No. 21-1271

IN THE
Supreme Court of the United States

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

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents,

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

BRIEF IN OPPOSITION OF RESPONDENT COMMON CAUSE

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QUESTION PRESENTED

Under the Elections Clause of the U.S. Constitution, "[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. The question presented is:

Does the Elections Clause forbid a state court from fulfilling its constitutional duty to ensure state laws do not violate individuals' state constitutional rights when the state law relates to "[t]he Times, Places and Manner" of federal elections?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Common Cause has no parent company nor does any public company have a 10 percent or greater ownership in it.

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BRIEF IN OPPOSITION FOR RESPONDENT COMMON CAUSE

INTRODUCTION

On December 17, 1776, the North Carolina constitutional convention enacted a Declaration of Rights. Its first words are, "That all political power is vested in and derived from the people only." N.C. Const. of 1776, Decl. of Rights, art. I. The next day, the convention exercised this political power and passed North Carolina's first constitution. That constitution created the General Assembly and bound it to the Declaration of Rights, which "ought never to be violated, on any presence whatsoever." *Id.* art. XLIV.

Eleven years later, and before North Carolina had ratified the U.S. Constitution, the North Carolina Supreme Court concluded that it had the power and obligation to review state laws for compliance with the North Carolina Constitution, including the Declaration of Rights. *See Bayard* v. *Singleton*, 1 N.C. 5 (1787). Over the centuries, North Carolina's Supreme Court has re-confirmed that state courts' "obligation to protect the fundamental rights of individuals is as old as the State." *Corum* v. *Univ. of N.C. ex rel. Bd. of Governors*, 413 S.E.2d 276, 290 (N.C. 1992). And this Court has confirmed that a state court's power of judicial review extends to state laws that relate to congressional redistricting. *See Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019).

So when the North Carolina General Assembly enacted a congressional redistricting map in 2021 that Respondents challenged in state court as a partisan gerrymander in violation of the State's constitution, Common Cause did exactly what the *Rucho* Court told it—a party in that case—to do and challenged the map in state court. The North Carolina courts then undertook the same judicial review they have for centuries: They evaluated the constitutionality of the legislature's enactment.

The North Carolina Supreme Court concluded that 2021 N.C. Session Law 174 violated North Carolina's constitution. The trial court—on remand and pursuant to specific direction in a state statute addressing redistricting—returned the matter to the General Assembly for enactment of congressional districts that complied with the North Carolina Constitution. The legislature failed to remedy the defects that had rendered its earlier map unconstitutional. And so, the

trial court followed the directions the legislature set out in yet another state statute specifying what action to take in these circumstances; the trial court adopted an interim map for use solely in the 2022 congressional elections.

Petitioners now ask this Court to exercise its certiorari review to invalidate the map the trial court adopted for the 2022 elections on the ground that state courts are forbidden from protecting individuals' state constitutional rights by reviewing state laws that touch on federal elections, including the enactment of congressional districts. The way they see it, because the Constitution refers to "the Legislature" of a State setting the time, place, and manner of congressional elections, it precludes state courts from reviewing whether such election-related legislation complies with the State's own constitution. Instead, Petitioners would have this Court say that a state legislature has carte blanche in this context—unrestrained by state constitutional limitations and unable to incorporate state courts into the process, even if it passes a statute attempting to do so.

As a matter of text, structure, history, precedent, and long-established practice in this country, that is flatly wrong. The U.S. Constitution does not grant impunity to a state legislature for violations of its state constitution simply because the legislation relates to congressional elections. Furthermore, the question presented is beside the point here, as the North Carolina courts' review occurred pursuant to an intricate *statutory* scheme enacted by North Carolina's legislature precisely to govern how the State's courts would review the General Assembly's redistricting enactments.

As a result, certiorari should be denied. First, there is no disagreement in the courts about how to resolve the question presented. Petitioners cite non-binding, irrelevant, or since-doubted decisions, as well as two dissenting opinions, that, at best, fly in the face of a mountain of case law on the other side. Second, Petitioners' arguments hang on a hyper-literal reading of the word "Legislature" that ignores that word's context, constitutional structure, and precedent. Third, consistent with the statutory process previously put in place by the legislature, the congressional map adopted by the state court will only be in place for the November 2022 election, meaning that this case will be moot by the time this Court issues an opinion. And finally, Petitioners waived their Elections Clause argument by failing to timely raise it below.

Any of these reasons alone—let alone all of them together—render this matter not "an appropriate case" in which to resolve any purported issue with the Elections Clause. *Moore* v. *Harper*, 142 S. Ct. 1089 (2022) (mem.) (Kavanaugh, J., concurring in denial of application for stay). The petition should be denied.

STATEMENT

A. Statutory Background

In 2003, the North Carolina General Assembly created a reticulated system of judicial review for "act[s] of the General Assembly that apportion[ ] or redistrict[ ] State legislative or congressional districts." N.C. Gen. Stat. Ann. § 1-267.1(a). "Any action challenging the validity of" such a law "shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County," *id.*, the composition of which is determined by state law, *id.* § 1-267.1(b). Such a

three-judge panel is the only state body that can enter an "order or judgment * * * affecting the validity" of a redistricting law or finding "that an act of the General Assembly is facially invalid * * * [under] the North Carolina Constitution or federal law." *Id.* § 1-267.1(c). An "order or judgment declaring" a redistricting act "unconstitutional or otherwise invalid" shall: "find with specificity all facts supporting that declaration," "state separately and with specificity the court's conclusions of law," and "identify every defect found by the court." *Id.* § 120-2.3.

The General Assembly further specified that if a court declares a redistricting law invalid, the court must give "the General Assembly a [specified] period of time to remedy any defects identified by the court in its findings of fact and conclusions of law." *Id.* § 120-2.4(a). The General Assembly did not stop there: "In the event the General Assembly does not act to remedy any identified defects to its plan within that period of time, the court may impose an interim districting plan for use in the next general election only[.]" *Id.* § 120-2.4(a1); *see also id.* § 120-2.4(a) (referring to "a court['s] * * * own substitute plan"). Indeed, the General Assembly imposed guardrails on the scope of the court's authority to do so, specifying that the "interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court." *Id.* § 120-2.4(a1).

