IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico; HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate; MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate; and BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners - Defendants,

v.

HONORABLE FRED VAN SOELEN, Respondent,

and

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR. BOBBY and DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs – Real Parties in Interest;

MAGGIE TOULOUSE OLIVER,

Defendant – Real Party in Interest.

No. _____
District Ct. No. D-506-CV-2022-00041

VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

HINKLE SHANOR LLP
Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
(505) 247-4800

Holly Agajanian
Kyle P. Duffy
Maria S. Dudley
490 Old Santa Fe Trl, Suite 400
Santa Fe, NM 87501
(505) 476-2200

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
(505) 263-2764

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
(505) 266-8042

Attorneys for Mimi Stewart and Brian Egolf

Petitioners Michelle Lujan Grisham, Governor of New Mexico, Howie Morales, Lieutenant Governor of New Mexico (collectively, the Executive Defendants), Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives (collectively, the Legislative Defendants), pursuant to article VI, § 3 of the New Mexico Constitution and Rule 12-504 NMRA, petition this Court to exercise its power of superintending control to resolve the following controlling legal issues in this case:

(1) Whether Article II, Section 18 of the New Mexico Constitution provides a remedy for a claim of alleged partisan gerrymandering?

(2) Whether the issue of alleged partisan gerrymandering is a justiciable issue; and if such a claim is justiciable under the New Mexico Constitution, what standards should the district court apply in resolving that claim in this case?

Absent this Court's intervention and control, although the 2022 election cycle will proceed under the legislatively adopted plan, the State of New Mexico's redistricting and electoral processes, and those state actors charged with ensuring their execution and integrity, remain at risk of unnecessary confusion, challenge, and delay. For the same reasons, Petitioners also request the Court enter a stay of the trial court litigation until resolution of these issues.

I. JURISDICTION

1. The New Mexico Constitution grants the Supreme Court superintending control over all inferior courts. N.M. Const. art VI, § 3.[1] Under such grant, this Court has original jurisdiction to control the course of this redistricting litigation in the trial court. Given that writs may issue to correct any specie of error, Petitioners have also simultaneously filed a *Petition for Writ of Error*, pursuant to Rule 12-503 NMRA, before the Court of Appeals.[2]

2. Although traditionally and prudentially exercised in extraordinary or exceptional circumstances, *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 8, 120 N.M. 619, the Court's power of superintending control is "...unlimited, being bounded only by the exigencies which call for its exercise." *State v. Roy,* 1936-NMSC-048, ¶ 94, 40 N.M. 397 (internal quotation marks and citation omitted). Where appeal affords an inadequate remedy, superintending control prevents imposition of hardship, delay, or expense upon the parties and judicial system while

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[1] N.M. Const. art. VI, § 3 ("The supreme court shall have original jurisdiction...and shall have a superintending control over all inferior courts; it shall also have power to issue ... all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same.")

[2] **Important Disclosure:** Petitioners have filed a Petition for a Writ of Error under Rule 12-503 with the Court of Appeals seeking the same relief. While the question presented in both Petitions may ultimately require final resolution by this Court, Petitioners acknowledge the opportunity for additional appellate examination before final resolution of the significant legal questions presented herein.

settling questions of great public interest and importance "at the earliest moment." *State ex rel. Townsend v. Court of Appeals,* 1967-NMSC-128, ¶ 10, 78 N.M. 71, 74. In these circumstances, the Court should not hesitate to provide prompt and final resolution through issuance of a writ of superintending control. *Griego v. Oliver*, 2013-NMSC-003, ¶ 12 (quoting *Schwartz*, 1995-NMSC-069, ¶ 9).

3. Additionally, where a case presents a purely legal issue of first impression without clear answers, on which this Court may offer guidance to provide certainty and uniformity in the application of the law, the Court has found it proper to exercise its long-standing power of superintending control. *See, e.g.*, *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 30–31.

4. The Court's exercise of its broad power of superintending control in the instant matter is proper because intervention will further the interests of justice, correct manifest error in the lower court, avoid the irreparable injury of burdensome discovery upon the Legislative and Executive Defendants, and provide the plainest, speediest remedy in resolving a matter of substantial public interest. *See In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144(quoting *Albuquerque Gas & Elec. Co. v. Curtis*, 1939-NMSC-024, ¶¶ 10-15, 43 N.M. 234).

II. REAL PARTIES IN INTEREST

5. Petitioner-Defendants Governor Michelle Lujan Grisham, Lieutenant Governor Howie Morales, Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives are named in their official capacities and acting in discharge of their official duties.

6. Defendant New Mexico Secretary of State Maggie Toulouse Oliver is also named in her official capacity and acting in discharge of her official duties.

7. Respondents are Plaintiffs Republican Party of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales, Jr., Bobby And Dee Ann Kimbro, and Pearl Garcia.

8. Proposed Intervenors Larry Marker and the Board of County Commissioners of Lea County, New Mexico filed Motions to Intervene in the trial court. Both motions were denied by an order of the district court.

III. RECORDINGS REQUESTED

9. Petitioners assert that all available opinions, orders, transcripts, or other papers indicating the parties' position on the matter in question are contained in the record below. Additionally, the District Court's April 19, 2022 Letter Decision is

attached hereto as **Exhibit A**, and the District Court's July 11, 2022 *Order Denying Legislative and Executive Defendants' Motion to Dismiss* is attached as **Exhibit B**.

10. Further, as to comply fully with Rule 12-504(B)(2), Petitioners have attached a preliminary copy of their *Petition for Writ of Error*, to be filed in the Court of Appeals, *see* **Exhibit C**, and a copy of the *Petition for Writ of Certiorari* recently granted by the United States Supreme Court in *Moore v. Harper*, No. 21-1271, *see* **Exhibit D**, raising the issue of the independent state legislature doctrine under the federal Free Election Clause, being both necessary and appropriate to inform the Court of circumstances affecting the Petition herein.

IV. BACKGROUND AND PROCEDURAL HISTORY

11. On December 17, 2021, the Governor signed Senate Bill 1 (SB-1) into law, establishing new boundaries for New Mexico's three congressional districts which the Legislature had adopted following a special legislative session devoted primarily to redistricting.[3] Laws 2021 (2nd S.S.), Ch. 2, § 2.

12. Respondents-Plaintiffs filed suit on January 21, 2022, challenging the redrawn boundaries of the congressional districts,[4] asking the district court to declare

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[3] This is the first occasion that the political process enacted a congressional redistricting plan since 1991. The legislature and executive were unable to reach a consensus on congressional redistricting after the 2000 and 2010 census, requiring the courts to enact districting plans for New Mexico congressional districts.

[4] No districting plans involving the New Mexico House of Representatives or the New Mexico Senate are challenged.

that the boundaries of the congressional districts violate the Equal Protection Clause of the New Mexico Constitution and for the district court to impose its own, different boundaries. Plaintiffs' theory does not rely upon the established federal constitutional and statutory principles of equal populations ("one person, one vote") or that of protection of disadvantaged classes. Rather, Plaintiffs argue that their equal protection rights as Republicans under New Mexico's Constitution were violated when, by virtue of the new lines drawn for Congressional District 2 (CD-2), Plaintiffs were allegedly disadvantaged in their ability to elect one of their own.

13. Respondents-Plaintiffs also filed a *Motion for Preliminary Injunction*, seeking to set aside SB-1 and adopt an alternative congressional map for the 2022 election cycle.

14. Petitioners-Defendants opposed the injunction and filed on February 18, 2022, two motions to dismiss asserting that the New Mexico Constitution does not recognize a cause of action for political, or partisan, gerrymandering.

15. After full briefing by the parties and a hearing on both motions, the district court issued separate letter rulings denying both injunction and dismissal, as later followed by formal orders.[5] *See, e.g.*, Ex. A & B.

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[5] With respect to the denial of Plaintiffs' *Motion for Preliminary Injunction*, the letter ruling made clear that "[t]o require a change this late in the game would bring a level of chaos to the process that is not in the public's or the candidate's interest." *See* Ex A, Letter Ruling on Preliminary Injunction at 1-2. Thus, the 2022 election will take place under the plan enacted into law.

16. In denying dismissal, the district court recognized that New Mexico's Equal Protection Clause mirrors that of the Fourteenth Amendment of the U.S. Constitution, and under the interstitial approach, "New Mexico's Constitution will only provide broader protections than the U.S. Constitution if the federal approach is unpersuasive because it is flawed or undeveloped." Ex. B, ¶ 2.

17. The district court also noted, without deciding whether such constitutional grounds exist in New Mexico or the merits of Plaintiffs' case, that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), stopped short of foreclosing "possible court action at the state level where constitutional or statutory grounds may be available to address the issue." Ex. B, ¶ 4.

18. Therefore, noting the North Carolina Supreme Court decision in *Harper v. Hall*, 2022-NCSC-17, 380 N.C. 317, 868 S.E.2d 499 (2022), the district court determined that Plaintiffs' claim, that SB-1 is an unconstitutional political gerrymander diluting Republican votes in alleged violation of the traditional redistricting principles noted in *Maestas v. Hall*, 2012-NMSC-006, and the guidelines in the New Mexico Redistricting Act,[6] states a plausible claim for relief. Ex. B, ¶¶ 6 & 8.

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[6] The district court's Order acknowledged the Petitioners- Defendants' position that *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies only to court-

19. Petitioners-Defendants now request this Court exercise control over the issues identified and rejected or avoided in the district court's July 11, 2022 Order denying the Legislative Defendants' and Executive Defendants' Motions to Dismiss.[7]

V. ARGUMENT

A. Writ of Superintending Control is Necessary for Definitive, Constitutional Resolution of Issues of Great Public Importance

The twin issues of jurisdiction and justiciability were fully briefed and squarely rejected by the district court's denial. *See* Ex. B, ¶¶ 3 & 5. In doing so, the district court put off answering the ultimate question of standards to another day, after the parties will have spent their own (and—as state officials—more accurately the public's) resources and the court's own time and resources litigating unprecedented claims that may not be viable. Therefore, in exercising its power of superintending control to decide a question of great public interest at the earliest possible stage in the litigation, this Court should determine (1) whether a claim exists under New Mexico's Equal Protection Clause for partisan gerrymandering, and if

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drawn maps, and the Redistricting Act requirements are not binding on the Legislature. Ex. B, ¶7.

[7] In the district court's prior Letter Ruling on Petitioners' *Motion to Dismiss*, Ex. A at 2, it characterized the issue as an "undeveloped area of political gerrymandering as an equal protection claim," however Petitioners' request for interlocutory appeal, submitted with Respondent-Plaintiffs via a joint proposed order, was rejected by the district court.

so, (2) what standards are to guide a court in making that determination. Following New Mexico and persuasive federal precedent, Petitioners urge this Court to respect and preserve the fundamental doctrines of separation of powers and justiciability. Here, no clear, discernable standards appear in New Mexico's Constitution to guide the judiciary or remove Plaintiffs' claims from the reach of *Rucho*'s holding.

1. Bedrock Principles of Separation of Powers and the Political Question Doctrine Support Dismissal.

In answering the questions presented, however, this Court does not write upon a blank slate: the Court has taken great pains to caution courts from wading into what is "fundamentally a political dispute," absent a complete failure of the co-equal branches of government:

> [u]nfortunately, because of the inability of our sister branches of government to find a way to work together and address the most significant decennial legislation to affect the voting rights of the adult citizens of our State, the judiciary in New Mexico finds itself embroiled in this political thicket.

