No. 21A455

IN THE

Supreme Court of the United States

TIMOTHY MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, ET AL.,

Applicants,

v.

REBECCA HARPER, ET AL.,

Respondents.

RESPONDENT COMMON CAUSE'S OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

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March 2, 2022

RULE 29.6 DISCLOSURE STATEMENT

Respondent Common Cause has no parent company nor does any public company have a 10 percent or greater ownership in it.

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

Less than three years ago, Respondent Common Cause was before this Court on a case involving partisan gerrymandering much like this one: *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019). There, as here, the North Carolina legislature adopted an overt partisan gerrymander. There, as here, the legislature's plan diluted North Carolinians' voting power based on political affiliation. There, as here, Common Cause sought judicial relief from that denial of rights. In *Rucho*, this Court decided that federal judges were not authorized to provide that relief, but that resort to state courts was available. *Id.* at 2506-07. Indeed, the Court stated that its holding did not "condemn complaints about districting to echo into a void" because "state constitutions can provide standards and guidance for state courts to apply" in redistricting cases. *Id.* at 2507.

Common Cause took the Court at its word. Relying on *Rucho*, Common Cause pursued its case in state court when the legislature again enacted a patently partisan gerrymander in 2021. In its lawsuit, Common Cause alleged multiple state constitutional violations. And it won. The trial record confirmed that Applicants engaged in "intentional * * * partisan redistricting," App. 50a ¶ 27, a practice the trial court observed (as did this Court in *Rucho*) would lead to "results that are incompatible with democratic principles." *Id.* at 543a ¶ 145 (citing *Rucho*, 139 S. Ct. at 2504). And the North Carolina Supreme Court held that Applicants' congressional map "violate[s] several rights guaranteed to the people by [the] state constitution[.]" *Id.* at 36a ¶ 6.

But now, Applicants argue that the *Rucho* Court led Common Cause astray—that the courthouse doors have in fact been shut on North Carolina's voters all along. That is news—not just to the voters of North Carolina and its high court, but also to the Justices of this Court who joined *Rucho*. Indeed, in apparent defiance of this Court's holding that state courts can apply state constitutional standards in redistricting cases, Applicants now ask this Court to hold *the exact opposite*—that a state court cannot apply a state constitution to review any state election law related to elections for federal office. Rather, Applicants argue that, when such election laws are adopted, voters are without any recourse to state courts even when a state legislature violates the very constitution under which it was established.

Applicants' argument is repugnant not only to a century of this Court's precedents, but also to the Constitution's text, history, and structure. All told, Applicants' request hinges on arguments that are anti-originalist, anti-constitutional, and flatly ahistorical. Because Applicants fall well short of the extraordinary standard required for emergency relief, the stay should be denied.

COUNTERSTATEMENT OF THE CASE

The North Carolina General Assembly enacted a new map for congressional elections in November 2021. Respondent North Carolina League of Conservation Voters, Inc. and several individuals ("NCLCV Respondents") and a group of individuals ("Harper Respondents") immediately challenged that map in state court as unconstitutional and sought a preliminary injunction. On December 8, the North Carolina Supreme Court reversed the trial court's denial of the preliminary injunction,

stayed the candidate filing period, and ordered the trial court to hold proceedings on the merits in an expedited manner. Respondent Common Cause, which had previously filed a lawsuit in state court challenging Applicants' delay in approving a new congressional map, successfully intervened on December 15.

In mid-January, after accelerated discovery and briefing and a three-and-a-half day bench trial, the three-judge trial court recognized that "the 2021 Congressional plan is an intentional, and effective, pro-Republican partisan redistricting," App. 445a ¶ 423, but held that partisan gerrymandering claims are non-justiciable under North Carolina's Constitution. *Id.* at 543a ¶ 144. On February 4, 2022, the North Carolina Supreme Court issued an order reversing the trial court and holding that the congressional map was an illegal partisan gerrymander in violation of a number of state-constitutional clauses. The court remanded with instructions for Applicants to submit a redrawn map to the trial court by February 18. The court followed up with a lengthy opinion issued on February 14, which rejected Applicants' Elections Clause argument as waived and in any event meritless.

Applicants did not seek a stay of the court's February 4 Order or February 14 Opinion. They instead acquiesced to the process on remand by proposing their own special master and using this time to prepare and approve a new congressional map, which they submitted to the trial court on February 17. On February 23, the trial court rejected that map as constitutionally infirm. As it was explicitly authorized to do under state law, the trial court imposed an Interim Congressional Map. Candidate filing for North Carolina's 2022 elections opened on February 24 using that map.

Having tried but failed to have their way in state court, Applicants have now filed—three weeks after the February 4 Order—an emergency application for a stay in this Court. In the meantime, the 2022 primary is underway. Already more than 70 candidates have filed to run for congressional seats based on the trial court's Interim Congressional Map. Candidate filing closes on March 4. Absentee ballots will be distributed on March 28. And early primary voting will commence on April 28.

ARGUMENT

I. Legal Standard

This Court grants a stay pending appeal "only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). When considering stay applications, courts consider four factors. The first is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The second is whether "the applicant will be irreparably injured absent a stay." *Id.* (citation omitted). These factors "are the most critical," though courts also weigh "whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies." *Id.* (internal quotation marks omitted). To obtain a stay pending appeal, an "applicant must meet the heavy burden of" both showing that the lower court was likely "erroneous on the merits" and that the applicant "will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams* v. *Zbaraz*, 442 U.S. 1309, 1311 (1979) (internal quotation marks omitted).

In seeking a stay pending a petition for certiorari, a party must further establish (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari," (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous," and (3) "a demonstration that irreparable harm is likely to result from the denial of a stay." *Corsetti* v. *Massachusetts*, 458 U.S. 1306, 1306-07 (1982) (Brennan, J., in chambers) (citation omitted). Applicants have not established these factors weigh in favor of a stay.

II. Applicants' Elections Clause Argument Is Unlikely To Succeed Because It Is Waived, Unduly Delayed, And Without Legal Basis.

A. This Court Does Not Review Issues That Were Waived Below.

Applicants failed to raise their federal Constitutional argument before the trial court. As a result, the North Carolina Supreme Court observed that they waived it on appeal. Applicants have made no showing that five Justices would find any error in the North Carolina Supreme Court's conclusion that the claim was waived. This Court will not address an issue waived by a party and this deficiency alone merits denial of Applicants' stay request. *See Howell* v. *Mississippi*, 543 U.S. 440, 442-444, 446 (2005) (per curiam) (dismissing writ of certiorari as improvidently granted where federal constitutional claim was not properly raised in state court).

"It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb* v.

