No. 21A455

In The Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

Applicants,

v.

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK, GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETER; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Respondents,

&

REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

Applicants,

v.

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

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

Respondents,

&

COMMON CAUSE,

Intervenor-Respondent.

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

APPLICANTS' REPLY IN SUPPORT OF THEIR EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

March 3, 2022

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

INTRODUCTION

The Elections Clause of the United States Constitution, in relevant part, 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. Absent prompt action by this Court, North Carolina's 2022 congressional elections will be conducted in defiance of this constitutional command. That is because the courts of North Carolina have not once but twice invalidated the congressional maps drawn by the North Carolina General Assembly and have now replaced them with their own judicially preferred map.

Respondents insist that immediate action by this Court enforcing the plain meaning of the Elections Clause will sow chaos both in the administration of North Carolina's 2022 congressional elections and in the broader jurisprudence of elections law in this country. Neither contention has merit.

First, this Court can stay the judgments below without imperiling the May 17, 2022 congressional primary. While the State Board informed the North Carolina courts that it would be "preferable" for candidate filing for the primary to close on March 4, it indicated that if necessary the primary could be administered with a filing deadline as late as March 15. *See* State Bd. App. 23–24. What is more, the General Assembly remains in session to address any implementation issues that could be created by a decision of this Court. Indeed, the General Assembly already passed a bill delaying the primary to June 7, only to be met with a gubernatorial veto. This

Court should not allow the Governor's veto coupled with the state courts' pursuit of a course of action carefully timed to run out the clock on the deadlines asserted by the executive branch to preclude review in this case.

Second, this Court can rule in favor of Applicants without "clarify[ing] the entire field" of the reach of the Elections Clause. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). All the Court need hold to rule in Applicants' favor is that the Elections Clause does not allow a state court to usurp the General Assembly's authority under that provision by seizing upon an abstract and broadly worded provision of the state's constitution (such as the North Carolina's Constitution's command that "All elections shall be free," N.C. CONST. art. I, § 10) to impose its own policy determinations and rules about the extent to which partisan considerations may affect redistricting. As this Court held in *Rucho*, "[j]udicial review of partisan gerrymandering" under constitutional provisions not expressly and concretely addressing the subject violates the principle that "judicial action" must be "principled, rational, and based on reasoned distinctions found in the Constitution or laws." *Rucho v. Common Cause*, 588 U.S. ---, 139 S. Ct. 2484, 2507 (2019) (cleaned up). By acting in the absence of such clear guardrails, the North Carolina courts have usurped the General Assembly's authority to regulate congressional elections. The Court can leave for another day the extent to which state courts may enforce state constitutional provisions that actually do "provide standards and guidance for state courts to apply." *Id.* at 2507. And even if the Court were to hold that state constitutions have no substantive role to play in the regulation of federal elections,

that would not leave state legislatures unfettered. They still would be subject to the procedural requirements of state lawmaking, and they still would be subject to check by Congress and by the state and federal courts enforcing the federal constitution and federal statutes.

For these reasons, the Court should grant Applicants' petition for a stay. But even if the Court were not to do so, that does not mean that this case has to end. As Applicants have noted in their stay application (at 2 n.1), the Court may treat the application as a petition for certiorari and grant review. While an immediate stay is needed to prevent the grave and irreparable harm that the actions of the courts below will inflict this congressional cycle, even absent a stay a live dispute would remain as this issue will recur in future election cycles. Indeed, a ruling reversing the North Carolina Supreme Court's judgment invalidating the General Assembly's original congressional map would reinstate that map for future cycles. *See* 2022 N.C. Sess. Laws 3, § 2 (providing that if this Court "reverses or stays" the North Carolina Supreme Court decision "the prior version of G.S.§ 163-201(a) is again effective"); 2021 N.C. Sess. Laws 174, § 1 (amending N.C. Gen. Stat. § 163-201(a) to read: "For purposes of nominating and electing members of the House of Representatives of the Congress of the United States in 2022 *and periodically thereafter*, the State of North Carolina shall be divided into 14 districts as follows") (emphasis added).

ARGUMENT

I. There Is a Reasonable Probability of Certiorari and a Fair Prospect of Reversal on Applicants' Elections Clause Claim.

Article I, Section 4 of the Constitution provides that each State's legislature shall regulate the time, place, and manner of congressional elections, but unless this Court intervenes now the elections during the upcoming 2022 cycle will be conducted based on district maps drawn by *the courts* of North Carolina, rather than *its legislature*. Nothing in any of the four briefs filed by Respondents casts any doubt on the clear likelihood that this Court will grant review and put a stop to that constitutionally intolerable state of affairs.

A. Applicants' Elections Clause Claim Is Not Forfeited.

Several Respondents hope to avoid the merits of the Elections Clause issue altogether, urging that Applicants forfeited it by failing to raise it "in their trial court briefing or at trial." Common Cause Br. 6; *see also* NCLCV Br. at 24. There is nothing to this opening gambit.