Maestas, 2012-NMSC-006, ¶ 27, 274 P.3d 66. Now, and for the first time since 1991, the political branches of government passed and enacted into law a congressional districting plan. Here, there was no failure or deadlock. The Legislature and the Executive accomplished their delegated tasks and have done so in unchallenged compliance with the federal constitutional standards of one-person, one-vote, and the federal statutory standards contained in the Voting Rights Act to protect minority rights from discriminatory treatment. The district court's decision

to intervene in the political redistricting process at this stage, essentially trumping the will of New Mexico's people and their elected representatives,[8] jeopardizes the credibility of the judiciary itself.[9]

2. No Discernable, Justiciable Guidelines Exist to Remove Partisan Redistricting Claims from the Realm of Political Question.

Respondents-Plaintiffs claim partisan vote dilution under New Mexico's Equal Protection Clause because *Rucho* forecloses the federal avenue. Under the interstitial approach cited by the district court, Ex. B at ¶2, the next step for this Court is to ascertain whether divergence from federal precedent is justified because of (1) a flawed federal analysis, (2) structural differences between state and federal government, or (3) distinctive state characteristics. *State v. Gomez,* 1997-NMSC-

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[8] *See Maestas*, 2012-NMSC-006, ¶ 32, 274 P.3d 66, 77 ("[The] Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people"); *Connor v. Finch*, 431 U.S. 407, 414–15 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality."); *Cockrell v. Bd. of Regents of New Mexico State Univ.,* 2002-NMSC-009, ¶ 13, 132 N.M. 156, 163, 45 P.3d 876, 883 (policy decisions of great public importance and relating to the "most fundamental political processes [are] particularly unsuited for judicial resolution as a matter of state constitutional law") (internal quotations omitted).

[9] *Cf. Montoya v. Ulibarri,* 2007-NMSC-035, ¶ 21, 142 N.M. 89, 96 (in interpreting the New Mexico Constitution, the judiciary is charged with protecting state sovereignty, and "[i]ntrinsic within state sovereignty is an interest protecting the credibility of the state judiciary."); *Eturriaga v. Valdez,* 1989-NMSC-080, ¶ 17, 109 N.M. 205, 784 P.2d 24 ("It is not the province of this Court to invalidate substantive policy choices made by the legislature.").

006, ¶ 19, 122 N.M. 777. Because Respondents-Plaintiffs have not asserted or raised structural differences or distinctive state characteristics, *i.e.* textual differences or the adoption of the Equal Rights Amendment, *see, e.g.*, *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 29, 126 N.M. 788, Petitioners focus the Court's attention on the federal analysis of equal protection claims of partisan gerrymandering.[10] A close reading of *Rucho's* rationale demonstrates and supports a similar, coextensive interpretation of New Mexico's Equal Protection Clause and the conclusion that partisan redistricting remains a political question.

(i) Federal Analysis of Partisan Gerrymandering Claims under Rucho *is Sound and Persuasive.*

First, *Rucho* recognizes that '[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings* 412 U.S. 735, 753 (1973); *see also Maestas*, 2012-NMSC-006, ¶ 27 (characterizing redistricting and apportionment as a "fundamentally political dispute"). Thus, absent the precision of the one-person, one-vote standard or the absolute bar on racial discrimination, the "central problem" for the judiciary becomes one of degree: how to reliably differentiate between constitutional political gerrymandering and when a

[10] *See Morris v. Brandenburg*, 2015-NMCA-100, ¶23, 356 P.3d 564, 573, *aff'd, Morris v. Brandenburg*, 2016-NMSC-027 (where plaintiffs asked court to depart from federal precedent, plaintiffs failed to carry their initial burden in establishing greater protections under Article II, Section 18 of New Mexico Constitution).

redistricting map's partisan dominance is too far or too much. *Rucho*, 139 S. Ct. at 2497, 2499 (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 296 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006). *Rucho* follows Justice Kennedy's caution in *Vieth* against adopting standards which would not only invite but "commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306).

Second, *Rucho* addresses Plaintiffs' implicit proportionality argument, wherein challengers declare a validly adopted redistricting map unconstitutional because it is more "difficult for one party to translate statewide support into seats in the legislature." *Id.* at 2499. Proportionality is a "norm that does not exist" in our electoral system, federal or state. *Id.* And the U.S. Supreme Court has dismissed this argument and its attendant unmanageable standards directly,[11] whether cloaked as "fairness" or otherwise. *Rucho*, 139 S. Ct. at 2499–2500.

Third, Plaintiffs, just as in *Rucho*, ask the Court to insert its own political judgment as to the amount of representation a particular political party deserves. No

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[11] *See Davis v. Bandemer,* 478 U.S. 109, 159 (1986) (opinion of O'Connor, J.) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."). As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Id.*

guidelines equip this Court to do so, nor do constitutional provisions grant such authority. Because "judicial action must be governed by standard, by rule," and by "principled, rational, and based upon reasoned distinctions" grounded in the law, *Vieth*, 541 U.S. at 278, 279 (plurality opinion), Plaintiffs' request for judicial review of partisan gerrymandering, without enunciating a workable standard, fails. Were this Court to engage in such an unprecedented and novel expansion of judicial power—not only into one of the most intensely partisan aspects of American political life, but also unlimited in scope and duration, repeating with each new census—it would flout the prior wisdom and judicial restraint espoused in *Eturriaga,* 1989-NMSC-080, ¶ 17, 109 N.M. 205 (advising where conflict arises between legislative and judicial branches, "[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature.").

(ii) New Mexico has yet to Adopt Clear, Manageable Standards to Adjudicate Partisan Redistricting: Maestas *and the Redistricting Act are Inapposite.*

Finally, in following the federal analysis of *Rucho*, specific provisions in state statutes or constitutions could provide Plaintiffs' sought-after standards. Indeed, numerous other States have done so through legislative enactment or constitutional referendum.[12] But New Mexico has yet to join their ranks. The district court's vague

[12] *See Rucho,* 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *see also id.* at 2507–

citation to "traditional redistricting principles" employed in court-drawn maps under *Maestas*, 2012-NMSC-006, ¶ 34, or by the independent Citizens Redistricting Committee under the Redistricting Act, NMSA 1978, § 1-3A-7(A), addresses the wrong audience. Ex. B, ¶ 6. The audience is the Legislature, elected by the people of this State; not the courts, as in *Maestas* (when the legislative process of enacting a map has failed), and not an appointed Committee which is not directly accountable to the people, and whose sole function is to make non-binding proposals to the Legislature. Therefore, in the absence of any specific Constitutional or statutory

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08, noting the following states' constitutional and statutory prohibitions against partisanship in redistricting:

- Florida's Fair Districts Amendment to the Florida Constitution, Fla. Const., art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.");
- Mo. Const., art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.");
- Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.");
- Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

See also Ohio Const. art. XI, § 6(A) ("No general assembly district plan shall be drawn primarily to favor or disfavor a political party.") and Article XIX, Section 1(C)(3)(a) ("The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents."); *But see* Rucho, 139 S.Ct. at 2524, n.6 (Kagan. J, dissenting) (commenting that "state courts do not typically have more specific 'standards and guidance' to apply to electoral redistricting," and noting that few states have constitutional provisions like Florida which expressly address political parties).

standards controlling the Legislature or precedent expanding the reach of New Mexico's Equal Protection Clause to partisan redistricting, Respondent-Plaintiffs' case must be dismissed as nonjusticiable for lack of jurisdiction and failure to state a claim.

B. A Stay is Warranted to Avoid Burden, Confusion, and Potential Mootness

For the same reasons that an exercise of superintending control is appropriate, to prevent confusion or conflicting decisions as to the justiciability of Respondents-Plaintiffs' claims prior to this Court providing definitive guidance, Petitioners respectfully ask that the Court order all proceedings stayed in Case No. D-506-CV-2022-00041 during the pendency of this Petition. Rule 12-504(D) NMRA. Petitioners will informally notify Respondents and Real Parties in Interest of this Petition at the time of filing and serve the Petition as soon as possible thereafter. Alternatively, Petitioners also request that the Court stay all litigation in the case below until the matter at issue in *Moore v. Harper* has been heard and decided before the U.S. Supreme Court. A stay is warranted for the following reasons:

(1) No Prejudice to Respondents-Plaintiffs Effectuated by Stay.

As the district court made clear in its Letter Ruling on the denial of Plaintiffs' Motion for Preliminary Injunction, the 2022 congressional election will proceed under the law passed during the last session of the legislature. *See also* Order Denying Preliminary Injunction dated July 11, 2022. As a result, the appellate courts

are relieved of the pressure and need for immediate resolution found in many redistricting cases. Here, there is sufficient time for careful and considered resolution of the issues, allowing for the most efficient and expeditious resolution of the case on the merits.

(2) Stay will Avoid Hardship and Burden Imposed upon Petitioners and Furthers Judicial Economy.

If Petitioners succeed in their challenge to the district court order, dismissal of Plaintiffs' claims obviates the need for a trial on the merits. Thus, the same concerns underlying judicial decisions to delay or forego burdensome discovery under qualified immunity challenges, *see, e.g.*, *Doe v. Leach*, 1999-NMCA-117, ¶¶ 17 & 31, 128 N.M. 28 (granting writ of error and reversing district court decision subjecting immune governmental defendants to discovery), are present here, especially so where legislative immunity, as understood and enforced through the speech and debate clause, N.M. Const. art VI, § 13, renders many areas of inquiry inaccessible and prejudicial.

Second, even if the Respondents-Petitioners' claims are not dismissed, this Court would still be required to direct how the claim is to be litigated and what standards apply in the first instance. Thus, efficiency and concern for judicial economy requires final judicial resolution of the issues presented here *before*—not after —resolution of the merits and the trial discovery attendant to that resolution.

(3) Stay Extending Beyond Decision in *Moore v. Harper* Affords Certainty and Uniformity.

Good cause also exists to extend the Court's stay of the underlying litigation until the U.S. Supreme Court has issued its opinion on the closely related federal Free Election Clause issue, U.S. Const., art I, § 4, determining the powers of the state judiciary in overturning or overriding legislatively enacted congressional redistricting plans. *See* Ex. D. Should the U.S. Supreme Court adopt the independent legislature theory as applied to federal elections, such an outcome would obviate this Court's need to engage in Plaintiffs' express challenge to congressional redistricting maps and render potential, interim-issued opinions moot.

WHEREFORE, Petitioners, the Legislative and Executive Defendants, respectfully request that this Court:

1. Grant their *Petition for Writ of Superintending Control* and order a hearing and supplemental briefing on the issue, as a matter of great public importance;
2. If it believes it necessary for the parties to present additional briefing to the Court, to issue a supplemental brief and oral argument schedule, including directive to any potential amici;
3. Issue a stay of proceedings in the district court pending decisions by this Court on the issues presented;
4. Reverse the district court and find that Plaintiffs have failed to state a claim for relief under New Mexico's equal protection clause for partisan

gerrymandering , or alternatively provide the district court with guidance as to what standards it should apply in resolving such a claim; and

5. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

HINKLE SHANOR LLP

Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
575-622-6510 / 575-623-9332 Fax
rolson@hinklelawfirm.com
lwilliams@hinklelawfirm.com
atripp@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
505-247-4800
mbaker@peiferlaw.com
ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104

505-263-2764
pstelzner@aol.com

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
505-266-8042
mbrowde@me.com

Attorneys for Mimi Stewart and Brian Egolf

Holly Agajanian
Chief General Counsel to Governor Michelle Lujan Grisham
Kyle P. Duffy
Maria S. Dudley
Deputy General Counsels to Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@state.nm.us
kyle.duffy@state.nm.us
maria.dudley@state.nm.us

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

VERIFICATION

I, Mimi Stewart, pursuant to 12-504 NMRA, state, under oath and subject to penalty of perjury under the laws of the State of New Mexico as follows:

1. My name is Mimi Stewart. I am one of the Petitioners in the Petition for Superintending Control to which this Verification is attached.

