Elections Clause.

The state-court orders below fundamentally transgress the Constitution's specific allocation of authority over the manner of holding congressional

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contrary to Petitioners' position in this case, and that the case is not distinguishable, the Court should overrule it.

elections. As just shown, the Constitution's resolution of "electoral districting problems" is to "assign[ ] the issue to *the state legislatures*, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496 (emphasis added). In North Carolina, the General Assembly is the "Legislature," established by the people of the State.

The North Carolina Constitution makes clear beyond cavil that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1 (emphasis added). And it makes clear, too, that the state judiciary *is not* the "Legislature" in North Carolina, nor any part of it. To the contrary, the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). Thus, the General Assembly alone is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. *Id.* (internal quotation marks omitted). That, and no other, is "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367.

Nor can North Carolina's courts claim to benefit from any sort of *delegation* of the General Assembly's exclusive power to craft congressional districts and otherwise regulate the manner of congressional elections. For under North Carolina law, "the legislature

may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *Adams v. North Carolina Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978).

Further still, even if the General Assembly *could* as a matter of state law delegate its core lawmaking functions to some other state entity (and it cannot), it has not made any such delegation *to state courts*. For the North Carolina judicial branch's role is to "interpret[ ] the laws and, through its power of judicial review, determine[ ] whether they comply with the constitution," *Berger*, 781 S.E.2d at 250, *not* to resolve "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government," *Cooper v. Berger*, 809 S.E.2d 98, 107 (N.C. 2018). Given the North Carolina Constitution's deliberate proclamation that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. CONST. art. I, § 6, the state courts are thus constitutionally incapable of receiving, and exercising, the power of "lawmaking in its essential features and most important aspect," *Smiley*, 285 U.S. at 366—*even if* the General Assembly were constitutionally capable of giving it away.

Yet the court below exercised *precisely* that power, in direct contravention of the federal Elections Clause. The North Carolina Supreme Court's February 4, 2022 Order striking down the General

Assembly's original congressional map on state-law grounds directly seizes the power to regulate the manner of congressional elections. When the General Assembly enacted that map in 2021, it exercised its constitutionally vested authority to "prescribe[ ]" the "Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. The Constitution prescribes a single method for setting aside such a choice: "the Congress may at any time by Law make or alter such Regulations." *Id.* The Elections Clause *does not* give the state courts, or any other organ of state government, the power to second-guess the legislature's determinations.

That is the plain holding of this Court's decision in *Smiley*. There, Minnesota's Governor had, in effect, done *precisely* what the North Carolina Supreme Court's February 4 order did here: he rendered the legislature's chosen districting plan "a nullity" by "return[ing] it without his approval." 285 U.S. at 361. This Court had no difficulty recognizing that this nullification of the state legislature's congressional map would plainly violate the Elections Clause *unless* "the Governor of the state, through the veto power, shall have a part in the making of state laws." *Id.* at 368. And the Court thus held that the Governor's nullification of the Minnesota legislature's congressional map was consistent with the Elections Clause *only because* it concluded that the veto power, "as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority." *Id.*; *see Dummit*, 298 Ky. at 50 (explaining that while *Smiley* "holds

that a legislature must function in the method prescribed by the State Constitution in directing the times, places, and manner of holding elections," that does not mean that "when functioning in the manner prescribed by the State Constitution, the scope of its enactment on the indicated subjects is also limited by the provisions of the State Constitution"). Here, by contrast, because *a state court's* nullification of a congressional map through the exercise of judicial review is plainly *no* "part in the making of state laws," *Smiley*, 285 U.S. at 368, the opposite conclusion necessarily follows.

To be sure, in limited circumstances a state legislature's election rules are subject to review or invalidation by entities other than Congress—because other provisions of *the United States Constitution* explicitly or implicitly so provide. For example, where the congressional districts drawn by a state legislature violate *some other* provision of the Constitution, such as the Equal Protection Clause, the Constitution itself authorizes the federal courts to intervene to secure enumerated constitutional rights—in the same manner as they secure those rights when Congress, through an exercise of *its* enumerated powers, transgresses them. *See Rucho*, 139 S. Ct. at 2495–97. No such enumerated, federal constitutional right is at issue here.

Instead, the state supreme court justified its nullification of the General Assembly's regulation of the manner of congressional elections by pointing to a hodge-podge of *state* constitutional provisions. *See*

App.11a–12a. But the *federal* constitution vests the authority to draw a State's congressional districts in "the *Legislature* thereof," U.S. CONST. art. I, § 4, cl. 1 (emphasis added), where it must be exercised "in accordance with the method which the state has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367—not hedged or parceled out by the state's constitution to its judiciary.

Moreover, "none of" the state constitutional provisions invoked by the court below "say[ ] anything about partisan gerrymandering, and all but one make no reference to elections at all." *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). And that one provision—the "Free Elections Clause"— was "for 246 years . . . not found to prohibit partisan gerrymandering." *Id.* at 1091; *see* App.196a–206a (Newby, J., dissenting). It is one thing for a state court to enforce specific and judicially manageable standards, such as contiguousness and compactness requirements. It is quite another for the court to seize the authority to find, hidden within the folds of an open-ended guarantee of "free" or "fair" elections, rules governing the degree of "permissible partisanship" in redistricting—a matter that this Court has held to be "an unmoored determination" that depends on "basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500–01 (quotation marks omitted).

This Court in *Rucho* squarely held that any attempt to answer this "unmoored" question is an exercise in politics, not law—that is to say, it is a

quintessentially legislative exercise. *Id.* If the Elections Clause places *any* limits on what matters may be parceled out to entities in a State other than "the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1—and this Court's precedents uniformly recognize that it must—then it cannot allow a State's courts to do what was done in this case: discover somewhere within an open-ended guarantee of "fairness" in elections a novel rule requiring partisan criteria to be taken explicitly into account when drawing congressional districts.

Having rendered the General Assembly's original congressional map "a nullity," *Smiley*, 285 U.S. at 362, the state courts then compounded the constitutional error by creating, and imposing by fiat, *a new* congressional map. These further acts demonstrate with remarkable clarity this Court's teaching that crafting congressional districts "involves lawmaking in its essential features and most important aspect," *id.* at 366, and "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500. Rather than hearing briefing and argument on any recognizably legal question, the trial court below proceeded by appointing three "Special Masters" who, in turn, hired political scientists and mathematicians to "assist in evaluating" the remedial plans the state supreme court had ordered the parties to produce. App.273a–74a. This cadre of extra-constitutional officers then proceeded to reject the General Assembly's plan (again) and craft *their own* plan, based on tools and datasets similar to the ones used by the General

Assembly. App.289a; 301a–04a. Worse still, in the process of analyzing the parties' remedial plans and crafting their own plan, this team of judicial-appointees and political scientists had repeated, *ex parte* contacts with the experts *for the plaintiffs*, App.296a–99a—behavior that may be acceptable for *legislative* officials but has long been forbidden for genuinely *judicial* officers. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 (2000).

The short of it is this: the decisions by the courts below to nullify the General Assembly's chosen "Regulations" of the "Manner of holding Elections," U.S. CONST. art. I, § 4, cl. 1, and to replace them with new regulations of their own, discretionary design, simply cannot be squared with the text and original meaning of the Elections Clause, nor with this Court's interpretation of it.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari.

March 17, 2022 Respectfully Submitted

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