No. 21-1271

IN THE
Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, ET AL.,
Petitioners,

v.

REBECCA HARPER, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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QUESTIONS PRESENTED

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." U.S. CONST. art. I, § 4, cl. 1. In North Carolina, the legislature has enacted constitutional provisions that limit its redistricting authority. The legislature has also enacted statutes authorizing state courts to review congressional redistricting plans and to remedy plans they find unconstitutional. Below, the state courts duly applied those constitutional provisions and statutes to review and remedy the legislature's congressional redistricting plans. That review remains ongoing via pending appeals in the state supreme court. The questions presented are:

1. Does this Court have jurisdiction over this interlocutory petition given the ongoing state-court appeal where Petitioners are raising the same Elections Clause arguments raised here?

2. Did the North Carolina courts violate the Elections Clause by reviewing and remedying congressional redistricting plans in the manner expressly "prescribed by … the Legislature" under North Carolina law?

RULE 29.6 DISCLOSURE STATEMENT

Respondent North Carolina League of Conservation Voters, Inc. ("NCLCV") has no parent company, and no public company has a 10 percent or greater ownership in it.

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INTRODUCTION

Petitioners ask this Court to resolve whether state courts violate the Elections Clause when they apply state constitutions to declare congressional redistricting plans unconstitutional. Nearly a century ago, this Court held that the Elections Clause does not abrogate restrictions imposed by the people in the very state constitutions to which state legislatures owe their existence. *Smiley v. Holm*, 285 U.S. 355, 367–69 (1932). But this case does not even implicate that settled proposition, nor present Petitioners' broad Elections Clause arguments. That is because the state courts here proceeded just as the state legislature "prescribed." U.S. CONST. art. I, § 4, cl. 1. First, the legislature authorized state courts to review congressional redistricting plans for compliance with the state constitution. Second, the legislature authorized state courts to, if necessary, "impose an interim districting plan for use in the next general election only." And third, the legislature itself enacted the constitutional provisions by which state courts undertake their review. The legislature has thus prescribed precisely the manner in which congressional redistricting plans should be assessed.

Here, a unanimous, bipartisan trial-court panel followed those prescriptions to find that the original congressional map was an "extreme" and "intentional" gerrymander that was more partisan than 99.9999% of alternatives. After the state supreme court held that such gerrymanders violate the state constitution, the panel also unanimously concluded that the proposed remedy failed to redress the violations. So the panel did

as the legislature directed and crafted an interim plan for the 2022 election, with help from bipartisan special masters. The state supreme court denied a motion to stay that decision—as did this Court—but plenary appeals are moving forward in state court.

Further review by this Court is unwarranted. This Court has received and denied many petitions and applications raising similar Elections Clause arguments. At the stay stage, Justice Kavanaugh suggested that "the Court should grant certiorari in an appropriate case." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (mem.) (Kavanaugh, J., concurring in denial of application for stay). This, however, is not that case.

First, this case does not present the petition's Question Presented. Petitioners ask this Court to resolve whether state courts, applying only "state constitutional provisions," may review regulations governing congressional elections. Pet. i. But the courts here did not simply apply state constitutional provisions. They acted pursuant to statutes specifically authorizing review of congressional redistricting plans and applied constitutional provisions the legislature itself enacted. So the only federal question is narrow: Does the Elections Clause *preclude* the legislature from authorizing other institutions to act in this manner? Petitioners, however, have disavowed any arguments on that score—perhaps because their own authorities concede that legislatures can do so. So even that narrow, un-cert-worthy issue is not presented. Instead, Petitioners raise only state-law delegation arguments, most of them not raised below. This Court does not

grant certiorari to referee state-law disputes on issues state courts have not addressed.

Second, Petitioners' arguments come both too early and too late. Their arguments come too early because this Court has jurisdiction only over "[f]inal judgments" from state courts, 28 U.S.C. § 1257(a), which the interlocutory decisions here are not. And their arguments come too late because, as the state supreme court emphasized, these arguments were not properly "presented at the trial court." Pet. App. 121a. Granting now would simultaneously (1) enmesh the Court in jurisdictional disputes; (2) deprive the Court of guidance on state-law issues that Petitioners themselves say are important; and (3) force the parties and the Court to chase a moving target. The state supreme court is likely to address Petitioners' state-law arguments in their pending state-court appeal and could well issue an opinion rejecting the state-law *premises* for Petitioners' arguments here while this case is pending.

Third, although Elections Clause challenges arise in many contexts, this Court's recent precedents are especially emphatic in foreclosing them in redistricting cases. Three years ago, every Justice agreed that state courts can apply "state statutes and state constitutions" to guard against excessive "partisan gerrymandering" in "congressional districting." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). That statement followed this Court's 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ("*AIRC*"). There, the Court divided on whether independent redistricting commissions can be "the Legislature" but unanimously

agreed that when the legislature prescribes regulations for congressional elections, it "may be required to do so within the ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting); *see id.* at 817–18 (majority op.). And this Court has long been unanimous in holding that state courts may develop remedial congressional redistricting plans to redress constitutional violations when legislatures fail to do so. *See Growe v. Emison*, 507 U.S. 25, 29, 33 (1993).

With this Court's cases so definitive, it is no surprise that Petitioners' "split of authority" proves nonexistent. Pet. 4. Nor is there any sound reason, absent a split, to grant a petition that is so rife with vehicle problems and does not even present Petitioners' Question Presented.

STATEMENT OF THE CASE

A. The North Carolina Legislature Authorized State Courts to Review and Remedy Unlawful Congressional Redistricting Plans.

Congressional redistricting in North Carolina has long been contentious. The state legislature has thus enacted statutes providing detailed procedures prescribing where, when, and how state courts can review and remedy unconstitutional congressional redistricting plans.

First, the legislature prescribed for "action[s] challenging the validity of any act … that apportions or redistricts State legislative or congressional districts [to] be filed in the Superior Court of Wake County and [to] be heard and determined by a three-judge panel." N.C.G.S. § 1-267.1(a); *see id.* § 1-81.1(a).