2. I have read the Petition. The statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

This Verification is made under oath and subject to penalty of perjury under the laws of the State of New Mexico this 22 day of July, 2022.

MIMI STEWART

VERIFICATION

I, Brian Egolf, pursuant to 12-504 NMRA, state, under oath and subject to penalty of perjury under the laws of the State of New Mexico as follows:

1. My name is Brian Egolf. I am one of the Petitioners in the Petition for Superintending Control to which this Verification is attached.

2. I have read the Petition. The statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

This Verification is made under oath and subject to penalty of perjury under the laws of the State of New Mexico this 22 day of July, 2022.

BRIAN EGOLF

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022 I caused the foregoing Verified Petition along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Additionally, a copy was emailed to The Honorable Fred Van Soelen at cloddiv3criminalproposedtxt@nmcourts.gov, and mailed via Certified Return Receipt to:

The Honorable Fred Van Soelen
Curry County Courthouse
700 N. Main St., Suite 3
Clovis, NM 88101

Additionally, pursuant to Rule 12-504(E) a copy was served via Certified Return Receipt to:

The Office of the Attorney General
Litigation Division
Galisteo St.
Santa Fe, NM 87504

HINKLE SHANOR LLP

EXHIBIT A

CHAMBERS OF
HON. FRED T. VAN SOELEN
DISTRICT JUDGE
Division III

CURRY COUNTY COURTHOUSE
700 NORTH MAIN, SUITE 3
CLOVIS, NEW MEXICO 88101
Ph: (575) 742-7510
Fax: (575) 762-7815

STATE OF NEW MEXICO

Ninth Judicial District Court

April 19, 2022

Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386

Richard E. Olsen
P.O. Box 10
Roswell, New Mexico 88202-0010

Christopher O. Murray
1263 Washington Street
Denver, Colorado 80203

Holly Agajanian
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501

Dylan K. Lange
325 Don Gaspar, Suite 300
Santa Fe, New Mexico 87501

Counsel:

The Court has considered both the Legislative and Executive Defendants' motions to dismiss under Rule 1-012(B)(1) and (6) NMRA, which allege that the Court lacks jurisdiction over the subject matter, and that Plaintiff's complaint fails to state a claim upon which relief can be granted. The question of whether Plaintiffs' claim is justiciable giving the Court jurisdiction to hear the case is intertwined with the second part of the motion as to whether there is a claim for which relief can be granted, so the Court will address both questions at the same time.

Plaintiff's complaint alleges a violation of Article II, Section 18 of the New Mexico Constitution, the equal protection clause. This clause mirrors the Fourteenth Amendment equal protection clause. *See* U.S. Const. amend XIV, § 1. Under the interstitial approach to constitutional interpretation, New Mexico's Constitution will only provide broader protections than the United States Constitution if the federal approach is unpersuasive because it is flawed or undeveloped.

The Plaintiffs allege that Senate Bill 1, the law that was passed creating the new Congressional districts, creates a partisan gerrymander that violates their right to equal protection

under the law. Both sides cite *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), which decided that political gerrymandering claims are non-justiciable at the federal level, as there was no consensus as to a standard to apply to political gerrymandering and "how much is too much". But *Rucho* also said that this did not foreclose possible court action at the state level, where constitutional or statutory grounds may be available to address the issue.

Plaintiffs allege unconstitutional political gerrymandering. They raise equal protection grounds as the basis for the complaint. Plaintiff's complaint makes a strong, well-developed case that Senate Bill 1 is a partisan gerrymander created in an attempt to dilute Republican votes in Congressional races in New Mexico. They make a strong, well-developed case that Senate Bill 1 does not follow traditional districting principles, including a lack of compactness, lack of preservation of communities of interest, and failure to take into consideration political and geographic boundaries. In considering a motion to dismiss under Rule 1-012, the Court is to accept as true all well pleaded facts.

If the Plaintiffs facts are true, the question is whether this adequately raises an equal protection claim. It is the role of the courts to decide constitutional claims, and this Court has jurisdiction to do so in this case. As the Supreme Court stated, "(i)t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch at 177, even if to later say that "this is not law". *Rucho*, at 2508.

As to the basis of Plaintiffs' claims, they cite to the traditional districting principles cited in *Maestas v. Hall*, 2012-NMSC-006, ¶ 34, and to the statutory guidelines of the Redistricting Act, § 1-3A-7(A), (2021), alleging the violation of these strictures give rise to their equal protections claim. Defendants claim these two sources do not apply to districting maps created by the Legislature and signed by the Governor, because the *Maestas* case applies to court-drawn maps only, and the Redistricting Act requirements are not binding on the Legislature, and serve only as recommendations. They further argue that New Mexico's equal protection protections are the same as federal protections, citing to a Court of Appeals case, *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, which deals with worker compensation claims. While the New Mexico Court of Appeals did say both the federal and state equal protection clauses offered the same level of protection in that area, in this undeveloped area of political gerrymandering as an equal protection claim, this Court can not say that *Vasquez* definitively answers the question in this case. Further, Plaintiffs cite to a North Carolina case, *Harper v. Hall*, 2022-NCSC-17, decided post-*Rucho*, that found equal protection violations (among other violations) in a partisan redistricting map.

Without deciding the full merits of the Plaintiffs' case, in deciding whether this Court has jurisdiction to hear the case, and whether, taking Plaintiff's facts alleged as true, the complaint states a claim upon which this Court could grant relief, the Court finds both to be true, and denies the Defendants' motions to dismiss.

Counsel for Plaintiffs shall prepare an order to this effect, and circulate for signatures, and present the order to the Court within five (5) days of receipt of this letter.

EXHIBIT A

Sincerely,

Fred Van Soelen

Hon. Fred Van Soelen
District Judge

EXHIBIT B

FILED
5th JUDICIAL DISTRICT COURT
Lea County
7/11/2022 3:46 PM
NELDA CUELLAR
CLERK OF THE COURT
Cory Hagedoorn

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, et al.,
Plaintiffs
v.

MAGGIE TOULOUSE OLIVER, et al.,
Defendants. No. D-506-CV-2022-00041

ORDER DENYING LEGISLATIVE DEFENDANTS' AND EXECUTIVE DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER is before the Court on Defendants Mimi Stewart and Brian Egolf's ("Legislative Defendants") and Defendants Michelle Lujan Grisham and Howie Morales's ("Executive Defendants") Motions to Dismiss filed February 18, 2022 ("Motions to Dismiss"). The Court having considered the Motions to Dismiss, Plaintiffs' Combined Response to Defendants' Motions to Dismiss, Executive Defendants' Reply in Support, and Legislative Defendants' Reply in Support, and having called the matter for hearing on April 18, 2022, now DENIES the Motions to Dismiss.

1. Plaintiffs' Verified Complaint alleges a violation of the New Mexico Constitution's Equal Protection Clause, Article II, Section 18. Specifically, Plaintiffs allege that Senate Bill 1, the state law creating the new congressional districts in New Mexico, violates the state's Equal Protection Clause because it effects an unlawful political gerrymander.

2. The state's Equal Protection Clause mirrors the Fourteenth Amendment of the U.S. Constitution. Under the interstitial approach to constitutional interpretation, New Mexico's Constitution will only provide broader protections than the U.S. Constitution if the federal approach is unpersuasive because it is flawed or undeveloped. The relevant question here is whether Plaintiffs well-pleaded facts adequately raises an equal protection claim.

3. Legislative Defendants and Executive Defendants moved to dismiss the Verified Complaint under Rule 1-012(B)(1) and (6), NMRA, arguing the Court lacks jurisdiction over the subject matter and that Plaintiffs failed to state a claim upon which relief can be granted. Because the question of whether Plaintiffs' constitutional claim is justiciable giving the Court jurisdiction to hear the case is intertwined with whether Plaintiffs state a claim for which relief can be granted, the Court will address both question at the same time.

4. Both sides cite the U.S. Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that political gerrymandering claims are nonjusticiable in federal court because there was no consensus as to the standard to apply to political gerrymandering claims to determine how much partisanship is "too much." But *Rucho* also said that its conclusion did not foreclose possible court action at the state level where constitutional or statutory grounds may be available to address the issue.

5. Initially, it is the role of the court to decide constitutional claims, and this Court has jurisdiction to do so in this case. As the Supreme Court stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is," 1 Cranch 137, 177 (1803), even if to later say that "this is not law," *Rucho*, 139 S. Ct. at 2508.

6. Next, in considering a motion to dismiss under Rule 1-012, the Court accepts as true all well-pleaded facts. Accepting the well-pleaded facts as true, Plaintiffs' Verified Complaint makes a strong, well-developed case that Senate Bill 1 is an unlawful political gerrymander that dilutes Republican votes in congressional races in New Mexico. As to the basis of Plaintiffs' claims, they cite to the traditional redistricting principles cited in *Maestas v. Hall*, 2012-NMSC-006, ¶ 34, and the standards in the Redistricting Act, § 1-3A-7(A) (2021), alleging the violation of these strictures give rise to their equal protection claim. The Court finds Plaintiffs make a strong, well-developed case that Senate Bill 1 does not follow traditional redistricting principles, including

lack of compactness, failure to preserve communities of interest, and failure to take into consideration political and geographic boundaries.

7. Defendants claim *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies to only court-drawn maps, and the Redistrict Act requirement are not binding on the Legislature, but rather serves only as a recommendation. Defendants further argue that New Mexico's Equal Protection Clause is the same as the federal analogue, citing *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, which dealt with workers' compensation claims. While the New Mexico Court of Appeals did say both the federal and state Equal Protection Clauses offer the same level of protection in that area, this Court cannot say that *Vasquez* definitively answers the question in the case. Further, Plaintiffs cite *Harper v. Hall*, 2022-NCSC-17, a North Carolina Supreme Court case decided post-*Rucho*, where the court found equal protection violations (among other violations) in a partisan redistricting map.

8. Without deciding the merits of Plaintiffs' case, the Court finds it has jurisdiction to hear Plaintiffs' constitutional claim, and that Plaintiffs have stated a claim upon which relief can be granted. The Court therefore denies the Motions to Dismiss.

IT IS SO ORDERED.

