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; 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,

Applicants,

v.

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. PETER; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Respondents,

&

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,

Applicants,

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTER, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND

DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE,

Respondents,

&

COMMON CAUSE,

Intervenor-Respondent.

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

EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

February 25, 2022

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

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

In the first of the two consolidated cases, Applicants are Speaker of the North Carolina House of Representatives Timothy K. Moore; President Pro Tempore of the North Carolina Senate Philip E. Berger; the North Carolina State Board of Elections; 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; Senator Paul Newton, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections. Applicants were the defendants in the North Carolina Superior Court and the 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 the appellants in the North Carolina Supreme Court.

Damon Circosta, in his official capacity as chair of the North Carolina State Board of Elections, is also a party. Damon Circosta was a defendant in the North Carolina Superior Court and an appellant in the North Carolina Supreme Court.

In the second of the two consolidated cases, Applicants 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. Applicants 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 parties are the State of North Carolina; the North Carolina State 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; Karen Brinson Bell, in her official capacity as Member of the North Carolina State Board of Elections. These parties were defendants in the North Carolina Superior Court and appellants 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.

The proceedings below were:

1. *Harper v. Hall*, No. 21 CVS 500085 (North Carolina Superior Court) – Order on Remedial Plans (entered February 23, 2022)

2. *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).

3. *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court) – Order Denying Temporary Stay and Writ of Supersedeas (entered February 23, 2022)

4. *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court) – Order Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 4, 2022).

5. *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).

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, no Applicant has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

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

The federal constitution expressly provides that the manner of federal elections shall "be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4. Yet barring this Court's immediate intervention, elections during the 2022 election cycle for the U.S. House of Representatives in North Carolina will be conducted in a manner prescribed not by the State's General Assembly but rather by its courts. "The Constitution provides that state legislatures"—not "state judges"—"bear primary responsibility for setting election rules," *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay), and this Court should intervene to protect the Constitution's allocation of power over this matter of fundamental importance to our democratic system of government.

In an order entered on February 4, the North Carolina Supreme Court invalidated the North Carolina General Assembly's congressional maps and remanded to state trial court for remedial proceedings. Rather than seek immediate review in this Court, Applicants engaged in a good-faith effort to craft a congressional map that would be valid under the state Supreme Court's order. Yet in an order entered on February 23, the North Carolina trial court rejected that map and instead mandated the use of a new map 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. Applicants immediately sought a stay from the North Carolina Supreme Court, but that stay was promptly denied.

If a redistricting process more violative of the U.S. Constitution exists, it is hard to imagine it. Without this Court's emergency intervention, the North Carolina courts' unconstitutional, judicially created congressional maps will be used to conduct the May 17, 2022 primary election. Time is of the essence to prevent such a profound constitutional violation from occurring. On February 24, the North Carolina Board of Elections began accepting candidate filings based on the North Carolina courts' map. The filing period currently is scheduled to expire at noon on March 4. Absentee ballots will be sent out on March 28, and one-stop early voting commences on April 28.

For these reasons, immediate relief is needed to ensure that the May 17 election can be conducted using maps that comply with the federal Constitution. In particular, this Court should stay—pending a forthcoming petition for writ of certiorari and, should certiorari be granted, resolution of the merits—three orders of the North Carolina courts. First, this Court should stay both the North Carolina Supreme Court's February 4 order and February 14 opinion invalidating the General Assembly's original congressional map. Second, this Court also should stay the state trial court's order mandating use of the judicially created map in the upcoming election.[1] To minimize the harm that already is occurring, Applicants also request entry of an immediate administrative stay while the Court considers this application.

[1] Of course, if the Court so desires it can treat this application itself as a petition for writ of certiorari, grant review, and enter a stay pending resolution of the merits. In addition, to the extent the Court decides against immediate review of the decisions below, Applicants in the alternative request that the Court stay the state courts' orders pending the conclusion of further proceedings in

This Court should put a stop to the North Carolina judiciary's usurpation of the General Assembly's specifically enumerated constitutional authority to regulate the manner of congressional elections. Anything less will surrender North Carolina's 2022 elections to a congressional map that palpably violates the U.S. Constitution, rewarding judicial activism of the most brazen kind.

OPINIONS BELOW

The North Carolina Supreme Court's order reversing and remanding for the creation of remedial maps is reproduced at App. 10a–29a. The North Carolina Supreme Court's written decision reversing and remanding for remedial maps is reproduced at App. 30a–243a. The North Carolina Superior Court's order on remedial maps is reproduced at App. 244a–75a. The North Carolina Supreme Court's order denying a temporary stay or writ of supersedeas is reproduced at App. 1a–3a.