Second, the legislature prescribed the manner of that review and provided for state courts to evaluate congressional redistricting plans for compliance with the state constitution. The legislature specified that "[e]very order or judgment declaring *unconstitutional* or otherwise invalid, in whole or in part and for any reason, any act … that apportions or redistricts … *congressional districts* shall find with specificity all facts supporting that declaration [and] shall state separately and with specificity the court's conclusions of law on that declaration." *Id.* § 120-2.3 (emphasis added).

Third, the legislature prescribed the time, place, and manner of the remedial process. The legislature provided that a court must "first give[] the General Assembly" at least two weeks "to remedy any defects" in its "plan apportioning or redistricting … congressional districts." *Id.* § 120-2.4(a). But if "the General Assembly does not act to remedy any identified defects to its plan …, the court may impose an interim districting plan for use in the next general election only." *Id.* § 120-2.4(a1). The legislature barred the State Board of Elections from using "any plan apportioning or redistricting … congressional districts other than a plan imposed by a court under this section or a plan enacted by the General Assembly." *Id.* § 120-2.4(b).

B. The Legislature Enacted Extreme Partisan Gerrymanders that Violated the State Constitution.

On November 4, 2021, the legislature enacted new redistricting plans for the state legislature and Congress. Twelve days later, Respondents invoked the process the legislature had created to challenge these

plans. Other voters filed their own suits within days. The actions were assigned to a three-judge panel and consolidated. The panel denied the plaintiffs' motions for a preliminary injunction. The state supreme court reversed, issued a preliminary injunction, postponed the primary election, and remanded for an expedited trial.

After a weeklong trial, the three-judge panel—a bipartisan panel designated by North Carolina's Republican Chief Justice and composed of two Republicans and one Democrat[1]—found that the maps were the product of "intentional, pro-Republican partisan redistricting." Pet. App. 24a.

The panel also found that the maps were "extreme partisan outliers," Pet. App. 9a, 24a, and that the congressional map was more advantageous to Republicans than 99.9999% of neutral maps. Pet. App. 35a. These extreme gerrymanders, the panel found, were "designed to systematically prevent Democrats from gaining a tie or majority" of seats, even if their candidates won a significant majority of votes. Pet. App. 38a, 132a. The panel nonetheless held that the state constitution provides no remedy for even extreme partisan gerrymandering. Pet. App. 49a–53a. That decision conflicted with the 2019 decision of another three-judge panel reaching the opposite result on the identical question. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Wake Cnty. Sept. 3, 2019).

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[1] North Carolina employs partisan elections for both trial and appellate courts; hence, affiliations are matters of public record.

The plaintiffs appealed, and the state supreme court reversed. Consistent with *Rucho*'s guidance that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," the court held that partisan-gerrymandering claims are justiciable under the state constitution. Pet. App. 72a. It issued a detailed order on February 4 and followed with a full opinion on February 14.

The court began with the state constitution's Free Elections Clause, which was enacted by the legislature in 1969. This clause, the court emphasized, "has no analogue in the federal Constitution" and is one of the "provision[s] that makes the state constitution 'more detailed and specific … in the protection of the rights of its citizens.'" Pet. App. 91a (quoting *Corum v. Univ. of N.C. ex rel. Governors*, 413 S.E.2d 276, 290 (N.C. 1992)). Looking to history, the court observed that this clause ultimately "derived from a clause in the English Bill of Rights of 1689," which "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote … to attain 'electoral advantage.'" *Id.* The court concluded that this clause protects the people's "right … to fair and equal representation in the governance of their affairs." Pet. App. 92a.

The state Equal Protection Clause, likewise adopted by the legislature, also "provides greater protection of voting rights than the federal Constitution." Pet. App. 98a. The state supreme court has repeatedly construed that clause more broadly than its federal counterpart, including to guarantee "substantially equal voting power" and "substantially equal legislative representation." Pet. App. 98a–99a (quoting *Stephenson*

v. Bartlett, 562 S.E.2d 377, 394 (N.C. 2002)). The court held that this guarantee "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials" and that partisan gerrymandering violates this guarantee "by diminishing or diluting the[] votes" of the "disfavored party." Pet. App. 100a–101a. The court reached similar conclusions as to the state constitution's Free Speech and Free Assembly Clauses, which the legislature also enacted. Pet. App. 102a–106a.

Applying these four provisions to the legislature's redistricting plans, the state supreme court held the plans unconstitutional. The plans, the court emphasized, were "designed [to] safeguard[] Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins." Pet. App. 37a (quotation marks omitted). And the court found it "abundantly clear" that the plans unconstitutionally diluted Respondents' voting power. Pet. App. 125a–138a. To provide guidance on remand, the state supreme court described potential quantitative measures of partisan skew that could help evaluate compliance. Pet. App. 230a–231a; Pet. App. 111a–115a.

As to Petitioners' argument that the Elections Clause "forbids state courts from reviewing a congressional districting plan," Pet. App. 121a, the court noted, first, that this argument "was not presented at the trial court." *Id.* The court also rejected this argument on the merits. *Id.*

C. A Bipartisan Trial-Court Panel and Bipartisan Special Masters Assessed Remedial Plans and Unanimously Ordered an Interim Congressional Plan.

On February 17, the legislature enacted a remedial state House plan with overwhelming bipartisan support. As to the state Senate and U.S. Congress, however, Petitioners rammed through remedial plans on party-line votes.

The trial-court panel followed the process the legislature had created and assessed whether the plans "remed[ied the] defects" the state supreme court had found. N.C.G.S. § 120-2.4(a1). The bipartisan panel appointed as special masters a bipartisan group of respected jurists—two retired state supreme court justices and one retired superior court judge (one Republican, one Democrat, and one unaffiliated). Pet. App. 273a. The special masters appointed four expert assistants. Those experts included Professor Bernard Grofman—one of the Nation's foremost redistricting experts, whose work has been cited in six opinions of this Court—as well as professors from Princeton and Brigham Young Universities. Pet. App. 273a–274a.