Fred Van Soelen

HON. FRED VAN SOELEN
DISTRICT JUDGE

EXHIBIT B

SUBMITTED BY:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By */s/ Eric R. Burris*
Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386
Emails: eburris@bhfs.com; hstratton@bhfs.com
Telephone: (505) 244-0770
Facsimile: (505) 244-9266

Julian R. Ellis, Jr. (*pro hac vice*)
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4432
Email: jellis@bhfs.com
Telephone: (303) 223-1100
Facsimile: (303) 223-1111

Christopher O. Murray (*pro hac vice*)
STATECRAFT PLLC
1263 Washington Street
Denver, CO 80203
Email: chris@statecraftlaw.com
Telephone: (602) 362-0034

Carter B. Harrison, IV
HARRISON & HART, LLC
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
Email: carter@harrisonhartlaw.com
Telephone: (505) 312-4245
Facsimile: (505) 341-9340

Attorneys for Plaintiffs

EXHIBIT B

APPROVED AS TO FORM BY:

HINKLE SHANOR LLP

By *s/ Richard E. Olson*
Richard E. Olson
Lucas M. Williams
P.O. Box 10
Roswell, NM 88202-0010
Telephone: (575) 622-6510; Fax: (575) 623-9332
Email: rolson@hinklelawfirm.com; lwilliams@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
Telephone: (505) 247-4800
Email: mbaker@peiferlaw.com; ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner
3521 Campbell Ct. NW
Albuquerque, NM 87104
Telephone: (505) 263-2764
Email: pstelzner@aol.com

PROFESSOR MICHAEL B. BROWDE
751 Adobe Rd., NW
Albuquerque, NM 87107
Telephone: (505) 266-8042
Email: mbrowde@me.com

Counsel for Mimi Stewart and Brian Egolf

GOVERNOR MICHELLE LUJAN GRISHAM AND
LIEUTENANT GOVERNOR HOWIE MORALES

By *s/ Holly Agajanian*
Holly Agajanian
Chief General Counsel to

EXHIBIT B

Governor Michelle Lujan Grisham
490 Old Santa Fe Trial, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: holly.agajanian@state.nm.us

Kyle P. Duffy
Deputy General Counsel to
Governor Michelle Lujan Grisham
490 Old Santa Fe Trial, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: kyle.duffy@state.nm.us

Maria S. Dudley
Deputy General Counsel to
Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: maria.dudley@state.nm.us

Counsel for Michelle Lujan Grisham and
Howie Morales

SECRETARY OF STATE
MAGGIE TOULOUSE OLIVER

By *s/ Dylan K. Lange*
Dylan K. Lange
General Counsel
325 Don Gaspar, Suite 300
Santa Fe, NM 87501
Telephone: (505) 827-3600
Email: Dylan.lange@state.nm.us

Counsel for the New Mexico Secretary of State

EXHIBIT C

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR. BOBBY and DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs-Appellees,

v.

No._____
District Ct. No. D-506-CV-2022-00041

MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico, HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate, and BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants-Appellants, and

MAGGIE TOULOUSE OLIVER, in her official capacity as New Mexico Secretary of State,

Defendant.

PETITION FOR WRIT OF ERROR

Directed To: The Fifth Judicial District, County of Lea
Honorable Fred Van Soelen, District Judge

HINKLE SHANOR LLP
Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
(505) 247-4800

Holly Agajanian
Kyle P. Duffy
Maria S. Dudley
490 Old Santa Fe Trl, Suite 400
Santa Fe, NM 87501
(505) 476-2200

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
(505) 263-2764

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
(505) 266-8042

Attorneys for Mimi Stewart and Brian Egolf

Defendants-Appellants Michelle Lujan Grisham, Governor of New Mexico, Howie Morales, Lieutenant Governor of New Mexico (together the "Executive Defendants"), Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives (together the "Legislative Defendants"), in accordance with the requirements of Rule 12-503 NMRA 2022 submit the following Petition for Writ of Error to the District Court.[1]

Jurisdiction is conferred on this Court by N.M. Const. art VI, § 29 and Rule 12-503(B).

I. NATURE OF THE CASE, SUMMARY OF PROCEEDINGS, DISPOSITION, AND RELEVANT FACTS

1. On December 17, 2021, the Governor signed Senate Bill 1 (SB 1) into law (codified at NMSA 1978, § 1-15-16 (2021)), establishing new boundaries for New Mexico's three congressional districts which the Legislature had adopted following a special legislative session devoted primarily to redistricting.

2. Plaintiffs-Appellees filed suit on January 21, 2022, challenging the redrawn boundaries of the congressional districts asking the district court to declare that the boundaries of the congressional districts violate the Equal Protection Clause

[1] **Important Notice:** Simultaneously with the filing of the Petition in this Court, Appellants have filed a Petition for a Writ of Superintending Control under Rule 12-504 with the Supreme Court, seeking the same relief. Filing both petitions leaves open the opportunity should the high Court wish to have the views of this Court before its possible final resolution of the significant legal questions presented herein. A copy of that petition is attached as **Exhibit E**.

of the New Mexico Constitution and to impose different boundaries. Plaintiffs' theory was not based upon established federal constitutional and statutory principles. Thus, they do not claim that the districts were comprised of unequal populations or that protected disadvantaged classes were not appropriately protected. Rather Plaintiffs' claim is that as Republicans their equal protection rights under New Mexico's constitution were violated when, by virtue of the new lines drawn for Congressional District 2 (CD-2), they were disadvantaged in their ability to elect one of their own to Congress—i.e., that they have been subjected to political gerrymandering which is allegedly precluded by New Mexico equal protection principles.

3. In addition, Plaintiffs filed a Motion for Preliminary Injunction, seeking the set aside of the newly adopted boundaries and the adoption of an alternative congressional map for the 2022 election year.

4. Defendants-Appellants opposed the Motion for Preliminary Injunction and filed two motions to dismiss asserting that New Mexico does not recognize a cause of action for political, or partisan, gerrymandering.

5. After full briefing by the parties and a hearing on both motions the district court issued separate letter rulings denying each.[2]

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[2] The trial court made clear that "[t]o require a change this late in the game would bring a level of chaos to the process that is not in the public's or the candidate's interest." Letter Ruling on Preliminary Injunction, attached hereto as **Exhibit C** at 1-2, further elaborated in the court's

6. The denial of Defendants-Appellant's motions to dismiss, which is the subject of this Petition, is contained in the district court's Letter Ruling of April 19, 2022, attached hereto as **Exhibit A**, as further elaborated in its Order entered on July 11, 2022. *See Order Denying Legislative Defendants' and Executive Defendants' Motion to Dismiss*, attached hereto as **Exhibit B**.

7. The district court recognized that New Mexico's Equal Protection Clause mirrors that of the Fourteenth Amendment of the U.S. Constitution, and that by applying New Mexico's interstitial approach to constitutional interpretation, "the [State's Equal Protection Clause] will only provide broader protections than the [Federal Equal Protection Clause] if the federal approach is unpersuasive because it is flawed or undeveloped." Ex. B, ¶ 2.

8. The court went on to explain that:

> [b]oth sides cite *Rucho v. Common Cause,* 139 S.Ct. 2484 (2019), which decided that political gerrymandering claims are non-justiciable at the federal level, as there was no consensus as to a standard to apply to political gerrymandering and "how much is too much." But *Rucho* also said that this did not foreclose possible court action at the state level where constitutional or statutory grounds may be available to address the issue.

Ex. B, ¶ 4.

Findings of Fact and Conclusions of Law of July 11, 2022, attached hereto as **Exhibit D**. The result is that the 2022 election with respect to the congressional districts will take place under the plan enacted into law. *See* Ex. C at 2.

9. Accepting the facts of Plaintiffs' complaint, the district court viewed it as presenting a well-developed case that SB 1 is an unlawful political gerrymander that dilutes Republican votes on the basis of the traditional districting principles in *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66, and the guidelines in the New Mexico Redistricting Act, § 1-3A-1, *et. seq.* NMSA 1978 , giving rise to Plaintiff's equal protection claim Ex. B, ¶ 6.

10. The district court acknowledged Defendants' claim that *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies only to court-drawn maps, and the Redistricting Act requirements are not binding on the Legislature, but rather serve only as a recommendation.[3] *Id.*, ¶ 9.

11. With respect to the Defendants' further argument that New Mexico's Equal Protection Clause is the same as its federal analogue, citing *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, 124 N.M. 655, the district court noted that, although *Vasquez* may have said that both federal and state Equal Protection Clauses offer the same level of protection, the court could not say that *Vasquez* definitively answers the questions in this case. Ex. B, ¶ 7. The district court recognized that this

[3] The Redistricting Act directs that "When proposing or adopting district plans, the committee *shall not: use, rely upon or reference partisan data* [other than required by federal law]." § 1-3A-7 (C) (1) (emphasis added).

is an "undeveloped area of political gerrymandering as an equal protection claim," Ex. A at 2,[4] noting that Plaintiffs cited to *Harper v. Hall,* 2022-NCSC-17, 380 N.C. 317, 868 S.E.2d 499 (2022), a North Carolina case which found equal protection violations (among other violations) in a partisan redistricting map. Ex. B, ¶ 7.

II. STATEMENTS CONCERNING THE ORDER SOUGHT TO BE REVIEWED

12. Question Presented was Conclusively Determined: On the basis of the foregoing, the district court concluded that the court has jurisdiction, and the complaint states a claim upon which relief could be granted. *Id.* ¶ 8

13. In denying the Defendants- Appellants', motions to dismiss the district court expressly ruled that the New Mexico Constitution provides a remedy for claims of discriminatory partisan gerrymandering and that partisan gerrymandering is a justiciable issue. *See* Exh. B, ¶ 9.[5]

14. Importance of the Issue Separate from the Merits: Determination of whether there is a claim under New Mexico's Equal Protection Clause for alleged excessive partisan gerrymandering, and if so, what standards are to guide a court in

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[4] Defendants-Appellants therefore requested that the district court include the specific finding on the need for interlocutory review as provided in NMSA 1978, § 39-3-4. The court's final Order did not include that language, precluding Defendants- Appellants from petitioning this Court for interlocutory appeal.

[5] Even if this Court were to determine the claim justiciable, this Court would be required to determine what standards should be applied in resolving the claim on the merits.

making that determination are of critical importance—and matters which must be finally determined before confronting the merits of the case which remains pending in the district court. The narrow holding of *Rucho,* 139 S. Ct. 2484, governs the jurisdiction of federal courts. Nonetheless, an understanding of its underlying rationale is important and useful to the resolution of this case.

15. As the *Rucho* Court made clear "[t]he "central problem" for the judiciary becomes one of degree: how to reliably differentiate between constitutional political gerrymandering and when a redistricting map's partisan dominance is too far or too much. *Rucho*, 139 S. Ct. at 2497, 2499 (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 296 (2004) and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006)). *Rucho* follows Justice Kennedy's caution in *Vieth* against adopting standards which would not only invite but "commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306).

16. What occurred in *Rucho* also occurred here, where Plaintiffs assert that a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature (or in this case in Congress). Such a claim is based on a "norm that does not exist" in our electoral system either federal or state. *Id.* at 2499 (quoting Davis v. *Bandemer* 478 U.S. 109, 159 (1986) (opinion of O'Connor, J.). The U.S. Supreme Court has

dismissed this argument and the attendant unmanageable standards directly, whether cloaked as "fairness" or otherwise. *Rucho*, 139 S. Ct. at 2499–2500.