The state procedural rule Respondents cite to establish this supposed "adequate and independent state-law grounds" for denying review, N.C. R. APP. P. 10(a)(1), provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired." *See* Common Cause Br. 6–7, 8. But as Common Cause is ultimately forced to concede (tucked away in a footnote), Applicants *did* "present[ ]" their Elections Clause argument "to the trial court"—in their December 2, 2021 brief opposing a preliminary injunction. *See* Common Cause

Br. 7 n.2. And as NCLCV concedes, Applicants presented the issue to the trial court *again*, in their February 21, 2022 brief opposing the adoption of the plaintiffs' proposed remedial map. NCLCV Br. 24. These presentations of the issue plainly satisfy the state courts' Rule 10. Respondents' only answer to this dispositive point is that Applicants did not present the issue *a third time*, in between these two trial-court briefs, by "rais[ing] the federal Elections Clause defense in their trial court briefing or at trial." Common Cause Br. 6. But they cite *no* rule of state procedure that would require Applicants to present an issue to the trial court not just once, and not just twice, but *three times* in order to preserve it.

The state supreme court's treatment of the Elections Clause issue is the clincher. That court did not, as Respondents intimate, hold that the issue had been forfeited. Rather, while the court stated that the claim "was not presented at the trial court"—by which it presumably meant it was not presented as an affirmative defense at trial—it went on to *reject the claim on the merits*, based on a substantive, two-paragraph-long discussion making many of the same arguments pressed by Respondents before this Court. *See* App. 146a–47a. If the argument had been forfeited as a matter of North Carolina procedure, the supreme court would have said so. *See Lilly v. Virginia*, 527 U.S. 116, 123 (1999) ("Indeed, the court addressed petitioner's Confrontation Clause claim without mentioning any waiver problems.").[1]

[1] Common Cause's suggestion that Applicants' presentation of the issue before the state supreme court might itself have been insufficient is insubstantial. Common Cause complains that the argument took up only "three paragraphs at the end of a 195-page brief," Common Cause Br. 7, but a substantive discussion spanning three paragraphs plainly meets any reasonable threshold for adequate presentation. Applicants can hardly be faulted for not choosing to spend more time on an

B. The Elections Clause Provides that State Legislatures, Not Courts, Shall Regulate the Time, Place, and Manner of Congressional Elections.

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. Respondents do not dispute that the creation of congressional district maps is a regulation of the manner of elections and is governed by this Clause. Nor do they dispute that North Carolina's supreme court is not "the Legislature thereof." But it necessarily follows from these admitted premises that the state courts' actions below in nullifying the General Assembly's map and replacing it with one of their own devising were in direct contravention of this constitutional provision. Respondents' arguments to the contrary all fail to persuade.

1. The text of the Elections Clause is clear and dispositive. Our opening stay papers set forth the original meaning of the Constitution's language at length, and Respondents say nothing to dispute our interpretation of the clause's key word—"Legislature"—as referring to a state's constituted lawmaking power, rather than its courts.

Instead, Respondents attempt to replace the Constitution's reference to a state's "Legislature," simpliciter, with a longer and very different phrase: by

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argument that the court had *already implicitly rejected* in granting preliminary injunctive relief. And again, the state supreme court dealt with the Elections Clause argument *by rejecting it on the merits*, not by holding it forfeited.

"Legislature," they say, the Constitution *actually* means the "state legislature . . . constrained by its state constitution." Common Cause Br. 12 (quotation marks omitted). That qualification follows, according to Respondents, by analogy to federal judicial review: "Just as the federal Constitution is considered higher law than acts of Congress, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–180 (1803), state constitutions are higher law than state legislative acts." Common Cause Br. 12. Thus, Respondents conclude, "[w]hen a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature." *Id.* at 13.

Respondents' qualification of the Constitution's unadorned delegation of power to each State's "Legislature" appears nowhere in the text of the Elections Clause, and this structural analogy to judicial review fails to justify inserting it. The key problem with Respondents' analogy is that while each State's constitution obviously limits the exercise of power that *it* grants—just as the *federal* Constitution limits the power that *it* grants—the power to regulate congressional elections is *granted to States by the federal constitution, not any state constitution.* "[T]he power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Thus, *only the federal constitution can limit* the exercise of that federal power, and all of Respondents' analogies fall apart.

Yes, a state's regulation of the time, place, and manner of elections is restricted *by the limits imposed by the federal Constitution itself*—in the same manner as

Congress's "backup power to regulate details of congressional elections." Common Cause Br. 13. But it does not follow that *States* have the authority, through the adoption of their own constitutions, to trump the federal Constitution's decision to place the power to regulate elections *in each states' legislature* rather than their courts. The governing principle on this point does not come from *Marbury*, it comes from *McCulloch*. *See McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316, 426 (1819) ("Th[e] great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.").

The Harper Respondents' reliance on Section 2 of the Fourteenth Amendment fails for similar reasons. Section 1 of that Amendment guarantees "the equal protection of the laws," and Section 2 then provides that when "the right to vote" for federal representatives is "denied . . . or . . . abridged," the State's representation in Congress "shall be reduced" proportionally. U.S. CONST. amend. XIV, § 1, 2. Applicants have never disputed that the federal constitution's own guarantee of equal protection constrains state legislatures when regulating the time, place, and manner of elections—nor that this express constitutional limitation may be enforced by the courts.[2]

[2] The Harper Respondents' citation to *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964), for the anodyne proposition that federal Equal Protection challenges to districting decisions are justiciable is thus utterly irrelevant. So is the holding in *Growe v. Emison* that federal courts should defer to state courts that are crafting new congressional districts to replace districts found unconstitutional under the Fourteenth Amendment. 507 U.S. 25, 27, 32 (1993).