The bipartisan trial-court panel and bipartisan special masters approved the bipartisan state House plan. They also approved the state Senate plan, over the objections of all plaintiffs. Invoking the need to "give appropriate deference to the General Assembly," Pet. App. 278a–279a, 299a–301a, the court rejected plaintiffs' arguments that the Senate plan failed to fully remedy the unlawful gerrymandering, Pet. App. 290a–293a; *see* Pet. App. 278a–279a.

But neither the trial court nor the special masters could reach the same conclusion as to the congressional plan. The court ruled that, even "giving appropriate deference to the General Assembly," the plan was unconstitutional and did not remedy the defects the state supreme court had found. Pet. App. 278a–279a, 301a. Per Professor Grofman, the plan was still "very lopsidedly Republican." Appendix to Response of NCLCV Respondents 202a, *Moore v. Harper*, No. 21A455 (U.S. Mar. 3, 2022) ("NCLCV Stay App'x").

The court, however, declined to adopt any of the alternative plans proposed by the plaintiffs. Pet. App. 288a–289a, 292a–293a. It explained that because "the ultimate authority and directive is given to the Legislature to draw redistricting maps, … the appropriate remedy is to modify the Legislative Remedial Congressional Plan to bring it into compliance." Pet. App. 292a. The special masters thus worked with Professor Grofman "to amend [the legislature's] plan to enhance its consistency with the [North Carolina Supreme Court's] opinion." Pet. App. 302a. The court found that the special masters' amendments remedied the defects and, pursuant to the process the legislature authorized, ordered this plan's use as an "interim" plan for the 2022 congressional elections. Pet. App. 292a–293a.

D. The North Carolina Supreme Court and This Court Denied Petitioners' Stay Applications.

All plaintiffs appealed and moved the state supreme court for an emergency stay of the order accepting the state Senate map; one plaintiff moved for a stay of the

order accepting the state House map. Petitioners appealed and moved for a stay on the congressional map. The state supreme court, with no noted dissents, denied all stay motions on February 23.

Petitioners then sought a stay from this Court, which this Court denied. *Moore*, 142 S. Ct. 1089. On May 17, 2022, North Carolina's primary election proceeded under the plan approved by the trial court.

E. The Parties Are Proceeding with Appeals in the North Carolina Supreme Court.

The state supreme court's February 23 order merely denied a stay. Hence, Petitioners' merits appeal on the congressional map remains pending (as does Respondents' appeal on the Senate map). On April 11, the parties exchanged proposed appellate records.

Petitioners' proposed record states that they intend to raise five issues, including "[w]hether the trial court erred by failing to give the Congressional map, N.C. Sess. Law 2022-3, the deference afforded to legislative enactments under the state and federal Constitutions"; whether "the trial court's adoption of the Special Master's Congressional plan violates the federal Constitution's Elections Clause"; and whether "the trial court erred in rejecting the legislatively enacted Congressional map, N.C. Sess. Law 2022-3, and instead imposing its own."[2]

Petitioners' opening brief will likely be due in late June; Respondents' brief will be due in late July; and the

[2] Because the record has not yet been filed, it is not publicly available as of the date of this filing.

reply brief will be due in mid-August. The case could be argued in the fall.

REASONS FOR DENYING THE PETITION

The Elections Clause does not abrogate restrictions imposed by the people in the state constitutions to which state legislatures owe their existence. For a century and without exception, this Court has held as much. But here, that is only the start of why the petition should be denied. First, this petition is a uniquely poor vehicle for addressing Petitioners' arguments. Second, there is no split of authority, and prudential considerations militate powerfully against taking up these arguments absent a split. Third, the state supreme court correctly followed a century of settled law that this Court recently reaffirmed.

I. This Case Is an Exceedingly Poor Vehicle.

Few cases could be less suitable for addressing Petitioners' Elections Clause arguments. One, this case does not even present Petitioners' broad Question Presented. Two, there is no "[f]inal judgment," 28 U.S.C. § 1257(a); instead, ongoing state-court proceedings are addressing the same Elections Clause issues. Three, Petitioners forfeited their Elections Clause argument, which independently bars review.

A. The Case Does Not Present Petitioners' Question Presented.

The Court should deny because this case does not even present Petitioners' Question Presented. And on the question this case actually presents, Petitioners raise only state-law arguments.

1. This Case Does Not Implicate Petitioners' Elections Clause Arguments.

Petitioners seek review of whether the Elections Clause prohibits state courts, applying only state constitutions, from invalidating and remedying congressional redistricting plans. Pet. i. This case, however, does not present that question. It presents only the narrow question whether the Elections Clause *disables* state legislatures from "prescribing" the manner of holding congressional elections by enacting limitations on their own redistricting power and then authorizing state courts to enforce those limits.

That is because, here, the legislature comprehensively and expressly prescribed just such a judicial-review process. To recap: First, the legislature authorized a special court to hear "actions challenging the validity of any act … that … redistricts … congressional districts," N.C.G.S. § 1-267.1(a), and provided for "judgment[s] declaring unconstitutional … any act … that … redistricts … congressional districts," *id.* § 120-2.3.

Second, the legislature specified that if it does not "remedy any defects" in "a plan … redistricting … congressional districts" within 14 days, "the court may impose an interim … plan." *Id.* § 120-2.4(a), (a1).

Third, the legislature itself, not a separate constitutional convention, approved the constitutional provisions the courts applied. In 1969, the legislature enacted each of these provisions pursuant to its normal lawmaking power, before presenting the constitution to

the people for ratification. Act of July 2, 1969, ch. 1258, § 1, 1969 N.C. Sess. Laws 1461, 1461–62; *see* N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL 2001–2002, at 120 (2002). Thus, the legislature prescribed not only the procedures for judicial review, but the substance too.