17. Plaintiffs, just as in *Rucho*, ask the court to insert its own political judgment as to the amount of representation a particular political party *deserves*. No guidelines equip this Court to do so, nor do constitutional provisions grant such authority. Because "judicial action must be governed by standard, by rule," and by "principled, rational, and based upon reasoned distinctions" grounded in the law, *Vieth*, 541 U.S. at 278, 279 (plurality opinion), Plaintiffs' request for judicial review of partisan gerrymandering, without enunciating a workable standard, fails. Were this Court to engage in such an unprecedented and novel expansion of judicial power—not only into one of the most intensely partisan aspects of American political life, but also unlimited in scope and duration, repeating with each new census—it would flout the prior wisdom and judicial restraint espoused in *Eturriaga v. Valdez,* 1989-NMSC-080, ¶ 17, 109 N.M. 205, 209 (advising where conflict arises between legislative and judicial branches, "[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature.") and *Maestas*, 2012-NMSC-006, ¶ 27 (cautioning against courts wading into the "political thicket" of redistricting unless the executive and legislative branches fail to agree on a new map).

18. Finally, in following the federal analysis of *Rucho*, specific provisions in state statutes or constitutions *could* provide Plaintiffs' sought-after standards. Indeed, numerous other States have done so through legislative enactment or constitutional referendum.[6] New Mexico has yet to join their ranks. The district court's vague citation to "traditional redistricting principles" employed in court-drawn maps under *Maestas*, 2012-NMSC-006, § 34, or by the independent Citizens Redistricting Committee under the Redistricting Act, NMSA 1978, § 1-3A-7(A), addresses the wrong audience. Ex. B, ¶ 6. The audience is the Legislature, elected

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[6] *See Rucho,* 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *see also id.* at 2507–08, noting the following states' constitutional and statutory prohibitions against partisanship in redistricting:

- Florida's Fair Districts Amendment to the Florida Constitution, Fla. Const., art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.");
- Mo. Const., art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.");
- Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.");
- Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

See also Ohio Const. art. XI, § 6(A) ("No general assembly district plan shall be drawn primarily to favor or disfavor a political party.") and Article XIX, Section 1(C)(3)(a) ("The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents."); *But see* Rucho, 139 S.Ct.. at 2524, n.6 (Kagan. J, dissenting) (commenting that "state courts do not typically have more specific 'standards and guidance' to apply to electoral redistricting," and noting that few states have constitutional provisions like Florida which expressly address political parties).

by the people of this state: Not the courts, as in *Maestas*, and not a Committee unaccountable to the people. Therefore, in the utter absence of specific Constitutional or statutory standards controlling the Legislature or precedent expanding the reach New Mexico's Equal Protection Clause to partisan redistricting, Respondent-Plaintiffs' case must be dismissed as nonjusticiable for lack of jurisdiction and failure to state a claim.

19. Appeal From a Final Judgment Would Be an Inadequate and Grossly Inefficient Remedy: If Defendants-Appellants' succeed in their appellate challenge to the district court order it would obviate the need for a trial on the merits and result in a dismissal of Plaintiffs' case on the merits. If Defendants-Appellants do not obtain dismissal, the appellate court would still be required to direct how the claim on the merits is to be litigated in the first instance. *See generally Maestas*, 2012-NMSC-006 (providing guidance to the district court for court-drawn maps only). Thus, efficiency and concern for judicial economy requires final judicial resolution of the issue presented here *before* not after any possible resolution of the merits.

20. Other Matters Relevant to This Court's Exercise of Its Discretion Including an Appropriate Stay of Proceedings in the District Court: As the district court made clear in its Letter Ruling on the denial of Plaintiffs' Motion for Preliminary Injunction, the current 2022 congressional election will proceed under the law passed during the last session of the Legislature. As a result, the appellate

courts are relieved of the pressure for an immediate result found in many redistricting cases. Here there is sufficient time for careful appellate resolution of the issues which will also allow for a more efficient and expeditious resolution of the case on the merits should such a trial be necessary. If this Petition is granted Defendants-Appellants fully intend, following the directive in Rule 12-503(M), to seek a stay of proceedings below until this matter is resolved in the appellate courts, and will so alert the trial court of that intention at the scheduling hearing currently set by the district court for July 28, 2022.

WHEREFORE, the Defendants-Appellants respectfully request that this Court grant this Petition for a Writ of Error, consider an appropriate stay of proceedings below, and assign the case to its appropriate calendar for resolution, and for such other and further relief as the Court deems just and proper.

HINKLE SHANOR LLP

_____

Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
575-622-6510 / 575-623-9332 Fax
rolson@hinklelawfirm.com
lwilliams@hinklelawfirm.com
atripp@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez

EXHIBIT C

Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
505-247-4800
mbaker@peiferlaw.com
ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
505-263-2764
pstelzner@aol.com

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
505-266-8042
mbrowde@me.com

Attorneys for Mimi Stewart and Brian Egolf

Holly Agajanian
Chief General Counsel to Governor Michelle Lujan Grisham
Kyle P. Duffy
Maria S. Dudley
Deputy General Counsels to Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@state.nm.us
kyle.duffy@state.nm.us
maria.dudley@state.nm.us

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

EXHIBIT C

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, I caused the foregoing Verified Petition along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Additionally, a copy was emailed to The Honorable Fred Van Soelen at cloddiv3criminalproposedtxt@nmcourts.gov, and mailed via Certified Return Receipt to:

The Honorable Fred Van Soelen
Curry County Courthouse
700 N. Main St., Suite 3
Clovis, NM 88101

HINKLE SHANOR LLP

EXHIBIT C

STATEMENT OF COMPLIANCE RULE 12-503(G)

As required by Rule 12-503(G), Defendants-Appellants certify that the body of this brief complies with Rule 12-503(F) NMRA because:

1. The body of this brief contains a total of 2415 words, excluding the parts of the brief exempted by Rule 12-503(F)(1).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

EXHIBIT D

No. _____

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

PETITION FOR WRIT OF CERTIORARI

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
MEGAN M. WOLD
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Petitioners

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QUESTION PRESENTED

Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

EXHIBIT D

PARTIES TO THE PROCEEDING

This application arises from two cases consolidated in the North Carolina Superior Court.

In the first of the two consolidated cases, Petitioners are Speaker of the North Carolina House of Representatives Representative Timothy K. Moore; President Pro Tempore of the North Carolina Senate Philip E. Berger; 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 Hise, 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 Standing Committee on Redistricting and Elections. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are 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. Peters; Kathleen Barnes; Virginia Walters Brien; and David Dwight Brown. Respondents were the plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are North Carolina State Board of Elections and Damon Circosta, in his official capacity as chair of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

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In the second of the two consolidated cases, Petitioners are 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. Petitioners were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Respondents are North Carolina League of Conservation Voters, Inc.; Henry M. Michaux, Jr.; Dandrielle Lewis; Timothy Chartier; Talia Fernos; 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. These Respondents were plaintiffs in the North Carolina Superior Court and appellants in the North Carolina Supreme Court.

Other Respondents are the State of North Carolina; the North Carolina Board of Elections; Damon Circosta, in his official capacity as Chairman of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as Secretary of the North Carolina State Board of Elections; Stacy Eggers

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IV, in his official capacity as Member of the North Carolina State Board of Elections; Tommy Tucker, in his official capacity as Member of the North Carolina State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections. These Respondents were defendants in the North Carolina Superior Court and appellees in the North Carolina Supreme Court.

Additionally, the North Carolina Superior Court granted the motion of Common Cause to intervene in the consolidated proceedings below. Common Cause was an intervenor-plaintiff in the North Carolina Superior Court and an intervenor-appellant in the North Carolina Supreme Court.

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RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Denying Temporary Stay and Writ of Supersedeas (entered February 23, 2022).
- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Order on Remedial Plans (entered February 23, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Written Decision Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 14, 2022).
- *Harper v. Hall*, No. 413PA21 (N.C. Supreme Court)—Order Reversing and Remanding to Three-Judge Panel for Remedial Maps (entered February 4, 2022).

The following proceedings are also directly related to this case under Rule 14.1(b)(iii) of this Court:

- *Harper v. Hall*, No. 21A455 (U.S. Supreme Court)—Order Denying Application for Stay (entered March 7, 2022).
- *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

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- *Harper v. Hall*, No. 21 CVS 500085 (N.C. Superior Court)—Memorandum Opinion (entered January 11, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the North Carolina Supreme Court.

The Constitution directs that the manner of federal elections shall "be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. "The Constitution provides that state legislatures"—not "state judges"— "bear primary responsibility for setting election rules," *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 592 U.S. ---, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay), including the rules establishing the shape of congressional districts, *see Smiley v. Holm*, 285 U.S. 355, 373 (1932). As this Court recently explained, "[t]he 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." *Rucho v. Common Cause*, 588 U.S. ---, 139 S. Ct. 2484, 2496 (2019).

Yet in the decision below, the North Carolina Supreme Court decreed that the 2022 election and all upcoming congressional elections in North Carolina *were not* to be held in the "Manner" "prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, but rather in the manner prescribed *by the state's judicial branch*. In an order entered on February 4, the state supreme court invalidated the North Carolina

General Assembly's congressional map and remanded to state trial court for remedial proceedings. And after Petitioners—North Carolina legislators, including the Speaker of the House of Representatives and the President Pro Tempore of the Senate—engaged in a good-faith effort to craft a congressional map that would be valid under the state supreme court's order, the state trial court *rejected that map too*. Instead, the trial court mandated the use of a new map in the 2022 election that had been created by a group of Special Masters and their team of assistants—who, to make matters worse, designed their own, judicially-crafted map after engaging in *ex parte* communications with experts for the plaintiffs. The North Carolina Supreme Court refused to stay this decision, thereby authorizing this judge-made map to govern the 2022 election cycle.

If a redistricting process more starkly contrary to the U.S. Constitution's Elections Clause exists, it is hard to imagine it. By its plain text, the Elections Clause *creates* the power to regulate the times, places, and manner of federal elections and then *vests* that power in "the Legislature" of each State. It does not leave the States free to limit the legislature's constitutionally vested power, or place it elsewhere in the State's governmental machinery, as a matter of *state* law. After all, the Elections Clause "could have said that [federal election] rules are to be prescribed 'by each State,' which would have left it up to each State to decide which [state entity] should exercise that power," but instead, the Constitution's "language

specifies a particular organ of a state government, and we must take that language seriously." *Moore v. Harper*, 595 U.S. ---, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay).

Worse still, the court below did not nullify the General Assembly's duly enacted congressional map pursuant to some specific, judicially manageable rule governing elections, such as a constitutional provision establishing concrete, enforceable criteria for the design of congressional districts. No, the North Carolina Supreme Court read abstract and broadly worded commands such as "[a]ll elections shall be free," N.C. CONST. art. I, § 10, to somehow authorize the court 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*, 139 S. Ct. at 2507 (cleaned up). For the basic questions in partisan gerrymandering claims are "political, not legal," *id.* at 2500, rendering the entire enterprise a quintessentially legislative one. And if the U.S. Constitution's Elections Clause means anything, it must mean at least this: *inherently legislative* decisions about the manner of federal elections in a State are committed to "the Legislature thereof."

The question presented in this case, concerning whether or to what extent a State's courts may seize

on vague and abstract state constitutional language requiring "free" or "fair" elections to essentially create their own election code, could scarcely be more significant. The question repeatedly arises, like this case, in the context of redistricting. And more broadly, every election cycle, the branches in multiple States vie for authority over important issues implicated by the answer to the question presented here—from ballot receipt deadlines to the scope of curbside voting. Properly interpreting the Elections Clause's allocation of authority over these matters is of the utmost importance, yet the lower federal and state courts have divided over the issue. That split of authority invites "confusion and erosion of voter confidence," threatening to "severely damage the electoral system on which our self-governance so heavily depends." *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ---, 141 S. Ct. 732, 735, 738 (2021) (Thomas, J., dissenting from the denial of certiorari).