2. Respondents' brief discussion of history gets them no further. They claim that "[s]ince the founding of the country there has been an unwavering practice of state constitutions regulating federal elections," Harper Br. 18, based on the constitutions adopted by four States in the first decade of the Republic: Georgia, Pennsylvania, Delaware, and Kentucky, Common Cause Br. 14–15. Three of those four constitutions—those of Georgia, Pennsylvania, and Kentucky—do not even conceivably show such an "unwavering practice," since they merely provide that "all elections shall be by ballot"—a general rule that in context is best read as applying to all *state* elections (for the state offices that those constitutions themselves establish) rather than *federal* elections (which none of these three Constitutions mentions at any point). *See* GA. CONST. art IV, § 2 (1789) (providing that "[a]ll elections shall be by ballot" and, in the same clause, providing for the "appointments of State officers"); PENN. CONST. art. III, § 2 (1790) ("All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*."); KY. CONST. art III, § 2 (1792) ("All elections shall be by ballot.").

That leaves Delaware's constitution. That document provided that "[t]he representative, and when there shall be more than one the representatives, of the people of this State in Congress, shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." DEL. CONST. art. VIII, § 2 (1792). But because the only regulation of the place or manner for state elections *actually prescribed* by the constitution was the rule that "[a]ll elections of governor, senators, and representatives shall be by ballot," *id.* art. IV, § 1,

it left the state legislature with near-complete freedom to "prescribe" the "Regulations" governing the "Times, Places and Manner of holding Elections" for Congress—subject only to the constraint that voting be by ballot and that whatever other specific regulations it did adopt, the legislature *also* had to apply to *state* elections. This minor constraint on legislative power is not in the same galaxy as the authority claimed by the courts below: the power to nullify and replace the legislature's district maps by judicial fiat, based on "political, not legal" standards, *Rucho*, 139 S. Ct. at 2500, espied from somewhere within an open-ended state-constitutional guarantee that elections should be "free."

Accordingly, none of Respondents' snippets of historical evidence supports their understanding of the Elections Clause as allowing States to nullify the Constitution's delegation of the power to regulate congressional elections in each State to "the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, rather than some other State entity.

3. Finally, Respondents' claim that accepting Applicants' Elections Clause argument "would require this Court to overrule a century of precedent," Common Cause Br. 20, is based on a blatant misreading of multiple of the Court's cases. Properly understood, this Court's precedent does not *foreclose* Applicants' reading of the Elections Clause, it *cements* it.

a. The Court first encountered the Elections Clause in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). The case arose out of a 1915 "act redistricting the state for the purpose of congressional elections," which was disapproved by popular

referendum. *Id.* at 566. The plaintiffs in the case challenged the referendum as invalid on the basis that "the referendum vote was not and could not be a part of the legislative authority of the state," and accordingly that the state-constitutional provision "mak[ing] the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void." *Id.* at 567. The Court rejected the challenge.

It viewed the issue "from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States." *Id.* As to the validity of this application of the referendum as a matter of Ohio's "Constitution and laws," the Court held that "the decision below" in the Ohio Supreme Court upholding the challenged use of the referendum "is conclusive." *Id.* at 568. With respect to "the power of Congress," the Court cited legislation establishing Congress's view "that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id.* And with respect to the constraints imposed by the U.S. Constitution itself, the Court reasoned that the plaintiffs' challenge "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power," an assumption the Court rejected. *Id.* at 569.

Common Cause cites *Hildebrant*, but it only quotes the Court's resolution of the *first* of these issues: whether the exercise of the referendum to nullify a legislature's district map was consistent with *state* law. Common Cause. Br. 17. That

is understandable, because the fact that the Court *even addressed* the second two questions *refutes* Respondents' interpretation of the Elections Clause. If, as Respondents say, the Elections Clause's reference to each State's "Legislature" were implicitly limited to the legislature as "constrained by its state constitution," the *only* question in *Hildebrant* would have been whether Ohio's constitution authorized the challenged use of the referendum power. If it did, it would necessarily follow from Respondents' interpretation of the Elections Clause that there could be no colorable challenge. The fact that the Court, after concluding that the use of the referendum was consistent with Ohio law, *went on* to determine whether it *was also* consistent with the Elections Clause clearly shows that this provision places independent limits on a State's ability to constrain, through its constitution, its legislature's exercise of the delegated power over the time, place, and manner of elections.

b. This principle is set forth even more clearly in the Court's next Elections Clause case, *Smiley v. Holm*, 285 U.S. 355 (1932). As discussed in our stay papers, *Smiley* concerned the Minnesota Governor's veto of the state legislature's districting plan. This Court upheld that use of the veto power—but it did so *only* because it found that subjecting the legislature's exercise of the power delegated by the Elections Clause to a gubernatorial veto "as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority." *Id.* at 368.

Smiley is fatal to Respondents' interpretation of the Elections Clause. Again, if Respondents were correct that the Elections Clause's delegation of power must be subject to whatever restraints a State's constitution may impose, then the Court's

lengthy discussion of whether the veto properly constituted a part of the lawmaking power delegated by the Clause was little more than a waste of everyone's time—the Court could have disposed of the case with the simple observation that the state constitution authorized the veto.

