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.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF FOR HARPER RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Elections Clause of the U.S. Constitution forbids North Carolina courts from reviewing the validity of a legislatively enacted congressional redistricting plan under provisions of the North Carolina Constitution, and adopting an interim remedial plan, pursuant to state statutes providing for such judicial review and adoption of interim remedial plans.

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INTRODUCTION

This Court has repeatedly held for over a century that nothing in the U.S. Constitution's Elections Clause permits state legislatures to enact congressional redistricting legislation in defiance of provisions of the state constitution. And just three years ago, the Court declared in *Common Cause v. Rucho* that "provisions in . . . state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering challenges to congressional redistricting plans enacted by state legislatures. 139 S. Ct. 2484, 2507 (2019).

Petitioners' attempt to reconcile their Elections Clause theory with this Court's precedents is underdeveloped and incoherent. Petitioners admit that *some* provisions of state constitutions do constrain state legislatures in enacting congressional plans, including both procedural constraints like a gubernatorial veto and substantive prohibitions on partisan gerrymandering. But they claim that the Elections Clause somehow prohibits state courts from construing what Petitioners deem "vague" state constitutional provisions—including those that guarantee free elections, equal protection, and free speech and assembly—to restrain state legislatures in drawing congressional districts. Pet. i. Such a distinction finds no support in the text or history of the Elections Clause. And under bedrock principles of federalism, it is state supreme courts—not this Court—that construe their own state constitutions. There is no basis in law for a decision that state legislatures, in enacting legislation regulating federal elections, may defy *some* but not *all* provisions of the state's constitution.

Even if this Court were interested in Petitioners' ill-conceived theory, the Court lacks jurisdiction to consider it here. Petitioners ask this Court to decide whether state courts may "nullify" state statutes and "replace them with regulations of the state courts' own devising." Pet. i. But

this Court has jurisdiction only to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," 28 U.S.C. § 1257(a), and the validity of the state court's replacement map is pending in North Carolina's Supreme Court right now.

Beyond the lack of jurisdiction, this case is a poor vehicle to consider the question presented because North Carolina statutes enacted by the General Assembly itself authorize state court review of redistricting legislation, and further authorize state courts to adopt interim remedial plans under specified circumstances, as the trial court did here. In other words, Petitioners' Elections Clause theory, even if adopted, would get them nowhere because they do not dispute that the Elections Clause allows a state "legislature" to invite judicial participation.

In any event, Petitioners' theory does not merit this Court's review. The constitutional text and history, as well as overwhelming precedent from this Court, refute the notion that the Elections Clause gives state legislatures free rein to regulate federal elections without regard to state constitutions, as construed by state courts. Congress, moreover, has exercised its own Elections Clause authority both to mandate that congressional plans must comply with substantive state constitutional provisions and to authorize court-drawn remedial plans. And there is no division among lower courts on the question presented. To the contrary, Petitioners' reading of the Elections Clause threatens to upend centuries of settled practice in American elections. The Court should deny certiorari.

STATEMENT

A. North Carolina's 2021 Congressional Map

1. Since 2010, "[t]he General Assembly's intentional redistricting for partisan advantage has been subject to

judicial review in multiple cases." Pets.' Stay Mot. Appendix ("Stay App'x") 328(a). In 2016, federal courts invalidated North Carolina's 2011 congressional and state legislative maps as racial gerrymanders in violation of the U.S. Constitution. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604–05 (M.D.N.C. 2016), *aff'd sub nom.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117, 176–78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). In 2019, North Carolina courts invalidated the General Assembly's remedial maps as partisan gerrymanders in violation of the North Carolina Constitution. *Harper v. Lewis*, No. 19 CVS 12667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct. Oct. 28, 2019); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

In *Harper*, a three-judge panel of the North Carolina Superior Court enjoined the 2016 congressional map as an unconstitutional partisan gerrymander under North Carolina's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. *See* 2019 N.C. Super. LEXIS 1227. The legislative defendants there, many of whom are also Petitioners here, did not seek appellate review, and North Carolina held its 2020 congressional elections under a remedial map enacted after the injunction.

2. Following the 2020 census, the General Assembly enacted new congressional, state House, and state Senate maps on November 4, 2021, all passed along strict party-line votes. Stay App'x 324a-327a. As the trial court later found, while North Carolina "gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning . . . areas, the number of anticipated Democratic seats under the enacted map actually decrease[d], with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." *Id.* at

345a. The congressional map accomplished this result largely by "splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each," despite there being "no population-based reason to" do so. *Id.* at 345a-346a.

B. Proceedings Below

1. *Harper* Respondents are 25 individual North Carolina voters residing in all 14 congressional districts under the 2021 map. Several were plaintiffs in *Harper v. Lewis*, the 2019 case that successfully challenged the 2016 congressional map as a partisan gerrymander under the North Carolina Constitution. *Harper* Respondents filed this action on November 18, 2022, asserting claims exclusively under the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses.

Pursuant to a North Carolina statute authorizing "action[s] challenging the validity of ... congressional districts" in North Carolina courts, North Carolina Supreme Court Chief Justice Paul Newby appointed a panel of three trial-court judges to hear the case. N.C. Gen. Stat. § 1-267.1. *Harper* Respondents' case was consolidated with *N.C. League of Conservation Voters v. Hall*, No. 21 CVS 015426, and Respondent Common Cause intervened. The consolidated cases presented claims only under the North Carolina Constitution.