The "important" issue presented by this case "is almost certain to keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). And this case presents an ideal vehicle for this Court to "carefully consider and decide the issue" not in an emergency posture but rather "after full briefing and oral argument." *Id.* For while the 2022 congressional elections in North Carolina will take place under a judicially created map, that map is good for 2022 only. This Court should intervene now, resolve this critically important and recurring question, and

ensure that congressional elections in 2024 and thereafter are conducted in a manner consistent with our Constitution's express design.

OPINIONS BELOW

The February 23, 2022 order of the North Carolina Supreme Court is reported at 868 S.E.2d 97 (Mem) and is reproduced at App.243a. The February 23 order of the North Carolina Superior Court is not reported and is reproduced at App.269a. The February 14, 2022 written opinion of the North Carolina Supreme Court is reported at 2022 WL 496215 and reproduced at App.1a. The February 4, 2022 order of the North Carolina Supreme Court is reported at 867 S.E.2d 554 (Mem) and reproduced at App.224a.

JURISDICTION

The North Carolina Supreme Court entered an order on February 4, 2022 and an accompanying written decision on February 14, 2022, striking down Petitioners' original Congressional maps, and on February 23, 2022, the North Carolina Supreme Court denied Petitioners a temporary stay of the remedial maps generated by the Special Masters. This Court has jurisdiction over these final orders under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reproduced at App.310a.

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STATEMENT

I. The General Assembly Enacts a New Congressional Map.

After each decennial census, "States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). The Elections Clause of the U.S. Constitution assigns this redistricting responsibility to state legislatures: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I § 4, cl. 1.

Beginning in mid-2021, the General Assembly undertook a transparent public process to draw new congressional districts in response to the 2020 U.S. Census data. Even before receiving the census data (which was substantially delayed as a result of the COVID-19 pandemic), the General Assembly's redistricting committees met in both the House and Senate to agree on line-drawing criteria, including prohibitions on using racial data, partisan considerations, and election results data to draw congressional districts. Once it received the 2020 census data, the General Assembly hosted public hearings throughout North Carolina, including in all thirteen existing congressional districts. Legislators and members of the public submitted map proposals, and the General Assembly held hearings on those proposals.

On November 4, 202, the North Carolina General Assembly enacted a new map for congressional elections. *See* 2021 N.C. Sess. Laws 174.

II. Respondents Seek To Enjoin the General Assembly's Map.

Despite the public and transparent redistricting process, Respondents filed suit seeking to enjoin the General Assembly's newly enacted congressional map. Respondents claimed the new congressional map violated the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses, and they claimed that the map was an unlawful partisan gerrymander because it failed to reflect the alleged 50-50 split in partisan preference among North Carolinians generally. Respondents did not allege—because they could not allege—that the General Assembly adopted a partisan-data criterion or otherwise announced a partisan purpose behind the new congressional map. Nor did they allege any violation of the United States Constitution.

Petitioners opposed Respondents' claims on multiple grounds, including on the basis of the Elections Clause, which they argued foreclosed Respondents' claims in their brief opposing a preliminary injunction. App.325a–27a. On December 3, 2021, a three-judge panel of the North Carolina Superior Court declined to preliminarily enjoin the challenged maps, based in part on the conclusion that "Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution," but "it

is the federal constitution which provides the North Carolina General Assembly with power to establish such districts." App.266a.

Respondents then sought a preliminary injunction, or immediate discretionary review, from the North Carolina Supreme Court. Petitioners opposed the request, again raising the Elections Clause argument. App.321a–23a. The state supreme court granted a preliminary injunction, during the completion of proceedings in the trial court, without addressing the Elections Clause issue. App.247a–52a.

After further proceedings, the three-judge trial court held, on January 11, 2022, that Respondents' claims were non-justiciable under the political question doctrine; that Respondents lack standing; and that Respondents were unlikely to establish that the General Assembly's congressional map was made with discriminatory intent, given that the evidence showed the General Assembly did not use partisan data in the creation of the congressional map. The court therefore entered final judgment for Petitioners.

Respondents appealed.

III. The North Carolina Supreme Court Strikes Down the Legislature's Congressional Map.

On February 4, 2022, the North Carolina Supreme Court issued an order granting Respondents' request to enjoin the General Assembly's congressional map. The court stated that "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," and although the

General Assembly "has the duty to apportion North Carolina's congressional . . . districts," the "exercise of this power is subject to limitations imposed by other [state] constitutional provisions. App.227a. The court concluded that the General Assembly's congressional map was an unconstitutional partisan gerrymander under four different clauses of the North Carolina Constitution, and the court "enjoin[ed] the use of these maps in any future elections, . . . including primaries scheduled to take place on 17 May 2022." App.228a. While Petitioners again argued that the Elections Clause foreclosed Respondents' requested relief, App.313a–15a, the court did not address the U.S. Constitution's Elections Clause in its February 4 order.

The court's order also set a deadline for parties and intervenors to submit remedial districting plans to the trial court and required the trial court to approve or adopt a compliant congressional districting plan no later than noon on February 23, 2022. The court explained its view that "[t]here are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," including "mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis." App.230a. "If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional." *Id.* The

court further required that the "General Assembly . . . submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating partisan fairness of the plan." App.230a–31a.

On February 14, 2022, the North Carolina Supreme Court supplemented its February 4 order with a written opinion. In that opinion, the North Carolina Supreme Court "disagree[d]" with the General Assembly's assertion that the federal constitution's Elections Clause bars Respondents' claims against the congressional plan. App.121a. The court cited this Court's opinion in *Rucho* for the proposition that "state constitutions can provide standards and guidance for state courts to apply" in addressing partisan gerrymandering, *id.* (emphasis omitted), and claimed "a long line of decisions" by this Court confirms the more general proposition that "state courts may review state laws governing federal elections to determine whether they comply with the state constitution," *id.*

IV. The General Assembly Enacts a Remedial Congressional Map.

In response to the North Carolina Supreme Court's February 4 order and February 14 opinion, the General Assembly developed a remedial congressional map, which it enacted on February 17. 2022 N.C. Sess. Laws 3. The General Assembly timely submitted its remedial map to the North Carolina Superior Court,

with an explanation of its constitutionality. According to the General Assembly's expert's calculations, the remedial congressional plan scored within the North Carolina Supreme Court's guidance for presumptive constitutionality according to key statistical metrics, *see* Legislative Defs.' Objs. to Pls.' Prop. 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. In enacting its remedial map, the General Assembly made clear that its original map would once again govern were this Court to reverse the North Carolina Supreme Court's decision invalidating it. *See* 2022 N.C. Sess. Laws 3, § 2 (providing that if this Court "reverses" 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).

V. The North Carolina Superior Court Implements a Congressional Map of Its Own Making.

On February 16, the North Carolina Superior Court appointed three Special Masters to assist in the

remedial process. Those Special Masters, in turn, hired two political scientists, a mathematician and a professor of neuroscience to "assist in evaluating the Remedial Plans." App.273a. The Special Masters and their team of assistants produced a proposed remedial congressional map for the court's consideration, as did the parties (including the General Assembly's enacted remedial map).

On February 23, the North Carolina Superior Court issued an order rejecting the General Assembly's remedial congressional map and adopting the map proposed by the Special Masters. App.269a. The court concluded, "based upon the analysis performed by the Special Masters and their advisors," that the General Assembly's remedial congressional map "is not satisfactorily within the statistical ranges set forth in the Supreme Court's full [February 14] opinion" and determined that it therefore failed to meet the North Carolina Supreme Court's standards. App.280a. Instead, the court adopted the remedial plan proposed by the Special Masters, which it held satisfied the North Carolina Supreme Court's standards. While Petitioners had presented their Elections Clause argument again on remand, in a February 21 brief objecting to the Plaintiffs' proposed plans, App.229a, the court did not address the Elections Clause issue. The Superior Court's order makes clear that its remedial map applies only to the 2022 congressional election cycle. App.293a.

At the same time, the North Carolina Superior Court denied Petitioners' motion to disqualify two of

the Special Masters' assistants after these individuals were discovered to have engaged in substantive *ex parte* communications with Respondents' experts. The court denied the motion despite no opposition being filed.

On the same day that the North Carolina Superior Court issued its decision, Petitioners sought a stay or writ of supersedeas from the North Carolina Supreme Court. Petitioners once again argued, in their stay motion, that the trial court's actions violated the Elections Clause. App.317a–19a. The state supreme court denied Petitioners' requests without analysis. App.243a–46a.

VI. Petitioners Seek a Stay from this Court.

Two days later, Petitioners sought a temporary stay pending a writ of certiorari (or, in the alternative, a grant of certiorari and a stay pending a merits decision), from this Court, which was denied. *Moore*, 142 S. Ct. 1089. While the Court denied the stay application, four Justices acknowledged the importance of the issue presented and expressed interest in granting certiorari upon timely filing of a petition. *Moore* 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay); *id.* at 1089, 1091 (Alito, J., dissenting from the denial of application for stay).

REASONS FOR GRANTING THE WRIT

The North Carolina Supreme Court's actions nullify the North Carolina General Assembly's regulations of the manner of holding federal elections in the State and replace them with new regulations of the

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judiciary's design. Those actions are fundamentally irreconcilable with the Constitution's Elections Clause. To secure self-government, that provision vests the power to regulate federal senate and congressional elections *in each State's legislature*, subject only to supervision by Congress. The state supreme court's usurpation of that authority—pursuant to vague and indeterminate state constitutional provisions securing free speech, equal protection, and free and fair elections—simply cannot be squared with the lines drawn by the Elections Clause. The state judiciary's actions raise profoundly important issues that have divided the lower courts, that have been repeatedly presented to this Court for review, and that will continue to recur until this Court finally resolves them. The Court should grant the writ.

I. The Lower Courts Have Divided over the Recurring and Critically Important Question Presented.

A. Whether State Entities Other than "the Legislature Thereof" Have Authority To "Make or Alter Regulations" Governing the "Times, Places, and Manner" of Congressional Elections Is a Question of the Highest Importance.

The allocation of authority to determine the times, places, and manner of electing federal Senators and Representatives is a matter of the most vital importance to our system of government. "Undoubtedly, the right of suffrage is a fundamental matter in a free

and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). The Founders bequeathed to us the precious inheritance of a "strictly republican" form of government—based on the conviction that "no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." THE FEDERALIST NO. 39, at 240 (James Madison) (C. Rossiter ed., 1961). And our Nation's commitment to republican principles of self-government renders the design of "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved" a matter of "lawmaking in its essential features and most important aspect." *Smiley*, 285 U.S. at 366.

