No. 21-1271

In the
Supreme Court of the United States

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

v.

REBECCA HARPER, *et al.*,
Respondents,

&

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

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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At the stay stage in this matter, after reviewing Petitioners' stay application and over 130 pages of opposition briefing from Respondents, four Justices concluded that "[t]his case presents an exceptionally important and recurring question of constitutional law," and that "the Court should grant certiorari in an appropriate case"—such as "this case from North Carolina"—and "carefully consider and decide the issue next Term after full briefing and oral argument." *Moore v. Harper*, 595 U.S. ---, 142 S. Ct. 1089, 1089 (Alito, J., dissenting from the denial of application for stay); *id.* (Kavanaugh, J., concurring in denial of application for stay). Respondents' briefs in opposition do not bring any new, meaningful arguments to the table, so that conclusion still holds.

I. Respondents advance three threshold arguments against granting review. None has any merit.

A. The decisions appealed from are final judgments over which this Court has jurisdiction. 28 U.S.C. § 1257(a).

Validity of the legislature's original maps. The North Carolina Supreme Court's order of February 4, 2022, and its accompanying written decision of February 14, 2022, struck down Petitioners' original Congressional map and rendered a final judgment regarding the use of that map. No further decision is possible in the North Carolina courts on this issue. This Court has jurisdiction to determine whether the North Carolina Supreme Court's opinion and order invalidating the legislature's original maps violates the Elections Clause. *See, e.g.*, *Market St. Ry. Co. v. Railroad Comm'n of State of California*, 324 U.S. 548, 551

(1945). The finality of this decision alone secures this Court's jurisdiction over this case.

Institution of remedial maps for 2022 election cycle. The petition involves a second final decision. The North Carolina Supreme Court entered an order on February 23, 2022 denying Petitioners a temporary stay of the remedial maps generated by the special master and ordered by the North Carolina Superior Court. That order is a final judgment of North Carolina's highest court with regard to the maps that will govern the 2022 election; indeed, North Carolina's 2022 primary has already taken place using those remedial maps. This Court therefore has jurisdiction to determine whether the North Carolina courts violated the Elections Clause when they generated and implemented maps of their own making for the 2022 election cycle. *See id.*

Several Respondents cite the ongoing appeal in the North Carolina Supreme Court to suggest the decisions below are not final, but that is incorrect. That appeal cannot change the finality of the North Carolina Supreme Court's orders striking down the legislature's original maps and setting the remedial maps that govern the 2022 election. And that appeal cannot set maps for the 2024 election cycle and beyond (despite NCLCV's incorrect assertion to the contrary, BIO at 17), because by operation of North Carolina law, a court-imposed remedial map is effective "for use in the next general election only." N.C. GEN. STAT. § 120-2.4(a1). The Superior Court's judgment reflects this limitation. *See* Pet.App.293a. Moreover, the Harper Respondents have already filed for their costs in the trial court, calling themselves "the parties to whom judgment was awarded"—an admission that

the orders below are final. Harper Pls.' Mot. for Costs at 3, Nos. 21 CVS 015426, 21 CVS 500085 (Wake Cnty. Super. Ct. Apr. 29, 2022). In sum, the litigation that leads to this certiorari petition is final in the North Carolina courts.

B. For two reasons, this controversy is not moot. *See* Common Cause BIO at 33. First, under current North Carolina law, if this Court reverses the North Carolina Supreme Court's February 4 order or February 14 opinion, the legislature's original maps will again take effect. By statute, if "the United States Supreme Court or any other federal court reverses or stays the 4 February 2022 order or 14 February 2022 opinion of the Supreme Court of North Carolina … holding unconstitutional" the original maps, then those original maps will be "again effective." 2022 N.C. Sess. Laws 3, § 2.

Second, even if North Carolina law did not secure a live controversy, the issues here are capable of repetition yet evading review. The "challenged action is in its duration too short to be fully litigated prior to cessation or expiration," as the history of this case amply demonstrates. *Federal Elections Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal citation omitted). This Court could not have heard full merits briefing before the court-imposed maps became *de facto* operational for the 2022 election. There is also "a reasonable expectation that the same complaining party will be subject to the same action again," *id*., because North Carolina has a history of redistricting disputes and the need to set maps for 2024 and beyond means that another such dispute is just around the corner. Yet waiting for that dispute to reach this Court would do nothing but waste time.