The trial court denied Respondents' motions for a preliminary injunction on December 2, but on December 8 the North Carolina Supreme Court reversed, granted a preliminary injunction, stayed the candidate filing period, and postponed the state's primaries to May 17, 2022. The state high court directed the trial court to conduct further proceedings and issue a final judgment by January 11.

2. Following a four-day bench trial, the trial court issued a final judgment finding that the state's

congressional, state house, and state senate redistricting plans were extreme partisan gerrymanders. Based on the analyses of Respondents' experts, the court found that the 2021 congressional map was an "intentional, and effective, pro-Republican partisan redistricting" that locked in ten Republican seats. Stay App'x 351a, 445a. Both the plan as a whole and each individual district was "the product of intentional, pro-Republican partisan redistricting." *Id.* at 351a (statewide); *see id.* at 462a-483a (district-by-district).

For example, the trial court found that the enacted map was "more carefully crafted to favor Republicans than at least 99.9999%" of all possible North Carolina district maps following the legislature's criteria. *Id.* at 361a-362a. Likewise, the court found that "[t]he enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8." *Id.* at 351a.

The trial court further found that the enacted map "reduce[d] the anticipated number of Democratic seats, disadvantaging Democratic voters, by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." *Id.* at 345a-346a. This "'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.'" *Id.* at 347a.

Petitioners "offered no defense of the 2021 Congressional Plan." *Id.* at 445a. Nevertheless, after finding that the maps were partisan gerrymanders, the trial court entered judgment for Petitioners, principally on the theory that Respondents' claims were nonjusticiable under the North Carolina Constitution. *Id.* at 540a-547a. The trial court's final judgment did not address whether invalidating the congressional plan would violate Article I, Section 4 the U.S. Constitution—

an argument Petitioners did not raise in their post-trial briefing.

3. The North Carolina Supreme Court reversed. In a February 4 order supplemented by an opinion on February 14, the state high court "adopted in full" the trial court's "extensive and detailed factual findings" regarding the partisan intent and effect of all three 2021 maps. Pet. App. 125a. But the North Carolina Supreme Court held the trial court was wrong to reject Respondents' claims as nonjusticiable under North Carolina law. The state supreme court concluded that such claims are justiciable under North Carolina's Free Elections Clause (which has no federal counterpart) and its Equal Protection Clause and Free Speech and Assembly Clauses (which the North Carolina Supreme Court has long interpreted to provide "greater protections" than their federal counterparts, *id.* at 99a). *See id.* at 97a-99a, 103a-105a. Thus, based on the trial court's factual findings, the state supreme court held that "the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power" under the above provisions in the North Carolina Constitution. *Id.* at 125a.

The North Carolina Supreme Court canvassed the history of North Carolina's Free Elections Clause, explaining that it was "included in the 1776 Declaration of Rights" and "derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688." *Id.* at 91a-92a. The Clause "reflect[ed] the principle of the Glorious Revolution that those in power shall not attain 'electoral advantage' through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be 'free and lawful.'" *Id.* at 93a (quoting Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of*

Charles II and the Glorious Revolution 250 (2007)). The court also invoked the state constitution's Equal Protection Clause, which the court had two decades ago applied to invalidate redistricting plans and had held extends more broadly than the corresponding federal clause. Pet. App. 74a-77a, 97a-102a (citing *Stephenson v. Bartlett*, 355 N.C. 354 (2002)). The court further relied on North Carolina's guarantees of free speech and assembly, citing prior authority "construe[ing]" these protections "more expansively" than the First Amendment. *Id.* at 104a.

Under these principles, the court held that North Carolina's redistricting plans must give "voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Id.* at 110a-111a. And though the court did "not believe it prudent or necessary to . . . identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander," it identified "multiple reliable ways of" evaluating these claims, including "mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis." *Id.* at 110a.

In resolving the justiciability issue, the state high court explicitly held that North Carolina's political question doctrine differs from the federal doctrine. *See id.* at 63a-64a ("federal cases" interpreting the "[f]ederal justiciability doctrines" are "not controlling"). The court observed that in several prior decisions it had enforced state constitutional provisions, including North Carolina's Equal Protection Clause, to strike down redistricting plans that would not have violated the corresponding provisions of the U.S. Constitution. *Id.* at 98-99a. And the court identified "several manageable standards for evaluating the extent to which districting plans dilute

votes on the basis of partisan affiliation," such that partisan gerrymandering claims "do not require the making of 'policy choices and value determinations'" as a matter of North Carolina law. *Id.* at 145a (quoting *Bacon v. Lee*, 353 N.C. 696, 717 (2001)).

The state high court also rejected Petitioners' argument that the U.S. Constitution's Elections Clause, U.S. Const. art. I, § 4, forbids state courts from reviewing the validity of a legislatively enacted congressional redistricting plan under the state constitution. Pet. App. 121a-122a. The court highlighted that this argument "was not presented at the trial court," *id.* at 121a; while Petitioners had raised the Elections Clause argument in opposing a preliminary injunction, they did not raise it during the merits phase. Regardless, the argument was "inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015," and was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." *Id.* The state supreme court cited "a long line of decisions" from this Court holding that "state courts may review state laws governing federal elections to determine whether they comply with the state constitution," including *Smiley v. Holm*, 285 U.S. 355 (1932); *Growe v. Emison*, 507 U.S. 25 (1993); and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Petitioners' theory also "contradicts the holding of" this Court in *Rucho v. Common Cause*, which declared that "'[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply'" in evaluating partisan gerrymandering challenges to congressional plans. Pet. App. 121a (alteration and emphasis in original) (quoting 139 S. Ct. at 2507).