The question presented in this case, at root, is who is vested with the power to decide the when, what, where, and how of the American people's exercise of self-government: state legislatures or state judges? "There can be no doubt that this question is of great national importance." *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from the denial of application for stay). Indeed, the answer will carry implications for every aspect of what happens every two years on Election Day. At stake is the allocation of the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of

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voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. In the last two years alone, state legislatures have vied with other state branches or entities over such pivotal matters as the deadline for receipt of mail-in ballots, *see Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ---, 141 S. Ct. 1 (2020) (statement of Alito, J.), witness requirements for absentee voting, *see* Emergency Application for Stay Pending Appeal, *Berger v. North Carolina All. for Retired Ams.*, No. 20A74 (Oct. 27, 2020), and—as in this case—the determination of the shape of congressional districts in the first place, *see* Emergency Application for Stay Pending Pet. for Writ of Cert., *Moore v. Harper*, No. 21A455 (Feb. 25, 2022); Emergency Application for Writ of Inj., *Toth v. Chapman*, No. 21A457 (Feb. 28, 2022).

The Constitution is far from silent on the proper allocation of authority to decide these important issues. Article I, Section 4 dictates, in unambiguous prose, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." U.S. CONST. art I, § 4, cl. 1 (emphasis added). And this clear demarcation of powers is not an empty formality. No, the Clause is a structural provision designed to preserve liberty. The Elections Clause is an embodiment of the security afforded by our federalist system, ensuring that the States' most representative bodies have primacy in regulating elections. THE FEDERALIST

NO. 51 (James Madison) (C. Rossiter ed., 1961); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 253, 254 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting "state legislatures" come "nearest to the people themselves"). This Court should vindicate the authority of state legislatures under this provision—and thus vindicate the liberty endowed by our Constitution's structural commands. *See* this Court's Rule 10(c); Antonin Scalia, *Foreword: The Importance of Structure In Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418–19 (2008) ("Structure is everything . . . . Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril.").

B. The Question Presented Has Divided the Lower Courts.

Despite the clarity of the Elections Clause's text—and, as discussed below, its original meaning and this Court's precedent interpreting it—the lower courts have divided over the ability of state courts and other state entities to make or alter the election rules enacted by "the Legislature thereof." U.S. CONST. art I, § 4, cl. 1. That split in authority—over a matter of such fundamental import to our system of self-government—has become increasingly intolerable.

1. The Eighth Circuit has interpreted the scope of the legislature's authority under the Electors Clause—the substantially-identically worded constitutional provision governing the choosing of *presidential* electors—correctly. In 2020, the Minnesota

Secretary of State entered a consent decree with plaintiffs who had challenged the legislatively prescribed deadlines for mail-in ballots in the 2020 Minnesota presidential election that effectively "extended the deadline for receipt of ballots without legislative authorization." *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020). The Eighth Circuit invalidated this revision of the ballot deadline under the Electors Clause. "By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the Legislature of each state," and "a legislature's power in this area is such that it cannot be taken from them or modified even through their state constitutions." *Id.* at 1060 (quotation marks omitted).

A long line of earlier state-court precedents likewise reject state law authority to negate statutes enacted by their state legislatures under the Elections and Electors Clauses. In *State ex rel. Beeson v. Marsh*, for example, the Nebraska Supreme Court rejected a claim by prospective presidential electors for the Progressive Party that the state statutes governing the appointment of electors—which the court had "construed so as not to permit the nomination" of the Party's elector candidates—violated the Nebraska Constitution's guarantee that "All elections shall be free." 34 N.W.2d 279, 245, 246 (Neb. 1948). The court found it "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision" because it

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concluded, on the authority of this Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), that the Electors Clause gave "plenary power to the state legislatures in the matter of the appointment of electors," and that the Nebraska Constitution "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States." *Beeson*, 34 N.W.2d at 246; *see also Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (similar).

The Rhode Island Supreme Court has likewise held that state laws allowing the election of Members of Congress by plurality vote could not be invalid under a state constitutional provision requiring majority vote in all elections in the State. That state constitutional provision, the court concluded, would be "manifestly in conflict" with the Electors Clause "if it be construed to extend to elections of representatives to congress; for, so construed, it assumes to impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint, so long as and to the extent that congress refrains from making regulations in the same matter." *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *see also, e.g.*, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. App. 1944) (concluding that state laws authorizing absentee voting in federal elections for state citizens serving abroad in World War II was valid under the Elections and Electors Clauses despite state constitutional provision requiring in-person voting); *In re Opinions of Justices*, 45

N.H. 595, 601 (1864) (similar), *called into doubt in part on other grounds*, *In re Opinion of the Justices*, 113 A. 293, 298–99 (N.H. 1921).

Finally, several federal appellate judges have also embraced this interpretation of the constitution's plain text in separate opinions. In *Wise v. Circosta*, for instance, Judges Wilkinson and Agee, joined by Judge Niemeyer, dissented from the Fourth Circuit's denial (on standing grounds, as relevant here) of a temporary injunction barring the North Carolina Board of Elections from changing "the statutory receipt deadline for mailed absentee ballots." 978 F.3d 93, 106 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting). The dissenting judges reasoned that the Elections and Electors Clauses' "clear, direct language" vested "[t]he power to regulate the rules of federal elections [in] a specific entity within each State: the 'Legislature thereof,' " and that the Board's re-write of the State's ballot-receipt deadline effectively "commandeered the North Carolina General Assembly's constitutional prerogative to set the rules for the upcoming federal elections within the State." *Id.* at 111.

Similarly, in *Hotze v. Hudspeth*, Judge Oldham dissented from the majority's refusal (on the basis of mootness) to enjoin Harris County, Texas from altering "the Legislature's express instructions" governing "drive-through voting" by making it available to "all voters." 16 F.4th 1121, 1128, 1129 (5th Cir. 2021) (Oldham, J., dissenting). Under the Elections Clause, Judge Oldham reasoned, the place for the policy debate "about the wisdom or folly of drive-through

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voting . . . is in the Legislature," and Harris County had "wholly ignored" that body's resolution of the question. *Id.* at 1128, 1130.

2. The North Carolina Supreme Court's decision below, by contrast, split with these authorities and asserted the power to *override and replace* the General Assembly's determinations concerning the manner of congressional elections based on its alleged *state* constitutional authority "to protect the democratic processes through which the political power of the people is exercised." App.120a. Allowing the General Assembly to actually exercise the exclusive authority vested in it by the Elections Clause to determine the time, place, and manner of congressional elections would, the court below concluded, be "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." App.121a.

The Supreme Court of Florida reached a similar conclusion in 2015. In *League of Women Voters of Florida v. Detzner*, that court struck down the state legislature's 2012 congressional redistricting plan as violating "the Florida Constitution's prohibition on partisan intent" in redistricting. 172 So.3d 363, 370 (Fla. 2015). In doing so, the court rejected "the Legislature's federal constitutional challenge" to the application of that state constitutional provision under the Elections Clause. *Id.* at 370 n.2.

In other States, too, the courts have blessed—or engaged in—open rewriting of "important statutory

provision[s] enacted by the [state] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania*, 141 S. Ct. 1 (statement of Alito, J.). The Pennsylvania Supreme Court, like the North Carolina Supreme Court below, has asserted the power under its "Free and Equal Elections Clause" to nullify and replace the legislature's congressional map, in the teeth of the federal Elections Clause. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821–24 & n.79 (Pa. 2018). And that court again, in the run-up to the 2020 general election, relied on the same state constitutional provision to assert a "broad authority to craft meaningful remedies" in federal elections, which it employed to blue-pencil the legislature's deadline for the receipt of mail-in ballots, extending it by three days. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020); *North Carolina All. for Retired Ams. v. North Carolina State Bd. of Elections*, 20-CVS-8881 (N.C. Super. Ct. Oct. 5, 2020), *injunction pending appeal denied sub nom. Berger v. N.C. State Bd. of Elections*, 141 S. Ct. 658 (2020) (upholding similar, wholesale changes to election deadlines by non-legislative entities).

The alternate interpretations of the Elections Clause relied upon by these decisions cannot be reconciled with the correct understanding of the provision adopted by the Eighth Circuit and the other state supreme courts cited above. This Court has the solemn responsibility to intervene and resolve the

disagreement over this issue "of the most fundamental significance under our constitutional structure." *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from the denial of certiorari); *see* this Court's Rule 10(b).

C. The Question Presented Will Continue To Recur Until this Court Resolves It.

The question whether a State's courts or other entities may nullify, alter, or replace the election regulations enacted "by the Legislature thereof" is not going to go away. Simply by virtue of the issue's significance for American elections and the variety of contexts that raise it, *see supra*, Part I.A, "[t]he issue is almost certain to keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in the denial of application for stay).

Take the underlying issue in this case: the authority to draw a State's congressional districts. That question has been presented to this Court before, *see, e.g.*, Petition for Writ of Cert., *Turzai v. Brandt*, No. 17-1700 (June 25, 2018), it was presented to the Court twice this Term already, *see Moore*, *supra*, No. 21A455; *Toth*, *supra*, No. 21A457, and it will be presented to the Court again and again if the Court does not grant review now. After all, the States engage in redistricting every ten years. Moreover, some 30 state constitutions contain a "free and fair elections"

clause[1]—and *they all* contain some guarantee of free speech, equal protection, or both.[2] The North Carolina Supreme Court was not the first to divine in these open-ended clauses the heretofore undiscovered power to alter or amend the State's congressional districts, and unless this Court intervenes, it will assuredly not be the last.

And redistricting is just the beginning. As noted above, the Elections Clause governs—and state intra-branch disputes have arisen over—the whole waterfront of voting issues, from absentee voting deadlines to witness requirements, voter ID to curbside voting. The whole purpose of the Elections Clause is to establish a clear and definite allocation of the authority to set the rules of the road for federal elections before the voting starts. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 816 (1833) ("A discretionary power over elections must be vested somewhere."). Yet until this Court clearly enforces the Constitution's express selection of each State's legislature as the repository of this power, subject only to a check by Congress, the continued lack of "clear rules" settling this fundamental question will "invite further confusion and erosion of voter confidence." *Degraffenreid*, 141 S.

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[1] *Free & Equal Election Clauses in State Constitutions*, NATIONAL CONF. OF STATE LEGISLATURES, https://bit.ly/3MzzOJb (last accessed Mar. 15, 2022).

[2] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 92, 133 (2018).

Ct. at 738 (Thomas, J., dissenting from the denial of certiorari).

D. This Case Is a Particularly Suitable Vehicle for Resolving the Scope of a State Legislature's Authority Under the Elections Clause.

While this Court has previously "not yet found an opportune occasion to address" the division of authority over this fundamental and recurring issue, this case presents a uniquely suitable vehicle for doing so. *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). The Elections Clause issue was squarely and repeatedly presented to both courts below, and the state supreme court directly passed upon it, *see supra*, pp. 7–10, 12–13—so despite Respondents feeble protestations to the contrary at the stay stage,[3] there can be no plausible dispute that the issue was preserved below and is squarely presented for this Court's review. And the issue is the only determinative one left in the case, so there is little risk that the case, once granted, will end up being decided on some narrower grounds, with the Elections Clause issue once again left as a loose end.

Finally, and critically, this case presents the Court with the opportunity to consider and resolve this important issue on plenary review, with full

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[3] Respondent Common Cause's Opp'n at 5–8, *Moore*, *supra*, No. 21A455 (Mar. 2, 2022); Respondent North Carolina League of Conservation Voters' Opp'n at 23–24, *Moore*, *supra*, No. 21A455 (Mar. 2, 2022).

briefing and argument in the ordinary course. Most of the previous cases presenting the Elections Clause question have arisen in applications for emergency relief, where the Court is necessarily deprived of the fulsome briefing it ordinarily receives in cases raising important questions of constitutional law. In this case, by contrast, events will not compel the Court to act until the 2024 election cycle approaches—ensuring that the Court will benefit from a full ventilation of the Elections Clause issue by the parties' counsel and amici.