Respondents point to the language in *Smiley* explaining "that a state legislature exercising its authority under the Elections Clause . . . must act 'in accordance with the method which the state has prescribed for legislative enactments.' " Common Cause Br. 17 (quoting *Smiley*, 285 U.S. at 367). Nothing in this language supports their view. By its plain text, all this passage establishes is that a state legislature acting pursuant to Article I, Section 4's delegation must do so "in accordance *with the method* which the state has prescribed"—that is, it must act through whatever procedure "in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 367, 368 (emphasis added). Regardless of how the actions of the courts below in creating and imposing their own districting map might be described, one thing is clear: it was not an exercise of "the method" under which North Carolina's constitution "has provided that laws shall be enacted." *Id.* at 367, 368; *see also Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (upholding New York's use of the veto in districting legislation on the authority of *Smiley*); *Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (upholding Missouri's use of the veto in districting legislation on the authority of *Smiley*).

Accordingly, while *Smiley* ultimately upheld the state rule that districting decisions are subject to the veto, it did so based on reasoning that is fatal to the

actions of the state courts below. Respondents cannot have the result in *Smiley* without the reasoning.

c. Respondents' reliance on this Court's more recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), is misplaced for the very same reason. That case, just like *Smiley*, concerned the definition of a State's "lawmaking processes"—and, in particular, whether it encompassed lawmaking by initiative. *Id.* at 824. The Court divided over the answer to that question, but the Court apparently was unanimous in the premise: that if lawmaking by initiative *could not* be said to be a part of the State's lawmaking process, Arizona's redistricting commission would be in contravention of the Elections Clause. This is illustrated by the Court's statement—in the one passage of the opinion Respondents repeatedly quote—that "Nothing in that 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." *Id.* at 817–18. That statement was in support of the proposition that "[w]e resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives *as an alternative legislative process*." *Id.* at 817 (emphasis added). The case does not hold that a state constitution may impose *open-ended substantive* limits on a State's legislative power to be enforced by the State's courts.

d. Respondents next attempt to support their view by tweezing a single sentence of dicta from the tail-end of this Court's decision in *Rucho*. There, after

concluding that claims of partisan gerrymandering were non-justiciable under the federal Constitution, the Court noted that this conclusion did not "condemn complaints about districting to echo into a void," since States potentially possessed a variety of alternative tools to address the problem, including adopting legislation prohibiting partisan favoritism, "placing power to draw electoral districts in the hands of independent commissions," and enacting "[p]rovisions in state statutes and state constitutions [that] provide standards and guidance for state courts to apply." 139 S. Ct. at 2507–08.

Respondents seize on this last suggestion, going so far to claim that it "eviscerates Applicants' argument." Common Cause Br. 20. That is obviously not so, for this passage from *Rucho* is the purist of dicta. *Rucho* nowhere addresses the Elections Clause limits at issue in this case—a fact that is alone fatal to the Harper Respondents' claim that this passage somehow "was essential to *Rucho*'s holding." Harper Br. 14. The passage came at the very end of the opinion, *after* the Court had explained and defended its holding, in a section that merely discussed the policy implications of that holding. Indeed, *the Court itself declared* that the passage was dicta. After floating these potential routes for curbing partisan gerrymandering, including the passage cited by Respondents, the Court expressly said that "[w]e express no view on any of these pending proposals." 139 S. Ct. at 2508. It is hard to see how *Rucho* "eviscerates Applicants' argument," Common Cause Br. 20, when the only passage even potentially touching on the argument avowedly "express[ed] no view" on the matter, *Rucho*, 139 S. Ct. at 2508.

e. Finally, Respondents cite a potpourri of additional precedents that supposedly "foreclose" Applicants' Elections Clause claim. Common Cause Br. 15–16. They do nothing of the kind.

Common Cause argues that Applicants' Elections Clause claim is somehow in tension with the cases establishing that "federal courts must defer to state court interpretations of state statutes," arguing that "adopting Applicants' constitutional interpretation would preclude state-court review of legislative action on redistricting, to be replaced by federal-court oversight." Common Cause Br. 15–16 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). These cases are completely irrelevant. Applicants are not arguing that state constitutions may impose open-ended, substantive limits on a state legislature's use of the Elections Clause power so long as they are enforced by *federal* courts rather than state courts; we are arguing that state constitutions may not impose such limits *at all*.

Finally, the Harper Respondents string together several snippets of dicta from this Court's decisions in *Arizona Independent Redistricting Commission* and *Branch v. Smith*, 538 U.S. 254 (2003), in an effort to show that "Congress has mandated that states' congressional districting plans comply with substantive state constitutional provisions and it has authorized state courts to adopt remedial plans." Harper Br. 19. Not so.

Both cases concern 2 U.S.C. Section 2a(c), which provides that if apportionment results in "a decrease in the number of Representatives and the number of districts in [the] State exceeds such decreased number of Representatives,"

those Representatives shall be elected "from the State at large" "[u]ntil [the] State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c)(5); *see Arizona Independent Redistricting Commission*, 576 U.S. at 812 (noting that the other provisions of Section 2a(c) are unconstitutional). Seizing on the *Branch* plurality's interpretation of the statutory phrase "the manner provided by the law [of the State]" as encompassing "the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles,' " 538 U.S. at 277–78 (plurality) (internal citations omitted), Respondents conclude that unless a state's congressional plan complies with the substantive provisions of the "State's . . . constitution," *id.* Section 2a(c)'s default procedures kick in. And that, Respondents say, amounts to a Congressional "mandate[ ] that states' congressional districting plans comply with substantive state constitutional provisions." Harper Br. 19, 20.

