No. 22-___

In the Supreme Court of the United States

SENATE PRESIDENT MATT HUFFMAN, ET AL.,
Petitioners,

v.

MERYL NEIMAN, ET AL.,
Respondents.

SENATE PRESIDENT MATT HUFFMAN, ET AL.,
Petitioners,

v.

LEAGUE OF WOMEN VOTERS OF OHIO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Elections Clause vests in "the Legislature" of "each State" and in "Congress" the power to prescribe the "Times, Places, and Manner" of congressional elections. U.S. Const., art. I, §4, cl. 1. Ohio's legislature recently exercised that power by adopting a congressional district map. The Ohio Supreme Court found that the map violated the Ohio Constitution and invalidated it. It determined that any map must ensure that Democratic candidates are likely to win six of Ohio's fifteen House seats to provide adequately proportional representation. Pet.App.19a. The questions presented are:

1. Whether state courts violate the Elections Clause by enforcing state constitutional limits on a state legislature's power to regulate congressional elections.

2. Whether state courts violate the Elections Clause by dictating the results that congressional district maps must achieve or by crafting extra-constitutional rules for state legislatures to follow when drawing such maps.

LIST OF PARTIES

The petitioners are Matt Huffman, one of four respondents in the case below named in his official capacity as President of the Ohio Senate; Robert Cupp, another respondent in the case below named in his official capacity as Speaker of the Ohio House of Representatives; Senator Rob McColley, another respondent in his official capacity as a member of the Ohio Redistricting Commission; and Representative Jeff LaRe, another respondent in his official capacity as a member of the Ohio Redistricting Commission.

The respondents from case No. 2022-0298 in the Ohio Supreme Court are: Meryl Neiman, Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Holly Oyster, Constance Rubin, Solveig Spjeldnes, and Everett Totty. The respondents from case No. 2022-0303 in the Ohio Supreme Court are the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, Bette Evanshine, Janice Patterson, Barbara Brothers, John Fitzpatrick, Janet Underwood, Stephanie White, Renee Ruchotzke, and Tiffany Rumbalski.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

The "fundamental political right" to vote preserves all other rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). So on the flip side, the power to govern elections preserves all other powers.

Because that power is so enormous, the framers specified exactly who has it: the Constitution's Elections Clause says that "[t]he Times, Places, and Manner of holding" congressional elections are governed by "the Legislature" of "each State" and by "Congress." U.S. Const., art. I, §4, cl. 1.

Article XIX of the Ohio Constitution tries to implement that grant of authority by spelling out how the Ohio legislature should draw congressional district maps. It also limits that authority: if, among other circumstances, a map does not garner supermajority approval, then it cannot "unduly favor[] or disfavor[] a political party or its incumbents." Ohio Const., art. XIX, §1(C)(3)(a).

In the decision below, the Ohio Supreme Court seized on that limit and invalidated the Ohio legislature's congressional district map. Pet.App.2a. That decision violated the Elections Clause in two ways.

Most broadly, the Ohio Supreme Court incorrectly read Article XIX to impose a judicially enforceable limit on the legislature's authority under the Elections Clause. But the Elections Clause "confer[s] on state legislatures, not state courts, the authority to make rules governing" congressional elections. *Republican Party of Pa. v. Boockvar,* 141 S. Ct. 1, 2 (2020) (statement of Alito, J.). State courts cannot second-guess the exercise of that authority because even if a state constitutional provision purports to grant state courts such supervisory power, state

courts are "bound" by the Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. So the Elections Clause prevails in court, and courts cannot enforce state constitutional limits on the power of state legislatures to regulate congressional elections.

More narrowly, the Ohio Supreme Court unlawfully robed itself with the mantle of the legislature and *created* rules governing congressional elections. First, it did so by dictating the result that Ohio's congressional district map must achieve: Democratic candidates must be likely to win at least six of Ohio's fifteen House seats, with more than 52% of the vote in each district. Pet.App.18a–19a. Second, it did so by distorting Article XIX to require "proportional representation … as the baseline against which partisan favoritism is measured," despite the lack of such a standard anywhere in Article XIX's text. Pet.App.44a (Kennedy and DeWine, JJ., dissenting).

The Ohio Supreme Court's decision thus presents the broad question: can state courts enforce state constitutional limits on a state legislature's power to regulate congressional elections? And within that, it presents two more narrow questions: can state courts dictate the outcomes that congressional district maps must achieve, and can they craft extra-constitutional rules that state legislatures must follow when drawing such maps?

The Court should take this chance to answer each question with a no. The questions are "of great national importance." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from the denial of application for stay). They are "certain to

keep arising until the Court definitively resolves" them. *Id.* (Kavanaugh, J., concurring in denial of application for stay). And they have "divided the lower courts." *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (Alito, J., dissenting from denial of certiorari). Further, this case is a prime vehicle for answering those questions because the brooding deadline of an upcoming election will not hurry the Court, as too often happens when resolving election-law disputes.

In fact, the Court already acknowledged as much. In *Moore v. Harper*, the Court agreed to decide what limits the Elections Clause places on state courts. 142 S. Ct. 2901 (2022) (order granting certiorari).