The only issue of federal law this case could possibly present is thus whether the Elections Clause forbids legislatures from "prescrib[ing]" the "Manner" of congressional elections via such legislative authorizations. That fact renders this case an unsuitable vehicle for addressing Petitioners' broad arguments about what the Elections Clause would require absent such legislative authorizations.

Critically, on the narrow issue this case actually presents, Petitioners *do not claim* such authorizations violate the Elections Clause. Thus, were this Court to grant, it could find itself unable to resolve any federal question at all—because Petitioners have abandoned their arguments on the sole federal question this case implicates.

This abandonment was not an oversight. Respondents made the same argument at the stay stage. NCLCV Stay Resp. 4–6, 19–23, 25, *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022). In reply, Petitioners called the question of whether a "legislature could … delegate … power [under] the Elections Clause" a "question which this Court should avoid if possible." Reply 18–19, *Moore v. Harper*, No. 21A455 (U.S. Mar. 3, 2022) ("Stay Reply"). Then, in their petition, Petitioners chose not to raise any such argument.

Petitioners were right to abandon this argument, which obviously lacks merit. Nobody has ever thought that state legislatures cannot authorize other institutions to exercise authority over congressional elections. Indeed, election administration would collapse if legislatures could not "prescribe[]" election rules by directing executive officials and courts to carry out their commands. Hence, Chief Justice Rehnquist agreed that the Florida legislature had permissibly "empowered … courts … to grant 'appropriate' relief" in federal election cases." *E.g.*, *Bush v. Gore*, 531 U.S. 98, 121 (2000) (Rehnquist, C.J., concurring). And the leading academic proponent of Petitioners' Elections Clause theories has emphasized that legislatures may authorize "executive officials *or others* … to establish rules for federal elections" and that contrary arguments are "without merit." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 554 (2021) (emphasis added); *accord* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. __ (forthcoming 2022) (similar). But whatever the reason for Petitioners' abandonment, the dispositive point is that Petitioners made their choice as to which Elections Clause issue to present—and their case does not present the only federal issue their petition raises.

2. Petitioners' State-Law Arguments Underscore Why the Petition Should Be Denied.

Petitioners chose instead to raise only state-law arguments for why the legislative authorizations here are not dispositive. They contend that "North Carolina's

courts" cannot "benefit from any sort of delegation" because (1) "under North Carolina law," the legislature cannot delegate redistricting authority; and (2) regardless, the legislature "has not made any such delegation to state courts." Pet. 32–33 (emphasis deleted). For two reasons, these arguments underscore why certiorari is unwarranted.

First, state-law arguments are outside this Court's domain. "[S]tate courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and "interpret[] their state constitutions" "free and unfettered by" this Court, *Florida v. Powell*, 559 U.S. 50, 56 (2010) (quotation marks omitted). Petitioners cannot obtain certiorari by asking this Court to weigh (for example) North Carolina nondelegation doctrine.

Second, to the extent these state-law arguments are predicates to Petitioners' federal claims, that is all the more reason to deny. Petitioners never raised these issues before the state courts, which thus have never decided—for example—whether N.C.G.S. §§ 1-267.1, 120-2.3, or 120-2.4 authorize state courts to review and remedy congressional maps on state-law grounds (as Respondents contend) or are limited to federal-law challenges (as Petitioners claimed at the stay stage). Stay Reply 19–20; *see infra* Part III.A (addressing this argument on the merits). As discussed below, *see* Part I.B, the state supreme court may well address those issues in Petitioners' pending appeal. This Court should not take this petition in order to guess about state law when those questions may soon have answers.

B. This Court Lacks Jurisdiction Given the Ongoing State-Court Proceedings.

The petition should also be denied because this Court possesses jurisdiction over only "[f]inal judgments" by state courts. 28 U.S.C. § 1257(a). The interlocutory decisions here are classic nonfinal orders, particularly given that Petitioners are continuing to raise Elections Clause arguments in the ongoing state-court proceedings.

The situation today differs from when this Court considered Petitioners' stay application. When the state supreme court denied Petitioners' stay request in February 2022, that denial "finally determined" the map for the 2022 election and was a "final judgment for purposes of [this Court's] jurisdiction." *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). But as Petitioners admit, the 2022 election will now proceed under the court-drawn map, with the only question being what map applies "in 2024 and thereafter." Pet. 5. And on that issue, there is no final judgment. It will be decided in Petitioners' pending state-court appeal.

No exception from the final-judgment rule authorizes this interlocutory petition. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified "four categories" of exceptions from the rule that § 1257(a) generally "preclude[s] review 'where anything further remains to be determined by a State court.'" *Id.* at 477 (citation omitted). Here, the only exception that is even arguably relevant is the second *Cox* category—for cases where "the federal issue, finally

decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. But for two reasons, that exception does not apply.

First, the ongoing state proceedings "could moot the federal question" by reaffirming that Petitioners forfeited their Elections Clause claims under state law. *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997). Respondents maintain that the state supreme court has *already* found forfeiture. *Infra* Part I.C. Petitioners at the stay stage disagreed. Stay Reply 5. But regardless, Respondents plan to reassert their forfeiture arguments in the pending appeal. And if the state supreme court agrees, that would eliminate any arguably federal claims by providing an independent and adequate state ground.

Second, the relevant *Cox* exception requires that any further proceedings be entirely disconnected from any federal issue. That exception applies only when the further proceedings "could not remotely give rise to a federal question … that may later come here." 420 U.S. at 480 (alteration in original) (quotation marks omitted). Those proceedings must "have little substance," "their outcome [must be] certain," or they must be "wholly unrelated to the federal question." *Id.* That makes sense: If the further proceedings could re-raise or affect the federal question, immediate review risks exactly the "piecemeal review" that the final-judgment rule exists to prevent. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) ("[I]n most, if not all, of the cases falling within the [*Cox*] exceptions, … there were no other federal issues to be resolved. There was thus no probability of piecemeal review….").