B. Procedural History

1. The North Carolina General Assembly began the redistricting process in August 2021. Pet. App. 14a. Committee chairs gestured at transparency by requir-

ing legislators "to draw potential maps" on public computers with special software. *Id.* at 17a. But the promised "transparency" was a façade; with the help of partisan assistants using "unknown software and data" on private computers, legislators crafted secret "concept maps" for use at the public computers. *Id.* at 17a-18a. These secret maps were subsequently destroyed and unavailable in response to discovery requests. *Id.* at 18a n.5. The General Assembly enacted a new map for congressional elections in November 2021. *See* Pet. App. 18a; 2021 N.C. Sess. Law 174.

Respondents North Carolina League of Conservation Voters, Inc., joined by several North Carolinians, challenged the congressional map in state court, contending that it violated the North Carolina Constitution and seeking a preliminary injunction to delay the candidate-filing period. Pet. App. 19a. Other North Carolinians filed a similar suit. *Id.* at 19a-20a. The cases were assigned to a three-judge panel under N.C. Gen. Stat. Ann. § 1-267.1, Pet. App. 20a, which consolidated the cases and denied the motions for preliminary injunction, *id.* at 253a-268a. The North Carolina Supreme Court reversed that denial, stayed the candidate-filing period, and ordered expedited proceedings. *Harper* v. *Hall*, 865 S.E.2d 301, 302-303 (N.C. 2021). Respondent Common Cause, which had previously filed a lawsuit in state court challenging Petitioners' delay in approving the congressional map, intervened in December. *See* N.C. Super. Ct., 21.12.15 Order on Common Cause Mot. to Intervene.[1]

[1] The trial court's docket is available at https://bit.ly/3ICqi5p.

In January 2022, following a trial, the three-judge panel found that the congressional map was "a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." Pet. App. 44a (quotation marks omitted). But the panel left the map in place, concluding that partisan-gerrymandering claims are nonjusticiable under the state constitution. *Id.* at 53a.

2. The North Carolina Supreme Court reversed. *Id.* at 224a-233a. In a February 4 order, the court held that "claims asserting that" a congressional map is an "unlawful partisan gerrymander[ ] that violate[s] the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause * * * of the North Carolina Constitution are * * * justiciable in North Carolina courts." *Id.* at 227a-228a. The court then held that the map was "unconstitutional beyond a reasonable doubt" under these clauses and "enjoin[ed] the use of these maps in any future elections." *Id.* at 228a. "In accordance with [N.C. Gen. Stat. Ann.] § 120-2.4(a)," the court gave the General Assembly "the opportunity to submit a new congressional" map "that satisf[ies] all provisions of the North Carolina Constitution." *Id.* at 232a. Adhering to the enacted legislative framework for this situation, the court explained that should the General Assembly not do so, "the trial court will select a plan which comports with constitutional requirements." *Id.*

The North Carolina Supreme Court later supplemented its order with a written opinion. *See id.* at 1a-143a. After expanding upon its earlier analysis, *id.* at 62a-130a, the court rejected Petitioners' argument that the Elections Clause "forbids state courts from reviewing [whether] a congressional districting plan

violates the state's own constitution." *Id.* at 121a. The court recognized that "[t]his argument[ ] * * * was not presented at the trial court," and then observed that it "is inconsistent with nearly a century of precedent of the Supreme Court of the United States." *Id.* Beyond that, the court explained that the argument is "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." *Id.*

3. The trial court issued an order requiring Petitioners to submit a remedial congressional map. N.C. Super. Ct., 22.02.08 Order on Submission of Remedial Plans at 2-5. The General Assembly accordingly enacted a new congressional map, 2022 N.C. Session Law 3, and submitted it to the court. Pet. App. 270a-271. The court held that this map, too, was unconstitutional. *Id.* at 292a-293a. With the assistance of three bipartisan former North Carolina judges appointed as special masters who "submitted a modified version of the proposed remedial congressional plan submitted by" Petitioners, *id.* at 301a, the trial court modified the remedial map only to the extent necessary "to bring it into compliance with the Supreme Court's order," citing N.C. Gen. Stat. Ann. § 120-2.4(a1), *id.* at 292a. The court then adopted this map as the Interim Congressional Map and "approved [it] for the 2022 North Carolina Congressional elections." *Id.* at 293a.

4. Petitioners appealed and sought a stay in the North Carolina Supreme Court, which that court denied. *Id.* at 243a-246a. Petitioners next filed an emergency application for a stay in this Court. *Moore*, 142

S. Ct. at 1089. That, too, was denied. *Id.* Petitioners thereafter filed a petition for certiorari.

The 2022 congressional primary election, using the Interim Congressional Map, occurred on May 17.

Petitioners' merits appeal on the Interim Congressional Map, which involves whether the court's adoption of that map violates the Elections Clause, remains pending in the North Carolina Supreme Court. *Harper* v. *Hall*, No. 413PA21 (N.C. 2022).

REASONS FOR DENYING THE PETITION

I. PETITIONERS' SPLIT IS ILLUSORY.

Petitioners assert an "increasingly intolerable" split over whether state legislatures must follow state constitutions when regulating federal elections. Pet. 17. Hardly. There is no split. State courts have adjudicated claims similar to the issue decided by the North Carolina courts below for over a century. And, rather than adopt Petitioners' view, these courts have consistently recognized, either explicitly or implicitly, that the U.S. Constitution does not grant a state legislature "any superiority over or independence from" a state constitution. *In re Opinion of the Justices*, 107 A. 705, 706 (Me. 1919).

1. Petitioners rightly recognize that the North Carolina Supreme Court is one of several courts to find that state constitutions bind state legislatures, even when the subject matter is congressional elections. *See* Pet. 21-22 (citing cases from Florida and Pennsylvania). But Petitioners fail to recognize just how much of an outlier their position is.