JURISDICTION

The North Carolina Supreme Court entered an order on February 4, 2022 and an accompanying written decision on February 14, 2022, striking down Applicants' original Congressional maps. That order and its accompanying written opinion constitute a final judgment of North Carolina's highest court with regard to Applicants' original Congressional maps. 28 U.S.C. § 1257(a). The North Carolina Supreme Court entered an order on February 23, 2022, denying Applicants a temporary stay of the remedial maps generated by the special master and ordered by

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state court and the filing and disposition of any subsequent petition for certiorari to this Court. *See CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers).

the North Carolina Superior Court. That order is a final judgment of North Carolina's highest court with regard to the remedial maps' application in the 2022 primary. 28 U.S.C. § 1257(a). Without a stay from this Court, these decisions will finally determine the maps to be used in the 2022 primary, working a Constitutional injury against Applicants. *See*, *e.g.*, *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (deeming final, for § 1257 purposes, the denial of a stay because it "finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review"); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479–483 (1975) (describing circumstances of final orders under 28 U.S.C. § 1257).

This Court has authority to stay the orders of the North Carolina Supreme Court and Superior Court pending the filing and disposition of a writ of certiorari. 28 U.S.C. §§ 1651(a), 2101(f).

STATEMENT OF THE CASE

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 on redistricting throughout North Carolina, including in all thirteen existing congressional districts. The General Assembly provided a public portal where members of the public could provide input throughout the redistricting process and even invited citizens to draw their own districts in a specialized room at the Statehouse. When legislators began drawing maps themselves, they did so on public terminals during recorded sessions. After legislators and members of the public submitted their map proposals, the General Assembly held additional hearings on the proposals.

On November 4, 2021, the North Carolina General Assembly enacted a new map for congressional elections.

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.

The three-judge panel of the North Carolina Superior Court held 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 Applicants. See App. 556a.

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. 12a. The court concluded that the General Assembly's congressional

map was "unconstitutional beyond a reasonable doubt" under four different clauses of the North Carolina Constitution, and that it was an unconstitutional partisan gerrymander, 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. 13a–14a. 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. 15a. "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." App. 16a. 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. 16a.

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. 36a. The court cited this Court's opinion in *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), for the proposition that "state constitutions can provide standards and guidance for state courts to apply" in addressing partisan gerrymandering, App. 96a–97a, 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," App. 146a.

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 undertook to develop remedial maps. While the General Assembly had *not* relied on partisan election data in developing its initial maps, the North Carolina Supreme Court's order and opinion now *required* the use of partisan election data, which the General Assembly would need to consider in explaining to the trial court "what data they relied on . . . in evaluating the partisan fairness of the plan." App. 16a. The General Assembly therefore uploaded partisan election data and election results data into the districting software, Maptitude. The General Assembly then began with a blank slate, and each chamber proceeded to draw new districts and make adjustments with the goal of complying with the North Carolina Supreme Court's February 4 order. The General Assembly relied primarily on the mean-median and efficiency gap tests to measure the effects of district lines on partisanship. It sought to bring those measures within the statistical measurements that scholars define as presumptively legal.

On February 17, the General Assembly enacted a remedial congressional map, Session Law 2022-3, which it timely submitted to the North Carolina Superior Court with an explanation of its constitutionality, as required by the North Carolina Supreme Court's February 4 order. The legislation enacting the map provided that "[t]he remedial plan . . . is effective *contingent on its approval or adoption by the Wake County Superior Court*," "unless the United States Supreme Court or any other federal court reverses or stays the" February 4 order or February 14 opinion of the North Carolina Supreme Court. 2022 N.C. Sess. L. 3, § 2. In that event, "the prior version" of the map would again be effective. *Id*.

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, proceeded to hire two political scientists, a mathematician, and a professor of neuroscience to "assist in evaluating the Remedial Plans." App. 248a–49a. 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 map and adopting the map proposed by the Special Masters. App. 244a. 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. 254a. Instead, the court adopted the remedial plan proposed by the Special Masters, which it held satisfied the North Carolina Supreme Court's standards. *Id*.

At the same time, the North Carolina Superior Court denied Applicants' motion to disqualify two of the Special Masters' assistants after these individuals, Tyler Jarvis and Steven Wang, were discovered to have engaged in substantive *ex parte* communications with Respondents' experts. App. 276a. Applicants' motion had detailed the *ex parte* communications and sought to disqualify Jarvis and Wang from further participation in the work of the Special Masters, and it had requested that their existing work product be destroyed. App. 280a. The court denied the motion despite no opposition being filed.

On the same day that the North Carolina Superior Court issued its decision, Applicants sought a stay or writ of supersedeas from the North Carolina Supreme Court. That court denied Applicants' requests without analysis. App. 1a.