This case presents an excellent companion to, yet is uniquely distinct from, *Moore*. The Ohio Constitution contains several specific limitations on the Ohio legislature's authority to regulate congressional elections; the North Carolina Constitution (at issue in *Moore*) does not. Thus, hearing this case alongside *Moore* would allow the Court to fully address whether state courts can enforce substantive limits on a state legislature's authority to regulate congressional elections—whether the state court relies on general state constitutional provisions (as in *Moore*) or more specific ones (as here).

Further, the Ohio Supreme Court did not go so far as to physically draw its own map, as the North Carolina courts did. But it still dictated the map's result and made up instructions for how the legislature was to do its job. So this case would allow the Court to hold that not only did the North Carolina courts' artistry violate the Elections Clause but so

did the Ohio Supreme Court's judicially crafted mandates.

At the least, because the outcome in *Moore* will inform the proper resolution of this case, the Court should hold this petition pending a decision in *Moore*.

OPINION BELOW

The opinion of the Ohio Supreme Court is reported at 2022-Ohio-2471 and reproduced at Pet.App.1a–53a.

JURISDICTION

The Ohio Supreme Court issued its judgment on July 19, 2022. That court's decision is final, and this petition timely invokes the Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Elections Clause of the United States Constitution and Article XIX, §§1(A)–(C) and 3 of the Ohio Constitution are reproduced at Pet.App.54a–59a.

STATEMENT OF THE CASE

I. Factual Background

This case stems from Ohio's congressional redistricting efforts after the 2020 census.

A. Ohio's congressional redistricting process

1. Article XIX of the Ohio Constitution sets out the way the Ohio legislature—either through its General Assembly or its Redistricting Commission—is to draw congressional district maps after it re-

ceives new census data. That process can end at one of three points.

First, the Ohio General Assembly has until September 30th "of a year ending in the numeral one" to pass a congressional district map. Ohio Const., art. XIX, §1(A). To do so, it must secure "the affirmative vote of three-fifths of the members of each house of the general assembly, including the affirmative vote of at least one-half of the members of each of the two largest political parties represented in that house." *Id.*

Second, if the General Assembly does not pass such a map by that deadline, the Ohio Redistricting Commission[1] has until October 31st to adopt a map. *Id.* §1(B). For it to do so, it must draw a map that wins "the affirmative vote of four members of the commission, including at least two members" from the "two largest political parties represented in the general assembly." *Id.*

Third, if the Commission does not do so by that deadline, it hands the pen back to the General Assembly. *Id.* §1(C). This time, the General Assembly must pass a map by the end of November. *Id.* §1(C)(1).

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[1] The Ohio Redistricting Commissions is a seven-member body that is part of Ohio's "legislature" for purposes of congressional redistricting. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Its seven members are: the Governor, the Secretary of State, the State Auditor, an individual selected by the Speaker of the House, an individual selected by the House Minority Leader, an individual selected by the Senate President, and an individual selected by the Senate Minority Leader. Ohio Const., art. XI, §1(A).

At this point, the General Assembly has two options. Under option one, it can pass a map that wins the "affirmative vote of three-fifths of the members of each house, including the affirmative vote of at least one-third of the members of" the two largest parties. *Id.* §1(C)(2). Under option two, it can pass a map by a "simple majority of the members of each house." *Id.* §1(C)(3).

But option two comes at a price. A simple majority map remains in place for just four years, rather than the usual ten. *Id.* §1(C)(3)(e). And that is a very real incentive to compromise: if the party in the majority cannot garner bi-partisan support, it may find itself in the minority four years later—when the new majority party establishes Ohio's congressional districts for the remaining six years of the decade.

And congressional district maps adopted by a simple majority vote of the General Assembly must bear certain features. Relevant here, such maps cannot "unduly favor[] or disfavor[] a political party or its incumbents." *Id.* §1(C)(3)(a). And the General Assembly must explain how its map complies with that and other state constitutional requirements. *Id.* §1(C)(3)(d).

2. Beyond establishing when and how the Ohio legislature must draw congressional district maps, Article XIX also establishes a mechanism for challenging those maps in court and for what follows a successful challenge.

Article XIX gives "the supreme court of Ohio … exclusive, original jurisdiction in all" such cases. *Id.* §3(A). If the Ohio Supreme Court deems a map invalid, the Ohio legislature takes up the drawing task once again. The General Assembly first has thirty

days (from the Ohio Supreme Court's final order) to pass a revised map. *Id.* §3(B)(1). If the General Assembly does not do so, the Commission must then adopt a map within thirty days, but it can do so this time by a simple majority vote of the Commission. *Id.* §3(B)(2). In either case, the revised maps "shall remedy any legal defects in the previous plan identified by the court but shall include no other changes to the previous plan other than those made in order to remedy those defects." *Id.* §3(B)(1)–(2).