Start with redistricting laws. The high courts of Pennsylvania, Florida, Colorado, Illinois, and South Dakota have expressly rejected that the Elections

Clause renders a state legislature immune from the state constitution when redistricting. *See League of Women Voters* v. *Pennsylvania*, 178 A.3d 737, 821-824 & n.79 (Pa. 2018); *League of Women Voters* v. *Detzner*, 172 So. 3d 363, 370 n.2 (Fla. 2015); *People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1232, 1235 (Colo. 2003); *Moran* v. *Bowley*, 179 N.E. 526, 531-532 (Ill. 1932); *see also id.* at 534 (De Young, J., dissenting on grounds that Elections Clause precludes application of state constitution); *State* v. *Polley*, 127 N.W. 848, 849, 851 (S.D. 1910). A Kansas trial court recently held the same. *Rivera* v. *Schwab*, No. 2022-CV-000089, slip op. at 154 (Kan. Dist. Ct. Apr. 25, 2022).[2]

Other state courts have implicitly rejected that the Elections Clause prevents a state court from applying the state constitution to a state legislature's redistricting law, finding such laws invalid under the state constitution without seeing the need to address whether such review was proper. *See, e.g.*, *In re Harkenrider* v. *Hochul*, No. 60, 2022 WL 1236822, at *1 (N.Y. Apr. 27, 2022); *League of Women Voters* v. *Ohio Redistricting Comm'n*, Nos. 2021-1193, -1198, -1210, 2022 WL 1113988, at *1 (Ohio Apr. 14, 2022) (per curiam); *Szeliga* v. *Lamone*, No. C-02-CV-21-001816, slip op. at 88-94 (Md. Cir. Ct. Mar. 25, 2022);[3] *Wilkins* v. *Davis*, 139 S.E.2d 849, 853-854 (Va. 1965). Still other courts have reviewed congressional redistricting plans under their state constitutions and upheld them. *See, e.g.*, *Johnson* v. *Missouri*, 366 S.W.3d 11, 22-32 (Mo. 2012); *Parella* v. *Montalbano*, 899 A.2d 1226, 1230-32 (R.I. 2006); *LeRoux* v. *Sec'y of State*, 640

[2] Available at https://bit.ly/3wqVnnK.

[3] Available at https://bit.ly/3NmRuae.

N.W. 2d 849, 856-860 (Mich. 2002) (per curiam); *Application of Forsythe*, 450 A.2d 499, 500 (N.J. 1982) (per curiam). These cases are consistent with the Maine Supreme Court's recognition, over a century ago, that the U.S. Constitution does not grant a state legislature "any superiority over or independence from" a state constitution. *In re Opinion of the Justices*, 107 A. at 706.

State courts have also evaluated the constitutionality of other state laws regulating federal elections. Over a hundred years ago, the Illinois and Washington supreme courts applied their respective constitutions to decide the validity of state laws requiring filing fees for congressional candidates. *See People ex rel. Breckton* v. *Bd. of Election Com'rs of Chicago*, 77 N.E. 321, 324-325 (Ill. 1906) (law unconstitutional), *overruled in part on other grounds*, *People ex rel. Lindstrand* v. *Emmerson*, 165 N.E. 217 (Ill. 1929); *State ex rel. Zent* v. *Nichols*, 97 P. 728, 730 (Wash. 1908) (law upheld). And the California high court applied the state constitution to a state law implementing congressional primaries. *Spier* v. *Baker*, 52 P. 659, 661-664 (Cal. 1898) (law unconstitutional). Other examples abound.[4]

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[4] *See, e.g.*, *Rison* v. *Farr*, 24 Ark. 161, 161-162 (Ark. 1865) (oath unconstitutional); *DeWalt* v. *Bartley*, 24 A. 185, 186 (Pa. 1892) (secret ballot constitutional); *Chase* v. *Lujan*, 149 P.2d 1003, 1005-12 (N.M. 1944) (absentee-voting law unconstitutional); *Brady* v. *New Jersey Redistricting Com'n*, 622 A.2d 843, 848-849 (N.J. 1992) (portion of redistricting law vesting original jurisdiction in only state supreme court unconstitutional); *Weinschenk* v. *State*, 203 S.W. 3d 201, 204 (Mo. 2006) (en banc) (per curiam) (voter-ID law unconstitutional); *Martin* v. *Kohls*, 444 S.W.3d 844, 851-853 (Ark. 2014) (voter-ID law unconstitutional); *Guare*

2. Ignoring this avalanche of state-court precedent, Petitioners instead claim a "split in authority" on this issue by citing non-binding, irrelevant, or since-doubted opinions. Pet. 17. Make no mistake: There is no split.

Carson v. *Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam), is about state executive-branch officials, not state courts. The Minnesota Secretary of State—acting without any apparent authority—had changed the state-law mail-in ballot deadline for the 2020 general election. *Id.* at 1055-56. The panel held that the challengers were "likely to succeed on the merits" of their claim that this violated the Electors Clause,[5] concluding that "the Secretary has no power to override the [state] legislature." *Id.* at 1059, 1060. *Carson* thus addressed an executive-branch official's authority to alter an elections law, not a state court's authority to review the constitutionality of an elections law. One is not like the other: "It is the duty of the secretary of state to conform to the law[,]" while it is the "duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 158, 177 (1803). And as a preliminary-injunction case, *Carson* does not reflect the Eighth Circuit's settled view of the law. *See Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) (grant of a preliminary injunction is not binding on merits).

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v. *State*, 117 A.3d 731, 735-741 (N.H. 2015) (per curiam) (voter-registration law unconstitutional); *see also* Michael Weingartner, *Liquidating the Independent State Legislature Theory*, Harv. J.L. & Pub. Pol'y at 42-45 (Apr. 18, 2022) (forthcoming 2023) draft available at https://bit.ly/3LyWSqq (collecting cases).

[5] The Electors Clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. Const. art. II, § 1.

More, Petitioners' preferred line from that case—that a legislature's authority in this space "cannot be taken * * * even through their state constitution," *Carson*, 978 F.3d at 1060 (quotation marks omitted)—is dicta atop dicta. That line is from an 1874 Senate Report on a failed constitutional amendment quoted in *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892), a case that had earlier explained that a State's "legislative power" is "limited by the constitution of the state," *id.* at 25. The line is irrelevant as to the Elections Clause, which this Court has recognized contains nothing indicating "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." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n* ("*AIRC*"), 576 U.S. 787, 817-818 (2015).[6] Indeed, state constitutions, this Court has explained, "can provide standards and guidance for state courts to apply" to state redistricting laws. *Rucho*, 139 S. Ct. at 2507.