Justice Morgan, joined by Justice Earls, wrote separately to emphasize the "dispositive strength of [North Carolina's] Free Elections Clause." *Id.* at 144a.

Chief Justice Newby, joined by Justices Berger Jr. and Barringer, dissented, expressing the view that partisan gerrymandering does not violate the North Carolina Constitution. *Id.* at 145a. The dissenters did not, however, dispute any of the trial court's factual findings, *see id.* at 10a, and did not express any disagreement with the majority's determination that its decision was consistent with the federal Elections Clause.

4. The North Carolina Supreme Court then remanded for remedial proceedings pursuant to the North Carolina statute that governs the replacement of congressional maps declared unconstitutional by North Carolina courts. That law, N.C. Gen. Stat. § 120-2.4, requires courts to give the legislature two weeks to enact a remedial plan, and then authorizes the court to impose its own interim districting plan if necessary to remedy any defects identified by the court. The North Carolina Supreme Court's February 4 order remanded the case to the trial court for a remedial phase that gave the General Assembly the prescribed two weeks; authorized the other parties to propose their own proposed remedial maps at the same time; and instructed the trial court to adopt compliant maps by noon on February 23. *Id.* at 232a.

The General Assembly enacted a remedial congressional map that passed on strict party-line votes and replicated key unconstitutional features of the invalidated 2021 map. For example, the trial court had found that one feature of the 2021 plan's extreme partisan gerrymandering was the "creation of three safe Republican districts in the Piedmont Triad area." Stay App'x 459a-460a. The enacted remedial map did the same thing.

5. On February 23, the trial court issued a final order adopting the General Assembly's remedial state legislative maps but finding that its remedial congressional map again violated the North Carolina Constitution. Pet. App. 270a-305a. The trial court and its special masters explained that the congressional map failed relevant tests identified by the state supreme court. *Id.* at 279a-280a, 301a-303a. The court accordingly adopted an interim congressional map proposed by the special masters. *Id.* at 293a. To comply with North Carolina's statute governing the remedial process in redistricting challenges, the special masters and an assistant began with the General Assembly's enacted remedial map and "modif[ied] [it] … to bring it into compliance with the Supreme Court's order," rather than drawing an entirely new map or adopting one of the parties' proposed alternatives. *Id.* at 292a (citing N.C. Gen. Stat. § 120-2.4(a1)); *see id.* at 302a-303a.[1]

6. Petitioners appealed and moved to stay the trial court's order adopting the remedial interim congressional map; respondents did the same for the remedial state senate maps. The North Carolina Supreme Court denied all stay motions the same day, with no noted dissents. *Id.* at 245a-246a. The appeals on the merits, however, remain pending in the North Carolina Supreme Court, with briefing expected to conclude this summer.

Petitioners then moved in this Court for a stay of the North Carolina Supreme Court's ruling or, in the alternative, for certiorari and a stay pending resolution of the merits. The Court denied Petitioners' application. 142 S. Ct. 1089.

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[1] The special masters explained that the two assistants whom Petitioners sought to disqualify played no role in the drawing of the interim map. *Id.* at 303a.

Petitioners argued in their stay briefing to the North Carolina Supreme Court that the imposition of the remedial congressional map violated the Elections Clause, and have indicated as part of their proposed record on appeal that they intend to raise their Elections Clause argument in their merits briefing this summer before the North Carolina Supreme Court.

REASONS TO DENY THE PETITION

Certiorari should be denied for numerous reasons. This Court lacks jurisdiction because the petition seeks review of interlocutory orders, including an order of the state trial court that is currently on appeal to the North Carolina Supreme Court. Beyond that, this case is a poor vehicle to address whether the federal Elections Clause forbids state courts from reviewing the constitutional validity of legislatively enacted congressional plans, because statutes enacted by the North Carolina General Assembly specifically authorize state courts to do so. In all events, Petitioners' Elections Clause theory lacks merit. It is contrary to the constitutional text and history, over a century of this Court's precedent, and settled federalism principles recognizing the unfettered prerogative of state supreme courts to interpret their own state constitutions. Petitioners' newfound argument that the Elections Clause allows state legislatures to disregard some but not all provisions of state constitutions in regulating federal elections does not warrant this Court's plenary review.

A. This Court Lacks Jurisdiction Under 28 U.S.C. § 1257(a).

Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). A state court judgment must be final "in two senses: it must be subject to no further

review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market St. Ry. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). The decisions below are final in neither sense, depriving of this Court of jurisdiction.

1. The decisions below are not final judgments.

None of the decisions on which Petitioners seek review constitutes a final judgment reviewable by this Court under § 1257(a).

Petitioners seek review of the North Carolina Supreme Court's February 4 order and February 14 opinion declaring the General Assembly's 2021 congressional plan unconstitutional. Pet. 5. These decisions do not constitute an "effective determination of the litigation," *Market St. Ry.*, 324 U.S. at 551, because they resulted in a remand to the trial court for further proceedings to "oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." Pet. App. 9a. The decisions are quintessentially interlocutory.