The Elections Clause issues will be the same, but likely in an emergency posture again, without time for this Court's merits review.

C. Nor, finally, can Respondents avoid the merits based on Petitioners' supposed forfeiture of the Elections Clause issue. The state procedural rule Respondents cite, 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." But as Respondents are ultimately forced to concede, *e.g.*, State BIO 34, Petitioners *did* "present[ ]" their Elections Clause arguments, over and over again: twice in the trial court, Pet.App.229a, 325a-27a, and three times in the supreme court, *id.* at 321a-23a, 313a-15a, 317a-19a. Respondents cite no authority establishing that Petitioners somehow had to present their claim yet again "at trial," Common Cause BIO 34—*after* the state supreme court had just implicitly *rejected* the claim by enjoining the General Assembly's map in the teeth of the Elections Clause claim. The one case cited by Common Cause, *State v. Grooms*, is unavailing, since it is based on a criminal-trial evidentiary rule that is inapplicable here. 540 S.E.2d 713, 723 (N.C. 2000).

The final blow to Respondents' forfeiture argument is that the North Carolina Supreme Court *addressed the Elections Clause claim on the merits*. Yes, the court stated that the claim "was not presented at the trial court," but 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*

Pet.App.121a-22a. If the argument had been forfeited as a matter of North Carolina procedure, presumably the supreme court would have said so. *See Lilly v. Virginia*, 527 U.S. 116, 123 (1999).

II. "This case presents an exceptionally important and recurring question of constitutional law," *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from the denial of application for stay), and Respondents fail to show that the Court should deny review anyway.

A. As shown in our Petition (at 17-23), there is an enduring division of authority over the question presented. Respondents try unsuccessfully to distinguish the decisions on Petitioners' side of the split seriatim. They assert that *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), is distinguishable because it involved the state legislature's authority under "the Electors Clause," Common Cause BIO 12, rather than the Elections Clause; but Respondents provide no reason why the Electors and Elections Clauses—which are identically worded in all relevant respects—should be interpreted differently. Respondents' attacks on the state-supreme-court decisions on our side of the split fare no better. Their principal response to these decisions is that they are too old, *see* Harper BIO 29; NCLCV BIO 23, but it is unclear why the length of time these precedents have endured should count *against* them.

B. Respondents next claim that "this case is a poor vehicle to consider the question presented because North Carolina statutes enacted by the General Assembly itself authorize state court review of redistricting legislation." Harper BIO 2. 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 here.

Respondents point to two different North Carolina statutes in support of their delegation argument: a venue statute establishing which court may hear "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts," N.C. GEN. STAT. § 1-267.1(a), and a statute providing that any "order or judgment declaring unconstitutional" such an act 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.

Moreover, while Respondents assume that these Acts were meant to apply to—and thus implicitly authorize—lawsuits challenging congressional districts on *state constitutional* grounds, such as the one below, that is far from clear. 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 Petitioners have never disputed that such challenges may be brought consistent with the Elections Clause. These procedural statutes are best read as merely laying out the procedures that

govern such a federal constitutional challenge brought in state court. NCLCV (at 26) assails this interpretation as "absurd[ly]" reading the word "unconstitutional" to have two different meanings, but that is not so—it merely reads the word to mean "unconstitutional" under *whichever constitution is applicable*.

III. Respondents also fail to defend the decisions below on the merits.

A.1. "[I]f the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections." *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from the denial of application for stay). Respondents resist that conclusion, arguing that the Elections Clause's delegation of authority must not be exclusive because the Clause does not include "a word like 'sole,' " Common Cause BIO 25, in contrast to "other constitutional provisions that grant unreviewable power," such the Impeachments Clauses in Article I, Sections 2 and 3, Harper BIO 19. But the Constitution does not invariably use the word "sole," or similar language, when granting exclusive power: no such language appears in the Article I, II, and III Vesting Clauses, for example, yet those grants have long been understood to be exclusive. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 116 (1926).

2. The acts of the courts below amount to a particularly blatant violation of the Elections Clause because they seized the power to override the General Assembly's election regulations not under specific and definite state-constitutional limits, such as contiguousness and compactness requirements, but rather

under vague and abstract language requiring "free" or "fair" elections. Respondents claim that this distinction is "entirely made up," Harper BIO 20, but it flows directly from the nature of the "judicial power"—which must be exercised in a way that is "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).