B. The Ohio General Assembly passes a 2021 congressional district map.

After the 2020 census, both the Ohio General Assembly and the Ohio Redistricting Commission did not agree on a congressional district map by their respective deadlines. *Adams v. DeWine,* 2022-Ohio-89, ¶¶13–14. So the General Assembly ultimately adopted a congressional district map by a simple majority vote. *Id.* ¶21.[2] As Article XIX requires, the General Assembly explained why the map did not unduly favor a political party or its incumbents: the new map created five more competitive districts (seven of the fifteen districts) than Ohio's previous congressional map from the prior decade, it split fewer governmental units than the prior decade's map, and it was visually more compact than the prior decade's map. *Id.* ¶¶22, 124; *2020 Official Election Results*, Ohio Secretary of State, https://www.ohiosos.gov/globalassets/elections/2020/gen/statewid

[2] On November 20, 2021, the Governor of Ohio signed into law the map passed by the General Assembly that established Ohio's congressional districts. 2021 Ohio Laws File 54 (Sub. S.B. 258), https://publicfiles.ohiosos.gov/free/publications/SessionLaws/134/134-SB-258_5.pdf.

eresultsbycounty.xlsx (showing that the 2020 election saw just 2 of Ohio's 16 congressional races decided by between 7 and 8 points; the other 14 were decided by 13 points or more).

II. Procedural History

A. The *Adams* decision

Shortly after the General Assembly passed the 2021 map, a collection of individual voters and voting rights groups sued in the Ohio Supreme Court to invalidate it. *Adams v. DeWine,* 2022-Ohio-89, ¶23. In a 4–3 decision, the court obliged. *Id.* ¶5. It concluded that the map violated Article XIX §1(C)(3)(a) by unduly favoring or disfavoring a political party, and it ordered the Ohio General Assembly to draw a new congressional district map. *Id.*

After the General Assembly did not pass a new map within thirty days, the matter returned to the Redistricting Commission. Pet.App.4a. This time, the Commission settled on a revised map, adopted by a simple majority vote of the Commission. Pet.App.9a–10a.

The *Adams* petitioners then sought to amend their complaints to challenge the new map and enjoin its use in the 2022 election. *Adams v. DeWine*, 2022-Ohio-871, 184 N.E.3d 111. The Ohio Supreme Court declined and required that the petitioners file a new lawsuit. *Id.* Thus, the 2022 election is proceeding based on the districts drawn by the Commission in the revised congressional district map.

B. The decision below

Respondents, also a collection of individual voters and voting rights groups, then filed two new suits

in the Ohio Supreme Court challenging the revised map. Pet.App.2a & n.1. Both suits name Petitioners (Speaker Bob Cupp, Senate President Matt Huffman, Representative Jeff LaRe, and Senator Rob McColley, in their official capacities) as respondents. Pet.App.14a.[3]

Then, after full briefing in which Petitioners argued that "[t]he Elections Clause does not permit th[e Ohio Supreme] Court—a judicial body, not a legislative body—to vest itself with the authority to draw congressional boundary lines," Pet.App.60a–69a, the Ohio Supreme Court again invalidated the map, Pet.App.2a.

The court once again concluded that the map contravened Article XIX's prohibition on unduly favoring or disfavoring a political party. Pet.App.2a. It held that the adopted map violated that standard because it had "five Democratic-leaning districts and ten Republican-leaning districts" with "three of the five Democratic-leaning districts hav[ing] Democratic vote shares very close to 50 percent (52.15, 51.04, and 50.23 percent)." Pet.App.18a. The problem with that result, the court explained, was that

> the best-case projected outcome for Democratic candidates under the March 2 plan is that they will win four—roughly 27 percent—of the seats. Considering that Democratic

[3] Petitioners Senator Rob McColley and Representative Jeff LaRe were respondents in their official capacity as members of the Ohio Redistricting Commission, *Neiman v. LaRose*, 2022-Ohio-1887, 188 N.E.2d 179 (Table), while Petitioners Senate President Matt Huffman and Speaker Robert Cupp were named as respondents in their legislative capacities with the Ohio General Assembly.

> candidates have received about 47 percent of the vote in recent statewide elections, this probable outcome represents only a modest improvement over the invalidated plan. Indeed, according to [an expert], any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier.

Pet.App.19a. In plainer terms, the court said that for a map to pass muster, Democratic candidates must be likely to win at least six of Ohio's fifteen apportioned House seats. And the court said that Democratic candidates are "likely to win" a seat *only if* the district has a Democratic vote share of 52% or more. Pet.App.18a.

The court also rejected the Commission's "choice to focus on creating competitive districts" as the way to ensure political neutrality. Pet.App.46a (Kennedy & DeWine, JJ., dissenting); *see also* Pet.App.46a. ("The majority … prioritizes guaranteed outcomes over competitive elections"). And it rejected Petitioners' Elections Clause argument *sub silentio*.

As before, three justices dissented. Pet.App.39a–53a. The dissenters faulted the majority for failing to "present 'any workable standard about what it means to unduly favor a political party.'" Pet.App.40a (citing *Adams,* 2022-Ohio-89, ¶107). They also argued that, in truth, "the majority believe[d] that the partisan breakdown should 'roughly equate to what would happen under a system of proportional representation.'" Pet.App.40a (citing *Adams,* 2022-Ohio-89, ¶108). But as the dissenters explained, "there is nothing in Article XIX that establishes proportionality as an aspirational goal, much

less a requirement." Pet.App.44a. And the lack of such a requirement contrasts with Article XI of the Ohio Constitution, Ohio's state-legislative-districting provision, which expressly requires the legislature to attempt to achieve proportionality in some scenarios. Pet.App.44a.