State ex rel. Beeson v. *Marsh*, 34 N.W.2d 279 (Neb. 1948), similarly relied on a misreading of *McPherson* in a case about the Electors Clause. In *Beeson*, the Nebraska Supreme Court reasoned that it was "unnecessary" to decide whether a law regulating the appointment of presidential electors violated the state constitution. *Id.* at 287. The court quoted *McPherson* for support, *id.* at 286-287—and like *Carson*, glided over that case's contradictory language. And whatever *Beeson* had to say about the Electors Clause in

[6] *See also id.* at 841 (Roberts, C.J., dissenting) (agreeing that when a state legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process").

1948 is irrelevant as to the Elections Clause after *AIRC* and *Rucho*. Perhaps because it is so wrong, *Beeson* has been cited by a Nebraska court only once—in a traffic-law case. *See State* v. *Luttrell*, 68 N.W.2d 332, 337 (Neb. 1955).

And *In re Plurality Elections*, 8 A. 881 (R.I. 1887), is an advisory opinion containing dicta on the scope of the Elections Clause that was called into doubt by the Rhode Island Supreme Court more than a century ago. The question in *Plurality* was whether the state constitution, which required a majority vote for "all elections held by the people under this constitution," extended to congressional elections, which under Rhode Island law were decided by plurality. *Id.* at 882 (quotation marks omitted). The court advised that the majority-vote requirement likely did not apply to congressional elections because they were not elections "under this constitution." *Id.* (quotation marks omitted). And although the court then suggested in dicta that extending the majority-vote requirement to congressional elections might clash with the Elections Clause, that court later backtracked by calling that speculation into doubt. *See In re Opinion to the Governor*, 103 A. 513, 516 (R.I. 1918) (acknowledging the "contrary view" that a legislature regulating federal elections must act "in conformity" with the state constitution).

Petitioners also suggest, in "see also" citations, that a few other cases fall on their side of the "split." Pet. 19-20. None help Petitioners: They all predate *AIRC* and *Rucho*, and none hold that the Elections Clause preempts state-court judicial review.

Parsons v. *Ryan*, 60 P.2d 910 (Kan. 1936), did not refuse to review an elections law under the state constitution. *Parsons* instead held that because a state-law deadline was "an orderly way for the selection of candidates for presidential electors," that deadline "cannot be urged as discriminatory, unfair, illegal, or *unconstitutional*." *Id.* at 912 (emphasis added).

Commonwealth ex rel. Dummit v. *O'Connell*, 181 S.W.2d 691 (Ky. App. 1944), did not turn on the Elections Clause. It instead upheld an absentee-voter law despite a state constitutional provision requiring in-person voting based on "one sure foundation": a purported "axiomatic principle that all doubts as the constitutionality of a legislative enactment should be resolved in favor of its constitutionality," especially when an erroneous ruling "could not be remedied" by the state supreme court before an election. *Id.* at 696. The court also pointed to the "sacredness" of the right to vote. *Id.* Confirming that the Elections Clause had nothing to do with it, the court held that the act did not violate the state constitution's free-and-equal-elections clause, *id.* at 696-697—a holding that would make no sense if the Elections Clause rendered the state constitution inapplicable.

And the advisory opinion *In re Opinions of Justices*, 45 N.H. 595 (1864), concerned a state law that did not conflict with the state constitution. The issue there was whether the state constitution's time-and-place restrictions on voting in certain state elections were incorporated as "qualifications" under the federal Constitution's Qualifications Clause, such that an absentee-voting law for federal elections violated the federal Constitution. *See id.* at 601-602; U.S. Const. art. I, § 2. The court ultimately advised that voting in

a certain place was not a "qualification" under the federal Constitution. *In re Opinions of Justices*, 45 N.H. at 602-605. In any event, this irrelevant "qualifications" discussion has since been called into question. *See In re Opinion of the Justices*, 113 A. 293, 298-299 (N.H. 1921).

Effectively admitting the paucity of cases on their side of the "split," Petitioners reach for the dissenting opinions of "several federal appellate judges." Pet. 20. But dissents cannot create a split of authority. *Cf. Joseph* v. *United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari). And, like *Carson*, these dissents are irrelevant, arising in cases concerning actions taken by state executive-branch officials. *See Wise* v. *Circosta*, 978 F.3d 93, 96 (4th Cir. 2020) (extending deadline for receipt of mail-in ballots); *Hotze* v. *Hudspeth*, 16 F.4th 1121, 1123-24 (5th Cir. 2021) (drive-through voting).

II. PETITIONERS' ATEXTUAL, AHISTORICAL, AND INCONSISTENT ATTACK ON THE DECISIONS BELOW IS MERITLESS.

1. The North Carolina Supreme Court's decision in this case follows over two centuries of jurisprudence recognizing that the State's courts have a "responsibility * * * to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of [the] state." Pet. App. 10a. The Elections Clause does not displace this ancient power of judicial review. *Id.* at 121a-122a. Petitioners' argument that it does, the court went on, "is inconsistent with nearly a century of precedent of the Supreme Court affirmed as recently as 2015." *Id.* at 121a. "It is also repugnant to

the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." *Id.* The court's decision, and the trial court's adoption of the amended map, is fully consistent with the Constitution's text, structure, and history; precedent; and a long-established course of practice.

a. At the time of the Framing, "the public meaning of state 'legislature' was clear and well accepted* * * : A state 'legislature' was * * * an entity created and constrained by its state constitution." Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, U. Ill. Coll. L. Research Paper No. 21-02 at 24 (Apr. 6., 2022) (forthcoming) (emphasis omitted).[7] This understanding goes to the core of the Framers' political theory. The American "people are the only legitimate fountain of power" in this country. The Federalist No. 49 at 313 (Madison) (C. Rossiter ed., 1961); N.C. Const. of 1776, Decl. of Rights, art. I ("all political power is vested in and derived from the people only"). And just as the federal Constitution is derived from the People, *McCulloch* v. *Maryland*, 17 U.S. 316, 403-404 (1819), so too at the time of the Framing were state constitutions "universally understood as creations of the American People themselves," Amar & Amar, *supra*, at 24; *see also, e.g.*, N.C. Const. of 1776, pmbl. (constitution was framed "under the authority of the people"). Just as the federal Constitution was considered—and still is—the "paramount law" of the

[7] Draft available at https://bit.ly/3JZTsM9.

federal Union, *Marbury*, 5 U.S. at 178, state constitutions were considered—and still are—"the fundamental law of the land" of each State, *Bayard*, 1 N.C. at 7.

