No. 25A608

IN THE

Supreme Court of the United States

GREG ABBOTT,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, ET AL.,
APPLICANTS,

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
RESPONDENTS.

BRIEF OF *AMICUS CURIAE* STEPHEN M. SHAPIRO IN SUPPORT OF RESPONDENTS ON THE EMERGENCY APPLICATION FOR STAY AND ADMINISTRATIVE STAY PENDING APPEAL

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INTEREST OF THE *AMICUS*[1]

Amicus Stephen M. Shapiro lives in Maryland. His interest is in vindicating rights that preserve effective representation for himself and other voters. In 2013, he led a bipartisan group of voters who filed the original pro se complaint in what became *Lamone v. Benisek*, which was ultimately decided by this Court along with *Rucho v. Common Cause* in 2019. He was the lead petitioner when *Benisek* was first before this Court as *Shapiro v. McManus* in 2015.

During 2023, *Amicus* expended significant effort engaging leaders of the North Carolina General Assembly in an attempt to convince them to limit the partisan aspects of their congressional district map so as to prevent reciprocal revisions to Maryland's map and those of other states. Those efforts failed, and Maryland's Governor and some leaders of the Maryland General Assembly are now considering a mid-decade revision to Maryland's districts in order to respond to the latest maps enacted in Texas and in North Carolina.

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[1] No person other than the *Amicus* has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

Amicus takes the State of Texas at its word when it contends that it "redistricted the State's 38 congressional districts mid-decade to secure five additional Republican seats in the U.S. House of Representatives." Appl. 1. Texas further speaks the truth when it says that "[o]ther States answered in kind. California is working to add more Democratic seats to its congressional delegation to offset the new Texas districts, despite Democrats already controlling 43 out of 52 of California's congressional seats. Virginia Democrats initiated a constitutional amendment for a mid-cycle redraw." *Id.* The reason for each of these mid-decade redistricting efforts is clear: Each of these legislatures is attempting to impose its preference on the outcome of the 2026 congressional elections so as to influence which party will control the U.S. House of Representatives.

But this Court held in *Cook v. Gralike*, 531 U.S. 510 (2001), that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 523-24 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995)). The regulation at issue in *Gralike* was the design of a ballot.

This Court later held in *Rucho v. Common Cause*, 588 U.S. 684 (2019), "that partisan gerrymandering claims present political questions beyond the reach of the

federal courts." *Id.* at 718. This Court in *Rucho* rejected the premise that the Elections Clause limits the ability of legislatures to favor its preferred candidates in the context of drawing congressional district maps. *Id.* at 717 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004)).

But this Court in *Rucho* did not discuss let alone overrule *Gralike*. Thus, both decisions must be read together: The Elections Clause does not afford legislatures the authority to dictate electoral outcomes or to favor their preferred candidates. While a claim that a legislature has exceeded its Elections Clause authority is generally actionable, the federal courts lack the means to determine when a legislature has exceeded its Elections Clause authority in drawing specific congressional districts.

This Court need not undertake a review of the specifics of the challenged Texas congressional districts in order to determine that the entire undertaking—the mid-decade redistricting done solely and explicitly "to secure five additional Republican seats in the U.S. House of Representatives"—exceeded the legislature's Elections Clause authority. The violation under *Gralike* is clear, and this Court and lower courts can readily determine that without treading into waters precluded by *Rucho*.

While this Court can decide this case without revisiting its decision in *Rucho*, it is clear that *Rucho* has encouraged the scramble we see in many state legislatures to alter their congressional maps so as to influence or further influence the outcome of

the 2026 congressional elections. Appl. 1 (citing *Rucho*). It would be appropriate for the Court to revisit *Rucho* in light of this scramble, and the tension between *Rucho* and *Gralike*—particularly if the Court determines that *Gralike* cannot apply here in light of *Rucho*. A legislature's abandonment of traditional districting criteria can, if properly applied, serve to mark when a legislature's favoring its preferred candidates becomes actionable under *Gralike* in the context of a congressional district map.

Amicus is providing this brief in case the Court considers the Emergency Application as a Jurisdictional Statement, as Applicants encourage the Court to do. *Amicus* does not doubt the racial gerrymandering infirmities found by the court below, but is confident that Respondents will fully address those issues.