These decisions, moreover, did not address the full scope of the Elections Clause issue on which Petitioners seek certiorari. The petition presents the question of whether "a State's judicial branch may nullify the regulations governing [congressional elections] *and replace them with regulations of the state courts' own devising*." Pet. i (emphasis added); *see also id.* at 31 (asserting that "the State Courts' . . . imposition of a map of their own making violates the Elections Clause."). But the North Carolina Supreme Court addressed only whether "the word 'Legislature' in [the Elections Clause] forbids state courts from *reviewing* a congressional districting [that] violates the state's own constitution." Pet. App. 121a. The state high court did not address

whether the Elections Clause allows a state court to implement a court-drawn remedial plan.

The trial court addressed this issue in its February 23, 2022 decision on remand, but that decision is not a final judgment because it remains "subject to … further review or correction" in the North Carolina Supreme Court. *Market St. Ry.*, 324 U.S. at 551. Indeed, Petitioners admitted that the North Carolina Supreme Court must address this issue when they moved that Court for an emergency stay pending appeal of the trial court's remand decision. *See* Pet. App. 317a ("In selecting its own remedial congressional map the trial court is likely violating federal law. The *federal* Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts."). Nor is the North Carolina Supreme Court's February 23, 2022 order denying that emergency motion a final judgment, as Petitioners' appeal of the trial court's remand decision remains pending before the North Carolina Supreme Court. Petitioners intend to raise their Elections Clause argument, along with other potentially dispositive state-law objections to the court-drawn remedial plan, in that yet-to-be-decided appeal.

Because the decisions below are not final judgments, this Court lacks jurisdiction.

2. No exception to the final judgment rule applies.

This case does not fit into any of the four categories of cases described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), in which this Court has "found finality as to the federal issue despite the ordering of further proceedings in the lower state courts," *Jefferson v. City of Tarrant*, 522 U.S. 75, 82 (1997) (citing *Cox*, 420 U.S. at 469).

Under the first two *Cox* exceptions, this Court may invoke jurisdiction where (1) a decision is final "for all practical purposes" and the "outcome of further proceedings [is] preordained," or (2) future state-court proceedings will not affect the need for decision on the federal issue. *Cox*, 420 U.S. at 479. "In the cases in [these] first two categories . . . the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478.

Neither of these *Cox* exceptions applies to the decisions below. The North Carolina Supreme Court's February 4 order and February 14 opinion have led to further state-court proceedings that are not "wholly unrelated to the federal question" in the petition. *Id.* On the contrary, those further proceedings *concern* the federal question in the petition: whether the Elections Clause permits the North Carolina judiciary to replace the congressional map drawn by the General Assembly with a map "of the courts' own devising." Pet. i. Nor is the outcome of those proceedings "preordained," *Cox*, 420 U.S. at 479, as they could result in the North Carolina courts reimplementing the General Assembly's remedial plan or affording the General Assembly another opportunity to redraw, mooting the question of whether the Elections Clause permits state courts to draw remedial maps. The first part of Petitioners' question presented, which concerns state courts' power to review congressional plans, also is not "wholly unrelated" to, but instead is bound up in, the further remedial proceedings on remand.

The third and fourth *Cox* categories do not apply, either. Petitioners may obtain later review of all questions presented in a petition from the North Carolina Supreme

Court's ultimate final judgment, and later review will not "seriously erode federal policy." *Cox*, 420 U.S. at 481-83. To the contrary, it is not possible for this Court to reinstate the 2021 congressional plan for the 2022 elections. North Carolina already conducted its congressional primaries on May 17, 2022, ensuring that any relief will not take effect until the 2024 elections. Any decision to review the case now, as opposed to after a final state court judgment, will therefore have no practical impact. There is accordingly no "sufficient justification for immediate review" that would warrant an exception to the final judgment rule. *Id.* at 478-79.

3. Petitioners failed to raise their Elections Clause argument before the trial court.

This Court lacks jurisdiction for a second reason: as the North Carolina Supreme Court held, Petitioners failed to raise their Elections Clause claim to the trial court. Pet. App. 121a. North Carolina law requires litigants to raise all arguments before the trial court, N.C. R. App. P. 10(a)(1), and the state Supreme Court's finding that Petitioners failed to preserve their argument is an independent and adequate state ground preventing this Court's review.

B. This Case Is an Unusually Bad Vehicle for Petitioners' Elections Clause Theory.

Beyond this Court's lack of jurisdiction, this case is a particularly poor vehicle because the facts do not even present the federal issue asserted in the petition. Petitioners assert that the Elections Clause gives state legislatures plenary authority over congressional redistricting without review by state courts under the state constitution. Pet. 27. But unlike other state legislatures, the North Carolina General Assembly itself has authorized North Carolina courts to review congressional redistricting plans. Indeed, the General

Assembly passed a statute expressly authorizing a special three-judge court to hear "action[s] challenging the validity of any act . . . that . . . redistricts . . . congressional districts," N.C.G.S. § 1-267.1(a); issue "judgment[s] declaring unconstitutional . . . any act . . . that . . . redistricts . . . congressional districts," *id.* § 120-2.3; and implement "an interim districting plan" if the General Assembly does not "remedy any defects" in its plan within two weeks, *id.* § 120-2.4(a), (a1).

