No. 21-1271

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 Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR *AMICI CURIAE* SENATOR KIM WARD, THE MAJORITY LEADER OF THE PENNSYLVANIA SENATE, AND THE REPUBLICAN CAUCUS OF THE PENNSYLVANIA SENATE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Senator Kim Ward ("Leader Ward") is a duly elected member of the Pennsylvania Senate from the Commonwealth's 39th Senatorial District. She is also the duly elected Majority Leader of the Pennsylvania Senate. In that capacity, she leads *amicus curiae* the Republican Caucus of the Pennsylvania Senate ("Senate Republican Caucus"), which is the Senate's Majority Caucus. The Senate Republican Caucus consists of 29 of 50 members of the Senate: 28 Republican Senators and one independent Senator who caucuses with the Republicans.

As the Leader and Majority Caucus of the Pennsylvania Senate, respectively, Leader Ward and the Senate Republican Caucus participate in drafting, introducing, reviewing, debating, and enacting Pennsylvania legislation, including statutes that govern the time, place, and manner of federal elections in the Commonwealth. As a result, they have a distinct interest in the limits that the U.S. Constitution's Elections Clause places on state courts as they adjudicate challenges to those types of statutes. That issue lies at the heart of this matter.

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[1] Counsel of record for all parties consented in writing to the *amici curiae*'s filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the offices of the *amici* made a monetary contribution that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Pennsylvania's recent jurisprudence helps to illustrate the undesirable outcomes that can occur when state court justices, in reliance on vague provisions in state constitutions and while ostensibly crafting judicial remedies, deem invalid and then create or re-write redistricting and other laws that govern federal elections – the very approach that the North Carolina judiciary took in this case. This approach not only contravenes the Elections Clause, but it also has a number of other anti-democratic consequences. For instance, it can incentivize the legislative or executive branch in a divided state government to refrain from negotiating with the other branch, in good faith, to enact a requisite redistricting plan in response to a court order, viewing a court-drawn map as a politically preferable alternative. For similar reasons, it can encourage one branch in a divided state government to avoid engaging meaningfully with the other one to replace a judge-made map with a legislatively-created plan. It also results in redistricting plans and other election laws that are created by state court justices – governmental actors who are not subject to the same level of voter accountability as the officials who are supposed to make those laws. And, similarly, it means that justices are making the sorts of policy decisions that are not only constitutionally committed to, but also most appropriate for, state legislative bodies.

This Court should reverse the decision of the North Carolina Supreme Court.

ARGUMENT

The Elections Clause in the United States Constitution establishes that "[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. As this Court has stressed, under the Elections Clause, congressional "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). Pennsylvania's legislative power (and therefore its power to engage in congressional redistricting) is vested exclusively in the General Assembly. *See* Pa. Const. art. II, § 1. In Pennsylvania, in other words, the "primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821-22 (Pa. 2018). The Governor, for his part, is empowered to "examine the provisions of the legislation [that the General Assembly has passed] within the ten days allotted by [Pa. Const. art. IV,] Section 15 and to either approve it or return it, disapproved, for legislative reconsideration." *Scarnati v. Wolf*, 173 A.3d 1110, 1120 (Pa. 2017). By contrast, "[t]he province of the judicial branch of the [Pennsylvania] government is to construe and administer the laws, not to make them." *Vare v. Walton*, 84 A. 962, 963 (Pa. 1912); *see also Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975) ("The court's

function is to interpret legislative enactments and not to promulgate them.").

In recent years, however, the Pennsylvania Supreme Court, acting to address what it deemed to be violations of the Commonwealth's constitution, has "made laws" by creating or re-writing redistricting and other laws that govern federal elections. Pennsylvania's experience helps to illustrate the anti-democratic outcomes that can occur when state court justices usurp the authority that the Elections Clause bestows on state legislatures.

Recent Pennsylvania Jurisprudence

Unlike with this Court's interpretation of the United States Constitution, *see Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Pennsylvania Supreme Court has concluded that partisan gerrymandering claims are justiciable under the Commonwealth's constitution. In *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018), the Pennsylvania Supreme Court addressed whether the Pennsylvania Congressional Redistricting Act of 2011 ("2011 Plan") embodied an unconstitutional partisan gerrymander. It explained that, "[w]hile federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter." *Id.* at 741. The court concluded that the 2011 Plan violated Article I, Section 5 of the Pennsylvania Constitution, the "Free and Equal

Elections Clause," which provides (vaguely) that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. The court reasoned that "the 2011 Plan subordinates the traditional redistricting criteria in the service of partisan advantage, and thereby deprives Petitioners of their state constitutional right to free and equal elections." *League of Women Voters of Pa.*, 178 A.3d at 818.