Legislatures, in contrast, are "Creatures of the Constitution" that "owe their existence to the Constitution." *VanHorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308 (C.C.D. Pa. 1795) (Patterson, J., riding circuit). They are thus structurally inferior to their constitution and accordingly bound by it. *Cf. Marbury*, 5 U.S. at 178. The Constitution reflects this hierarchy; the Supremacy Clause ranks state constitutions as higher law than state statutes. *See* U.S. Const. art. VI, cl. 2; Amar & Amar, *supra*, at 25 (the Supremacy Clause "enumerate[s] five types of law * * * from highest law to lowest law").

Early practice confirms that the Framers considered state legislatures structurally bound by state constitutions. At least five state constitutions predating the Framing, including North Carolina's, expressly permitted voters to "instruct" their state representatives and bind them on those issues. *See* Amar & Amar, *supra*, at 27-28. And despite the Articles of Confederation providing that delegates to Congress "shall be annually appointed in such manner as the legislature of each state shall direct," Articles of Confederation, art. V, "[m]ost of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L. J. 101, 135 (Apr. 29, 2022) (forthcoming).[8]

[8] Draft available at https://bit.ly/3slBc9K.

In short, constitutional restrictions on state legislatures were "well known" at the time of the Framing. *Smiley* v. *Holm*, 285 U.S. 355, 368 (1932). "That the state Legislature might be subject to" their state constitution when legislating under the Elections Clause "was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that Congress in making its regulations under the same provision would be subject to" the federal Constitution. *Id.* "The latter consequence was not expressed, but there is no question that it was necessarily implied, as the Congress was to act by law." *Id.* at 369. So just as the Framers would not have expected Congress to defy other parts of the Constitution when exercising its residual power under the Elections Clause (such as by banning those of a certain religion from running for office, *see* U.S. Const. art. VI, cl. 3), so too would the Framers not have expected state legislatures to defy *their* constitutions when exercising their identical authority under the same clause.

Several state constitutions adopted shortly after the Framing eliminate any doubt that the original public understanding of a "Legislature" was an entity that had to act in accordance with the state constitution's structural restraints, even when the legislature passed elections laws. These state constitutions contained structural constraints concerning that very subject. Delaware's 1792 constitution, for example, required congressional representatives to be elected in the same manner as state ones. *See* Del. Const. of 1792, art. VIII, § 2.

Georgia's 1789 constitution, Pennsylvania's 1790 constitution, Kentucky's 1792 constitution, Tennessee's 1796 constitution, and Ohio's 1803 constitution likewise regulated the manner of federal elections—they required that "[a]ll elections" be "by ballot" rather than viva voce. *See* 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. This directive was significant; "the choice between elections 'by ballot' or 'viva voce' was an important issue at the time" that was "actively contested." Smith, *supra*, at 146.

And Virginia's 1830 constitution apportioned Virginia's congressional seats by "adding to the whole number of free persons, * * * three-fifths of all other persons." Va. Const. of 1830, art. III, § 6. One delegate invoked the Elections Clause when arguing against this clause: "[I]t was 'unnecessary and improper, to regulate by the State Constitution, any of the powers or duties devolved on the Legislature by the Constitution of the United States.'" Smith, *supra*, at 142 (citation omitted). James Madison and Chief Justice John Marshall rejected that argument and voted in favor of the clause. *Id.*

The original understanding of "Legislature" thus contemplated a governing body defined and bounded by state constitutional limits. These limits are appropriately enforceable in state courts. *See Bayard*, 1 N.C. at 7; Pet. App. 82a-83a. This, too, was a concept familiar to the Framers. *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933-935 (2003) (the Framers had "an understanding that the state judiciaries had asserted, and were properly endowed with, the power

to refuse to enforce unconstitutional statutes"). Indeed, the North Carolina Supreme Court first recognized its constitutional authority of judicial review two years before that State ratified the U.S. Constitution. *Compare Bayard*, 1 N.C. 5 (decided on November 1, 1787), *with* Yale L. Sch., The Avalon Project, *Ratification of the Constitution by the State of North Carolina; November 21, 1789* (last visited May 20, 2022).[9]

b. Precedent confirms this original understanding. In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), this Court explained that the Elections Clause's "Legislature" is "the legislative power" of a State, which contains "the state Constitution and laws." *Id.* at 568. This Court built upon that statement in *Smiley*, holding that when a state legislature is exercising this legislative power, it is "making law[ ]" and must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. This includes the state constitution. *Id.* at 367-369.

AIRC drove the point home: "Nothing in th[e 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." 576 U.S. at 817-818; *see id.* at 841 (Roberts, C.J., dissenting) (agreeing that when a state legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process"). Redistricting laws are thus subject to referenda authorized by the state constitution (*Hildebrant*); can be vetoed by a governor

[9] Available at https://bit.ly/3kplciF.

provided that constitutional power (*Smiley*); and can be enacted by an independent commission so authorized by a state constitution (*AIRC*).

This Court then expressly confirmed in *Rucho* (to Respondent Common Cause, no less) that state courts may review state laws governing federal elections to determine compliance with a state's constitution. It held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506-07. But this Court did "not condone excessive partisan gerrymandering" nor "condemn complaints about districting to echo into a void." *Id.* at 2507. "The States, for example, are actively addressing the issue on a number of fronts." *Id.* And "[p]rovisions in * * * *state constitutions* can provide standards and guidance for *state courts* to apply" in redistricting cases. *Id.* (emphases added); *see also id.* (pointing to case where "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the" state constitution).