This case proceeded under those statutes. Pet. App. 20a. *Every step taken by the state courts below—including to invalidate the 2021 plan and replace it with an interim remedial plan—was authorized by the General Assembly itself.* Petitioners have not challenged North Carolina's judicial review statutes under the Elections Clause—not in the petition for certiorari nor in the proceedings below. They do not argue or ask the Court to hold that the Elections Clause prohibits state legislatures from making the delegation that North Carolina's legislature has made here. This case accordingly does not present the question that Petitioners *do* raise, whether the Elections Clause allows state courts to "nullify" state legislative choices. Pet. i. If this Court is inclined to take up the question of whether the Elections Clause prohibits ordinary state-court judicial review pursuant to a state's constitution, it should do so in a case where state statutes do not expressly authorize state-court judicial review of congressional maps.

C. The Decisions Below Are Correct.

Jurisdictional and vehicle problems aside, the decisions below were correct as a matter of text, history, precedent, and constitutional structure. Nothing in the Elections Clause permits a state legislature to violate the state constitution, as construed by the state's highest court, in enacting congressional redistricting legislation—no more than it permits Congress to ignore this Court's

decisions interpreting the U.S. Constitution. This Court has so held many times, and Petitioners present no persuasive argument for revisiting those holdings.

1. The text of the Elections Clause permits state judicial review under state constitutions.

The Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. In the founding era, like today, a "Legislature" "prescrib[ed]" legislation subject to restrictions imposed by the state constitution, as construed by the state courts and enforced through judicial review.

Prior to ratification of the U.S. Constitution, the courts of at least seven states—including North Carolina—had not only engaged in judicial review of legislation but had "deemed a state statute to violate a fundamental charter (or other species of higher law)." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 & n.169 (2003) (citing, among other decisions, *Bayard v. Singleton*, 1 N.C. 5, 7 (1787)). The framers during the drafting and ratification debates cited these decisions favorably. *Id.* at 934-35. Hamilton's defense of judicial review in *The Federalist* applied equally to state judicial review. *Id.*; *The Federalist* No. 81, at 481-482 (Clinton Rossiter ed., 1961) ("[T]his doctrine" of constitutional supremacy "is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most if not to all the State governments."); *id.* No. 78, at 469 ("The benefits of the integrity and moderation of the judiciary have already been felt in more States than one ….."). And several state

constitutions in the eighteenth century specifically imposed substantive restrictions *on elections*, including federal congressional elections.[2]

Petitioners stress that "the Legislature" means a legislative entity rather than a judicial or executive one. Pet. 27-29. But that merely begs the question whether the relevant act of the "Legislature" is subject to state judicial review under the state constitution. To prevail, Petitioners must show that the Elections Clause supplants that ordinary state constitutional constraint. *Id.* at 34 ("state courts" categorically lack "power to second-guess the legislature's determinations").

Petitioners identify no textual or historical support for that theory. They cite nothing suggesting that the Elections Clause was intended to abrogate the regime of state judicial review that the framers not only understood, but cited during the framing and ratification process. And Petitioners identify no way in which the process here defied the text of the Elections Clause as originally understood. The "Legislature" here "prescribed" a congressional districting plan through the ordinary process governing redistricting legislation. The plan was then subjected to judicial review under North Carolina's Constitution—the same constitutional check placed on all legislation. The General Assembly even "prescribed" all relevant aspects of the judicial review—from the

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[2] Delaware's constitution established rules for electing "representatives … in Congress." Del. Const. of 1792, art. VII, § 2. Others required elections for all offices to be by ballot, Ga. Const. of 1789, art. IV, § 2; Pa. Const. of 1790, art. III, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art. IV, § 2, and regulated the apportionment of congressional seats, Va. Const. of 1830, art. III, § 6. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205#.

procedures by which challenges are heard, N.C.G.S. §§ 1-267.1(a), 120-2.3, to the substantive constitutional protections, to the process for implementing "interim districting plan[s]" to remedy "defects identified by the court," *id.* § 120-2.4.

Petitioners' interpretation also ignores key textual differences between the Elections Clause and other constitutional provisions that grant *unreviewable* power to the legislature. The U.S. House and Senate, for example, have "the *sole* Power" to impeach and to try impeachments, respectively. Art. I, §§ 2-3. The Elections Clause is different. It simply designates "the Legislature" and "Congress" as the entities that may legislate on the subject of congressional elections. The Clause thus resembles other grants of legislative power in the Constitution, which contemplate legislation subject to ordinary constitutional checks. For example, "Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. Although no other branch of government can enact Commerce Clause legislation, Congress's Commerce Clause legislation is nonetheless subject to other constitutional restrictions, including judicial review. When courts strike down such legislation, they do not usurp Congress's power under the Commerce Clause. Indeed, as Petitioners emphasize (Pet. 35), federal courts permissibly review Congress's election legislation "to secure … rights" in the U.S. Constitution—and do not "make or alter" legislation in violation of the Elections Clause when they do so. And while Petitioners suggest that state constitutional review is somehow different, they make no effort to root that distinction in the Elections Clause's text, which refers to "the Legislature" and "Congress," not federal courts, as responsible for prescribing election regulations.