3. Respondents next attempt to defend the courts below through an extended analogy to federal judicial review: "Just as the federal Constitution" is the 'paramount law' of the federal union, *Marbury* [*v. Madison*, 1 Cranch (5 U.S.) 137, 178 (1803)], state constitutions" are "the fundamental law of the land of each state." Common Cause BIO 17-18 (cleaned up). The key problem with this argument 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. 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*—just like any other power conferred by the Constitution.[1] But it does not

[1] This Court's cases concerning congressional districting challenges under the Fourteenth Amendment, *see Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964); *Growe v. Emison*, 507 U.S. 25, 27, 32 (1993), are thus utterly irrelevant.

follow that *States* have the authority, through the adoption of their own constitutions, to trump the federal Constitution's delegation of authority to *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). Common Cause (at 26) calls this key structural principle "a big 'so what,' " but Chief Justice Marshall obviously did not view the federalist structure established by the Constitution's "most interesting and vital parts" so cavalierly, *McCulloch*, 4 Wheat at 400, and neither should this Court.

B. Turning from text to history, Respondents claim that "several state constitutions in the eighteenth century specifically imposed substantive restrictions on elections, including federal congressional elections." Harper BIO 17-18. Five of the seven constitutions they cite—those of Georgia, Pennsylvania, Kentucky, Tennessee, and Ohio—do not even conceivably support them, since they merely provided 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.

Delaware's constitution 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 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. This minor constraint on legislative power is not in the same galaxy as the authority claimed by the courts below.

Finally, Respondents rely on the provision included in Virginia's 1830 Constitution incorporating the notorious federal "three-fifths" rule in apportioning Virginia's congressional seats. VA. CONST. art. III, § 6 (1830). As an initial matter, this provision was not adopted until more than four decades after the Elections Clause—too late to undermine the meaning that is evident from the Clause's text and contemporary evidence. *See Gamble v. United States*, 587 U.S. ---, 139 S. Ct. 1960 (2019). Moreover, the only recorded discussion of the constitutionality of this provision during the 1830 Virginia convention was one delegate's *objection* that it was "improper[ ] to regulate by the State constitution, any of the powers or duties devolved on the Legislature by the Constitution of the United States."[2] And while that argument ultimately did not prevail, the article cited by Respondents itself explains that the delegates were "less concerned with this constitutional question than with the underlying question of whether slaves would be accounted for in representation."[3] Indeed, the primary *defense* of the clause came from a fiery speech declaring that incorporating the three-fifth's rule into the state constitution would cement Virginia as "a bullwork of the great

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[2] PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30 857 (1830).

[3] Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 101, 142 n.174 (forthcoming 2022), https://bit.ly/3lFzL2c.

Southern interest" against "the fanatical [abolitionist] spirit on this subject of negro slavery."[4]

C. This Court's precedent clinches the unconstitutionality of the courts' actions below, and Respondents' claims to the contrary are all unavailing.

1. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court upheld a referendum establishing congressional districts. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that a state legislature's districting legislation could be subject to the gubernatorial veto. And in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ("*AIRC*"), the Court further held that lawmaking by initiative also could be encompassed within a State's legislative process. All three decisions were based on the conclusion that these respective law-making processes were consistent with the Elections Clause's delegation of power to the state "Legislature" because that delegation implicitly referred to whatever "method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. It necessarily follows that if a state entity interferes with the legislature's election regulations *outside* of the State's prescribed legislative method, it violates the Elections Clause. Respondents insist that judicial review *is* simply another "check in the legislative process," no different from "a governor's veto," Common Cause BIO 28, but our whole understanding of the separation of powers, and the permissible judicial role, is premised on the opposite view.

[4] PROCEEDINGS, *supra*, at 858.

2. Respondents are thus left relying on *Rucho*'s statement that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering cases. 139 S. Ct. at 2507. This passage from *Rucho* is the purist of dicta. Indeed, *the Court itself declared* that the passage was dicta: after floating several potential, alternative 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." *Id*. at 2508.

CONCLUSION

For the foregoing reasons, the petition should be granted.

May 27, 2022

Respectfully Submitted

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