Webb, 451 U.S. 493, 499-497 (1981)); *see also* Sup. Ct. R. 14.1(g)(1) (requiring Applicants to "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment"). This Court's lack of jurisdiction over unpreserved claims in state-court cases flows from "[p]rinciples of comity in our federal system," which "require that the state courts be afforded the opportunity to perform their duty," "include[ing] responding to attacks on state authority based on the federal law." *Webb*, 451 U.S. at 499. A failure to adequately raise such issues below is accordingly fatal. *See, e.g.*, *id.* at 495; *Rotary Club of Duarte*, 481 U.S. at 549-550; *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1027 n.4 (2020). And *state-court* procedures determine whether a litigant properly raised and preserved a federal claim. *See, e.g.*, *Engle* v. *Isaac*, 456 U.S. 107, 124-135 (1982); *Parker* v. *North Carolina*, 397 U.S. 790, 798 (1970); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 n.1 (1961). Such state-court procedures can require that litigants assert "federal constitutional rights" in state court within "reasonable time limitations." *Michel* v. *Louisiana*, 350 U.S. 91, 97 (1955).

Here, Applicants failed to raise the federal Election Clause defense in their trial court briefing or at trial. App. 307a-308a ¶ 14 (judgment listing Applicants' affirmative defenses does not include federal Elections Clause). The trial court accordingly did not issue a decision on that defense. Under North Carolina rules and case law, this failure to raise the defense and secure a trial-court ruling on it was fatal to preserving the issue for appeal. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party

desired * * *."); *State* v. *Bell*, 603 S.E.2d 93, 112 (N.C. 2004) ("[A]n error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." (internal quotation marks omitted)).

Applicants did not substantively raise the Elections Clause defense until their brief opposing Respondents' appeal of the trial court's judgment. They did so in three paragraphs at the end of a 195-page brief. *See* N.C. Sup. Ct. Legis. Defs.-Appellee's Br.[1] at 183-184.[2] Respondents properly pointed out that this new argument was waived; it had not been raised and pursued before the trial court or included in the Record on Appeal, per North Carolina R. App. P. 10(a)(1). *See* N.C. Sup. Ct. Reply. Br. of Common Cause. As the issue was unpreserved, the North Carolina Supreme Court's February 4 Order being appealed here did not address the defense. *See generally* App. 10a-29a. And the North Carolina Supreme Court's February 14 Opinion expressly noted that the argument "was not presented at the trial court." *Id.* at 146a. Although the court noted that this argument was "repugnant to the sovereignty of states" and contrary to this Court's precedent, *see id.* at 146a-147a ¶¶ 175-177, those observations, following a clear statement that the argument was not timely, could hardly be said to be a "decision of the federal question [that] was *necessary* to its determination of the cause"—a precondition for this Court's review of a state-court

[1] North Carolina Supreme Court filings are available at: https://bit.ly/3K4R1Ig.

[2] Applicants briefly raised an Elections Clause argument in initially opposing a preliminary injunction, *see* 21.12.02 Legs. Defs.' Mem. Opposing Pls.' Mots. at 29-30 (unless otherwise noted, all lower court non-appellate documents are available at: https://bit.ly/3ICqi5p), but after the North Carolina Supreme Court reversed the denial of a preliminary injunction, thereby extending the 2022 primary schedule, Applicants did not pursue an Elections Clause affirmative defense in the trial court.

decision, *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956) (emphasis added and internal quotation marks omitted); *see also Lambrix* v. *Singletary*, 520 U.S. 518, 522-523 (1997) (explaining that adequate and independent state-law grounds preclude this Court's review). Even if Applicants were to argue that it is unclear if the court's rejection of this argument was based on waiver under state appellate procedure or substantive federal law, this Court's review remains foreclosed. *Durley*, 351 U.S. at 281 ("[W]here the decision of the state court might have been either on a state ground or on a federal ground[,] * * * the Court will not undertake to review it").

B. Applicants' Unexplained And Weeks-Long Delay In Seeking A Stay Counsels Against Granting Emergency Relief.

On February 4, the North Carolina Supreme Court issued an Order striking down Applicants' original plan as an unlawful partisan gerrymanders under the North Carolina Constitution and instructing Applicants to submit a new map to the trial court, and directing the trial court to either "approve" or "adopt" a complaint congressional map. Applicants did not immediately apply to this Court for an emergency stay on the basis that the North Carolina courts acted without authority, despite that now being their entire basis for a stay.[3] Applicants instead complied with the Order, taking weeks to draw a remedial congressional map and suggesting a Special Master. In the meantime, the North Carolina Supreme Court issued its February 14 Opinion, dismissing Applicants' Elections Clause defense as untimely, accompanied by a brief discussion of its legal infirmity. Applicants continued to comply with

[3] Nor, as required by this Court's rules, did Applicants immediately seek a stay of the February 4 Order from the North Carolina Supreme Court. *See* Sup. Ct. R. 23(3).

the court's Order and submitted a remedial congressional map. On February 23, the trial court rejected that map for failing to adequately address state constitutional requirements and ordered adoption of a separate remedial map, as it was authorized to do by state law. *See infra* pp. 22-25. Candidate filing opened the next day, on February 24.

On February 25, Applicants filed an emergency application for a stay based on the North Carolina Supreme Court's February 4 Order and February 14 Opinion. But there is no emergency here. Applicants willingly submitted to the jurisdiction of the trial court by participating in the remedial process and failing to seek an immediate stay following the February 4 Order, or even the February 14 Opinion. The purported "emergency" only arose when the trial court issued an order adopting a map that Applicants did not like. Applicants' heads-I-win-tails-you-lose gamesmanship—willing to play along with the North Carolina trial court unless and until it issued a decision they did not like—should not be rewarded.

Applicants' dilatory invocation of emergency stay procedures has severely prejudiced Respondents and poses a threat to the orderly conduct of North Carolina's 2022 elections. Candidate filing began on February 24 and will close at the end of this week on March 4. As of March 2, more than 70 candidates have filed to run for congressional seats.[4] This will be followed by the distribution of absentee ballots on March 28 and the commencement of early voting on April 28. As explained *infra,* in

[4] *See* State Bd. of Elections, *Candidate List Grouped By Contest*, https://bit.ly/3vLNsD9 (last visited Mar. 1, 2022).

Section II.F.2., any stay issued by this Court at this stage will delay and disrupt the election schedule. Consideration of Applicants' belated federal constitutional arguments—arguments neither timely asserted before the trial court nor expeditiously pursued via an emergency stay application to this Court—would undermine principles of comity, federalism, and fair play, and reward the cynicism and legal brinksmanship in which Applicants engaged. Having acceded to the North Carolina Supreme Court's ruling, and claimed an emergency only after the trial court rejected their remedial map for reasons entirely unrelated to the Election Clause or any new federal issue, Applicants' Motion should be denied as untimely.

Applicants' inequitable position and effective waiver at this stage is compounded by the relief sought via the stay application: they ask this Court to disregard the remedial map that they chose to prepare as an alternative to pursuing further judicial review and instead order the original congressional map, adopted four months ago on November 4, 2021, and subsequently found unconstitutional by the North Carolina Supreme Court, to be reinstated today.