Having concluded that the 2011 Plan was contrary to the Free and Equal Elections Clause, the Pennsylvania Supreme Court gave the General Assembly and Governor only about three weeks to enact a remedial districting plan. The court stated that, "considering both the constitutionally infirm districting plan and the imminent approaching primary elections for 2018 [which were scheduled to occur in approximately three months], we requested that these sister branches enact legislation regarding a new districting plan, providing a deadline to do so approximately three weeks from the date of our Order." *Id.* at 822. When the General Assembly and Governor were unable to meet the expedited deadline, the court took matters into its own hands. It adopted its own districting plan, which it had developed in consultation with its own private consultant, and ordered the plan to be used in subsequent congressional elections. *See League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1087-88 (Pa. 2018). As a dissenting justice observed, the court had adopted "a judicially created redistricting plan apparently upon advice from a

political scientist who has not submitted a report as of record nor appeared as a witness in any court proceeding in this case." *Id.* at 1121-22 (Saylor, J., dissenting).

Last year, in turn, when the General Assembly and Governor were unable to agree upon a new congressional districting plan to account for the 2020 Census data, the Pennsylvania Supreme Court, in *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022), picked its own plan from among various options that parties and *amici* had submitted to it – including proposed plans from the General Assembly's leaders and Governor.[2] The court explained that, because of the "Commonwealth's loss of population relative to the nation as a whole, Pennsylvania's allotted number of congressional representatives declined from eighteen to seventeen" and therefore "Pennsylvania now requires a new congressional districting plan drawn with only seventeen districts for the upcoming May 17, 2022, Primary Election." *Id.* at 450. After assessing the proposed plans that the litigants had proffered, the court picked one that a collection of private plaintiffs had submitted – which was the one

[2] *Amici curiae* acknowledge that, in *Branch v. Smith*, 538 U.S. 254 (2003), the Court concluded that, under 2 U.S.C. § 2c, after a new apportionment of Representatives takes place, a state court may adopt a congressional districting plan to account for the new Census data if the state's legislative process fails to do so in a timely manner. *See id.* at 272 ("We think, therefore, that while § 2c assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming.").

that was the most similar to (or "least changed" from) the plan that it had adopted in *League of Women Voters*, and ordered it to be used in subsequent congressional elections. The court said that, in using the "least change" approach, its selected plan "worked in this case to produce a map that satisfies the requisite traditional core [redistricting] criteria while balancing the subordinate historical considerations and resulted in a plan that is reflective of and responsive to the partisan preferences of the Commonwealth's voters[.]" *Id.* at 464.

The net effect of these events is that, since 2018, Pennsylvania has had two congressional districting plans, both of which the Pennsylvania Supreme Court adopted, one of which the court created on its own (based on the advice of a private consultant) to replace a legislatively-adopted map that it had deemed to be invalid under state law, and the other of which was designed to be as similar to the first one as possible, while still taking account of new Census data. Neither plan was ever introduced in, let alone passed by, the General Assembly.

In the meantime, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Pennsylvania Supreme Court addressed Act 77 of 2019, which amended the Commonwealth's Election Code to create the opportunity (for the first time) for all qualified Pennsylvania voters to vote in federal elections by mail, regardless of whether they would be absent from their voting districts on Election Day. Among other issues, the court considered whether

the statutory deadline for returning mail-in and absentee ballots to county election boards (8:00 p.m. on Election Day) would disenfranchise voters in violation of the Free and Equal Elections Clause. The court answered "yes." It then turned its attention to fashioning a remedy. And, in doing so, it stated that, "[u]nder our Extraordinary Jurisdiction, this Court can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters." *Id*. at 371. The court then unilaterally "extended" the statutory deadline by three days. The court, in other words, effectively re-wrote the statute.

The Pennsylvania Supreme Court's actions in *League of Women Voters* (as perpetuated through its decision in *Carter*) and *Pennsylvania Democratic Party* stand in contrast to the Elections Clause,[3]

[3] In *League of Women Voters*, three out of seven of the court's justices dissented to the court's adoption of its own districting plan on grounds that doing so violated the Elections Clause. *See League of Women Voters of Pa.*, 181 A.3d at 1121-22 (Saylor, Baer, and Mundy, J., dissenting). *Amici curiae* agree with the following statement that Justice Mundy, one of the dissenting justices, made in relation to the Elections Clause:

> If this Court concluded that a congressional map was unconstitutional, *and* if the General Assembly was given sufficient time to act (which is not the case here) and it fails to act, a circumstance may arise where this Court could draw a map on a temporary remedial basis pending further state or federal legislative action. But it is quite another matter for this Court to put the General Assembly on a three-

which establishes that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[,]" ***not*** by the Judiciary thereof, subject only to the caveat that "the Congress may at any time by Law make or alter such Regulations[.]" U.S. Const. art. I, § 4, cl. 1.