This argument suffers from multiple independent problems. First, the *Branch* plurality's interpretation of the phrase "manner provided by [State] law" as including a state's constitutional provisions governing districting was offered in the course of explaining the "role for *federal* courts in redrawing congressional districts," 538 U.S. at 277 (emphasis added); it is far from clear that the plurality meant, by this passage, to establish a substantive limit on the types of state redistricting plans that suffice to avoid Section 2a(c)(5)'s at-large default. Second, even if it did, that limit would only apply in the circumstance where a state's allotment of Representatives has decreased—a circumstance not presented here. And third, even assuming that

Congress can and did require in Section 2a(c) "that states' congressional districting plans comply with substantive state constitutional provisions" in that narrow circumstance, Harper Br. 19, that would have *no* implication for the entirely distinct question presented in this case: whether *state courts can seize the power to mandate such compliance on their own*.

Respondents also point to the language in *Branch*, repeated in *Arizona Independent Redistricting Commission*, to the effect that Section 2a(c)'s reference to redistricting "in the manner provided by [state] law" "can certainly refer to redistricting by courts as well as by legislatures." 538 U.S. at 274. That statement, however, in no way contradicts Applicants' Elections Clause argument. For the state-court redistricting referred to in *Branch* was redistricting designed to remedy "a failure to redistrict constitutionally" in violation of the federal constitution's prohibition of malapportionment. *Id.* at 270. Again, we concede that state courts have a legitimate role in enforcing *federal* constitutional limits on congressional districting.

C. The General Assembly Has Not Delegated Its Elections Clause Authority to the State Courts.

Respondents next argue that the actions of the courts below do not offend the Elections Clause because "[t]he North Carolina legislature, in its enactments, has decided to include its own state courts as part of its election administration and operation, including in congressional redistricting." Common Cause Br. 22. But even if a state legislature *could* willingly delegate away the substantive power conferred upon it by the Elections Clause—a momentous constitutional question which this

Court should avoid if possible—it plainly has not done so through the civil procedure statutes cited by Respondents.

Respondents point to two different North Carolina statutes in support of their delegation argument: first, a venue statute providing that "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel," N.C. Gen. Stat. § 1-267.1(a); and second, a statute governing the remedy in such a challenge, providing that an "order or judgment declaring unconstitutional or otherwise invalid . . . any act of the General Assembly that apportions or redistricts State legislative or congressional districts" must be based on specific factual findings and legal conclusions and may "impose an interim districting plan . . . only to the extent necessary to remedy any defects identified by the court," *id.* §§ 120-2.3, 120-2.4(a1). Nothing in these statutes purports to delegate the legislature's substantive power under the Elections Clause. To the contrary, these statutes plainly do no more than govern the *procedure* that applies in whatever districting challenges may be authorized by other, substantive provisions of law.

Nor does the fact that the General Assembly established procedural rules governing challenges to districting plans mean that it must have viewed the state courts as having the substantive power under the state constitution to nullify, and replace, the plans that it enacts pursuant to the Elections Clause. Respondents assume that these Acts' reference to a lawsuit "declaring unconstitutional" the

legislature's "congressional districts" must refer to a lawsuit brought on *state constitutional* grounds, such as the one below. But state courts are open to hear *federal* constitutional challenges to congressional districts, *see generally Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990), and Applicants have never disputed that such challenges may be brought consistent with the Elections Clause. The state laws cited by Respondents are best read as merely laying out the procedures that govern such a federal constitutional challenge brought in state court. And so read, they say *nothing at all* about challenges on *state* constitutional grounds—and they certainly do not affirmatively delegate to the courts the power to hear such challenges.

Finally, Respondents also seek support for their delegation argument in the legislature's enactment of the 1971 state constitution, which they claim "specifically provides for the state judiciary's role in matters like this one" by including the free elections clause relied upon below as well as the general provisions vesting the state courts with jurisdiction. Harper Br. 24–25. As with the civil procedure laws just discussed, Respondents' attempt to wring a delegation of power from these constitutional provisions—which do not so much as mention the Elections Clause or the legislature's power to regulate the time, place, and manner of elections—strains them beyond the breaking point. And in any event, as Respondents concede, while the 1971 Constitution was "enacted"—i.e., proposed—by the General Assembly, it was not effective until "approved by voters." Harper Br. 24. Accordingly, it is simply not an example of a direct delegation of power enacted by the legislature itself.

D. Respondents' Policy Arguments Fail To Persuade.

Unable to find support in the text and history of the Elections Clause, or this Court's precedent interpreting it, Respondents launch a parade of horrible policy outcomes that will supposedly result from enforcing the Clause as written. None of them justifies ignoring the clear constitutional text.

Respondents trot out a grab bag of other "state constitutional provisions" governing elections, from the "free" and "fair" elections clauses in other States and state constitutional protection of the right to vote, to "provisions that substantively restrict the drawing of congressional districts by providing criteria with which state legislatures must comply in drawing districts." Harper Br. 26–28. The most fundamental problem with Respondents' argument on this score is its suppressed premise: that while *judges* may be trusted to set the rules of the road for congressional elections, *state legislatures may not*. The Constitution proceeds on precisely the opposite premise: that the branch of government "nearest to the people themselves" is the safest guardian of the people's fundamental right to vote. Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 253, 254 (Philip B. Kurland & Ralph Lerner eds., 1987). Or as this Court put the point in *Rucho*, "The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." 139 S. Ct. at 2496. The system that results is not "unfathomable," Harper Br. 27, *it is a democratic republic*.