Petitioners timely filed this petition.

REASONS FOR GRANTING THE PETITION

The Ohio Supreme Court violated the Elections Clause when it struck down the Ohio legislature's congressional district map, dictated the map's result, and imposed extra-constitutional requirements for drawing such maps. The Court should grant certiorari to answer the important, long-simmering, and divisive questions that arise from the Ohio Supreme Court's decision.

I. The Questions Presented Are Important and Recurring, They Have Divided Lower Courts, and This Case Is a Good Vehicle for Addressing Them.

1. It almost goes without saying that the Elections Clause questions presented here are "important recurring constitutional question[s]" that the Court should address. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (Alito, J., dissenting from denial of certiorari); *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from the denial of application for stay) ("This case presents an exceptionally important and recurring question of constitutional law, namely, the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections."); *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J.,

concurring in denial of application for stay) ("[T]he underlying Elections Clause question raised in the emergency application is important."); *see also Degraffenreid,* 141 S. Ct. at 734 (Thomas, J., dissenting from the denial of certiorari) ("Elections are 'of the most fundamental significance under our constitutional structure.'" (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))).

Indeed, parties will keep raising "serious arguments" about the Elections Clause's meaning "until the Court definitively resolves" the issue. *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). And the Court has repeatedly alluded to these questions without ever issuing a majority opinion answering them. *See, e.g.*, *id.*; *id.* at 1090–91 (Alito, J., dissenting from the denial of application for stay); *Degraffenreid,* 141 S. Ct. at 732–38 (Thomas, J., dissenting from the denial of certiorari); *Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring in denial of application to vacate stay); *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from the denial of certiorari); *see also Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C. J., concurring).

2. On top of that, lower courts are intractably divided over the questions presented. By rejecting Petitioners' Elections Clause argument, the Ohio Supreme Court aligned itself with at least three other state supreme courts that have limited state legislatures' authority to govern congressional elections.

To start, in *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court held that because it "possesses broad authority to craft meaningful remedies" when enforcing the Pennsylvania Constitution's "Free and Equal Elections Clause," it could extend the "received-by deadline for mail-in ballots" that the Pennsylvania General Assembly set. 238 A.3d 345, 371 (Pa. 2020), *cert. denied sub nom. Degraffenreid*, 141 S. Ct. at 732.

The Florida Supreme Court has taken a similar approach. In *League of Women Voters of Florida v. Detzner*, it struck down the legislature's congressional district map for violating "the Florida Constitution's prohibition on partisan intent." 172 So.3d 363, 370 (Fla. 2015). And it specifically rejected the legislature's contrary Elections Clause argument. *Id.* at 370 n.2.

Finally, the North Carolina Supreme Court recently joined that side of the fray. In *Moore v. Harper* (which the Court has agreed to review), the North Carolina Supreme Court determined that the state legislature's congressional district map violated the North Carolina Constitution and enjoined the map's use. *Harper v. Hall*, 2022-NCSC-17, ¶¶217, 222–23, 868 S.E.2d 499, 559, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022).

But at least five states and one federal appellate court have taken the opposite view. First consider the Eighth Circuit's decision in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). That case dealt with the Electors Clause. U.S. Const., art. II, §1, cl. 2. Just as the Elections Clause empowers state legislatures to prescribe the rules for choosing Representatives and Senators, the Electors Clause uses almost the

same wording to empower state legislatures to prescribe the rules for choosing presidential electors: "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress … ." *Id.* (emphasis added).

The Eighth Circuit interpreted that language to give Minnesota's legislature "plenary authority to establish the manner of conducting" presidential elections. *Carson*, 978 F.3d at 1060. To put a finer point on it, the court stated that "a legislature's power in this area is such that it 'cannot be taken from them or modified,' even through 'their state constitutions.'" *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). Given the textual similarities between the Electors and Elections Clauses, the Court has noted that *Carson*'s plenary-power reading of the Electors Clause "split from the Pennsylvania Supreme Court" and caused "confusion and erosion of voter confidence." *Degraffenreid*, 141 S. Ct. at 734, 738 (Thomas, J., dissenting from denial of certiorari).

In truth, *Carson* deepened a pre-existing split. The Rhode Island Supreme Court, Mississippi Supreme Court, and Kentucky Court of Appeals long ago read the Elections Clause to empower state legislatures to "prescribe[] the manner of holding" congressional elections without regard to any "restraint" imposed by their state constitutions. *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *Com. ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692 (Ky. 1944) (concluding that a state law could grant service members absentee voting rights despite a contrary state constitutional provision); *State v. Williams*, 49 Miss. 640, 666–67 (1873) (holding that the Mississip-

pi constitution did not limit the state legislature's power under the Elections Clause to schedule congressional elections).