This Court has denied relief in response to similar delay in seeking a stay. For example, in *Winston-Salem/ Forsyth County Board of Education* v. *Scott*, 404 U.S. 1221 (1971) (Berger, C.J., in chambers), the applicants waited a month to seek a stay of an order desegregating a school district, leaving the Court four days to decide the issue before the school system was set to open. *Id.* at 1221-22. The Chief Justice rejected the application, explaining that there was "no reason[] why" the applicants

did not seek a stay "at an earlier date" and the late-breaking application left insufficient time "to deal adequately with the complex issues presented." *Id.* at 1226. The same is true here. Applicants had no reason other than gamesmanship to delay seeking a stay—on an argument equally available to them weeks ago—until the day after candidate filing had opened. That leaves this Court with insufficient time "to deal adequately" with the issues Applicants now raise—weak though they are. The Application should be denied.

C. State Legislatures Are Subject To State Constitutions When Passing Redistricting Laws Under The Elections Clause.

Applicants ask this Court to grant a stay so that the Court can break dramatic new legal ground and hold that Article I, Section 4, Clause 1 of the United States Constitution precludes state courts from reviewing or enforcing state constitutional law claims related to federal Senate or Congressional elections (even though Applicants chose to forgo that argument before the trial court). As Applicants now see it, the North Carolina Supreme Court acted unconstitutionally in addressing Respondents' claims and should have held (had the issue been timely raised) that state courts had no jurisdiction to hear this dispute and, as a result, the North Carolina General Assembly had carte blanche to establish congressional districts in disregard of North Carolina's constitutional protections and state law. As the North Carolina Supreme Court put it, that argument is "repugnant to the sovereignty of the states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." App. 146a ¶ 175.

A stay application is not an appropriate mechanism for breaking new legal ground to begin with, but here, the arguments that Applicants say they plan to raise in a petition for certiorari are legally infirm and unlikely to attract the support of five Justices—which is the governing standard for a stay in these circumstances.

1. The text, history, and structure of the federal Constitution reject the notion that state legislatures are unbound by their state constitutions as interpreted by state supreme courts when redistricting under the Elections Clause. At the time of the Founding, "the meaning of state 'legislature' was well accepted and bore a clear public understanding * * * : A state 'legislature' was an entity created and constrained by its state constitution." Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush*-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, U. Ill. Coll. of L. Research Paper No. 21-02 at 24 (Feb. 24, 2022) (forthcoming).[5] Indeed, state legislatures *had to be* constrained by state constitutions: The American people are the source of sovereignty in this country, and state constitutions at the time of the Founding "were universally understood as creations of the American people themselves." *Id.* Just as the federal Constitution is considered higher law than acts of Congress, *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-180 (1803), state constitutions are higher law than state legislative acts. Indeed, state constitutions at the time of Founding allowed for judicial review of state laws. Amar & Amar, *supra*, at 24. "So of course state constitutions were understood as supreme court state legislatures at the Founding * * * ." *Id.* The text

[5] Draft available at https://bit.ly/3JZTsM9.

of the Supremacy Clause—with its ordinal ranking of the superiority of law—reinforces this obvious conclusion. *Id.* at 25. At the top is the federal Constitution; in the middle are state constitutions; at the bottom are the "Laws of any State." U.S. Const. art. VI, cl. 2.

The point is: "Since the Revolution, every state legislature has been defined and circumscribed, both procedurally (e.g., *What counts as a quorum? Is the governor involved in legislation?*) and substantively (e.g., *What rights must the legislature respect?*) by its state constitution, which in turn emanates from the people of each state." Amar & Amar, *supra*, at 25 (emphasis in original). "When a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature for these purposes." *Id.* The Elections Clause simply *cannot* be read to "exclud[e] control by state peoples and state constitutions." *Id.*

An analogy to the rest of the Elections Clause is illustrative. The second half of that clause vests backup power to regulate details of congressional elections in "the Congress." U.S. Const. art. I, § 4, cl. 1. That language does not mean that Congress can do whatever it wants and defy *other* parts of the Constitution, such as by banning those of a certain religion from running for office. *See* U.S. Const. art. VI, cl. 3. To the contrary, Congressional acts authorized by the second half of the Elections Clause are appropriately viewed as subject to the limitations imposed by other parts of the federal Constitution. *Cf. Buckley* v. *Valeo,* 424 U.S. 1, 132 (1976) (per curiam) (observing that Congress's authority over federal election practices is not of "such a

wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions"), *superseded by statute on other grounds as recognized in McConnell* v. *Fed. Election Comm.*, 540 U.S. 93 (2003); *Citizens United* v. *FEC*, 558 U.S. 310, 320-321, 365-366 (2010) (invalidating election related Acts as unconstitutional). The same must be true as a textual matter for state legislative acts authorized by the first half of that Clause: they are subject to the limitations imposed by their state constitutions.

"Indeed, at the Founding, the 'legislatures' of each state to which Articles I and II refer were, as a general matter far from free agents." Amar & Amar, *supra*, at 27. At least five state constitutions expressly permitted voters to "instruct" their state representatives and bind them on those issues. *See id.* (citing state constitutions of Pennsylvania (1776), North Carolina (1776), Vermont (1777 and 1786), Massachusetts (1780), and New Hampshire (1784)). State legislatures were thus understood to be *agents* of the people, not *principals*. And this, again, is an obvious result of the fact that sovereignty ultimately resides in the people of the various States, who *themselves* created state constitutions. These state constitutions then conferred such sovereignty onto state legislatures in accordance with the structural constraints imposed by those constitutions. *Id.* at 28. And some of these structural restraints, drafted in the first years of the Republic, concerned the *manner of federal elections*. *Id.* at 29. The Delaware Constitution (1792) required congressional representatives to be elected in the same manner as state ones. The Georgia Constitution (1789), the Penn-

sylvania Constitution (1790), and the Kentucky Constitution (1792) all required elections by ballot and not *viva voce*. *Id.* If state legislatures were free to disregard their constitutions on election issues, these provisions would be nonsensical. *Id.* at 30.

This history refutes Applicants' notion that "legislature" means "independent legislature" and excludes the participation of any other state entity or authority in addressing election issues. Rather, the original understanding of the term means a legislature as defined and bounded by state constitutional limits, which are acceptably and appropriately enforceable in state courts.

At this stage, Applicants fail to shoulder the necessary—and exceptional—burden of explaining why the most natural and historically plausible understanding of the term "legislature" does not govern. Applicants offer no originalist (or even *stare decisis*) reasons for the Court to embrace their reading. Instead, they offer up a non-historical interpretation of the term that flouts not only longstanding practice, but also the reading every Justice of this Court gave in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). *See infra* pp. 19-20. The bottom line is that "legislature" has never been understood to mean a state legislature that acts exogenous of constraints on their powers. Absent a convincing basis for Applicants' interpretation of "legislature," there is no basis to support their sought-after relief. And there is no basis to find that this novel interpretation provides a basis to meet Applicants' heavy burden in seeking a stay at this late hour.