This Court has also recognized the "possibility and legitimacy of state *judicial* redistricting." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). *Growe* concerned whether a federal court could enjoin a state-court order redistricting the State after the parties stipulated that the original maps violated the U.S. and state constitutions. *Id.* at 27-31. Justice Scalia, writing for a unanimous Court, explained that the Elections Clause "leaves with the State primary responsibility for apportionment of their federal congressional * * * districts," and that the State can exercise this responsibility "through its legislature or other body." *Id.* at 34 (quotation marks omitted). This "other body" can be

a state court. *Id.* Federal courts accordingly cannot obstruct such a judicial redistricting process. *Id.*

c. Moreover, "[l]ong settled and established practice" "put[s] at rest" the meaning of the Elections Clause. *Houston Cmty. Coll. Sys.* v. *Wilson*, 142 S. Ct. 1253, 1259, 1260 (2022) (quotation marks omitted). "[S]tate constitutions have regulated both the procedure and substance of federal elections" since the Framing. Weingartner, *supra*, at 37-38. And "state courts [have] consistently reviewed laws regulating federal elections, including laws related to congressional redistricting, voter registration, absentee voting, secret ballots, and voting machines." *Id.* at 43; *see also id.* at 43-44 (collecting cases); *supra* pp. 9-12 & n.4. State legislatures, until recently, did not "rail[ ] against state constitutions"; they have instead "long accepted that they remain subject to state constitutional constraints when they enact laws under the * * * Elections Clause[ ]." Weingartner, *supra*, at 46. In fact, several state legislatures, including North Carolina's, have implemented statutory schemes specifically governing state-court judicial review of redistricting laws.[10] They have also authorized state courts to remedy unconstitutional congressional maps or draw them in the first instance in certain circumstances.[11] North Carolina is among these States, as well. *See* N.C. Gen. Stat. Ann. § 120-2.4.

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[10] *See* N.C. Gen. Stat. Ann. § 1-267.1(a); Ala. Code § 29-1-2.5(a); Me. Rev. Stat. Ann. tit. 21-A, § 1206(3); Mich. Comp. Laws Ann. § 3.72; Or. Rev. Stat. § 188.125(2); Wash. Rev. Code Ann. § 44.05.130.

[11] *See* Me. Rev. Stat. Ann. tit. 21-A, § 1206(2); Mich. Comp. Laws Ann. § 3.72; Or. Rev. Stat. §§ 188.125(8)(a), 11(b); Va. Code Ann. § 30-399(A); Wash. Rev. Code Ann. § 44.05.100.

The North Carolina Supreme Court's decision hewed to this history. The court exercised its constitutional power of judicial review—a power contemplated by the Framers—to strike down a state law passed by the legislature that violated rights of individuals guaranteed by the state constitution—fundamental law the Framers understood to bind state legislatures. And by ensuring that the legislature's redistricting law abided by the state constitution, the state courts acted consistently with "nearly a century of" this Court's precedent, as well as the long-settled practice of state courts. Pet. App. 121a.

2. Petitioners' broadsides against the state courts' decisions miss their mark.

a. Petitioners first argue that the text says "the Legislature," which, according to Petitioners, is a specific type of representative body whose actions are immune to state-court judicial review when passing elections laws because "the Legislature" necessarily excludes the judiciary. *See* Pet. 27-28; *see also Amicus* Br. of the National Republican Redistricting Trust ("NRRT Am. Br.") 6-7 (similar). Putting aside that this Court has already rejected a similarly crabbed understanding of "the Legislature," *see AIRC*, 576 U.S. at 813-814, whether the judiciary is part of the legislature is not the question. The question is whether North Carolina's legislature may violate rights guaranteed to North Carolinians by the State's constitution when acting under the Elections Clause. Petitioners' laser-like focus on the word "Legislature" has nothing to say about that.

Petitioners divine from dictionary definitions and *Federalist* quotations that when the Elections Clause

says "the Legislature," it actually means *only* the legislative branch of the state government—exempt from the state constitution that created it and that sets the limits of its authority. *See* Pet. 27-31. That argument is entirely unsupported. The Framers knew how to give unreviewable authority to a specific body. For example, they gave the Senate the "*sole* power to try all Impeachments," U.S. Const. art. I, § 3 (emphasis added); the Senate's authority to "determine procedures for trying an impeached official" is accordingly "unreviewable by the courts," *Nixon* v. *United States*, 506 U.S. 224, 232 (1993). The Framers' decision not to use a word like "sole" in the Elections Clause—a word of "considerable significance," *id.* at 230—is especially pronounced given that "the Legislature" was understood to be a body constrained by the state constitution, as ultimately interpreted by state courts, *see supra* pp. 17-21. If the Framers had wanted to create the exceptional situation where one sliver of state law was immune from state-court judicial review, they would have said so.[12]

Or they surely would have at least debated it. But Petitioners "do not offer evidence of a single word in the history of the Constitutional Convention," *Nixon*, 506 U.S. at 233, suggesting that the Framers even

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[12] NRRT suggests that the clause "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, supports its view. *See* NRRT Am. Br. 8-9 n.4. That is wrong. A "separate provision specif[ies] the only qualifications * * * for House membership." *Nixon*, 506 U.S. at 237. So while "[t]he decision as to whether a Member satisfied these qualifications *was* placed with the House, * * * the decision as to what these qualifications consisted of was not." *Id.* There is no separate provision specifying the "Times, Places and Manner" of congressional elections.

contemplated exempting state laws regulating congressional elections from state-court judicial review. "This silence is quite meaningful in light of" the actual debate over the Elections Clause, *id.*, which "centered on" whether state legislatures should be restrained by Congress or not, *AIRC*, 576 U.S. at 836 (Roberts, C.J., dissenting); *see also* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1009-15 (2021). The Anti-Federalists "supported vesting election regulation power solely in state legislatures" because they are closer to the People. *AIRC*, 576 U.S. at 836 (Roberts, C.J., dissenting). The Federalists, conversely, feared unchecked state legislatures would "manipulat[e] * * * electoral rules * * * to entrench themselves." *Id.* at 815. The Federalists carried the day. That this restraint-focused debate "do[es] not mention state constitutions specifically," Weingartner, *supra* at 34-35, indicates that lifting these well-known restraints on state legislatures was not on the table.[13]