Although Petitioners' primary argument is categorical, Pet. 34, the petition suggests an alternative theory that the Elections Clause precludes only the enforcement of "vague and abstract state constitutional language." *Id.* at 4; *see id.* at i. Petitioners offer no textual or historical support for this interpretation. It is entirely made up. No text in the Elections Clause or anywhere else in the U.S. Constitution divides state constitutional provisions into A and B teams based on their supposed clarity or specificity. To the contrary, deciding the contours of state constitutional provisions is a matter wholly for state courts. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Stripping state courts of the ability to conduct judicial review based on the "vagueness" of state constitutional protections would invite unprecedented intrusions by federal courts into the structure of state government, requiring federal courts to discard state constitutional provisions that—measured against a vagueness standard that neither Petitioners nor any court has ever articulated—they view as insufficiently detailed. And it would impose an affronting double standard. The North Carolina Supreme Court applied provisions guaranteeing that "[a]ll elections shall be free," N.C. Const. art. I, § 10, that "[n]o person shall be denied the equal protection of the laws," *id.* § 19, that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained," *id.* § 14, and that that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances," *id.* § 12. This Court invalidates statutes enacted by Congress under the Elections Clause under constitutional provisions at least as open-ended, like that protecting "the freedom of speech." When this Court does so, it does not become "Congress" or somehow "usurp[]" Congress's legislative authority. Pet. 14.

As a final fallback, Petitioners suggest that there is something different about the North Carolina Supreme Court's exercise of judicial review in this particular case because redistricting involves "policy choices." *Id.* at 33 (quoting *Cooper v. Berger*, 809 S.E.2d 98, 107 (N.C. 2018)). But as Petitioners' reliance on North Carolina precedent confirms, that is simply an invitation to relitigate the conclusion of North Carolina's Supreme Court that Respondents' challenge is justiciable under the standards of state law. The state high court explained that North Carolina's justiciability doctrine differs from the federal doctrine, Pet. App. 63a-64a; that the Free Elections Clause had no federal counterpart, *id.* at 99a; that in several prior decisions it had enforced state constitutional provisions, including North Carolina's Equal Protection Clause, to strike down redistricting plans that would not have violated the corresponding provisions of the U.S. Constitution, *id.* at 98-99a; and that the presence of "manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation" meant that, as a matter of North Carolina law, partisan gerrymandering claims "do not require the making of 'policy choices and value determinations,'" *id.* at 145a (quoting *Bacon*, 353 N.C. at 717). While Petitioners disagree with these conclusions, they identify no authority, and nothing in the text of the Elections Clause as originally understood, indicating that the Clause gives federal courts jurisdiction to review state courts' compliance with their own justiciability standards or supplant those standards with federal ones.

2. Petitioners' theory conflicts with a century of this Court's precedents.

For over 100 years, this Court has repeatedly held that the Elections Clause does not prevent state courts from conducting judicial review of congressional districting plans under the state's constitution.

Most recently, *Rucho v. Common Cause* held that "[p]rovisions in … *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering challenges to congressional districting plans enacted by state legislatures. 139 S. Ct. at 2507 (emphases added). *Rucho* concerned North Carolina's 2016 congressional plan, and as an example of state courts' power in this realm, the Court pointed to another state supreme court's decision striking down the state's legislatively enacted congressional plan under the state's constitution. *Id.* (citing *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015)).

Petitioners contend that *Rucho* supports their theory, pointing to this Court's statement that "[t]he Framers … assign[ed] the issue" of redistricting "to the state legislatures, expressly checked and balanced by the Federal Congress." Pet. 29 (quoting *Rucho*, 139 S. Ct. at 2496). But the Court was simply noting that the Framers never envisioned that "the *federal courts* had a role to play." 139 S. Ct. at 2496 (emphasis added). *Rucho*'s recognition of the role of *state* courts in applying state constitutional provisions to rein in partisan gerrymandering was essential to the Court's holding and promise that "complaints about districting" would not "echo into a void." *Id.* at 2507.

Even before *Rucho*, an unbroken line of precedent dating back a century confirmed that state courts may review state laws governing federal elections to determine whether they comply with state constitutions and that state courts may adopt court-drawn remedial plans. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided," which may include the participation of other branches of state government. *Id.* at 368. The

Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369. In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans that violate "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *see Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (same). Even before *Smiley*, the Court held that state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

Petitioners admit that these decisions endorse the enforcement of "check[s] in the legislative process" by branches of state government besides the Legislature. Pet. 34. And they offer no textual or historical support for their notion (Pet. 35) that judicial review—understood by the framers to be inherent in legislation under a written constitution—is somehow different in kind from the "check" endorsed in these decisions.

The Court recently reaffirmed *Smiley*'s principle, holding that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Leg.*, 576 U.S at 817-18. While the Court split over the definition of "Legislature," no justice asserted that the Elections Clause immunizes congressional redistricting legislation from the "ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting). Indeed, Petitioners acknowledge that their theory conflicts with *Arizona State Legislature* and suggest that "the Court should overrule it." Pet. 30, n.4. But the

readiness with which Petitioners would discard another precedent only underscores the degree to which their theory is irreconcilable with this Court's historic and well-settled understanding of the Elections Clause.

Not only are state courts authorized to evaluate a congressional districting plan's compliance with state constitutional provisions, this Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), makes clear that state courts have a greater role to play than federal courts in adjudicating congressional redistricting claims. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (quotations omitted). Writing for a unanimous Court, Justice Scalia expressly recognized state courts' role in redistricting—not only to review legislative enactments, but also to craft remedial plans on their own—and held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id.* at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Court affirmed that congressional reapportionment may be conducted "though [a state's] legislative *or* judicial branch." *Id.* at 33 (emphasis in original). As a result, the Court found that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan)" by a date certain was "precisely the sort of state judicial supervision of redistricting [the Court] has encouraged." *Id.* In *Growe*, the district court erred in "ignoring the . . . legitimacy of state *judicial* redistricting." *Id.* at 34 (emphasis in original). Petitioners make the same error here.