Indeed, landmark cases such as *Green* v. *Neal's Lessee*, 31 U.S. (6 Pet.) 291 (1832), and *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), foreclose Applicants'

notion that state courts should be precluded from reviewing the constitutionality of redistricting decisions made by their legislatures. Doing so would leave any potential recourse for challenging redistricting actions to the federal courts. But federal courts must defer to state court interpretations of state statutes. *Green,* 31 U.S. (6 Pet.) at 298. The Constitution does not give federal courts the ability to opine on state law in defiance of states' own court systems. Yet adopting Applicants' constitutional interpretation would preclude state-court review of legislative action on redistricting, to be replaced by federal-court oversight. The elimination of state autonomy is inconsistent with the historical practice and the intent of the Election Clause and invites the risk that federal courts will wrongly interpret state law—a significant risk given the difficulty federal courts have in mastering 50 different States' laws. That risk is only heightened in cases, like this one, that arise out of North Carolina; federal courts *cannot* certify questions of state law to the North Carolina Supreme Court. *See, e.g.*, *In re McCormick*, 669 F.3d 177, 182 n.* (4th Cir. 2012).

2. Applicants' independent state legislature theory cannot justify a stay pending a petition for certiorari—and is also wrong—for another reason: It flouts a century's worth of this Court's precedents. In case after case, this Court has confirmed what the original understanding of the Constitution makes clear: State legislatures are subject to state constitutions when redistricting under the Elections Clause.

This Court first considered a state legislature's purported independence under the Elections Clause in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). That case concerned a state constitutional amendment granting veto power by popular-

vote referendum. *Id.* at 566. When the Ohio legislature "passed an act redistricting the state for the purpose of congressional elections" and a popular vote rejected that act, state election officers sued on the theory that "the referendum vote was not and could not be part of the legislative authority of the state" under the Elections Clause. *Id.* at 566-567. This Court rejected that argument, finding "conclusive" the Ohio Supreme Court's determination that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 567-568. "[N]othing in [federal statutory law] or in [the Elections Clause] operated to the contrary * * * ." *Id.* at 567. The state legislature's redistricting act thus could be overturned via a referendum authorized by the state constitution.

In *Smiley* v. *Holm*, 285 U.S. 355 (1932), this Court explained that a state legislature exercising its authority under the Elections Clause to redistrict the state is "making law[]" and thus must act "in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367. This Court found "no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-368. So a state constitutional provision requiring the Governor's approval of state laws could not be ignored, even when the state law concerns redistricting. *Id.* As the Court explained, executive approval of state laws "is a matter of state poli[c]y" and "cannot be regarded as repugnant to the grant of legislative authority." *Id.* Indeed, such provisions existed in

two state constitutions at the time of the Founding. *Id.* at 368. In short, "restriction[s] imposed by state Constitutions upon state Legislatures when exercising * * * lawmaking power" are not lifted when that "lawmaking power" is redistricting under the Elections Clause. *Id.* at 368-369.

Many years later and much more recently, in *Arizona Independent Redistricting Commission*, this Court again directly repudiated the notion that state legislatures can ignore state-constitutional limitations when drawing congressional districts. And it was crystal clear: "Nothing in th[e Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817-818; *see id.* at 841 (Roberts, C.J., dissenting) (agreeing that when a state legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process"). The case concerned a challenge under the Elections Clause to an amendment to Arizona's state constitution vesting redistricting authority in an independent commission. *Id.* at 792. In rejecting that challenge, this Court explained that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Id.* at 808. The Court then looked to the "historical record," which teaches that "[t]he dominant purpose of the Elections Clause * * * was to empower Congress to override state election rules, not to restrict the way States enact legislation." *Id.* at 814-815. The phrase "the Legislature thereof" in the Elections Clause

thus does not require assignment of congressional redistricting to the State's representative body free from state constitutional constraints. *Id.* at 816. Rather, in "our federal system * * * States retain autonomy to establish their own governmental processes" free from incursion by the Federal Government. *Id.*

Finally, in *Rucho*, this Court expressly confirmed that state courts may review state laws governing federal elections to determine compliance with a state's constitution. *Rucho* held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. at 2506-07. But this Court did "not condone excessive partisan gerrymandering" nor "condemn complaints about districting to echo into a void." *Id.* at 2507. "The States, for example, are actively addressing the issue on a number of fronts." *Id.* And "[p]rovisions in * * * *state constitutions* can provide standards and guidance for *state courts* to apply" in congressional districting cases. *Id.* (emphases added); *see also id.* (pointing to case where "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution"). *Rucho* made clear that, although the federal courts may be closed to partisan-gerrymandering claims, the state courts are open.

For over a century, this Court has been consistent. State constitutions are, just as much as the federal Constitution, fundamental texts against which state laws are measured. And the Elections Clause does not grant state legislatures an exemption from such review just because the subject is "[t]he Times, Place, and Manner of holding Elections for Senators and Representatives." U.S. Const. art I, § 4, cl. 1.

To accept Applicants' argument that partisan gerrymandering claims are immune from state constitutional scrutiny by state courts would require this Court to overrule a century of precedent. Applicants cloud this fact by suggesting that these cases somehow support their theory (Appl. at 15-16), but they do not plausibly explain how a state legislature could act "in accordance with the State's prescriptions for lawmaking," *id.* at 16 (quoting *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 808), while at the same time be unbound by state constitutional law. And, despite citing *Rucho* here and there, Applicants fail to engage with this Court's explicit endorsement of a state supreme court applying state constitutional law to confine the actions of a state legislature when redistricting. 139 S. Ct. at 2507. The decision in *Rucho* eviscerates Applicants' argument: in the context of a state legislature's federal redistricting law, the Court held that a state constitution supersedes the state legislature, and that a state supreme court could enforce such constitutional provisions.

Applicants' citation (Appl. at 16) of *McPherson* v. *Blacker*, 146 U.S. 1 (1892) does not undermine any of this longstanding jurisprudence. That case was not about the Elections Clause; it was about the Presidential Electors Clause of Article II, Section 1. *McPherson*, 146 U.S. at 24. The case raised no question whatsoever about whether a state legislature could redistrict in a way that violated its own state constitution; it concerned whether a state legislature could provide that presidential electors be elected via a district-by-district (as opposed to statewide) election. The question was thus not whether a state law was subject to scrutiny under the State's own constitution; it was instead the classic question of whether a state law violated the

U.S. Constitution. *Id.* Lest there be any doubt about the lack of relevance of the case to the matter at hand, the Court in *McPherson* emphasized that "[t]he legislative power is the supreme authority *except as limited by the constitution of the state*." *Id.* at 25 (emphasis added).