ARGUMENT

I. This Court properly held in *Cook v. Gralike* that a state legislature exceeds its authority to regulate congressional elections when it thereby favors its preferred candidates.

> The House of Representatives shall be composed of *Members chosen* every second Year *by the People* of the several States * * * .

U.S. Const. art. I, § 2 (emphasis added).

> 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 * * * .

U.S. Const. art. I, § 4 (emphasis added).

A state legislature exceeds this regulatory authority when its regulations "dictate electoral outcomes" or "favor or disfavor a class of candidates." *Cook v. Gralike*, 531 U.S. 510, 523-34 (2001) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34). Article I, Sections 2 and 4, are closely linked. Thus a legislature exceeds its Section 4 authority to regulate when it arrogates to itself a Section 2 role that is reserved for voters as to the selection of Representatives. Rather, Article I, § 4 mandates a duty to enact "procedure and safeguards * * * necessary * * * to enforce the fundamental right involved." *Gralike*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). This "fundamental right" is, of course, the voters' right to choose Representatives. *See Smiley*, 285 U.S. at 366 (characterizing Article I, § 4 as "embrac[ing] authority to provide a complete code for congressional elections).

"Nothing in the Constitution or The Federalist Papers, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *U.S. Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring). *See also id.* (quoting, inter alia, *United States v. Classic*, 313 U.S. 299, 315 (1941) ("The right of qualified voters

within a state to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution" and "is secured against the action of individuals as well as of states.").

This division of authority among a state's legislature and its voters, as laid out in *Gralike* and *U.S. Term Limits*, is reinforced by the Privileges or Immunities Clause:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

U.S. Const. amend. XIV, § 1, cl. 2.

The Privileges or Immunities Clause explicitly reinforces those cases—protecting voters' Article I, § 2 representational rights in full, from any abridgment done through a state's use of its limited Article I, § 4 authority, or through any reserved powers a state could apply in either designing congressional districts or in support of any other state action that directly or indirectly causes such harm. U.S. Const. amend. XIV, § 1, cl. 2; *see U.S. Term Limits*, 514 U.S. at 843-44 (Kennedy, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884)); *Wiley v. Sinkler*, 179 U.S. 58, 62–63 (1900)), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964); *cf. Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) (holding that the rights of political assembly and speech are "a privilege inherent in citizenship of the United States which the Amendment protects").

II. This Court's Ruling in *Rucho v. Common Cause* Should be Read as an Exception to *Gralike* With Respect to Judicial Enforcement

This Court held in *Rucho v. Common Cause*, 588 U.S. 684 (2019), "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 718. The Court noted with disapproval the holdings of the court below that "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts," *id.* at 717, and that "partisan gerrymandering infringes the right of 'the People' to select their representatives," *id.* The Court noted with approval that "the plurality in *Vieth* concluded—without objection from any other Justice—that neither §2 nor §4 of Article I 'provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.'" *Id.* (quoting *Vieth v. Jubelirer*, 541 U. S. 267, 305 (2004)).

The Court did not address its prior decisions in *Cook v. Gralike* or *U.S. Term Limits v. Thornton*, which used language similar to that used by the court below in *Rucho*. Without more, *Rucho* cannot be considered to have overruled either prior decision. And congressional district maps were not at issue in either *Gralike* or *U.S. Term Limits*. Thus the best reading of these three opinions is that while a state legislature infringes on its voters' right to choose Representatives when it regulates congressional elections so as to favor its preferred candidates, such infringement in

the context of drawing congressional districts is not actionable or justiciable in the federal courts due to a lack of standards enabling judicial enforcement.