Petitioners' view that the Elections Clause confines congressional redistricting authority exclusively to state

legislatures and Congress also conflicts with *Wesberry v. Sanders*, 376 U.S. 1 (1964), which held that the Elections Clause's reference to "Congress" does not deprive federal courts of power to review congressional maps: "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6.

Much of Petitioners' authority stands for the unremarkable and uncontested proposition that redistricting in North Carolina is primarily the province of the North Carolina General Assembly. *See, e.g.*, Pet. 27 (noting that "state legislatures … bear primary responsibility for setting election rules"). But when the General Assembly violates the State's constitution, it is the obligation of North Carolina courts to exercise their "most fundamental [] sacred dut[y]" to "protect the [state] constitutional rights of the people of North Carolina from overreach by the General Assembly," and remedy the General Assembly's transgression. Pet. App. 9a-10a. In doing so, North Carolina courts have fulfilled their constitutional duty to "interpret[] the laws and, through [their] power of judicial review, determine[] whether they comply with the [state's] constitution." Pet. 10 (citing *State v. Berger*, 368 N.C. 633, 635 (2016)).

3. Congress has independently exercised its Elections Clause power to mandate compliance with state constitutions and to authorize state court remedial plans.

Regardless of the meaning of "Legislature" in the first part of the Elections Clause, the second part allows Congress "at any time" to make its own regulations related to congressional redistricting. U.S. Const. Art. I, § 4. Using this authority, Congress has mandated that states' congressional districting plans comply with

substantive state constitutional provisions, and it has authorized state courts to adopt remedial plans. Accordingly, Petitioners' Elections Clause theory can get them nowhere in the context of congressional redistricting.

Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting unless a state, "after any apportionment," has redistricted "in the manner provided by the law thereof." As this Court explained in *Arizona State Legislature*, a predecessor to § 2a(c) had mandated those default procedures "unless 'the legislature' of the State drew district lines." 576 U.S. at 809 (quoting Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided by [state] law." *Id.* at 809–10. Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the very serious evils arising from gerrymanders." *Id.* at 810 (quotation marks omitted). And as Justice Scalia explained for the plurality in *Branch v. Smith*, "the manner provided by state law" encompasses substantive restrictions in state *constitutions*: "the word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" 538 U.S. 254, 277–78 (2003) (citations omitted). Justice Scalia rejected the argument that "the word 'manner' … refer[s] to *process* or *procedures*, rather than *substantive requirements*." *Id.* Thus, unless a state's congressional plan complies with the substantive provisions of the state's constitution, § 2a(c)'s default procedures kick in.

In addition to mandating compliance with substantive state constitutional constraints, Congress has authorized state courts to establish remedial congressional districting plans. Under 2 U.S.C. § 2c, which requires single-member congressional districts, courts may "remedy[] a failure" by the state legislature "to redistrict constitutionally," and the statute "embraces action by *state and federal courts*." 538 U.S. at 270, 272 (emphasis added). Section 2a(c) also recognizes state courts' power to adopt congressional plans. Its default procedures apply "[u]ntil a State is redistricted in the manner provided by [state] law," and the *Branch* plurality explained that this "can certainly refer to redistricting by courts as well as by legislatures," and "when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by [state] law.'" *Id.* at 274 (emphasis added); *see Ariz. State Leg.*, 576 U.S. at 812 (same).

In short, any question as to whether the first part of the Elections Clause permits state courts to review and remedy congressional districting laws under state constitutions is academic because Congress has declared that state courts can do so.

4. Petitioners' theory cannot be reconciled with the Reduction Clause.

The Fourteenth Amendment's Reduction Clause confirms that the U.S. Constitution not only permits but *requires* congressional districting plans to comply with state constitutional provisions protecting voting rights. The Reduction Clause provides that "when the right to vote at any election for . . . Representatives in Congress" is "denied . . . or in any way abridged," the state's representation in Congress "shall be reduced" proportionally. U.S. Const. art. XIV, § 2. *McPherson v. Blacker*, 146 U.S. 1 (1892), held that, under this clause, "[t]he right to vote intended to be protected refers to the right to vote as established by the laws and constitution of

the state." *Id.* at 39. *McPherson* thus held that "the right to vote" in federal elections—meaning the right to vote *under the state's own constitution*—"cannot be denied or abridged without invoking the penalty" of reducing the state's representation in Congress. *Id.* These statements were essential to *McPherson*'s holding: this Court rejected the argument that the Reduction Clause guarantees a *federal* constitutional right to vote in federal elections on the ground that the "right to vote" referenced in the clause instead refers to *state* constitutional (and statutory) rights.

This Court therefore has made clear that state constitutional provisions protecting voting rights *do* apply to voting in congressional elections. The North Carolina Supreme Court held that the General Assembly's 2021 congressional map violated the "right to vote" of the state's Democratic voters—roughly half of the electorate—under multiple provisions of the North Carolina Constitution. The federal Elections Clause does not require North Carolina to conduct its congressional elections in a manner that would trigger the loss of half of North Carolina's seats in Congress under the Reduction Clause.