As the candidate filing window is now underway, there is no time for additional state court review of these decisions. The decisions of the North Carolina Supreme Court and Superior Court are final for purposes of the 2022 congressional elections cycle.

REASONS FOR GRANTING THE STAY PENDING APPEAL

Pursuant to 28 U.S.C. Section 2101(f), this Court is authorized to stay "the execution and enforcement" of a "final judgment or decree of any court . . . subject to

review . . . on writ of certiorari." In addition, the All Writs Act gives an individual Justice or the Court broad discretion to issue "all writs necessary or appropriate in aid of [its] . . . jurisdiction[ ]," 28 U.S.C. § 1651(a), in "exigent circumstances" where the "legal rights at issue are indisputably clear." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (internal quotation marks and brackets omitted).

This Court will grant a stay of a lower court's order if there is "(1) a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curium); *San Diegans for the Mt. Soledad Nat'l Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 1301, 1302 (2009); *West Virginia v. EPA*, 136 S.Ct. 1000 (2016); *Anderson v. Loertscher*, 137 S.Ct. 2328 (2017). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

For the reasons given below, Applicants have satisfied these requirements, and the Court should stay the orders of the North Carolina courts striking down the General Assembly's original districting plan and imposing a new plan designed by the North Carolina Superior Court and its Special Masters.

I. There Is a Reasonable Probability that Four Justices Will Vote To Grant Certiorari and a Fair Prospect that Five Justices Will Vote To Reverse the North Carolina Supreme Court's Violation of the Elections Clause.

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 replaces 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 congressional supervision. The state Supreme Court's usurpation of that authority simply cannot be squared with the lines drawn by the Elections Clause. The state judiciary's actions raise profoundly important issues that this Court likely will agree to review—and if it does agree to review them, this Court likely will reverse.

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." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (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) ("[T]he 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 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 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) 78.

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 v. Holm*, 285 U.S. 355, 373 (1932). 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 v. Common Cause*, 139 S. Ct.

2484, 2496 (2019) (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, 841; *cf. id.* at 827–29 (Roberts, C.J., dissenting). Nearly a 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 v. Blacker*, 146 U.S. 1, 35 (1892). And 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.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601 (1864).

The specific demarcation of powers dictated by the Elections Clause 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 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"). To vindicate the authority of state legislatures is to vindicate the liberty endowed by our Constitution's structural commands. *See* 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 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 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," *State v. Berger*, 368 N.C. 633, 635 (2016), *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*, 370 N.C. 392, 408 (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 courts below exercised *precisely* that power, in direct contravention of the federal Elections Clause. They did so in two ways. First, 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. The Constitution prescribes a single method for setting aide 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.* 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," *id.* 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—but only 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. 13a–14a. But the *federal* constitution vests the authority to draw a State's congressional districts in "the *Legislature* thereof," U.S. CONST. art. I, § 4, 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 to the state judiciary through vague state-constitutional provisions purportedly vesting the state courts with a general superintendence of the fairness of elections.

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. 247a–48a. 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 Assembly. App. 262a–63a; 271a–72a. Worse still, in the process of crafting their own plan, this team of judicial-appointees and political scientists had repeated, *ex parte* contacts with the experts *for the plaintiffs*, App. 268a–69a—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, 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.

C. The Court Is Likely To Intervene To Resolve the Division in Authority over the Critically Important Questions Presented in This Case.

This Court is likely to grant review of the orders in question and reverse. The Elections Clause question at issue checks all the boxes for this Court's review: it involves a—recurring—conflict between the lower courts on a critically important question of constitutional law that this Court should resolve. *See* This Court's Rule 10.

The federal appellate and state supreme courts have divided over the extent to which the Elections Clause countenances interference by other branches in a state legislature's regulation of the time, place, and manner of congressional elections. The Eighth Circuit has interpreted the Elections Clause correctly, invalidating the Minnesota Secretary of State's "attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election" as an unconstitutional interference with the state legislature's constitutionally prescribed role. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020); *see also Wise v. Circosta*, 978 F.3d 93, 111 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (concluding, in dissent, that the North Carolina Board of Elections had "commandeered the North Carolina General Assembly's constitutional prerogative to set the rules for the upcoming

federal elections within the State" under the Elections and Electors Clauses). A long line of earlier state-court precedents likewise reject state law authority to negate their state legislature's statutes. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. App. 1944); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of the Justices*, 113 A. 293, 299 (N.H. 1921); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

The North Carolina Supreme Court's decision below, however, 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. 144a–45a. And 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 v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J.). The Pennsylvania Supreme Court, for instance, in the run-up to the 2020 general election, relied on the *Pennsylvania* Constitution's Free and Equal Elections Clause 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); *see also North Carolina All. for Retired*

Ams. v. North Carolina State Bd. of Elections, No. 20-CVS-8881 (N.C. Wake Cnty. Super. Ct. Oct. 5, 2020), *injunction pending appeal denied sub nom. Berger v. N.C. State Bd. of Elections*, 141 S. Ct. 658 (2020) (blessing similar, wholesale changes to election deadlines by non-legislative entities).