Anti-Democratic Consequences

The events in Pennsylvania help to illustrate and reinforce the anti-democratic outcomes that can occur when state court justices assume the authority that the Election Clause bestows on state legislatures.

One of these outcomes can occur when a state court, applying state law, strikes down a legislatively-adopted congressional district plan and the state's lawmaking machinery is divided between political parties – with the legislature controlled by one party and the governorship controlled by another. Under these circumstances, in determining how to react to the court's order – including any court-imposed "deadline" for the adoption of a replacement plan through the legislative process – the prospect of judicial mapmaking can incentivize one of the branches to refrain from undertaking good

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> week timeline without articulating the complete criteria necessary to be constitutionally compliant.

League of Women Voters of Pa., 178 A.3d at 836 n.3 (Mundy, J., dissenting).

faith negotiations with the other one, particularly if the refraining branch believes that the judiciary will be sympathetic to its political position. Rather than working with its coordinate branch to enact a new district plan, for example, one branch may prefer to let an "impasse" unfold – or at least be apathetic about it – with the understanding that, under those circumstances, the state's judiciary will likely impose its own plan and the belief that the judiciary's plan will be better for it (politically) than what it could have otherwise negotiated.

Although *Carter* did not involve a state court's invalidation of a legislatively-adopted plan, it nevertheless helps to illustrate this phenomenon. In *Carter*, for months on end, Pennsylvania's Governor opted not to engage with the General Assembly on the drawing of congressional maps to account for the 2020 Census data, suggesting instead that, in this context, he plays "no role" in the bill passage process. The Governor was quoted as stating that, "when someone calls and says 'let's talk about the map,' I'm not talking. I sent my principles. Here are the principles I think ought to be used." Dennis Owens, ABC27 News, "Gov. Wolf Says 'Negotiating' a New Congressional Map is Not His Role" (Dec. 17, 2021).[4] According to the same report, the Governor was asked: "So you're not engaging with them [*i.e.*, the

[4] Available at https://www.abc27.com/this-week-in-pennsylvania/pennsylvania-politics/gov-wolf-says-negotiating-a-new-congressional-map-is-not-his-role/ (last visited Aug. 31, 2022) (including video of interview).

General Assembly] and say we don't like this or that[,] you're just waiting until you get something?" *Id*. The Governor, according to the report, responded as follows: "Yes. I think that's the way it should be. I don't think this is a negotiation." *Id*. Not surprisingly, when the General Assembly passed a congressional map, the Governor promptly vetoed it. Later on, in mid-January of 2022, the Governor finally released the very map that he asked the Pennsylvania Supreme Court to consider as it sought to pick a new map in light of the "impasse." *See* Gov. Tom Wolf, Congressional Districts Map Proposals.[5] By that point, it was too late for any meaningful public involvement with the Governor's plan. The judiciary had already taken over the redistricting process. *See Carter*, 270 A.3d at 452-54 (describing procedural history).

When a state has a divided government, moreover, and the state's judiciary adopts a congressional district map as a remedial measure, this occurrence can incentivize one of the political branches to avoid engaging meaningfully with the other one to replace the judiciary's map with a legislatively-created plan. As this Court has recognized, "if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 416 (2006).

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[5] Available at https://www.governor.pa.gov/congressional-districts-map-proposals/#fair-maps (last visited Aug. 31, 2022).

Indeed, "to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process." *Id*. But, in a divided state government, there is little incentive for the governorship or legislature (as the case may be) to work together with its coordinate branch to come up with a replacement plan, if the court-drawn plan is functioning in a way that is politically advantageous to it.

Of course, these anti-democratic dynamics that can materialize when a state has a divided government can also unfold, in the same way and for the same reasons, as between the houses of a divided state legislature.

When state court justices create or re-write redistricting or other laws that govern federal elections, moreover, it means that those laws are being made by governmental actors – justices – who are not subject to the same level of voter accountability (if any) as the officials who are supposed to make them. In Pennsylvania, this issue was compounded in *League of Women Voters* when the Supreme Court hired a private consultant to develop its districting plan, given that the consultant was shielded from public oversight and certainly not accountable to any voter. The Elections Clause "clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality). The idea is that, in a jurisdiction like Pennsylvania or North Carolina, state laws that govern the time,

place, and manner of federal elections should reflect a deliberative and open legislative process, which involves negotiations, compromise, and policy judgments, and which the people's elected representatives undertake in order to memorialize and implement state policy that reflects the will of their constituents. If the voters are dissatisfied with the efforts of these elected officials, their remedy is at the ballot box, through the regular election cycle (typically two or four years). *See, e.g., Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1047 (Pa. 2019) (noting the importance of "ensur[ing] that [the] duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate.") (internal citations omitted). By contrast, voters have the chance to take up the retention of state court justices only periodically, *see, e.g.*, Pa. Const. art. V, § 15 (Pennsylvania justices stand for retention every 10 years); N.C. Stat. § 7A-4.2 (North Carolina justices stand for retention every eight years), or, in some cases, not at all, *see, e.g.,* Me. Const. art. V, pt. 1, § 8 (Maine justices are not elected but instead appointed by the state's governor, with confirmation by the state's senate).