In any event, this Court need not reach the questions raised by Respondents' parade of horribles to decide this case. For it is one thing for a State to effectively sub-delegate to the courts the power to enforce specific and judicially manageable standards such as a "require[ment] that congressional districts be contiguous and compact." Harper Br. 28. It is quite another for it to give the state judiciary the authority to find, hidden within the folds of an open-ended guarantee of "free" or "fair" elections, rules governing the degree of "permissible partisanship" in redistricting—a matter that this Court has held to be "an unmoored determination" that depends on "basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500–01 (quotation marks omitted). This Court in *Rucho* squarely held that any attempt to answer this "unmoored" question is an exercise in politics, not law—that is to say, it is a *quintessentially legislative* exercise. *Id.* If the Elections Clause places *any* limits on what matters may be parceled out to entities in a State other than "the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1—and this Court's precedents uniformly recognize that it must—then it cannot allow a State's courts to do what was done in this case: discover somewhere within an open-ended guarantee of "fairness" in elections a novel rule requiring partisan criteria to be taken explicitly into account when drawing congressional districts.

Similarly, this case does not present, and the Court need not decide, whether or to what extent a state legislature may delegate "the 'interstitial policy decisions' inherent in overseeing elections" to state executive officials. State Br. 23. It is enough work for the day to hold that the North Carolina General Assembly plainly has not

delegated to the state courts the power to nullify the legislature's congressional district maps.

The Harper Respondents also claim that Applicants' challenge would cast into doubt "procedural requirements in state constitutions," such as "provisions that require a gubernatorial signature" and "quorum requirements." Harper Br. 27. It is difficult to understand how that could even conceivably be so, given that Applicants have *nowhere* questioned this Court's repeated holdings that the Elections Clause leaves to the States such matters concerning "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367.

Finally, the State Respondents argue that Applicants' interpretation of the Elections Clause raises "serious administrability concerns," because if general laws governing voting are valid as to state elections but not federal ones, "elections officials will be left trying to puzzle through how to apply state court decisions that strike down state laws." State Br. 22. It is unclear where the puzzle is: under the Elections Clause, while such state-court decisions may govern state and local elections, if they are based on state-constitutional limitations they may not govern federal elections. While this may cause some awkwardness given the fact that "congressional contests nearly always happen on the same day as other state and local races," *id.* at 22, that matter of convenience cannot trump high constitutional principle.

E. The Court Is Likely To Grant Review.

For all of these reasons, if this Court grants review it is likely to reverse. And Respondents have failed to cast any doubt on the likelihood that this Court will grant review. As set forth in our opening papers, this case presents a lower-court division

of authority over a recurring issue of paramount importance. It is hard to imagine the prospect of review being any higher.

Respondents do not dispute that the issue presented is critically important, or that it will continue to recur until the Court resolves it. They do attempt to diminish the existence of a split, but the attempt fails. Respondents argue that the Eighth Circuit's decision in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), has no bearing on this case, but that is not so. *Carson* squarely held that state legislatures' "plenary authority" under the Electors Clause "is such that it 'cannot be taken from them or modified' even through 'their state constitutions.' " *Id.* at 1060 (quoting *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). That holding not only "provide[s] . . . insight into the issue here," Common Cause Br. 25 n.7, *it decides it*. To be sure, the case involved Article II, Section 1's Presidential Electors Clause, rather than Article I, Section 4's Elections Clause, but Respondents provide no reason why these two clauses—which are identically worded in all relevant respects—should be interpreted differently. Respondents' attempt to sweep aside the earlier state-court decisions we cite fails in equal measure. Common Cause's response to most of these cases boils down to its assertion that they are "flatly wrong"—hardly an argument against the existence of a split. And, again, that some of the cases involved the Electors Clause is not a basis to distinguish them.

II. Prudential and Equitable Factors Favor a Stay.

A. The Urgency of This Matter Is the Result of Actions Beyond Applicants' Control.

Respondents argue that the emergency posture in which this dispute reaches this Court is a basis for denying a stay. This "emergency," however, is due to circumstances beyond Applicants' control. Indeed, the events preceding the application demonstrate the extent to which the executive and judicial branches in North Carolina have worked in tandem to make the General Assembly at best a junior-varsity partner in prescribing the rules for congressional elections in the State.

Throughout this litigation, North Carolina's executive branch, speaking through the State Board, has informed the State's courts what it views as the feasible timeline for running the 2022 primary election. In turn, the North Carolina courts have scheduled their proceedings to consume the window of time that the State Board has suggested, leaving an unnecessarily short window for this Court's review (indeed, *too* short a window, in Respondents' telling).

The State Board has even imposed some delays directly. By the State Board's own account, "[a]s soon as the North Carolina Supreme Court acted last week, state and county elections officials began the technical work" of geocoding, but to do so, "they had to remove the prior coding" of the General Assembly's original maps "and start over." State Respondents' Br. At 2–3. The State Board now asserts that "[a] stay from this Court would require all of the congressional geocoding work to be undone and redone once more." *Id*. This simply means that the State Board *chose* to delete the earlier maps from its system (apparently without saving a backup), even before

Applicants had filed their emergency application with this Court, let alone received a decision from it. At the very least, the State Board was obligated to take steps to preserve the geocoding work previously performed so it could be reinstated if this Court so ordered.