That risk of piecemeal review certainly looms here. Petitioners ask this Court to decide whether state courts may weigh state legislatures' compliance with state law and "replac[e]" legislatures' unlawful maps with lawful alternatives. Pet. i. That same question is pending before the state supreme court. Right now, Petitioners are arguing that the trial court "erred in rejecting" their remedial map and "instead imposing its own Congressional plan," in violation of "the federal Constitution's Elections Clause." *Supra* at 11. Petitioners also argue that this decision violated state law, as contrary to "the state … Constitution[]" and as based on (for example) "clearly erroneous" factfindings. *Id.*

That pending appeal is especially significant because the state supreme court will likely address—for the first time—issues that go to the heart of Petitioners' claims here. That court has not yet addressed (for example) whether the state statutes detailed above authorized the state courts to act as they did. But that court *will* likely address those issues in adjudicating Petitioners' ongoing appeal. These proceedings thus are far from "wholly unrelated" to the Question Presented. *Cox*, 420 U.S. at 480.

Those pending proceedings also provide powerful prudential reasons to deny. To begin, the need to grapple with these knotty jurisdictional obstacles underscores why this case is a poor vehicle. And it makes little sense to grant now, when state courts are poised to address state-law issues that Petitioners themselves say are important, including (1) whether the legislature "has … made" laws authorizing "state

courts" to exercise authority under the Elections Clause; and (2) whether such laws violate the supposed North Carolina rule that "'the legislature may not … delegate its supreme legislative power.'" Pet. 32–33 (quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978)).

C. This Court Lacks Jurisdiction Given the State Court's Forfeiture Holding.

The Court should also deny because Petitioners forfeited their Elections Clause arguments entirely. This Court will not review state-court judgments unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quotation marks omitted). And when state courts hold arguments forfeited, those holdings are "adequate and independent ground[s] … barring review." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

That is just what happened here. The state-court rules provide that "[a]ll legal defenses … must be asserted in the responsive pleading." *E.g.*, *Mazzocone v. Drummond*, 256 S.E.2d 843, 845 (N.C. 1979). Petitioners, however, did not raise their Elections Clause defense in their answer—or, indeed, in any merits-stage filing in the trial court. Petitioners' observation that they raised an Elections Clause defense "in their brief opposing a preliminary injunction," Pet. 7, is thus irrelevant. That is why, when Petitioners raised their Elections Clause argument before the state supreme court, that court started by emphasizing that "[t]his argument … was not presented at the trial court."

Pet. App. 121a. In North Carolina, "a party must have presented to the trial court a *timely* request, objection, or motion." N.C. R. App. P. 10(a)(1) (emphasis added). Because Petitioners did not do so, the state supreme court correctly deemed their argument forfeited.

Petitioners cannot gain by offering—as they did at the stay stage—a different reading of the state supreme court's opinion. Stay Reply 5. It is Petitioners' burden to "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment." S. Ct. R. 14.1(g)(i). And again, this substantial jurisdictional issue certainly underscores why it would be a mistake to grant when the state supreme court could clarify its forfeiture holding while this case is pending.

II. The Absence of Any Split Underscores Why the Court Should Deny the Petition.

The Court should also deny because there is no split of authority on the petition's Question Presented, much less on the narrower question this case actually presents. Nor do Petitioners provide any sound reason to grant absent a split.

1. This Court has rejected the argument that the Elections Clause authorizes state legislatures to act "in defiance of provisions of the State's constitution." *AIRC*, 576 U.S. at 817–18. Even as the Court has divided on other issues, it has united in affirming that when the legislature "prescribes election regulations, [it] may be required to do so within the ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting); *see id.* at 817–18 (majority op.). And when

the legislature acts unlawfully, this Court has held that "the judiciary of a State" has the "power … to formulate a valid … [congressional redistricting] plan" and remedy violations of the "State and Federal Constitutions." *Growe*, 507 U.S. at 29, 33 (internal quotation marks omitted). Given these unequivocal holdings, it is no surprise that state courts have repeatedly rejected Petitioners' Elections Clause arguments. Pet. 21–22; *see*, *e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821–24 & n.79 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015); *Brown v. Saunders*, 166 S.E. 105, 106, 111 (Va. 1932).

Petitioners cite no case genuinely in conflict. None of Petitioners' cases even concerns the redistricting issues this Court has so often addressed. More than that: None of those cases holds, in any context, that the Elections Clause nullifies restrictions that the people of the States adopted in the state constitutions creating state legislatures.

Principally, Petitioners rely on *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (*per curiam*). *Carson*, however, did not address state courts acting to remedy violations of the state constitution, much less—as here—doing so pursuant to legislative authorization. Rather, the "Secretary [of State] extended the deadline for receipt of ballots *without* legislative authorization," pursuant to a consent decree procured with litigants. *Id.* at 1054. Indeed, the Eighth Circuit emphasized that it was not addressing "a court order … declar[ing a] statute invalid." *Id.* at 1060.

Petitioners' only other opinions from the last seven decades are dissents—which in any event are cut from the same cloth. The dissenters in *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), would have enjoined the State Board of Elections' decision to enter "a consent decree" that the dissenters believed lacked state-law authorization. *Id.* at 114 (Wilkinson, J., dissenting). The dissent in *Hotze v. Hudspeth*, 16 F.4th 1121 (5th Cir. 2021), objected to what it regarded as a county's decision to "wholly ignore" state law governing drive-through voting. *Id.* at 1129 (Oldham, J., dissenting). Neither addressed state courts enforcing state constitutions, much less state constitutional provisions that the state legislature itself had enacted and authorized state courts to enforce.