Overruling *Davis*, *Smiley*, *Arizona Redistricting Commission*, and *Rucho* would create myriad new legal problems for state and federal courts to parse, would dramatically increase the election caseload in federal courts, could force state election officials to administer different rules for federal and state races on the same election day, and would significantly degrade the historically recognized role of the state courts and state constitutions. In particular, state reform of the congressional redistricting process, which was essentially invited in the *Rucho* decision, 139 S. Ct. at 2507, would be rendered impossible. But that is not all. In the context of federal elections, state courts would be unable to review state laws purging voters from the rolls, drastically limiting voting hours and locations, or barring the secret ballot. State legislatures could even revive election laws related to federal elections previously found unconstitutional by state courts which would be powerless to intervene. And voters would have little recourse. This major doctrinal shift will wreak havoc and undermine voters' confidence in the democratic process. Certainly, Applicants have not shown, and cannot show, the substantial likelihood of success on this theory required to obtain the stay they seek.

The Chief Justice has recently and rightly recognized the critical distinction between cases that involve federal constraints on state legislatures, and those seeking to enforce state constitutional restraints on state legislatures via state courts:

> [T]his case presents different issues than the applications this Court recently denied in *Scarnati* v. *Boockvar*, and *Republican Party of Pennsylvania* v. *Boockvar*. While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.

Democratic Nat'l Comm. v. *Wisconsin State Legislature*, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in denial of application to vacate stay) (internal citations omitted). The same principle applies here and merits rejecting Applicants' interpretation of the Elections Clause.

D. Even If "Legislature" Means What Applicants Claim, It Would Have No Effect On The Outcome Here Because The North Carolina Legislature Has Expressly Included States Courts In Redistricting.

Even if Applicants' atextual, ahistorical, and contrary-to-precedent reading of the Elections Clause were right, it would not change the outcome in this case. The North Carolina legislature, in its enactments, has decided to include its own state courts as part of its election administration and operation, including in congressional redistricting. So while the North Carolina courts have for centuries, including at the time of the framing of the federal Constitution, had the "power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith," (App. 102a ¶ 118 (citing *Bayard* v. *Singleton*, 1 N.C. 5, 1 Mart. 48 (1787))), this Court need not even reach the question

of whether that longstanding tradition was overridden (as opposed to incorporated) by adoption of the federal Elections Clause. Instead, the Court need simply look to the North Carolina legislature's own pronouncements, which expressly utilize state courts as part of the election-regulation process.

When the North Carolina Supreme Court decided this case, it was not acting solely under general entrenched principles of judicial review, it was also acting under specific authorization from the legislature. Even if, as Applicants contend, the United States Constitution requires state legislatures to control the redistricting process, that is what happened here. The North Carolina courts' action in this case was implementing state legislative will, not acting in derogation of it. North Carolina General Statute ("GS") 1-267.1 provides that "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or *congressional* districts shall be filed in the Superior Court of Wake County * * * ." Opp'n App. 3a (emphasis added). The General Assembly has instructed courts undertaking this review that:

> [e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or *congressional districts* shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration * * * .

Opp'n App. 1a (GS 120-2.3) (emphasis added). Similarly, GS 120-2.4 specifically authorizes a court to impose a remedial congressional map when the General Assembly fails to cure constitutional defects, providing that:

> [i]f the General Assembly enacts a plan apportioning or redistricting State legislative or *congressional districts*, in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law * * * .

Opp'n App. 2a (emphasis added). These North Carolina state laws cannot be understood as anything other the express incorporation of the state courts, by the legislature, to review acts of the General Assembly drawing new congressional districts, and to impose appropriate judicial remedies, including judicial redistricting where the General Assembly fails to redress constitutional violations.[6]

Revealingly, Applicants mention none of this in their brief to this Court. They do not even cite the relevant North Carolina laws. Nor do they—or could they—make any claim that the North Carolina courts acted in a manner inconsistent with those laws. The only way Applicants can circumvent all of this overwhelming evidence of voluntary legislative-judicial partnership would be to mint a super-charged non-delegation doctrine for state legislatures. They do not even attempt to do that, and for good reason. That radical construction is, again, based on a weak and non-historical reading of the word "legislature",[7] and one that would rip away from legislatures'

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[6] Other state courts have similarly adopted court-drawn congressional maps when the legislature failed to fulfill its constitutional or statutory duty. *See, e.g.*, *In re Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012) (per curiam) (pursuant to authority conferred by state constitution, adopting redistricting plan drawn by a special master); *Hippert* v. *Ritchie*, 813 N.W.2d 391, 393-396, 403 (Minn. 2012) (pursuant to state statute, appointing redistricting panel and adopting districts drawn by the panel).

[7] Applicants cite several cases for the proposition that "earlier state-court precedents likewise reject state law authority to negate their state legislature's statutes." Appl.

longstanding (and quite appropriate) power to enlist courts to ensure fair elections. Needless to say, this Court has never adopted any argument even close to this revolutionary proposition. And rejecting it here would mean the Court need not take up the question of what result might follow the blanket prohibition of such voluntary state legislative-judicial partnership.

E. The Factual And Legal Basis For Seeking A Stay Materially Misconstrues The Procedural History And Record Of This Case.

Applicants' stay request mischaracterizes facts about this redistricting cycle and makes baseless claims about the special masters. They wrongly claim that the trial court said Respondents "were unlikely to establish that the General Assembly's congressional map was made with discriminatory intent." Appl. at 6. The trial court specifically agreed with "the findings of each of [Plaintiffs'] experts and [found] that

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at 23. These cases provide no insight into the issue here. *State ex rel. Beeson* v. *Marsh*, 34 N.W.2d 279 (Neb. 1948), and *Parsons* v. *Ryan*, 60 P.2d 910 (Kan. 1936), concern the Presidential Electors Clause. *In re Opinion of the Justices*, 113 A. 293 (N.H. 1921), suggests that a state law allowing vote-by-proxy for federal elections could violate the state constitution. *Id.* at 299. *Commonwealth ex rel. Dummit* v. *O'Connell*, 181 S.W.2d 691 (Ky. 1944), misread *Smiley* to be limited to the manner in which a state legislature "exercise[s] the function of lawmaking." *Id.* at 694. And the court there "possesse[d] no certainty" that it was correct. *Id.* at 696. That leaves *In re Opinions of Justices*, 45 N.H. 595 (1864), and *In re Plurality Elections*, 8 A. 881 (R.I. 1887), which are flatly wrong. Applicants also rely upon *Carson* v. *Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam), which invalidated the extension of the ballot deadline by the Minnesota Secretary of State under the *Presidential Electors Clause*. That decision is wrong on the merits, as it relies on a similar analysis advanced by Applicants here. *See supra* pp. 11-22. And unlike in that case, the legislature here has specifically authorized judicial review of its redistricting enactments. Further, *Carson* emphasized that counting votes that are "of questionable legality * * * threatens irreparable harm." *Id.* at 1061. Here, the irreparable harm weighs in the favor of the Respondents. *See infra* pp. 38-40

the 2021 Congressional plan is an intentional, and effective, pro-Republican partisan redistricting." App. 445a ¶ 423. The North Carolina Supreme Court did too. It found that the original congressional maps "subordinated traditional neutral redistricting criteria in favor of extreme partisan advantage by diluting the power of certain people's votes." *Id.* at 35a-36a ¶ 5. And it cited the trial court's findings that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate' and the 'product of intentional, pro Republican partisan redistricting.'" *Id.* at 55a ¶ 27 (quoting *id.* at 351a ¶ 140, 457a ¶ 466).