The alternate interpretations of the Elections Clause adopted by these different decisions cannot be reconciled, and this Court has the solemn responsibility to intervene to resolve the disagreement. This division of authority is not over some trifling matter, but over an issue "of the most fundamental significance under our constitutional structure." *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from the denial of certiorari). The question presented here goes to the very core of this nation's democratic republic: what entity has the constitutional authority to set the rules of the road for federal elections, the means we use to "exercise self-government." *Id.* Nor is this split in authority going to simply disappear. Rather, the issue has been repeatedly raised before this Court and will *continue* to be raised until it is resolved. *See id.* at 738 (Alito, J., dissenting from the denial of certiorari). Accordingly, the Court is likely to grant review in the case and reverse.

II. Applicants Will Be Irreparably Harmed Without a Stay.

Unless this Court enters a stay of the North Carolina courts' orders, Applicants will be irreparably harmed, losing forever the opportunity to appeal the orders below before the 2022 elections are conducted under a judicially crafted and unconstitutional congressional map. *See Hollingsworth v. Perry*, 558 U.S. 183, 190

(2010) (*per curiam*) ("[A] party asking this Court for a stay . . . must show . . . that the applicant would likely suffer irreparable harm absent the stay."). Applicants are state legislators to whom the Constitution grants the sole authority to create districting maps for congressional elections, including the Speaker of the House of Representatives and the President Pro Tempore of the Senate, who were required to be included as defendants "as agents of the State through the General Assembly." N.C. Gen. Stat. 1A-1, Rule 19(d). The North Carolina courts have usurped Applicants' constitutional authority by replacing the General Assembly's enacted map with their own, and so long as the General Assembly's congressional map is not implemented, Applicants' constitutional rights will be infringed irreparably. And ultimately, of course, that irreparable harm will extend to the State itself and its people, who risk being forced to select their representatives in Congress through unconstitutional election procedures. Enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

That harm is exacerbated by the late hour at which the North Carolina courts have created their new congressional map. The North Carolina Superior Court ordered the adoption of the Special Masters' proposed remedial map on February 23, the day before the North Carolina State Board of Elections was set to begin accepting candidate filing papers. As a result, the Board is now accepting candidate filing papers according to the districts set out in the North Carolina courts' unconstitutional, judicially created maps. When the candidate filing deadline ends on

March 4, the State Board of Election will begin designing and printing ballots, which must be completed by the time absentee balloting begins on March 28. Moreover, federal law requires North Carolina to provide ballots to certain voters no later than April 4, 2022. 52 U.S.C. § 20302(a)(8). "In view of the impending election" and "the necessity for clear guidance," the actions of the North Carolina courts should be stayed to allow the election to proceed according to the General Assembly's congressional map. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *see also Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring in grant of applications for stays) ("When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.").

Without a stay, North Carolina's upcoming election will take place based on unconstitutional congressional maps, and that injury to Applicants cannot be repaired.

III. The Balance of Harms and the Public Interest Favor a Stay.

Given the North Carolina courts' clear usurpation of the General Assembly's constitutional authority, the cause for a stay here is not close. But in the event the Court disagrees, the balance of harms favors a stay. *See Hollingsworth*, 558 U.S. at 190 ("In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."). The Constitution demands that the General Assembly set the manner of North Carolina's

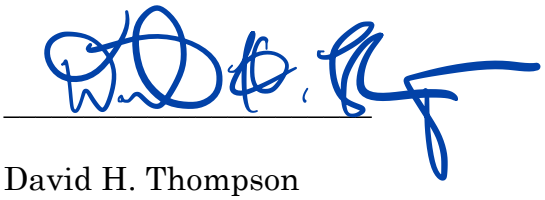
congressional election, and the people of North Carolina are entitled to have their elected representatives do so. The representatives of the people of North Carolina spent months preparing for and then creating a congressional map based on neutral principles, with full transparency and extensive public input. The people of North Carolina will be harmed if instead, a handful of judges are permitted to outsource the creation of a congressional map to a hastily selected group of Special Masters and their assistants, working behind closed doors and in communication with Plaintiffs' experts, and with less than a week to do their work.

CONCLUSION

For these reasons, Applicants respectfully ask this Court to stay the decisions of the North Carolina Supreme Court and state trial court pending a forthcoming petition for writ of certiorari and, should certiorari be granted, resolution of the merits. Applicants also request entry of an immediate administrative stay while the Court considers this application.

Dated: February 25, 2022

Respectfully submitted,



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