Meanwhile, Applicants have acted in good faith throughout these proceedings to avoid the urgent review now required. On January 19, 2022, the General Assembly passed House Bill 605, "An Act to Set the Date for the 2020 Primary as June 7, 2022." The bill inserted an additional three weeks into the primary season—providing additional time for meaningful appellate review of the state courts' decisions in these cases. Yet, the Governor vetoed the bill, stating that it was "an additional attempt by Republican legislators to control the election timeline" (heaven forbid) when instead, "the North Carolina Supreme Court . . . should have the opportunity to decide how much time is needed to ensure that our elections are constitutional."[3]

The Governor's veto thus allowed the North Carolina Supreme Court to control not only the date of the primary election but also the date that maps for the primary would be finalized. The North Carolina Supreme Court then set the date for approving remedial maps as February 23, 2022—exactly one day before the candidate filing window was set to open. Now Respondents argue that there is no time for this Court to grant a stay, since candidates are already filing under the court-imposed, judicially crafted remedial maps. These, of course, are the very same maps that North Carolina courts put into effect on the literal eve of candidate filing.

[3] Gov. Roy Cooper, *Objections & Veto Message* (Jan. 28, 2022), *available at* https://bit.ly/3vCSC4g.

This it is not the first time something like this has happened in North Carolina. Applicants currently are seeking to intervene in litigation over North Carolina's voter ID law (the intervention issue is pending before this Court). In that litigation, the State Board informed the federal district court that it would "need to be informed" of any order enjoining the voter ID law "by December 31, 2019, at the very latest," to implement the injunction for the 2020 primary. *See* Affidavit of Karen Brinson Bell ¶ 40, *North Carolina State Conference of the NAACP v. Cooper*, No. 1:18-cv-01034 (M.D.N.C. Oct. 30, 2019), Doc. No. 97-9, at 14. The district court then entered a preliminary injunction on December 31. *See North Carolina State Conference of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019), *reversed by North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). The State Board appealed but declined to seek a stay, explaining to the Fourth Circuit that it "did not seek to stay the district court's preliminary injunction due to the disruptive effect such relief would have had on the primary election scheduled for March 3, 2020." Brief of Defendants-Appellants at 16 n.8, *North Carolina State Conference of the NAACP v. Raymond*, No. 20-1092 (4th Cir. March 9, 2020), Doc. No. 34.

If this Court declines to issue a stay on timeliness grounds, it will provide a playbook for litigants and lower courts to shield decisions from effective review in this Court. State courts will know that they can insulate themselves from federal review so long as they extend their deliberations to the limit of whatever timing the state executive says is feasible.

Respondents even argue that Applicants "unduly delayed" this application by participating, for a period of less than three weeks, in the remedial process prescribed by the North Carolina Supreme Court—in the hopes of obviating the need for an emergency proceeding before this Court *at all*. According to the General Assembly's expert's calculations, the remedial congressional plan the General Assembly crafted scored within the North Carolina Supreme Court's guidance for presumptive constitutionality according to key statistical metrics, *see* Legislative Defs.' Objs. to Pls.' Proposed Remedial Plans and Mem. in Further Supp. of the General Assembly's Remedial Plans at 5–6, *North Carolina League of Conservation Voters v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct. Feb. 21, 2022), *available at* https://bit.ly/3HIsp6u, and it would have been one of the most competitive congressional plans in the nation, *id.* at 23–24. Yet the North Carolina courts still rejected the plan and imposed one of their own devising. Applicants should not be faulted in this Court for their good faith attempt to convince the state courts to allow them to *actually exercise* the power given them by the Elections Clause.

Respondents further argue that Applicants should have immediately sought a stay from the North Carolina Supreme Court from that court's February 4 order and February 14 opinion. But that essentially is a reprise of the argument that Applicants immediately should have sought review in this Court rather than participating in the brief remedial proceedings and fails for the same reasons. Nor was it necessary for Applicants to seek a stay to preserve the possibility of relief from this Court. As we have explained, the maps that would take effect if this Court grants relief are the

original maps enacted by the General Assembly, which were the operative maps before the North Carolina Supreme Court struck them down. To the extent Respondents are suggesting that we should have sought a stay of the order and opinion in the North Carlina Supreme Court *after* the remedial proceedings but *before* seeking a stay in this Court that course of action, which almost certainly would have been futile, would only have *extended* the duration of this litigation, when Respondents already claim there is insufficient time left for this Court's review as it is.

B. The *Purcell* Principle Demands a Stay Be Issued.

Respondents repeatedly invoke the long-established *Purcell* principle. They are right that the principle applies here, but they are wrong about the result. In fact, *Purcell* demands that a stay be issued.

Respondents argue that the *Purcell* principle does not apply to federal review of state court decisions, but that legalistic interpretation ignores that *Purcell* elucidates a *principle*, and one that holds fast whether the intervening decision comes from a state or a federal court: "When an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 595 U.S. ---, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring); *see Purcell v. Gonzalez,* 549 U.S. 1, 5 (2006). As *Purcell* recognized, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," with the risk increasing "[a]s an election draws closer." *Purcell*, 549

U.S. at 4–5. Court orders have that effect whether they come out of a federal or state courthouse.