The Supreme Courts of New Hampshire and Nebraska have adopted the same rule for the Electors Clause. *Opinions of Justices*, 45 N.H. 595, 600 (1864) ("The whole discretion as to the manner of the [electors'] appointment is lodged, in the broadest and most unqualified terms, in the legislature."); *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948) (concluding that the Electors Clause gives "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." (quoting *McPherson*, 146 U.S. at 25, 35)).

And in recent years several federal appellate judges have issued opinions signaling support for this understanding of the powers that the United States Constitution vests in state legislatures. *See, e.g.*, *Hotze v. Hudspeth*, 16 F.4th 1121, 1128 n.2 (5th Cir. 2021) (Oldham, J., dissenting); *Wise v. Circosta*, 978 F.3d 93, 111–12 (4th Cir. 2020) (Wilkinson and Agee, JJ., dissenting).

3. Finally, this case is an excellent vehicle for resolving the questions presented. It does not come to the Court in an emergency posture before an impending election. Instead, it permits the Court to "carefully consider and decide the issue[s] … after full briefing and oral argument." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). Further, Petitioners squarely presented their Elections Clause argument to the Ohio Su-

preme Court, Pet.App.60a–69a, and the court just as squarely ignored it. Last, there are no dispositive issues outstanding in this case. Thus if the Court agrees with Petitioners, it could grant Petitioners full relief from the Ohio Supreme Court's unconstitutional judgment.

* * *

Perhaps with the lower-court divide and the importance of the questions presented in mind, the Court recently agreed to hear *Moore v. Harper,* a case that will at least partially allow it to provide the needed answers. 142 S. Ct. 2901 (2022) (order granting certiorari). That case, like this one, arises in the context of congressional redistricting. Petition for Writ of Certiorari, at 1–2, *Moore*, 142 S. Ct. 2901 (2022) (No. 21-1271). And that case, like this one, presents the question of whether the Elections Clause bars state courts from invalidating congressional district maps for violating state constitutions. *Id*. at i.

But this case uniquely differs from *Moore* because the Ohio Constitution contains specific limitations on the Ohio General Assembly's authority to regulate congressional elections; most relevant here, Article XIX, §1(C)(3)(a) says that a map passed by a simple majority of the General Assembly cannot "unduly favor[] or disfavor[] a political party or its incumbents." Ohio Const., art. XIX, §1(C)(3)(a). In *Moore*, by contrast, the North Carolina Supreme Court limited the power of the state legislature based on an open-ended state constitutional provision guaranteeing that "[a]ll elections shall be free." Petition for Writ of Certiorari, at 3, *Moore*, 142 S. Ct.

2901 (2022) (No. 21-1271) (citing N.C. Const., art. I, §10).

This case thus presents an excellent companion to *Moore* that would allow the Court to more fully decide the extent to which a state court can usurp the legislature's role in redistricting. In *Moore*, the Court must decide whether a rogue state court may (mis)interpret a general "free elections" clause in a state constitution to seize the map-drawing pen from the legislature. Here, the Court must decide whether a rogue state court may (mis)interpret more specific provisions in a state constitution to achieve the same result.

Moreover, this case involves a congressional district map drawn by the Ohio Redistricting Commission, a commission established with legislative authority under the Ohio Constitution to draw congressional district lines. Such a commission is part of the legislature for purposes of the Elections Clause. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813–14 (2015). In *Moore*, by contrast, the North Carolina Supreme Court had before it a map drawn by the North Carolina General Assembly.

It is true that the Ohio Supreme Court did not draw its own map, as the North Carolina courts did. But it effected the same result by dictating to the Ohio legislature exactly what a map must achieve: six safe Democratic seats, with Democratic candidates expected to receive more than 52% support in each. Pet.App.18a–19a. If the court can dictate the electoral outcome, then it makes little difference whether the legislature or the court draws the lines.

Further, the Ohio Supreme Court set forth a standard of "proportional representation" for Ohio's legislature to meet. But that standard is not in the state constitution. So this case would allow the Court to hold that just as the North Carolina courts violated the Elections Clause by putting pen to paper, the Ohio Supreme Court violated the Elections Clause by decreeing through judicial fiat what results Ohio's congressional map must achieve.

II. The Ohio Supreme Court Violated the Elections Clause.

The Elections Clause "confer[s] on state legislatures, not state courts, the authority to make rules governing" congressional elections. *Republican Party of Pa. v. Boockvar,* 141 S. Ct. 1, 2 (2020) (statement of Alito, J.). It does not vest that authority in any other state-level entity. Thus state courts, which are not state legislatures, cannot regulate congressional elections.

The Ohio Supreme Court disregarded the Elections Clause by striking down the Ohio legislature's congressional district map, dictating the results that the map must achieve, and creating extra-constitutional requirements for the Ohio legislature to follow when drawing such maps.

A. The Elections Clause prohibits state courts from enforcing substantive state constitutional limits on a state legislature's power to regulate congressional elections.

1. In full, the Elections Clause provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives,

> shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const., art. I, §4, cl. 1.