* * * * *

This case finally presents the Court with "an opportune occasion" to resolve, once and for all, the festering issue of a state legislature's authority, under the Elections Clause, to regulate the times, places, and manner of federal elections free from interference by other state branches and entities. *Moore*, 142 S. Ct. at 1090. (Alito, J., dissenting from the denial of application for stay). The Court should grant the writ and end the conflict in the lower courts over this critical question of nationwide importance.

II. The Decisions Below Plainly Violate the Elections Clause.

Not only did the North Carolina Supreme Court split with the Eighth Circuit and the other state-court precedents cited above on the question presented, it got the answer to the question wrong. For the text and history of the Elections Clause, and this Court's precedent interpreting it, leave no doubt that a State's

judicial branch has no power to nullify and replace the legislature's duly chosen congressional map on the basis of broad generalities in the State's constitution.

A. The Elections Clause Vests State Legislatures with Authority To Set the Rules Governing Elections, not State Courts.

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Wisconsin State Legislature*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, THE FEDERALIST NO. 27, at 174–175 (Alexander Hamilton) (C. Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); *Legislature*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (Noah Webster) ("The body of men in a state or kingdom, invested with

power to make and repeal laws."); *Legislature*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Samuel Johnson) ("The power that makes laws."); 2 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (same); AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763) ("[T]he Authority of making Laws, or Power which makes them.").

"Any ambiguity about the meaning of 'the Legislature' is removed by other founding era sources." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 828 (2015) (Roberts, J., dissenting). For instance, "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives with the authority to enact laws." Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U.L. REV. ONLINE 131, 147 (2015). In Federalist 59, Hamilton "readily conceded that there were only three ways in which" the power to regulate elections "could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (C. Rossiter ed., 1961); *accord* 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, at § 816 (1833). The absence from that list of any role for the judiciary reflects that assigning such a political role and delegating legislative power to the judiciary would threaten its independence, as " 'there is no liberty if the power

of judging be not separated from the legislative and executive powers.' " THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961).

The Constitution thus grants the state "Legislature" primacy in setting the rules for federal elections, subject to check only by Congress. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884). And there can be no question that this specific delegation of power to state legislatures encompasses the authority to draw the lines of congressional districts. The design and selection of congressional maps is a core part of the "Regulation[ ]" of the "Manner of holding Elections." U.S. CONST. art. I, § 4, cl. 1. Consistent with the plain meaning of the text, this Court has squarely and repeatedly held that the lines drawn in Article I, Section 4 govern the authority of "districting the state for congressional elections." *Smiley*, 285 U.S. at 373. As the Court recently put the point, "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." *Rucho*, 139 S. Ct. at 2496 (emphasis added); *accord Arizona Indep. Redistricting Comm'n*, 576 U.S. at 804–08.

Accordingly, "[t]he only provision in the Constitution that specifically addresses" the crafting of congressional districts "assigns [the matter] to the political branches," not to judges. *Rucho*, 139 S. Ct. at 2506. What is more, the Elections Clause is the *sole* source of state authority over congressional elections.

Regulating elections to federal office is not an inherent state power. Instead, the offices of Senator and Representative "aris[e] from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 522 (2001). And because any state authority to regulate election to federal offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc.*, 514 U.S. at 804; *cf.* 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, at § 627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the Union"). Thus, whatever power a state government has to craft congressional districts *must* derive from—and be limited by—the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

Precedent from this Court and others is in accord with these principles. While the majority and dissenting opinions in *Arizona Independent Redistricting Commission* disagreed over the question whether the "legislature," under the Elections Clause, is limited to a specific legislative body or "the State's lawmaking processes" more generally, *all* Justices agreed at a minimum that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking" 576 U.S at 808, 824, 841; *cf. id.* at 827–29 (Roberts, C.J., dissenting).[4] Nearly a

[4] To the extent the Court were to find that some portion of the *Arizona Independent Redistricting Commission* opinion is

century ago, the Court reached the same conclusion: the drawing of congressional districts "involves lawmaking in its essential features and most important aspect," and "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 366, 367.

Similarly, this Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—that the state legislatures' power to prescribe regulations for federal elections "cannot be taken." *McPherson*, 146 U.S. at 35. And as noted above, other courts have long recognized this limitation on the power of States to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *Beeson*, 34 N.W.2d at 286–87; *Dummit*, 181 S.W.2d at 695; *In re Plurality Elections*, 8 A. at 882.

B. The State Courts' Invalidation of the Legislatively Chosen Map and Imposition of a Map of Their Own Making Violates the Elections Clause.

The state-court orders below fundamentally transgress the Constitution's specific allocation of authority over the manner of holding congressional

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contrary to Petitioners' position in this case, and that the case is not distinguishable, the Court should overrule it.

elections. As just shown, the Constitution's resolution of "electoral districting problems" is to "assign[ ] the issue to *the state legislatures*, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496 (emphasis added). In North Carolina, the General Assembly is the "Legislature," established by the people of the State.

The North Carolina Constitution makes clear beyond cavil that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1 (emphasis added). And it makes clear, too, that the state judiciary *is not* the "Legislature" in North Carolina, nor any part of it. To the contrary, the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). Thus, the General Assembly alone is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. *Id.* (internal quotation marks omitted). That, and no other, is "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367.

Nor can North Carolina's courts claim to benefit from any sort of *delegation* of the General Assembly's exclusive power to craft congressional districts and otherwise regulate the manner of congressional elections. For under North Carolina law, "the legislature

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may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *Adams v. North Carolina Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978).

Further still, even if the General Assembly *could* as a matter of state law delegate its core lawmaking functions to some other state entity (and it cannot), it has not made any such delegation *to state courts*. For the North Carolina judicial branch's role is to "interpret[ ] the laws and, through its power of judicial review, determine[ ] whether they comply with the constitution," *Berger*, 781 S.E.2d at 250, *not* to resolve "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government," *Cooper v. Berger*, 809 S.E.2d 98, 107 (N.C. 2018). Given the North Carolina Constitution's deliberate proclamation that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. CONST. art. I, § 6, the state courts are thus constitutionally incapable of receiving, and exercising, the power of "lawmaking in its essential features and most important aspect," *Smiley*, 285 U.S. at 366—*even if* the General Assembly were constitutionally capable of giving it away.

Yet the court below exercised *precisely* that power, in direct contravention of the federal Elections Clause. The North Carolina Supreme Court's February 4, 2022 Order striking down the General

Assembly's original congressional map on state-law grounds directly seizes the power to regulate the manner of congressional elections. When the General Assembly enacted that map in 2021, it exercised its constitutionally vested authority to "prescribe[ ]" the "Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. The Constitution prescribes a single method for setting aside such a choice: "the Congress may at any time by Law make or alter such Regulations." *Id.* The Elections Clause *does not* give the state courts, or any other organ of state government, the power to second-guess the legislature's determinations.

That is the plain holding of this Court's decision in *Smiley*. There, Minnesota's Governor had, in effect, done *precisely* what the North Carolina Supreme Court's February 4 order did here: he rendered the legislature's chosen districting plan "a nullity" by "return[ing] it without his approval." 285 U.S. at 361. This Court had no difficulty recognizing that this nullification of the state legislature's congressional map would plainly violate the Elections Clause *unless* "the Governor of the state, through the veto power, shall have a part in the making of state laws." *Id.* at 368. And the Court thus held that the Governor's nullification of the Minnesota legislature's congressional map was consistent with the Elections Clause *only because* it concluded that the veto power, "as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority." *Id.*; *see Dummit*, 298 Ky. at 50 (explaining that while *Smiley* "holds

that a legislature must function in the method prescribed by the State Constitution in directing the times, places, and manner of holding elections," that does not mean that "when functioning in the manner prescribed by the State Constitution, the scope of its enactment on the indicated subjects is also limited by the provisions of the State Constitution"). Here, by contrast, because *a state court's* nullification of a congressional map through the exercise of judicial review is plainly *no* "part in the making of state laws," *Smiley*, 285 U.S. at 368, the opposite conclusion necessarily follows.

To be sure, in limited circumstances a state legislature's election rules are subject to review or invalidation by entities other than Congress—because other provisions of *the United States Constitution* explicitly or implicitly so provide. For example, where the congressional districts drawn by a state legislature violate *some other* provision of the Constitution, such as the Equal Protection Clause, the Constitution itself authorizes the federal courts to intervene to secure enumerated constitutional rights—in the same manner as they secure those rights when Congress, through an exercise of *its* enumerated powers, transgresses them. *See Rucho*, 139 S. Ct. at 2495–97. No such enumerated, federal constitutional right is at issue here.

Instead, the state supreme court justified its nullification of the General Assembly's regulation of the manner of congressional elections by pointing to a hodge-podge of *state* constitutional provisions. *See*

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App.11a–12a. But the *federal* constitution vests the authority to draw a State's congressional districts in "the *Legislature* thereof," U.S. CONST. art. I, § 4, cl. 1 (emphasis added), where it must be exercised "in accordance with the method which the state has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367—not hedged or parceled out by the state's constitution to its judiciary.

Moreover, "none of" the state constitutional provisions invoked by the court below "say[ ] anything about partisan gerrymandering, and all but one make no reference to elections at all." *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). And that one provision—the "Free Elections Clause"— was "for 246 years . . . not found to prohibit partisan gerrymandering." *Id.* at 1091; *see* App.196a–206a (Newby, J., dissenting). It is one thing for a state court to enforce specific and judicially manageable standards, such as contiguousness and compactness requirements. It is quite another for the court to seize 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.

Having rendered the General Assembly's original congressional map "a nullity," *Smiley*, 285 U.S. at 362, the state courts then compounded the constitutional error by creating, and imposing by fiat, *a new* congressional map. These further acts demonstrate with remarkable clarity this Court's teaching that crafting congressional districts "involves lawmaking in its essential features and most important aspect," *id.* at 366, and "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500. Rather than hearing briefing and argument on any recognizably legal question, the trial court below proceeded by appointing three "Special Masters" who, in turn, hired political scientists and mathematicians to "assist in evaluating" the remedial plans the state supreme court had ordered the parties to produce. App.273a–74a. This cadre of extra-constitutional officers then proceeded to reject the General Assembly's plan (again) and craft *their own* plan, based on tools and datasets similar to the ones used by the General

Assembly. App.289a; 301a–04a. Worse still, in the process of analyzing the parties' remedial plans and crafting their own plan, this team of judicial-appointees and political scientists had repeated, *ex parte* contacts with the experts *for the plaintiffs*, App.296a–99a—behavior that may be acceptable for *legislative* officials but has long been forbidden for genuinely *judicial* officers. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 (2000).

The short of it is this: the decisions by the courts below to nullify the General Assembly's chosen "Regulations" of the "Manner of holding Elections," U.S. CONST. art. I, § 4, cl. 1, and to replace them with new regulations of their own, discretionary design, simply cannot be squared with the text and original meaning of the Elections Clause, nor with this Court's interpretation of it.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari.

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March 17, 2022

Respectfully Submitted

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
MEGAN M. WOLD
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Petitioners