Petitioners' remaining authorities—all between 74 and 158 years old—do not establish a cert-worthy conflict. Several concerned the Presidential Electors Clause, not the Elections Clause. *Parsons v. Ryan*, 60 P.2d 910, 910–11 (Kan. 1936); *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 281 (Neb. 1948); *cf. AIRC*, 576 U.S. at 807. The New Hampshire Supreme Court in *In re Opinion of the Justices*, 113 A. 293 (N.H. 1921), considered the Elections Clause but found it much more difficult than the Presidential Electors Clause and declined to decide any Elections Clause issue. *Id.* at 299. Similarly, the court in *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), discussed the Elections Clause but decided the case on a different ground. *Id.* at 696. And in *In re Opinion of the Justices*, 45 N.H. 595 (1864), the relevant statute and the state constitution were not in conflict. *Id.* at 605.

The decision in *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887), does contain one sentence of dicta—since called into doubt, *see In re Op. to the Governor*, 103 A. 513, 516 (R.I. 1918)—supporting Petitioners' position. Suffice it to say, 135-year-old dictum is not the stuff of a cert-worthy split. Indeed, this Court has recently and repeatedly declined to take up petitions raising similar arguments and invoking these same cases. Pet. 15–16; *see, e.g.*, Pet. 20–22, *Turzai v. Brandt*, 139 S. Ct. 445 (2018) (No. 17-1700), 2018 WL 3122294; Pet. 26 & n.1, *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (No. 20-542), 2020 WL 6273543.

2. Petitioners also provide no reason to grant absent a split. They say their Question Presented is "important." Pet. 16, 26. But that is no reason to grant a uniquely poor vehicle—especially one that *does not present* that question (and particularly when Petitioners themselves agree that the "Court should avoid if possible" the only federal question this case actually presents). *Supra* Part I.A.1. Nor is this petition some unique opportunity to address Elections Clause issues before the 2024 election. A number of States have enacted new laws governing congressional elections that are being actively litigated in state courts. *See* Nat'l Conf. of State Leg., *State Elections Legislation Database* (last visited May 19, 2022), https://bit.ly/3M6BysD. One estimate identifies 12 States as having enacted laws restricting access to the ballot. *See* Voting Rights Lab, *State Voting Rights Tracker*, (last visited May 19, 2022), https://bit.ly/3N4PovA. This Court has nearly two years in which it can, if desired, grant petitions raising

Elections Clause challenges and resolve them in the ordinary course before the 2024 election.

III. The Decision Below Is Correct.

The state supreme court's decision is also correct. Petitioners focus their fire on arguing that "the Legislature" in the Elections Clause means solely the standing legislative body. Pet. 27–31. This Court has rejected that argument. *See AIRC*, 576 U.S. at 813. But even accepting this contra-precedential premise, the state supreme court's decision is correct for two independent reasons. First, the North Carolina legislature permissibly exercised its Elections Clause authority by "prescrib[ing]" statutes and constitutional provisions authorizing state courts to do exactly what they did here. Second, regardless, the Elections Clause does not abrogate restrictions that the people have placed in the state constitutions to which state legislatures owe their very existence.

A. The Legislature Authorized State Courts to Review and Remedy Congressional Redistricting Plans that Violate the State Constitution.

The state supreme court's decision is correct, first, because congressional redistricting proceeded exactly as "prescribed" by the state legislature, which authorized state courts to review and remedy congressional redistricting plans in exactly the manner they did here. As explained above, Petitioners do not contend that the Elections Clause forbids legislatures from authorizing other state institutions to act in this manner. *Supra* Part

I.A.1. And Petitioners' state-law objections are outside this Court's jurisdiction and meritless to boot.

Petitioners do not dispute that the state statutes detailed above—which they addressed in their stay-stage reply, though not their petition—contemplate that state courts may "declar[e] unconstitutional" and "remedy" state laws "apportion[ing] … congressional districts." Stay Reply 19 (quoting N.C.G.S. §§ 120-2.3, 120-2.4(a1)). Petitioners appear to argue that these statutes do not speak *clearly enough*, because they do not intone that state courts may exercise "substantive power under the Elections Clause." *Id.* But it is hard to imagine how the legislature could have spoken more clearly. And Petitioners certainly cite nothing in state law or the Elections Clause requiring the magic words they appear to demand. *Cf. Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (applying "fair reading" of state statutes).

Even more absurd is Petitioners' alternative argument that these statutes are "best read" to "govern a … *federal*," not a state, "constitutional challenge." Stay Reply 19–20. These statutes refer without limitation to judgments declaring plans "unconstitutional." N.C.G.S. § 120-2.3. And absent "some indication to the contrary," "[g]eneral terms are to be given their general meaning." ANTONIN SCALIA & BRYAN GARNER, READING LAW 101 (2012). Petitioners do not explain how the word "unconstitutional" could mean "unconstitutional under the federal constitution" but not "unconstitutional under the state constitution."

Petitioners also have no adequate answer to the fact that the legislature itself enacted the state constitutional

provisions the state courts applied. At the stay stage, Petitioners conceded that "the 1971 Constitution was 'enacted' … by the" legislature but emphasized that "it was not effective until 'approved by voters.'" Stay Reply 20. But that is no different from *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), where the legislature enacted election regulations that voters then "approve[d] or disapprove[d]." *Id.* at 566–68.

Petitioners fare no better with state-law nondelegation principles. Pet. 32–33. They argue that the Elections Clause vests power in "the Legislature" and that, in North Carolina, other branches cannot exercise powers of "the Legislature." *Id.* But that argument is a non sequitur. The legislature has authorized state courts to act. To do so, state courts need not themselves *be* "the Legislature" or exercise legislative power. A contrary rule would invalidate, among other things, any statute authorizing executive officials to modify rules for congressional elections. The correct rule instead is the one the text provides: When "the Legislature" authorizes other state institutions to act, it permissibly "prescribe[s]" the "Manner" for congressional elections, whether or not those institutions exercise legislative power. U.S. CONST. art. I, § 4, cl. 1.