Petitioners contend that background principles of constitutionalism and judicial review do not apply in this context because "[r]egulating elections to federal office is not an inherent state power" and was instead created by the Constitution and delegated to state legislatures. Pet. 30. This contention is a big "so what." Petitioners offer no reason whatsoever why the Framers would have viewed delegated power as involving a separate interpretive framework. That is because

[13] This history also refutes NRRT's claim that the Framers made "a deliberate choice" to exclude state courts from "the election-regulation-prescription process." NRRT Am. Br. 9.

there is none. Regardless, this Court has already rejected that the Elections Clause's supposed delegation of power preempts the application of state constitutions to state laws passed under that power. *Compare* Appellant's Br., *AIRC*, 2014 WL 6845686, 12-13, 30 (Dec. 2, 2014) (making delegation argument), *with AIRC*, 576 U.S. at 817-818 ("Nothing in th[e Elections] Clause instructs" that a state legislature can act "in defiance of provisions of the State's constitution.").

b. Petitioners also argue that barring state courts from reviewing state laws related to congressional elections "vindicate[s]" the structural nature of the Elections Clause, which "ensure[s]" that the bodies closest to the People "have primacy in regulating elections." Pet. 16-17; *see also* NRRT Am. Br. 8-9 (similar). Not so. State-court judicial review based on state constitutional principles is entirely consistent with legislative primacy over elections. State-court judicial review in fact *better* vindicates the Elections Clause's structural protection of liberty. That clause protects liberty by empowering Congress to check state legislatures as a matter of federal law. *See AIRC*, 576 U.S. at 814-815 ("The dominant purpose of the Elections Clause * * * was to empower Congress to override state election rules."); *see also supra* pp. 25-26. State-court judicial review vindicates that structural protection by ensuring that state legislatures are likewise checked by their State's fundamental law. *See, e.g.*, Pet. App. 10a (judicial review is necessary "to keep the General Assembly from taking away the state constitutional rights of the people").

c. Petitioners next assert that this Court's precedent "is in accord" with its preferred reading of the Elec-

tions Clause. Pet. 30. Petitioners' own quotations belie that claim. If "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking," *id.* (quoting *AIRC*, 576 U.S. at 808), then that law must pass muster under the state constitution, *see, e.g.*, Pet. App. 78a (state laws are subject to state "constitutional limitations"); N.C. Gen. Stat. Ann. § 1-267.1(c). The same is true if redistricting "must be in accordance with the method the state has prescribed for legislative enactments." Pet. 31 (quoting *Smiley*, 285 U.S. at 367).

Petitioners try to cabin *Smiley*, arguing that it holds only that state legislatures are bound by state constitutional *procedures* applying to "the making of state laws." *Id.* at 34 (quoting *Smiley*, 285 U.S. at 368). *Smiley* is not so limited. *See supra* pp. 21-22. And even if it were, *Smiley* would still support the decisions below. Judicial review, just as much as a governor's veto, was a "well known" "check in the legislative process" at the time of the Framing and "cannot be regarded as repugnant to the grant of legislative authority." *Smiley*, 285 U.S. at 368. So just as a governor's veto is part of a State's "lawmaking power," *id.* at 369, so too is state-court judicial review.

All but conceding that their theory is inconsistent with this Court's precedent, Petitioners recognize that ruling for them might require overruling "some portion of" *AIRC*. Pet. 30 n.4. The only thing wrong with that statement is the hedging. Petitioners' Elections Clause theory is flatly inconsistent with that case's holding. *See AIRC*, 576 U.S. at 817-818.

McPherson (Pet. 31) is no help to Petitioners, either. The question there was whether a state law requiring that presidential electors be appointed in district-by-

district, as opposed to statewide, elections violated the Electors Clause. 146 U.S. at 24. The question thus was not whether the state constitution applied to a state law; it was instead the classic question of whether a state law violated the federal Constitution. And the dicta in that case suggesting that "the state legislatures' power to prescribe regulations for federal electors 'cannot be taken,'" Pet. 31 (quoting *McPherson*, 146 U.S. at 35), is lifted wholesale from an 1874 Senate Report on a failed constitutional amendment, 146 U.S. at 34-35. That dicta also clashes with the case's earlier statements that "[w]hat is forbidden or required to be done by a state is forbidden or required of the legislative power under *state constitutions* as they exist" and that "[t]he legislative power is the supreme authority, except as limited by the *constitution of the state*." *Id.* at 25 (emphasis added).

d. So much for text, structure, history, and precedent. But Petitioners' theory is not even internally coherent. The way Petitioners see it, although state courts are unable to review elections laws under their state constitutions, *federal* courts could review such laws under the *federal* Constitution. Pet. 35; *see also* NRRT Am. Br. 15 (similar). But six pages earlier, Petitioners told this Court that "[t]he Constitution * * * grants the state 'Legislature' primacy in setting rules for federal elections, subject to check *only by Congress*." Pet. 29 (emphasis added). Petitioners' hyperliteral interpretation of the Elections Clause precludes all judicial review, not just state-court review. Petitioners' decision to walk back from the cliff—with no textual or historical reason to do so—only highlights how bizarre their interpretation is.

e. Petitioners' final arguments betray that this case is really about state law. Petitioners grouse that the North Carolina constitutional provisions applied by the North Carolina Supreme Court are insufficiently specific. *See* Pet. 35-36; *see also* NRRT Am. Br. 18-19. But "state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. And the North Carolina Supreme Court has the final say on the North Carolina Constitution. *See* Pet. App. 79a ("This Court is the ultimate interpreter of our State Constitution." (quotation marks omitted)). Here, the North Carolina Supreme Court held that partisan gerrymandering is prohibited under four different clauses of the state constitution. *Id.* at 129a. That is the end of the matter.