Here, it is not Applicants who seek to "swoop in and re-do a State's election laws in the period close to an election," but rather, it is the North Carolina state courts that have done so. *Merrill*, 142 S. Ct. at 881 (Kavanagh, J., concurring). The status quo that Respondents so vigorously defend is a judicially created map imposed a mere *eight days* ago. It is that late-breaking map that constitutes a last-minute intervention in a state election, not any action of Applicants. The state courts' eleventh-hour intervention would be unreviewable if it did not implicate federal law. But the North Carolina courts' newly minted map challenged here dictates *congressional* districting, and the U.S. Constitution's Elections Clause establishes a state *legislature*'s responsibility for congressional districting. That is a federal question entrusted to this Court's enforcement, yet the North Carolina state courts have attempted to cut off any period for this Court's review whatsoever. Judicial tinkering that is so last-minute that it forecloses appellate review is precisely the kind of judicial maneuver that the *Purcell* principle disallows.[4]

[4] Some Respondents argue that even if the *Purcell* principle applies, they have overcome it. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (explaining that the *Purcell* principle as "not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its elections laws and procedures."). Not so. As we explain: (1) The underlying merits are clearcut in Applicants' favor. (2) Applicants would suffer irreparable harm absent a stay because the election, once conducted under unconstitutional maps, cannot be undone. (3) Applicants have not unduly delayed bringing this application; indeed, they filed a mere two days after the state courts concluded their review. (4) Time exists to conduct the election under the legislatively enacted congressional map.

C. North Carolina's Elections Will Not Be Unduly Disrupted If This Court Grants a Stay.

Respondents argue at length that no time remains for this Court to both issue a stay and also permit the orderly administration of North Carolina's elections, but that is incorrect.

While March 4 is *currently* designated as the last day for candidate filing, the State Board has previously stated that it can accommodate a candidate filing deadline as late as March 15. In a supplemental affidavit filed in the state trial court earlier this year, the Executive Director of the State Board of Elections stated that "candidate filing must conclude, at the latest," not on March 4, but "on **March 15, 2022**, if absentee ballots are to be distributed 45 days prior to the primary." State Board App. 24 (emphasis added).

Respondents further rely on the Director's affidavits to establish the immediacy of their alleged timeline, yet they fail to acknowledge that the Director provided her assessments of timing and feasibility at a time when *all* of North Carolina's maps were under challenge, including not only the congressional map but also the maps for state-level offices. Accommodating multiple map changes would require more time. Now, however, only the congressional map is in play, and less time will be needed to accommodate changes to that map than if all of the maps were to be changed. The Board Director has explained, for example, that "[t]he amount of time required for geocoding generally corresponds to the number of district boundaries that are redrawn within the counties." State Board App. 7. When she expected "most counties" to experience such changes "*including state legislative, congressional, and*

local jurisdiction districts," the Board Director estimated that geocoding would take "at least 21 days (including holidays and weekends) for the 2022 primary." State Board App. 7 (emphasis added). With only 14 congressional districts affected by a map change, however, the geocoding burden will be dramatically less and presumably can be completed in fewer than the 21 days the Director previously estimated. Indeed, the district boundaries for state-level races have been finalized since February 23 and geocoding for those districts presumably has been underway since then.

The same is true of ballot preparation and proofing. The Director previously estimated that these actions would require between 17 and 21 days, "depending on the number of ballot styles to prepare, which largely depends on the degree of change to intracounty district lines." State Board App. 7. The degree of change that is possible now, however, is much less than at the time the Director made this estimate. Having fewer changed districts reduces the time that the State Board requires to adjust and prepare for the 2022 primary.

Even if the Board's election preparations were to exceed expectations (and nothing suggests that they would), the Director may request a waiver of the requirement that absentee ballots be made available 45 days before a primary election, a waiver that federal law explicitly authorizes where "[t]he State has suffered a delay in generating ballots due to a legal contest." 52 U.S.C. § 20302(g)(2)(B)(ii); *see* State Board App. 23 (federal law "requires that absentee ballots that include elections for federal office be made available by 45 days before a

primary election, *see* 52 U.S.C. § 20302(a)(8)(A), unless I request a waiver of this requirement based on a legal contest delaying the preparation of ballots").

Moreover, as a final backstop, the North Carolina General Assembly, of which Applicants are leaders and members, remains in session and available to pass legislation as necessary to adjust existing deadlines and accommodate an orderly election procedure.

D. Irreparable Harm, the Balance of the Equities, and the Public Interest Favor a Stay.

For the same reasons outlined in the Application, the remaining equitable factors favor a stay here: Applicants will be irreparably harmed absent a stay, and the balance of equities and public interest favors a stay. To be sure, the analysis of these factors is bound up with the merits of the legal issues this Application presents, but because the merits strongly favor Applicants, the remaining equitable factors do as well.

Irreparable harm. An election, once conducted, is a bell that cannot be unrung. The 2022 primary will take place in North Carolina, and if the judicially imposed congressional maps are in place, Applicants and the State of North Carolina will have suffered an injury that cannot be repaired. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Balance of the equities. As shown, Applicants have worked in good faith at every turn to ensure that this Court would have a meaningful ability to review the federal constitutional conclusions reached by the North Carolina state courts. Any delays have arisen not by Applicants' fault, and time exists for the State Board to run

an orderly election if this Court grants a stay, reverting back to the original General Assembly maps.

Public interest. The public's interest continues to lie in having congressional elections conducted according to districts set by the state legislature, as the U.S. Constitution requires. Failing to grant a stay here will impose a set of unconstitutional congressional maps on the people of North Carolina. That is particularly egregious where the public participated extensively in drafting the original General Assembly maps but played no part in crafting the remedial map that the court ultimately selected.

CONCLUSION

Applicants respectfully ask this Court to stay the decisions of the North Carolina Supreme Court and state trial court pending a forthcoming petition for writ of certiorari and, should certiorari be granted, resolution of the merits.

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Respectfully submitted,

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