D. There Is No Division of Authority

Petitioners identify no split over whether the Elections Clause forbids state courts from reviewing the validity of legislatively enacted congressional plans under the state constitution. Every court to have addressed that question since *Smiley* has held that the Elections Clause does not bar state judicial review. *See, e.g.*, *League of Women Voters of Fla.*, 172 So. 3d at 370 & n.2. And this case is hardly the first time a state court has applied a state constitutional provision to invalidate a congressional map. *E.g.*, *Moran v. Bowley*, 179 N.E. 526, 531-32 (Ill. 1932) (citing cases and applying the Illinois Constitution's

Free and Equal Elections Clause, pre-*Wesberry*, to require population equality).

Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020) did not involve either the Elections Clause or a state court's invalidation of a state election law under the state constitution. Instead, *Carson* concerned a consent decree entered by the Minnesota Secretary of State extending the statutory deadline for receipt of mail-in ballots, which a state court approved without deciding the statute's validity. *Id.* at 1055–56. In defending the consent decree against collateral attack in federal court, the Secretary of State "argue[d that] the Minnesota Legislature [] delegated its authority to the Secretary." *Id.* at 1060 (quoting Minn. Stat. § 204B.47). The Eighth Circuit's conclusion that the consent decree violated the Electors Clause hinged solely on the interpretation of that statute—it "d[id] not reach" whether "the Legislature's Article II powers concerning presidential elections can be delegated in this manner," *id.*, and it never addressed whether a state court would be empowered to invalidate the challenged ballot-receipt deadline under the state constitution. Accordingly, *Carson* has no relevance to Petitioners' claim.

Nor do any of Petitioners' other cases establish a conflict. Petitioners rely (at 20-21) on two dissents from federal courts of appeals, both from cases that, like *Carson*, involved executive alterations of statutory ballot-receipt deadlines; neither questioned the power of state courts to review election laws under state constitutions. *Id.* Of the actual decisions Petitioners cite, several pre-date *Smiley*. Pet. 19-20 (citing state court decisions from 1864, 1887, and 1921). And the post-*Smiley* decisions do not remotely support Petitioners' theory. *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), stated that the "legislative process must be completed in the manner prescribed by the State Constitution in order

to result in a valid enactment," *id.* at 694, and held that the statute at issue did not violate any state constitutional provision, *id.* at 696. *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936), and *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948), involved the Electors Clause rather than the Elections Clause. *Parsons*, moreover, did not involve a claim that a state law violated the state constitution and suggested that a constitutional challenge could be viable if the state law were "discriminatory."

Even if Petitioners identified any disagreement as to the effect of the Elections Clause for state judicial review, they certainly have not identified any division on the question they have actually presented, which they claim is limited to state court enforcement of "vague" constitutional provisions. Pet i. Petitioners cite no decisions suggesting that the Elections Clause forbids judicial review under some (but not all) state constitutional provisions, further confirming that this ostensibly narrower question is not cert-worthy.

E. Petitioners' Theory Would Fundamentally Alter the Balance of State and Federal Power Over Election Administration

The unprecedented holding Petitioners seek would upend this nation's federalist system and threaten to nullify dozens of state constitutional provisions across the country. For example, nearly every state's constitution contains provisions affording citizens the right to vote if they meet specified qualifications. Other states have more recently adopted state constitutional provisions guaranteeing voting rights in all elections, relying on the settled principle that state constitutions can provide broader or more specific protections for voting rights than the U.S. Constitution. *See, e.g.*, Cal. Const. art. II, § 5(a) (eliminating partisan primaries for congressional elections); Mich. Const. art. II, § 4 (guaranteeing "[t]he right . . . to vote a secret ballot in all elections," "[t]he right

to a 'straight party' vote option on partisan general election ballots," and "[t]he right … to vote an absent voter ballot without giving a reason"). Until now, nobody had even thought to suggest that these state constitutional provisions are void in congressional elections. But Petitioners' Elections Clause theory would take us there and raise similar questions about the consequences for procedural requirements in state constitutions.

Petitioners' position would wreak particular havoc in redistricting. At least 12 state constitutions have provisions that *substantively* restrict the drawing of congressional districts by requiring that congressional districts be contiguous and compact; preserving political subdivisions or communities of interest; or precluding partisan considerations or efforts to protect incumbents. *See, e.g.*, *Rucho*, 139 S. Ct. at 2507-08 (highlighting examples). Holding that state legislatures could now disregard the constraints placed on them by the people, pursuant to some unchecked power supposedly granted by the Elections Clause, would gravely public confidence in elections.

And what about where state legislatures fail to redistrict at all? *Growe* ordered deference to state courts on matters of state constitutional compliance in the course of impasse litigation, where the judiciary is called upon to adopt new redistricting maps in the wake of a breakdown in the legislative process. 507 U.S. at 1077-78. This Court has long endorsed non-legislative map-drawing in this context, *see, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973), and it is a regular feature of every redistricting cycle.[3] Petitioners have no answer for how their reading

[3] For examples from the 2010 and 2000 redistricting cycles, *see, e.g.*, *Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Egolf v. Duran*, No. D-101-CV-

of the Elections Clause could allow the adoption of constitutionally apportioned districts where the state legislature fails to enact lawful maps itself. The better reading of the Elections Clause, then, is to recognize that state legislatures maintain *primary* redistricting authority, but the map-drawing pen may pass when a legislature—as here—fails to timely adopt lawful plans in advance of regularly scheduled elections.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2011-02942 (N.M. Dist. Ct., Santa Fe Cnty. Dec. 29, 2011); Guy v. Miller, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011); *Alexander v. Taylor*, No. 97836, 51 P.3d 1204 (Okla. June 25, 2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002). There are many more.