Petitioners finally complain that, after invalidating a North Carolina statute under the North Carolina Constitution, the North Carolina courts erred by "creating, and imposing by fiat, a new congressional map." Pet. 37 (emphasis omitted). But that, too, was authorized by North Carolina law. *See* Pet. App. 292a (citing N.C. Gen. Stat. Ann. § 120-2.4(a1)). Consistent with that state law, the court's interim map "differs from" Petitioners' proposed remedial map only "to the extent necessary to remedy the defects identified by the Court." Pet. App. 289a (citing N.C. Gen. Stat. Ann. § 120-2.4(a1)). State laws authorizing courts to remedy unconstitutional congressional maps have long been a feature of state polity. *See supra* p. 23. They have also been blessed by this Court. *See Growe*, 507 U.S. at 33-34.

* * *

State courts can review state laws for compliance with the state constitution, even when those laws relate to federal elections. Finding otherwise would cancel "the state constitutional rights of the citizens," Pet. App. 78a (quotations marks omitted), as they relate to federal elections. It would degrade "the sovereignty of states," *id.* at 121a, flip federalism on its head, and inject "chaos" into the electoral process. Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. Chi. L. Rev. __ at 5 (Mar. 24, 2022) (forthcoming 2023).[14] It would also require overruling settled precedent. The petition should be denied.

III. THIS IS A POOR VEHICLE TO DECIDE THIS ISSUE.

Regardless, this Court should deny the petition because it presents a uniquely poor vehicle to decide the question presented. To the extent this Court is waiting for "an appropriate case" to decide this issue, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in the denial of application for stay), this case is not it. This is so for three reasons, in addition to those raised by other Respondents.

1. Petitioners' Elections Clause argument is not outcome determinative to this case. Even if state legislatures are not inherently bound by state constitutions when redistricting (and they are), the legislature here voluntarily imposed state-court constitutional review on its redistricting process. By legislative enactment, the North Carolina General Assembly specified that its acts to "redistrict[ ] * * * congressional districts" could "violate[ ] the North Carolina Constitution,"

[14] Draft available at https://bit.ly/3OMpuOP.

N.C. Gen. Stat. Ann. § 1-267.1(a), (c), and has accordingly created an intricate system of state-court judicial review to resolve such claims, *see supra* pp. 4-5. This case proceeded through this statutory scheme. *See supra* pp. 5-9. And because Petitioners have not challenged these statutes, this case's outcome will be unaffected by this Court's resolution of the Elections Clause issue. This Court should accordingly deny the petition. *See Gamache* v. *California*, 562 U.S. 1083, 1083 (2010) (Sotomayor, J., respecting the denial of certiorari because state court's federal-law error was not outcome determinative); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 192-193 (1997) (declining to resolve federal question where doing so would not affect the case's outcome).

Petitioners do not even mention (much less grapple with) these statutes. They instead halfheartedly assert that the North Carolina Constitution prevents this arrangement. *See* Pet. 32-33. But if Petitioners are right that the Elections Clause disables state constitutions when legislatures enact redistricting laws, then the North Carolina Constitution has no bearing on the statutory scheme. Petitioners cannot have their cake and eat it, too: Either the state constitution applies to redistricting laws or it does not. And whether the state constitution precludes the state legislature from creating a state statutory scheme of judicial review for state statutes is the purest question of state law there is—and a question on which the North Carolina Supreme Court has the final say. *See, e.g.*, *Green* v. *Neal's Lessee*, 31 U.S. (6 Pet.) 291, 298 (1832) (federal courts must defer to state-court interpretations of state law). It is thus not a question presented by the petition.

2. This case is a poor vehicle to decide the question presented for a second reason: This case will be moot by the time this Court issues an opinion. As specified by state law, the challenged map is an "[i]nterim" map that is good for the 2022 congressional elections only. *See* Pet. App. 293a; N.C. Gen. Stat. Ann. § 120-2.4(a1). "[I]t is too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring). Consistent with state law, the General Assembly will adopt a new congressional map before the 2024 election. N.C Gen. Stat. Ann. § 120-2.4(a1). This Court's potential resolution of the legality of the 2022 interim map—"next Term after full briefing and oral argument," *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring)—will thus not have any "direct consequences on the parties involved," *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 71 (2013). Any opinion would instead be "advising what the law would be upon a hypothetical state of facts." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quotation marks omitted).

It may well be true that the Elections Clause issue will "keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring). But that cuts in favor of denying the petition, not granting it. There is nothing fundamental to state elections laws that makes them "in * * * duration too short to be fully litigated prior to cessation or expiration* * * ." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (quotation marks omitted). Should this Court wish to "carefully consider and decide the issue * * * after full briefing and oral argument," *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring), it should do so in a *live* case, not this one.

3. Finally, Petitioners waived their Elections Clause argument by failing to advance it in the trial court. This Court can consider a federal question on review from a state supreme court only when the petitioner "present[ed]" that claim "in the state courts" "at the time and in the manner required by the state law." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981). For a party to preserve an issue for appeal in North Carolina, it must present that issue "to the trial court" through "a timely request, objection, or motion" and "stat[e] the specific grounds for the ruling the party desired." N.C. R. App. P. 10(a)(1); *see also State* v. *Bell*, 603 S.E.2d 93, 112 (N.C. 2004) ("[A]n error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." (quotation marks omitted)). Petitioners did not do that. *See* Pet. App. 121a (Petitioners' Elections Clause argument "was not presented at the trial court"). Their Elections Clause argument is accordingly waived under North Carolina law.

Petitioners assert that they preserved the issue because they mentioned it in a brief opposing a preliminary injunction before trial. *See* Pet. 7. But to preserve an issue in North Carolina, a party must raise that issue "at trial," not merely before. *See State* v. *Grooms*, 540 S.E.2d 713, 723 (N.C. 2000) (holding that an argument advanced in a "pretrial motion" but not "during trial" is waived).

Petitioners also contend that because the North Carolina Supreme Court "passed upon" the Elections Clause issue, that issue "was preserved below and is squarely presented for this Court's review." Pet. 25. To the contrary. The North Carolina Supreme Court's

observations, following a clear statement that the argument was untimely, hardly count as a "decision of the federal question [that] was necessary to its determination of the cause"—a precondition for this Court's review. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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