Applicants also contend that the original map was based on partisan-neutral criteria. Appl. at 5. But the trial court found otherwise, concluding that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints" and finding that the "2021 congressional plan was 'drawn to optimize partisan advantage in the enacted plan.' " App. 36a ¶¶ 175-176 (internal quotations omitted); *see also id.* at 445a ¶ 423 ("[T]he 2021 Congressional plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage").

Even the Applicants' purported description of the "transparent" process omits findings to the contrary by the North Carolina courts. While Applicants point to the "public terminals" where legislators drew maps "during recorded sessions", Appl. at 5, they omit critical details demonstrating a severe lack of transparency:

- "[w]hile the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committee did not actively prevent legislators and their staff from relying on pre-

drawn maps created using political data, or even direct consultation of political data[]", App. 44a ¶ 16 (alterations in original) (internal quotations omitted);

- "no restrictions on the use of outside maps were ever implemented or enforced," *id.* (internal quotations omitted);

- "between sessions at the public computer terminals, Representative Hall, * * * 'met with his then General-Counsel * * * and others about the map-drawing *in a private room* adjacent to the public map-drawing room,'" *id.* (emphasis added), where he viewed " 'concept maps' created on an unknown computer and using unknown software and data," *id.*; and

- upon the trial court ordering the production of these "concept maps", Applicants asserted that "the concept maps that were created were not saved, are currently lost[,] and no longer exist[]," *id.* at 44a ¶ 16 n.5.

Applicants next mischaracterize the Special Masters' role in assisting the trial court to "approve or adopt compliant congressional and state legislative districting plans" consistent with the North Carolina Supreme Court's February 4, 2022 Order. In response to the trial court's invitation for the parties to suggest special masters, 22.02.08 Order on Submission of Remedial Plans, Respondent Common Cause, along with the other Respondents, nominated Dr. Nathaniel Persily; while Applicants suggested Mr. John Morgan. *See* 22.02.09 Common Cause Notice of Suggested Special master; 22.02.09 Legs.-Defs.' Notice of Suggested Special Master. Rather than selecting a special master nominee submitted by the parties, the trial court instead independently selected three respected, retired state-court judges to serve jointly as special masters: Robert F. Orr and Robert F. Edmunds, Jr., formerly elected Republican state Supreme Court justices, and Thomas W. Ross, formerly an elected Democratic Superior Court judge. Applicants sought to remove two of the Special Masters' assistants due to their outreach to Respondents' experts. *See* App. 280a-298a. Those

communications were immediately reported to all parties by the Harper Plaintiffs. *See* 22.02.21 Legislative Defendants' Motion to Disqualify. In rejecting Applicants' motion, the trial court relied upon the Special Masters' report as demonstrating that the communications were made in good faith for the purpose of promptly furthering the remedial process and that the analysis of the assistants was not determinative of the Special Masters' recommendation. *See* App. 276a-277a; *id.* at 252a-253a ¶¶ 23-27. Improprieties alleged by Applicants—i.e., "working behind closed doors", Appl. at 27—impugns the reputation of three respected, independently appointed former state jurists without basis and is rebutted by the specific findings of the trial court.

F. The *Purcell* Principle Compels The Denial Of A Stay Because Federal Judicial Intervention Is Inappropriate At This Late Date.

1. *Purcell* Prohibits Intervention In North Carolina's State Election Matters By A Federal Court This Close To An Election.

As this Court recognized in *Purcell* v. *Gonzalez*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5 (2006) (per curiam). Two Justices of this Court underscored last month that federal courts—which include this Court—should exercise caution in enjoining state election laws when an election is imminent. *Merrill* v. *Milligan*, Nos. 21A375 (21-1086) and 21A376 (21-1087), slip op. at 2 (U.S. Feb. 7, 2022) (Kavanaugh, J., concurring in grant of applications for stays). "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws

in the period close to an election." *Id.* at 4. In line with the important considerations of federalism embodied in *Purcell*, this Court has routinely denied applications to stay *state courts'* election-related orders. *See Berger* v. *North Carolina State Bd. of Elections*, 141 S. Ct. 658 (2020) (mem.); *Republican Party of Pennsylvania* v. *Boockvar*, 141 S. Ct. 643 (2020) (mem.); *Scarnati* v. *Boockvar*, 141 S. Ct. 644 (2020) (mem.).

The stay Applicants seek flies in the face of *Purcell*. Indeed, Applicants effectively seek to rewrite *Purcell* to militate against *all* judicial intervention in state election procedures. Applying the *Purcell* principle to cover "action by state courts and state executive agencies acting pursuant to a legislative delegation of authority * * * flips *Purcell* on its head." *Wise* v. *Circosta*, 978 F.3d 93, 99 (4th Cir. 2020) (Wynn, J., denying emergency injunctive relief). *Purcell* "clearly counsels against" the very sort of last-minute federal court intervention that Applicants request here. *Id.* The North Carolina Supreme Court, not this Court, is "the ultimate exposito[r] of state law." *Riley* v. *Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)). Granting a stay here would "expan[d] * * * federal court power at the expense of states' rights to regulate their own elections." *Wise*, 978 F.3d at 99 (Wynn, J., denying emergency injunctive relief).

In this case, it is the requested stay—not the North Carolina Supreme Court's decision—that violates *Purcell*. Applicants seek to overcome *Purcell* and thus have the burden, but they fail to demonstrate that the *Purcell* principle should be ignored

here. Not one of the factors identified by Justice Kavanaugh as supporting "overcom[ing]" the principle "with respect to an injunction issued close to an election" is satisfied. *Merrill*, slip op. at 5 (Kavanaugh, J., concurring).

First, Applicants cannot demonstrate that it is "entirely clearcut" that the North Carolina Supreme Court's decision violates the United States Constitution. *Id.* Quite the opposite. *See supra* Section II.C-D.

Second, Applicants cannot demonstrate "irreparable harm absent" a stay. *Merrill*, slip op. at 5 (Kavanaugh, J., concurring). The thrust of their claim is that the "North Carolina courts have usurped Applicants' constitutional authority by replacing the General Assembly's enacted map with their own." Appl. at 25. This ignores that the state courts have acted consistent with North Carolina law in reviewing the congressional maps and imposing a remedial map due to the General Assembly's failure to cure constitutional infirmities identified by the North Carolina Supreme Court. *See supra* Section II.D. Having passed laws providing the North Carolina courts with the authority exercised in this case, Applicants now claim that actions taken in conformity with such laws create an irreparable harm justifying a stay. A stay pending Applicants' appeal would perversely "give [Applicants] the fruits of victory whether or not the appeal has merit." *Jimenez* v. *Barber*, 252 F.2d 550, 553 (9th Cir. 1958).