This clause does two things. First, it creates the power to regulate the times, places, and manner of congressional elections. Second, it vests that power in just one state-level entity: "the Legislature" of "each State."

The Elections Clause "could have said that these rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). But it does not. "Its language specifies a particular organ of a state government,"—the legislature—"and we must take that language seriously." *Id.* Thus the Elections Clause "provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials, and not even state constitutions or their drafters and ratifiers—bear primary responsibility for setting election rules." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citing U.S. Const., art. I, §4, cl. 1).

Put differently, while state constitutions generally define the scope of state legislative authority, every "state legislature, in promulgating rules for congressional elections, acts pursuant to a *constitutional* mandate under the Elections Clause"—it does not act pursuant to state law. *Moore*, 142 S. Ct. at 1091

(Alito, J., dissenting from the denial of application for stay) (emphasis added); *see also* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 15 (2020) (explaining that the states' authority over congressional elections "comes from the U.S. Constitution").

That source of power has great import for courts because the Constitution is the "supreme Law of the Land, … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Thus the power that the Elections Clause grants to state legislatures exists "notwithstanding" state constitutional provisions purporting to limit that power. So just as courts cannot enforce state constitutional provisions limiting individual rights guaranteed by the United States Constitution, *see, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (prohibiting courts from enforcing the Michigan, Kentucky, and Tennessee constitutions' provisions that defined marriage), courts cannot enforce state constitutional provisions limiting the power to regulate congressional elections that the Constitution vests in state legislatures, *cf. Hawke v. Smith*, 253 U.S. 221, 230–31 (1920) (holding that state constitutions cannot limit state legislatures' Article V ratification power).

2. That understanding of the Elections Clause has both broad and narrow implications for state courts.

a. The broad implication is that state legislatures have "plenary authority to establish the manner of conducting" congressional elections. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020). That

means that election administrators violate the Constitution when they alter the rules governing congressional elections. *See id.*; *Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief). And of particular relevance here, it means that state courts cannot constrain state legislatures' "power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint." *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887).

No less an authority than Justice Story agreed with all this. While serving as a delegate to the Massachusetts Constitutional Convention of 1820, he opposed a provision that would have governed districting for congressional elections. Justice Story argued that the citizens of Massachusetts lacked the "right to insert in [their] constitution a provision which controls or destroys a discretion … which must be exercised by the Legislature, in virtue of powers confided to it by" the Elections Clause. *See* Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts 109 (Boston Daily Advertiser, rev. ed. 1853).

b. The Elections Clause has a narrower reading as well; courts violate the Elections Clause when they themselves prescribe rules governing the times, places, and manner of elections.

Courts can do so blatantly by, for example, drawing congressional district maps, *see* Petition for Writ of Certiorari, at 2, *Moore*, 142 S. Ct. 2901 (2022) (No. 21-1271), or dictating what results such maps must achieve, as happened in the decision below.

But they can also do so by "distorting" rather than faithfully applying state law. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C. J., concurring) (concluding that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required" and thus violated the Electors Clause).

Think of it this way: when a statute or constitutional provision announces the rules governing congressional elections, it "prescribes" the "manner" in which those elections are held. When a court gives effect to such provisions, it does not prescribe the rules governing elections—it simply gives force to the rules that another entity adopted.

A court does more, however, when it *modifies* the rules through "judicial distortion of [a] statute" or "constitution." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 472 (2015) (Scalia, J., dissenting). When a court's purported interpretation involves "not a construction of the" provision "but a rewriting of it," then it steps beyond its role of effectuating rules, and into the legislative prerogative of creating rules. *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936).

Courts cannot do that. They have no power to create rules governing congressional elections; only state legislatures and Congress have that power, and state courts are neither. So when courts "impermissibly distort[]" a provision governing congressional elections "beyond what a fair reading" will permit, they violate the Elections Clause. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). "Whatever authority there might be for a state court to ignore the

legislature's directions in other contexts," the Elections Clause (like the similarly worded Electors Clause) forbids "judicial reshaping of the law in connection" with congressional elections. Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 Cardozo L. Rev. 1219, 1262 (2002). After all, "if the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections." *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from denial of application for stay).

3. All of this tracks with the Court's precedent. In particular, the Court held in *Arizona State Legislature v. Arizona Independent Redistricting Commission* that when the Elections Clause speaks of "the Legislature," it refers generally to the state's lawmaking apparatus. 576 U.S. 787, 813–14 (2015). Normally, states may structure their lawmaking apparatuses however they like—the people may vest lawmaking powers in themselves or in any other entities they choose. On those grounds, *Arizona* held that when the people amend their state constitution to create an independent commission tasked with drawing legislative districts, that commission is part of "the Legislature" that the Elections Clause empowers to prescribe the manner of congressional elections. In short, the Court held that independent redistricting commissions comport with the Elections Clause. *Id.*