And, on a related note, when state supreme courts deem invalid and then create or re-write redistricting or other laws that govern federal elections, they are making the sorts of policy decisions that are committed to, and most appropriate for, state legislative bodies. As this Court has acknowledged, under the Elections Clause, state laws that govern the time, place, and manner of federal elections must

emanate from state "Legislatures" and they "involve[] lawmaking in its essential features and most important aspect." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). As with all forms of lawmaking, this form involves making policy decisions. And, when it comes to redistricting in particular, those policy decisions are inherently partisan in nature:

> Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is

> intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (internal citations omitted).

Not only are state legislative bodies constitutionally vested with the authority to make these types of election laws and the policy decisions that go along with them, but they are better suited than state supreme courts to do so. As the Pennsylvania Supreme Court has explained in addressing policymaking generally:

> We do not…re-assess the wisdom and expediency of alternative methods of solving public problems. It is the province of the legislature, not the judiciary, to determine the means necessary to combat public problems, for with means as with ends, the legislature, which is more responsive to the people and has more adequate facilities for gathering and assembling the requisite data, is in a better position to evaluate and determine alternative approaches.

Tosto v. Pennsylvania Nursing Home Loan Agency, 331 A.2d 198, 202 (Pa. 1975) (internal quotations and ellipses omitted). This Court, similarly, has recognized that "a state legislature is the institution that is by far the best situated" to address congressional redistricting issues. *Connor v. Finch*,

431 U.S. 407, 414–15 (1977). Courts, on the other hand, "lack[] the political authoritativeness that the legislature can bring to the task." *Id.*; *Perry v. Perez*, 565 U.S. 388, 393 (2012) (*per curiam*) (noting that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment[,]" and that redistricting involves policy judgments "for which courts are, at best, ill suited.").

These dynamics are fully at play here, where the North Carolina judiciary, in reliance on the state's constitution, and while ostensibly crafting a judicial remedy, deemed a legislatively-adopted redistricting plan to be invalid and then created and adopted its own plan that is set to govern congressional elections in the state. The North Carolina judiciary's action not only violates the Elections Clause, but it also opens the door to the other anti-democratic consequences that are discussed above.

Amici curiae believe that, to the extent that a state court can deem a congressional redistricting plan to be unconstitutional and then craft a remedy in relation to the plan, it should form the remedy only while adhering to certain principles that are designed to prevent gamesmanship and give due deference to the applicable state legislative process. First, to the degree possible, the court should leave the redistricting plan in place until it affords the legislative process sufficient time to adopt a new plan. *See Butcher v. Bloom*, 203 A.2d 556, 569 (Pa. 1964) (providing the General Assembly with approximately eleven months to adopt a new

apportionment plan for state legislative seats). A "sufficient time" should be measured in months, *id.*, not weeks. *See League of Women Voters of Pennsylvania*, 178 A.3d at 822 (providing the General Assembly with approximately three weeks to create a new redistricting map); *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. 2022) (providing North Carolina's legislature with two weeks to create a new redistricting map). Second, to the degree that a court-created map can be used, there should be an expectation that it will be used only temporarily, and the court should pronounce the obligation for the legislative process to generate a replacement map, consistent with the Elections Clause. *See, e.g., League of Women Voters of Pa.*, 178 A.3d at 836 n.3 ("a circumstance may arise where this Court could draw a map on a temporary remedial basis pending further state or federal legislative action") (Mundy, J., dissenting). Lastly, to the extent that the court can create its own temporary remedial plan, it should do so only while involving the political branches in this process to the greatest degree possible by, for example, inviting the legislative leaders and Governor to file comments on a draft of the plan before adopting it in final form.

While a congressional districting plan that has been adopted through the legislative process is always preferable, the remedy if a state court deems a legislatively-adopted map to be unconstitutional (to the degree that a state court can make such a determination) should not be one that lands on the opposite end of the spectrum by completely removing redistricting from the legislative process.

CONCLUSION

Amici curiae requests that this Court reverse the decision of the North Carolina Supreme Court.

Respectfully submitted,

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