Third, Applicants cannot establish that they have "not unduly delayed bringing the complaint to court," *Merill*, slip op. at 5 (Kavanaugh, J., concurring). To the contrary, Applicants have dragged their feet at every possible moment. Applicants did not raise their Elections Clause argument before the state trial court in their

answers and in their defense. They did not seek a stay after the North Carolina Supreme Court's February 4 Order or its February 14 Opinion. They instead acquiesced to the process, as reflected in North Carolina law, *see supra* Section II.D., by proposing their own special master to the trial court, *see* 22.02.09 Legis. Defs.' Notice of Suggested Special Master, and preparing a remedial map. Only now, after the opening of the candidate filing period on February 24 do Applicants seek federal court intervention. *See* supra Section II.B. Applicants provide no explanation for their delay. In fact, it appears that Applicants chose to pursue this challenge only after the trial court rejected their remedial map as unconstitutional.

Fourth, the last-minute stay that Applicants seek would create "significant cost, confusion, [and] hardship" to the North Carolina State Board of Elections (State Board), candidates, political parties, and voters. *Merrill*, slip op. at 5 (Kavanaugh, J., concurring). As discussed below, the 2022 North Carolina election schedule currently in place was set by state courts in coordination with the State Board, the state executive agency charged with overseeing the elections and ensuring their smooth execution. *See infra* Section II.F.2. A stay would upend that schedule and foment confusion among North Carolina voters. *See Republican Party of Pennsylvania* v. *Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J. dissenting from the denial of certiorari) ("To prevent confusion, we have thus repeatedly—although not as consistently as we should—blocked rule changes made by courts close to an election." (citing *Purcell*)).

Under *Purcell* and its lineage, "federal courts ordinarily should not alter state election rules in the period close to an election." *Andino* v. *Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J. concurring) (citing *Purcell*). The election here is imminent: The candidate filing period is set to close at the end of this week and the distribution of absentee ballots is scheduled to occur on March 28. 22.01.06 State Bd. Mot. for Clarification of Election Schedule ¶ 4. Applicants' invite precisely the eleventh-hour federal meddling that *Purcell* counsels against by requesting federal judicial intervention mere days before the candidate filing period is set to close. Applicants have made no showing remotely sufficient to overcome this Court's concern about the severe electoral disruption that underlies the principles annunciated in *Purcell*. Applicants' stay should be denied.

2. At This Late Stage, Federal Court Intervention Would Be Inappropriate And Would Disrupt The "Administratively Feasible" Election Schedule Maintained By The North Carolina Courts At The Request Of The State Board Of Elections.

Throughout the course of the litigation before the North Carolina state courts, the State Board has articulated the schedule necessary for the orderly administration of the 2022 election cycle. Both the trial court and the North Carolina Supreme Court deferred to the State Board's expertise as to election administration and their orders have ensured a workable election schedule consistent with the Board's scheduling statements. Now, with the candidate filing period already open and the start of early voting just over 30 days away, Applicants seek to throw that carefully orchestrated schedule into disarray, threatening the orderly administration of the primary.

From the beginning of this litigation, the State Board has maintained that, despite burdens associated with delaying the March 2022 primary to May 2022, "it would be administratively feasible as long as certain considerations and deadlines are set." Opp'n App. 11a. In December 2021, the State Board laid out the schedule necessary to administer the election in light of the anticipated litigation delays:

> [K]eeping in mind all of the estimates of time needed to prepare for the elections outlined above, and backtracking from the earliest relevant deadline for the general election * * * the first primary [can occur] by no later than Tuesday, May 17, 2022.

Id. at 10a-11a. Attentive to these requirements, the North Carolina Supreme Court set the primary election to occur on May 17, 2022. *Harper* v. *Hall*, 865 S.E.2d 301, 302 (N.C. 2021), *reconsideration dismissed*, 867 S.E.2d 185 (N.C. 2022).

In January 2022, the State Board requested that the candidate filing period start on February 24 and conclude on March 4, 2022. 22.01.06 State Bd. Mot. for Clarification of the Election Schedule ¶ 7. The trial court scheduled the candidate filing period as requested. *North Carolina League, of Conservation Voters, Inc.* v. *Hall*, No. 21 CVS 015426, 2022 WL 124616, at *115 (N.C. Super. Ct. Jan. 11, 2022).

When the North Carolina Supreme Court remanded the case to the trial court on February 4, it set a schedule that ensured that the candidate filing period would still begin on February 24. *See Harper* v. *Hall*, 867 S.E.2d 554, 557-558 (N.C. 2022). This schedule adhered to the State Board' administrative requirements.

Applicants' requested relief would severely disrupt this election schedule, injecting chaos into what has been an orderly and carefully balanced process. The State Board has declared that the current election schedule—including a candidate filing

period that started on February 24 and will close this week on March 4—reflects "dates of last resort." Opp'n App. 12a; *accord* 21.12.02 State Bd. Resp. to NCLCV Mot. for PI at 8. According to the State Board, with any further delay it "would likely become administratively infeasible for the State Board to conduct orderly elections in 2022." *Id.* Granting the stay requested by Applicants would necessarily require re-starting the candidate filing period anew. Such a delay, at least several weeks beyond what the State Board indicated was workable, would require the significant postponement of all deadlines associated with the primary.

"[S]tate and local election officials need substantial time to plan for elections." *Merrill*, slip op. at 3 (Kavanaugh, J., concurring). Here, the State Board has been a participant in the litigation throughout proceedings below, and the state courts have deferred to its scheduling recommendations to ensure an orderly election cycle. At this late stage, federal intervention would cause, rather than prevent, the "disruption and * * * unanticipated and unfair consequences for candidates, political parties, and voters." *Id.* at 4. The *Purcell* principle "reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled." *Id.* Here, the election is close at hand, and the rules of the road are clear and have been authoritatively settled by the North Carolina state courts. The Court's most recent application of *Purcell* instructs that this stay application be denied.

III. Applicants Have Not Shown That The Equities Weigh In Favor Of A Stay.

This Court must also examine whether "the applicant will be irreparably injured absent a stay," "whether issuance of the stay will substantially injure the other

parties," and "where the public interest lies." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). Simply showing some "possibility of irreparable injury," fails to satisfy the second factor. *Id.* at 434-435 (internal citation omitted).

A stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston–Salem/Forsyth Cnty. Bd. of Educ.*, 404 U.S. at 1231 (Burger, C.J., in chambers); *see also Williams*, 442 U.S. at 1311 (similar). "A stay is not a matter of right, even if irreparable injury might otherwise result * * * ." *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672 (1926). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* at 672-673.