The Court may well wish to revisit the rule set out in *Arizona*. It is "utterly devoid of textual or historic support" and thus "outrageously wrong." *Id.* at 859 (Scalia, J., dissenting); *accord id.* at 824–42 (Roberts, C.J., dissenting). The phrase "the Legisla-

ture" does not describe a state's entire lawmaking apparatus. Instead, it naturally refers to "the representative body which ma[kes] the laws of the people." *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke*, 253 U.S. at 227). Indeed, "[t]he Constitution includes seventeen provisions referring to a State's 'Legislature.'" *Arizona State Legislature*, 576 U.S. at 829 (Roberts, C.J., dissenting). In all of those contexts the word bears its natural meaning, and it should not bear a different meaning in the Elections Clause context, as *Arizona* held it did. *Id.* (Roberts, C.J., dissenting).[4]

But the Court need not overrule *Arizona* to apply the Elections Clause to this case. State courts are not "the Legislature," even under *Arizona*'s capacious reading of the term. And *Arizona* held only that state constitutions may "define what processes and entities constitute the state 'Legislature' for purposes of the Elections Clause." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 91 (2020). It did not hold that state constitutions may impose judicially enforceable "substantive restrictions on that legislature's authority to regulate federal elections." *Id.*

Thus, *Arizona* does not prevent the Court from embracing the principle that courts cannot constrain "the Legislature" of "each State" by enforcing state

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[4] If the Court revisits and overrules *Arizona*, it should affirm the decision below to the extent that it strikes down the Ohio Redistricting Commission's congressional district map. But it should ***reverse*** the decision below insofar as it directs the Ohio Redistricting Commission to adopt a new map if the Ohio General Assembly fails to do so within 30 days. Pet.App.33a.

constitutional restrictions on laws governing the times, places, and manner of congressional elections. And when state courts make rules governing congressional elections or effectively alter the prescribed rules through distorted interpretations of state law, they violate the Elections Clause.

B. The Ohio Supreme Court violated both the broad and narrow interpretations of the Elections Clause.

1. Start with the broad reading that the Elections Clause vests the Ohio legislature with "plenary authority to establish the manner of conducting" congressional elections. *Carson*, 978 F.3d at 1060.

In the decision below, the Ohio Supreme Court struck down a congressional district map adopted by the Ohio Redistricting Commission (a part of the "Legislature") for violating the court's reading of Article XIX, §1(C)(3) of the Ohio Constitution. Pet.App.2a. Where a state constitution includes a limitation on the legislature's power to regulate congressional elections, the Elections Clause simply does not permit a court to substitute its judgment on the meaning of that limitation for that of the legislature's.

Throughout this litigation, the Ohio Supreme Court has rested its assertion of power on the theory that the judiciary simply must always have the final say. *Adams*, 2022-Ohio-89, at ¶ 28 ("[T]hat does not mean that we must defer to the General Assembly on questions of law." (citing *Marbury v. Madison*, 5 U.S. 137 (1803))). But here, the Elections Clause declares that the state legislature—not the court—has the final say on "the Times, Places, and Manner of holding Elections" for Congress.

That is not to say that §1(C)(3) is not binding. Members of the legislature swear an oath to uphold the state constitution, and so they are duty-bound to follow the state constitution. Nor is it to say that §1(C)(3) is not enforceable; the people of Ohio may use their ballots to punish representatives who draw a map that they disapprove of. *See NFIB v. Sebelius*, 567 U.S. 519, 538 (2012) ("Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."). But the Elections Clause says that Ohio courts cannot use their pens to do the same.

2. Under the narrower reading of the Elections Clause, even if the Ohio Supreme Court can enforce state constitutional limits on the legislature's power to regulate congressional elections, the court can not *itself* prescribe rules governing the times, places, and manner of those elections.

Yet that is exactly what the Ohio Supreme Court did in the decision below.

a. To start, it did so by dictating the result that any congressional district map in Ohio must achieve: specifically, that Democratic candidates must have at least six seats (of fifteen total) drawn to their advantage, and that those candidates must be expected to receive, in each of those seats, more than 52% of the vote. Pet.App.18a–19a. Compare that to the facts underlying *Moore*. There, the petitioners argue that the North Carolina courts violated the Elections Clause by *drawing their own map*. Petition for Writ of Certiorari, at 2, *Moore*, 142 S. Ct. 2901 (2022) (No. 21-1271).

Petitioners grant that on the egregiousness-of-Elections-Clause-violations continuum, the Ohio Su-

preme Court fared better than North Carolina's. But not by much. Instead, the Ohio Supreme Court charted its own unfounded course when it invalidated the Ohio legislature's map because "any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier." Pet.App.19a. The court then dictated both the partisan allocation of districts in any acceptable congressional district map *and* the specific partisan vote share those districts must contain. Having dictated the substantive outcome of the election, the Ohio Supreme Court left the legislature with the comparatively limited power to draw lines that accomplish that pre-selected allocation. The court dictated the way that Ohio's congressional districts must be drawn, and so dictated the "Times, Places and Manner" of electing Ohio's congressional representatives. Besides the North Carolina courts' actions in *Moore*, "[i]f a redistricting process more starkly contrary to the U.S. Constitution's Elections Clause exists, it is hard to imagine it." Petition for Writ of Certiorari, at 2, *Moore*, 142 S. Ct. 2901 (2022) (No. 21-1271)

b. Second, the Ohio Supreme Court struck down the Ohio legislature's congressional district map by distorting Article XIX, §1(C)(3) to incorporate a proportionality requirement. The Ohio Supreme Court looked at the difference between two numbers: 27%—the share of seats that Democratic candidates would likely win under the challenged map; and 47%—the share of votes that Democratic candidates received "in recent statewide elections." Pet.App. 19a; *see also Adams*, 2022-Ohio-89, ¶47. And because of that difference, the court found that the map violated §1(C)(3). Pet.App.17a–27a; *see also Adams*, 2022-Ohio-89, ¶¶41–66. As the dissent put it, the