Nor, regardless, does North Carolina law forbid what Petitioners describe as "delegations." In North Carolina, delegations are permissible if "accompanied by adequate guiding standards." *Matter of Broad & Gales Creek Cmty. Ass'n*, 266 S.E.2d 645, 650 (N.C. 1980). Indeed, North Carolina courts have reviewed and remedied redistricting plans dozens of times, refuting

any claim that doing so is inconsistent with the State's separation of powers.[3] They have readily done so because statutes empowering courts to review and remedy unlawful government action are not invalid "delegation[s] of legislative and administrative authority." *In re Wright*, 46 S.E.2d 696, 697–98 (N.C. 1948); *cf. Sanderlin v. Luken*, 68 S.E. 225, 225–27 (N.C. 1910) (creating special taxing district was exercise of "judicial or quasi-judicial" power).

B. The Elections Clause Does Not Free State Legislatures from Limits in State Constitutions.

1. Even aside from the North Carolina statutes expressly authorizing state courts to act, Petitioners are wrong. This Court has squarely held that "[n]othing in the [Elections] Clause instructs … 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." *AIRC*, 576 U.S. at 817–18. And every Justice has agreed that the legislature, "when it prescribes election regulations, may be required to do so within the ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting); *see id.* at 817–18 (majority op.).

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[3] *E.g.*, *Stephenson v. Bartlett*, 582 S.E.2d 247, 249 (N.C. 2003); *Harper v. Lewis*, No. 19-CVS-12667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct. Wake Cnty. Oct. 28, 2019); *Common Cause v. Lewis*, 2019 WL 4569584; *N.C. State Conf. of NAACP v. Lewis*, No. 18-CVS-002322 (N.C. Super. Ct. Wake Cnty. Nov. 2, 2018); *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

In *Rucho*, too, every Justice endorsed that proposition. The Court emphasized that its nonjusticiability holding did not "condemn complaints about districting to echo into a void." *Rucho*, 139 S. Ct. at 2507. That was so, the Court explained, because state courts could employ "state statutes and state constitutions" to remedy "excessive partisan gerrymandering." *Id.* The Court cited with approval the decision of the "Supreme Court of Florida str[iking] down that State's *congressional districting plan* as a violation of … the Florida Constitution." *Id.* (emphasis added). The dissent agreed that state courts could do so. *Id.* at 2524 (Kagan, J., dissenting). If Petitioners are right, every Justice in *Rucho* was wrong, and this Court's promise was a mirage.

2. The Court was unanimous in *AIRC* and *Rucho* because a century of caselaw forecloses the argument that the Elections Clause authorizes state legislatures to enact state election laws in defiance of state constitutions. *Hildebrandt* held that because the Ohio Constitution granted voters the power to "approve or disapprove" a redistricting plan by referendum, a congressional map voted down by referendum had "no effect whatever." 241 U.S. at 566–68. And *Smiley* held that, "where the state Constitution … provided" for a gubernatorial veto as "a check in the legislative process," the legislature was required to enact a redistricting plan "in accordance with" that requirement. 285 U.S. at 367–69.

Petitioners admit that the gubernatorial veto in *Smiley* did "*precisely* what the North Carolina Supreme Court's … order did here." Pet. 34. Trying to make

lemonade out of lemons, Petitioners insist that *Smiley* differed because the veto was "a check in the legislative process." *Id.* (quotation marks omitted). But that argument, first, does not square with the Constitution's text. The Elections Clause does not say that States may regulate elections via "legislative" power. It vests authority in "the Legislature." U.S. CONST. art. I, § 4, cl. 1. And whatever else governors might be, they are not "the Legislature" under Petitioners' definition. So if Petitioners were right that the Elections Clause confers constraint-free authority on that body, this Court would have to abrogate both *Smiley* and *Hildebrandt*.

The better reading is the one endorsed by both opinions in *AIRC*: *Smiley* and *Hildebrandt* establish that redistricting must "'be performed in accordance with the State's prescriptions for lawmaking'" and that nothing in the Elections Clause prevents the people of the State, through their state constitutions, from "imposing some constraints on the legislature." *AIRC*, 576 U.S. at 841 (Roberts, C.J., dissenting) (quoting *id.* at 808 (majority opinion)). As in *Smiley*, North Carolina's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses are "check[s] in the legislative process." 285 U.S. at 367–68; *cf. Nixon v. United States*, 506 U.S. 224, 233 (1993) ("judicial review [i]s a check on the Legislature's power"); *Nixon v. Fitzgerald*, 457 U.S. 731, 761 (1982) ("Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances."). And the legislature has no "power to enact laws" governing congressional redistricting "in any manner

other than that in which the Constitution of the state has provided." *Smiley*, 285 U.S. at 368.[4]

3. This Court has also long recognized—in a line of cases Petitioners fail to acknowledge—that if state legislatures fail to act lawfully, "the judiciary of a State" has the "power … to formulate a valid redistricting plan" and remedy violations of "State … Constitutions." *Growe*, 507 U.S. at 29, 33 (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*)). Thus, when a federal court enjoined state-court proceedings aimed at formulating a valid congressional redistricting plan, this Court vacated that injunction as "clear error." *Id.* at 34. As Justice Scalia explained for a unanimous Court, that injunction had been "based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Id.* And that view, Justice Scalia emphasized, "ignor[ed] the … legitimacy of state *judicial* redistricting." *Id.* (emphasis in original).

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[4] Petitioners also cite *McPherson v. Blacker*, 146 U.S. 1 (1892). Pet. 31. *McPherson*, however, did not concern a state legislature's attempt to regulate congressional regulations in defiance of its state constitution. It addressed whether Michigan violated the *federal* Constitution's Presidential Electors Clause by providing for "the appointment of [presidential] electors by districts," rather than statewide. 146 U.S. at 24–25. If anything, *McPherson* undermines Petitioners' position: It emphasizes that the state "legislative power is the supreme authority, *except as limited by the constitution of the state*" and 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." *Id.* at 25 (emphasis added).