III. This Court Need Not Examine the Details of the Challenged Map to Determine that the Entire Undertaking Conflicts with *Gralike*

The gist of *Rucho* is that the federal courts are not equipped to determine when a congressional district map *impermissibly* favors candidates preferred by the legislature. 588 U.S. at 718. While this limitation serves to limit judicial analysis of the map recently produced by the Texas legislature, it should not limit this Court from evaluating the entire undertaking as a whole—i.e., a mid-decade redistricting done solely and explicitly "to secure five additional Republican seats in the U.S. House of Representatives." Appl. 1. This requires no analysis of any specific district within the challenged map. But rather, the entire enterprise was undertaken by the Texas legislature so as to favor its preferred candidates and secure them five additional seats. The specific number of seats so secured is not relevant here; a mid-decade redistricting done solely to secure just one additional seat is just as impermissible as an optional redistricting undertaken solely to secure five. The entire undertaking, when viewed as a whole, looks more like the impermissible ballot stricken in *Gralike*. The Court in *Gralike* did not have to analyze the degree to which

the challenged ballot favored or disfavored specific candidates. Such analysis is unnecessary here as well.

IV. This Court Could Establish a Rule to Enable Lower Courts to Determine When a Challenged Congressional District Map Violates *Gralike*

In light of the constitutional infirmities this Court has found outside of the redistricting context when state legislatures attempt to influence the outcome of congressional elections, the Court should revisit current doctrine as to redistricting. Specifically, the Court should undertake further efforts to identify a standard so as to limit the ever-increasing examples of partisan gerrymandering seen since *Rucho*. This could be particularly important here if the Court is reluctant to consider the constitutionality of this mid-decade redistricting effort as a whole, or if the Court does not accept the racial gerrymandering conclusions below.

Amicus suggests that a congressional district map impermissibly favors the legislature's preferred candidates if it disregards traditional districting criteria—i.e., compactness, contiguity, and minimizing splits of counties and municipalities—in pursuit of its partisan goals. Avoiding splits of counties and municipalities is particularly important, as a compact design may well be one designed to specifically favor some candidates over others if it splits cities or towns more than is needed to equalize populations among districts. Such a rule, if properly enforced, would not

lead to a requirement for proportionality. *See Allen v. Milligan*, 599 U.S. 1, 43-44, 44 n. 2 (2023) (Kavanaugh, J., concurring). It would leave legislatures with significant discretion and many permissible options.

The elements of the proposed standard are well known to state legislatures and courts. In the 2010 redistricting cycle, 48 states required legislative or congressional districts to be contiguous, 43 states limited splitting political subdivisions, and 34 states required compactness. NCSL, *Redistricting Law 2010*, at 106-08, Table 8. It should not be an insurmountable task for federal courts to develop the consistency that might be required for national application.

* * * * * *

The ongoing specter of numerous state legislatures that have or are considering whether to undertake a mid-decade redistricting in order to favor their preferred candidates—or to respond to other states that have done so—raises serious constitutional concerns. Nothing in the U.S. Constitution envisions such a battle among state legislatures to determine control of the U.S. House of Representatives.

Amicus respectfully encourages this Court to enforce the U.S. Constitution's allocation of powers among a state's legislature and its voters. See *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (contrasting political and judicial branch duties); *Highland*

Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) (warranting this Court's intervention in "a controversy affecting the structure of the national government as established by the provisions of the national Constitution"); cf. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (Ginsburg, J., concurring) ("The result of staying the judicial hand is to upset rather than to preserve the constitutional allocation of powers between the executive and the legislature."); *id.* at 857 (Kavanaugh, J., concurring).

CONCLUSION

In light of the foregoing, the Court should deny the Emergency Application for Stay and Administrative Stay Pending Appeal. If the Court construes the stay application as a jurisdictional statement, the Court should dismiss the appeal, or note probable jurisdiction and summarily affirm the judgment below.

In the alternative, the Court should order briefing and argument on the following questions:

1. Does a state legislature exceed its authority to regulate federal elections under Article 1, Section 4 of the U.S. Constitution when it designs congressional districts so as to favor its preferred candidates?

2. Does a legislature's disregard of traditional districting criteria—to include compactness, contiguity, and minimizing splits of counties and

municipalities—in order to favor its preferred candidates, afford a standard by which the lower courts could identify when such favoritism becomes actionable and impermissible in the context of congressional districting?

3. Is a mid-decade redistricting that is undertaken for the purpose of favoring candidates preferred by the legislature facially impermissible, as exceeding the legislature's authority under Article 1, Section 4 of the U.S. Constitution?

Respectfully submitted,

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