A. A Stay Would Cause Irreparable Harm to North Carolinian Voters.

Respondents will suffer significant and irreparable harm to their rights if their members must vote in the 2022 congressional elections based on the General Assembly's 2021 enacted map which has been struck down as unconstitutional by the North Carolina Supreme Court. *Cf.* App. 86a-87a (holding that Respondents have standing on similar grounds). The denial of constitutional rights—"for even minimal periods of time"— constitutes irreparable harm. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). That is particularly so for the right to vote, which is the preservative of all other rights. *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). For example, in *Larios* v. *Cox*, the Northern District of Georgia denied a stay because Georgia citizens would face irreparable harm through the denial of their constitutional rights if

elections were allowed to proceed according to unconstitutional plans. 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) (per curiam); *see also Vera* v. *Bush,* 933 F. Supp. 1341, 1348-49 (S.D. Tex. 1996) (denying stay for similar reason); *Cousin* v. *McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994) (denying stay for similar reason).

The North Carolina Supreme Court held that the original maps were "extreme partisan outliers" that violated North Carolinians' constitutionally protected rights to free elections, equal protection, freedom of speech, and freedom to assemble. *See* App. 50a ¶ 27; *see also id.* at 38a ¶ 9, 83a ¶ 94. These are all crucial and fundamental rights. And taken together, the original maps "substantially infringe[d] upon plaintiffs' fundamental right to equal voting power." *Id.* at 167a ¶ 222.

Granting a stay in this case would mean that North Carolinians would be forced to vote in the 2022 congressional elections according to constitutionally defective maps. That, as explained by the North Carolina Supreme Court, would mean denying those voters rights guaranteed by North Carolina Constitution. Notably, Applicants do not attempt to argue to this Court that the North Carolina Supreme Court erred in concluding that the original congressional map violated the North Carolina Constitution. That finding, by the North Carolina Supreme Court, is final. And forcing North Carolinians to vote according to the illegal map is irreparable harm.

B. A Stay Is Not In The Public Interest.

This Court must also examine "where the public interest lies" when weighing the equities. *Nken*, 556 U.S. at 434 (internal quotation marks omitted). A decision granting a stay would harm the public more broadly than denial.

A stay would result in Applicants implementing a map that they drew and adopted, and was subsequently found to be unconstitutional by the North Carolina Supreme Court. The resulting constitutional harms suffered by Respondents would be inflicted upon voters throughout North Carolina. *See Personhuballah* v. *Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016) ("The harms to the Plaintiffs would be harms to every voter in [the gerrymandered districts]."). The public, moreover, has an interest in having congressional representatives elected in accordance with the state constitution. *Cf. id.* at 560-561 ("The public has an interest in having congressional representatives elected in accordance with the [federal] Constitution.").

Not only is there a strong public interest in constitutionally drawn legislative districts, but a stay also would legitimize partisan misconduct of the North Carolina legislature, inviting legislatures across the Nation to follow suit. The Court should not signal that it will reward and enable extreme gerrymandering, especially when fundamental constitutional rights are vitiated as a result. *See Rucho*, 139 S. Ct. at 2506 (noting partisan "gerrymandering is 'incompatible with democratic principles" (internal quotation marks omitted)); *see also* App. 543a-544a ¶ 145 (similar).

Furthermore, a stay would gravely harm the public interest by signaling a willingness of this Court to undermine North Carolina's constitutional democracy by terminating all judicial oversight of congressional redistricting for partisan intent. The parties and courts that have considered the important issues in this case made monumental efforts to adjudicate these issues in a time frame that permitted the courts to remedy the harms the plans have been found to cause if used in the 2022 elections.

For example, responding to the anticipated delay by Applicants in approving maps, and transparent deficiencies in the redistricting criteria adopted by the General Assembly, Common Cause filed suit in state court seeking injunctive relief before the maps were even finalized. *North Carolina NAACP* v. *Berger*, No. 21CVS014476 (Wake Cnty. Super. Ct. 2021). NCLCV Respondents filed suit less than two weeks after the plans became law. The resulting scheduling order required expedited discovery, which occurred over a mere two-and-a-half-week period during the holidays; trial commenced in-person the first week of January in the midst of the continuing pandemic. "Due to the time-sensitive nature of this case" oral arguments in the subsequent appeal were heard by the North Carolina Supreme Court in a special session on February 2, 2022, resulting in an order striking down the congressional maps two days later, on February 4. Ten days after the initial order, the North Carolina Supreme Court issued a full 217-page decision. *See, e.g.*, App. 83a ¶ 93. Under these circumstances, a ruling that Respondents must still be subjected to unlawful plans found to violate their rights would signal that state legislators can adopt plans totally free from any judicial scrutiny, so long as they delay enactment until it is too late for courts to provide meaningful and effective relief. This would make unlawful plans effectively immune to challenge, which would gravely disserve the public interest.

C. This Is Not A Close Case, But Balancing The Equities Nonetheless Weighs In Favor Of Denying The Stay.

A separate balancing of the equities analysis is only required in cases where the irreparable harm to the defendant and the irreparable harm to the plaintiff appear to be close. *See Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam)

("In *close cases* the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." (emphasis added)).

This is far from a close case. On the one hand, the Supreme Court of North Carolina established that Applicants' maps are unlawful "beyond a reasonable doubt" and violate the Respondents' rights under four separate clauses of the North Carolina Constitution. App. 83a ¶ 94. On the other, Applicants will "los[e] the opportunity to appeal the orders below before the 2022 elections." Appl. at 24. But Applicants inflicted this "harm" on themselves by failing to appeal the North Carolina Supreme Court's Order and Opinion in a timely fashion, engaging with the trial court's remand procedures, and then rejecting the trial court's decision. And insofar as there is any legal issue here, it will arise again in the next election cycle, affording Applicants another chance to press their case. This is not a close case.

Even so, the equities weigh strongly in favor of denying a stay here. Applicants cannot show that the denial of a stay would impose on them any irreparable harm—let alone harm that outweighs the harm that millions of North Carolinians would suffer if a stay were granted. *Larios*, 305 F. Supp. 2d at 1344 (given the Court's "responsibility to ensure that future elections will not be conducted under unconstitutional plans," this substantial risk weighs strongly against granting the requested stay). Preserving the status quo to pursue a speculative legal theory contrary to a well-settled precedent simply does not compare to the immediate loss of rights Respondents, and all voters of North Carolina, would suffer if forced to vote pursuant to as unlawful map. *Cf. Dye* v. *McKeithen*, 856 F. Supp. 303, 306 (W.D. La. 1994)

("[P]otential injury of an election in which citizens are deprived of their right to vote negates any damage that may be sustained by Vernon Parish in the potential delay of elections."). The General Assembly was already provided with an opportunity to draw a constitutionally acceptable remedial map; having failed, however, it will be provided another opportunity after this election. *See* Opp'n App. 2a.

This Court has stated that subjecting voters to a redistricting plan that has been deemed unlawful requires an "unusual" showing that doing so is a "[n]ecessity." *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (per curiam); *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."). In this case, the balance of the equities weighs strongly in favor of denying a stay, and Applicants' have not shown that this is an especially unusual case that necessitates a stay. The stay should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Application for a Stay Pending Appeal.

Respectfully submitted,

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