Myriad other cases testify to this Court's longstanding "teaching that state courts have a significant role in redistricting," including for Congress. *Id.* at 33; *see Branch v. Smith*, 538 U.S. 254, 261–62, 271, 274 (2003) (reaffirming that congressional redistricting "is primarily the duty and responsibility of the State through its legislature or other body," including "state-court redistricting proceedings"); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (affirming the New York Court of Appeals' decision invalidating and imposing a court-crafted remedy for the New York legislature's congressional redistricting law because that law violated "the requirements of the Constitution of the state in relation to the enactment of laws"); *Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (similar). In reliance on that settled precedent, state courts have—just in this redistricting cycle—prescribed congressional maps in Minnesota, Ohio, New York, Pennsylvania, Virginia, and Wisconsin.

4. Petitioners' contrary arguments lack merit. Their position, at bottom, is based on a negative inference—that because the Elections Clause does not expressly say that state legislatures remain bound by state constitutions, the Elections Clause abrogates those limits. Pet. 30. Such negative inferences, however, "must be applied with great caution, since … so much [depends] on context." SCALIA & GARNER, *supra*, at 107; *see Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). And here, context renders inconceivable that negative inference. The Framers understood that legislatures are "Creatures of the Constitution"; that they "owe their existence to the Constitution"; and that

"all their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (Patterson, J.); *accord*, *e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470–71 (1793). Indeed, the Framers understood, specifically, that a "Legislature" could not "annul[]" state constitutional provisions "ordain[ing]" that "all elections … shall be by ballot, free and voluntary." *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 309 (discussing Pennsylvania constitution). The Framers could never have imagined that, by conferring power on "Legislature[s]," the Federal Constitution would unleash those legislatures from the restrictions the people imposed on them at their creation.

The Federal Constitution confirms that, when it confers powers, those powers are presumptively bounded by law, unless the Constitution's text or structure clearly shows otherwise. The Commerce Clause, for example, confers on Congress authority "[t]o regulate Commerce … among the several States." U.S. CONST. art. I, § 8, cl. 3. No one believes this clause confers authority free from the normal constraints of judicial review. *E.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). The Elections Clause itself is the same. If Petitioners were correct that the Elections Clause makes the state legislature's discretion "subject to check only by Congress," Pet. 29, it would follow that neither state courts *nor* federal courts could review congressional redistricting plans for compliance with constitutional constraints. Yet *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that "nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws

which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* at 6.[5]

Founding-era understandings also refute Petitioners' position. As *Smiley* explained, it was "well known" at the Founding that state legislatures were subject to "restriction[s]" and "limitation[s]." 285 U.S. at 368. The Framers also had "an understanding that the state judiciaries had asserted, and were properly endowed with, the power to refuse to enforce unconstitutional statutes." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933–35 (2003); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A] legislative act contrary to the constitution is not law…."). But despite those well-known limits, there is no "suggestion" in the Elections Clause or early historical practice that state laws regulating federal elections were exempt from the ordinary "conditions which attach to the making of state laws," including judicial review. *Smiley*, 285 U.S. at 365,

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[5] True, the Constitution in some places gives state legislatures powers or duties outside their ordinary roles in enacting legislation. Article V, for example, gives "the Legislatures … of the several States" a role in ratifying constitutional amendments. U.S. CONST. art. V; *see, e.g.*, *id.* art. IV, § 4; *id.* art. VI; *id.* amend. XIV, § 2. This Court, however, has held that the Elections Clause is not like that: "Article I, [§] 4, plainly gives authority to the [S]tate *to legislate* within the limitations therein named. Such legislative action is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required." *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (emphasis added).

368. Instead, many Founding-era state constitutions imposed both procedural and substantive restrictions on federal elections. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. ___, at 9, 28–34 (forthcoming 2022), https://bit.ly/3hrRCrl; *see* NCLCV Stay Resp. App'x 32 n.13 (citing sources); *accord* ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (new ed. 2018) (explaining that early understandings "display how the text of the Constitution was originally understood").

5. If doubt remained, 2 U.S.C. §§ 2a(c) and 2c would remove it. Final authority under the Elections Clause lies with Congress. *Rucho*, 139 S. Ct. at 2496. In § 2a(c), Congress provided that a State must be "redistricted in the manner *provided by the law thereof* after any apportionment" (emphasis added). And in § 2c, Congress underscored that elections must occur in districts "established by law." This Court has held that the words "the law thereof" encompass all of a State's procedures for lawmaking, including "judicial decisions." *Branch*, 538 U.S. at 271, 274 (internal quotation marks omitted). Thus, Congress has "left the question of redistricting to the laws and methods of the States." *AIRC*, 576 U.S. at 811 (internal quotation marks omitted). Under 2 U.S.C. §§ 2a(c) and 2c, then, state legislatures' congressional redistricting authority is subject to the restraints of state constitutions as interpreted and applied by state courts.

6. Finally, breaking with a century of precedent by accepting Petitioners' position would wreak havoc upon elections nationwide. If there is an Elections Clause problem in this case, then *every* state constitutional

provision that touches congressional elections is potentially void. But state constitutions have long regulated "[c]ore aspects of the electoral process" for federal elections. *AIRC*, 576 U.S. at 823. That includes whether "voting occurs by ballot or secret ballot," "voter registration," "absentee voting," "vote counting," and "victory thresholds." *Id.* It also includes prohibitions on "party tickets" on ballots, voter-residency requirements, and requirements to present identification. Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 716–17 (2016). And it includes requirements for the shapes of congressional districts, including contiguity and compactness requirements and requirements that districts follow existing geographic and subdivision boundaries. *Id.* at 713–14. Indeed, "[n]early all state constitutions" have provisions that regulate congressional elections. *Id.* at 720.

Petitioners' theory would call all those provisions into question. It would do so, moreover, for congressional elections *but not* other elections. So, if Petitioners are right, States would have to run two sets of elections, subject to two sets of rules, and follow state constitutions in one set but not the other. Nothing in the Federal Constitution's text, history, or precedent compels that chaos-inducing result.

CONCLUSION

The petition should be denied.

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