Ohio Supreme Court read §1(C)(3) to require "proportional representation" as "the baseline against which partisan favoritism is measured." Pet.App.44a (Kennedy and DeWine, JJ., dissenting).

The problem? Section 1(C)(3) doesn't say a single word about proportional representation or anything like it. In full, §1(C)(3) reads:

> (3) If the general assembly passes a congressional district plan under division (C)(1) of this section by a simple majority of the members of each house of the general assembly, and not by the vote described in division (C)(2) of this section [three-fifths vote], all of the following shall apply:
>
> > (a) The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents.

Nor does the subsection imply anything about it. Article XI of the Ohio Constitution governs state-legislative redistricting and was adopted in 2015—two and a half years before Article XIX. It says that, in some cases, General Assembly district maps must attempt to meet a proportional representation standard. Ohio Const., art. XI, §6(B) ("The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.").

So when Ohio voters later approved Article XIX in 2018, they had the blueprint for a proportionality requirement in Article XI. But Article XIX's language included nothing remotely similar to Article

XI's blueprint. That means that Article XIX does not require Ohio's congressional district maps to achieve any sort of proportionality. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning.").

The Ohio Supreme Court thus *made* election law when it manufactured a proportionality standard for Article XIX, even though Ohio voters approved an amendment expressly omitting that standard. If the Elections Clause means anything at all, it means that the Ohio Supreme Court, which is not the "Legislature," cannot so prescribe the "Times, Places, and Manner" of congressional elections. U.S. Const., art. I, §4, cl. 1.

c. The Ohio Supreme Court did not stop there. The court then distorted the language in Article XIX, and substituted its judgment for that of the Ohio legislature in other ways.

For example, on top of reading a proportionality requirement *into* §1(C)(3), the court read the phrase "or its incumbents" *out of* §1(C)(3). That subsection provides that the Ohio legislature "shall not pass a plan that unduly favors or disfavors a political party *or its incumbents*." Ohio Const., art. XIX, §1(C)(3) (emphasis added). When Ohio voters approved Article XIX in November 2018, 12 incumbent Republicans and 4 incumbent Democrats represented Ohio in the House. If the phrase "favors or disfavors a political party" required Ohio's new congressional district map to include at least 6 Democratic-leaning districts (and thus no more than 9 Republican-leaning districts), such a map would violate Article

XIX by disfavoring Republican incumbents. But the court saw no need to address those elephants in the room, so it treated the state constitution as if those words were not there. *See, e.g.*, Pet.App.17a ("[T]he commission is required to refrain from unduly favoring one political party over the other"); Pet.App.28a ("[E]xpert analysis remains probative of whether a plan unduly favors or disfavors a political party in violation of Section 1(C)(3)(a)"); Pet.App.29a ("[T]heir analysis remains probative of whether the March 2 plan unduly favors or disfavors a political party.").

Further, by its express and unambiguous terms, §1(C)(3) applies only to maps passed by a simple majority of "the general assembly." But the Ohio Supreme Court ignored that language and applied §1(C)(3) to a Commission-approved map.

Next, the Ohio Supreme Court rejected the Ohio legislature's finding that Ohio's map was politically neutral because it had seven competitive districts, which was five more than Ohio's decade-old map. Pet.App.46a (Kennedy and DeWine, JJ., dissenting); *see also Adams*, 2022-Ohio-89, ¶71. Determining whether favoring or disfavoring a party or its incumbents is measured by the number of competitive districts across the state (as the legislature did) or by proportional representation (as the Ohio Supreme Court did) is a policy decision with political implications. The legislature made its choice on that front, and the Ohio Supreme Court violated the Elections Clause by simply substituting its own different choice.

Last, the Ohio Supreme Court has correctly recognized that the legislature's work of drawing congressional district maps deserves the highest defer-

ence. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, 192 N.E.3d 379, 399 ("[T]he burden of proof on one challenging the constitutionality of an apportionment plan is to establish that the plan is unconstitutional beyond a reasonable doubt."). But in the decision below, it forgot about that deference. Instead, it trampled on the legislature's work by inventing new state constitutional law and demanding that Ohio's congressional district map put six Democratic candidates in the United States House of Representatives. The Elections Clause does not permit such impertinent judicial overreach.

CONCLUSION

The Court should grant the petition for certiorari and reverse. In the alternative, the Court should hold this case pending its resolution of *Moore v. Harper*, 142 S. Ct. 2901 (2022) (order granting certiorari).

Respectfully submitted,

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