No. 22-362

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,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF OF LEAGUE OF WOMEN VOTERS OF OHIO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Elections Clause is violated where (i) the Legislature expressly provides for judicial review of partisan gerrymandering claims and provides the substantive standard for such review, and (ii) the State's highest court does no more than exercise that review, leaving the map-drawing function to the Legislature.

2. Whether the Elections Clause allows federal courts to second-guess state-court interpretations of state law where the Legislature, through constitutional amendment approved by the voters, authorizes state-court review and provides the state court with substantive standards specifically addressing redistricting.

CORPORATE DISCLOSURE STATEMENT

League of Women Voters of Ohio has no parent company, and no public company has a 10% or greater ownership in it.

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INTRODUCTION

There is no Elections Clause violation here. The Elections Clause authorizes the state "Legislature" to establish the terms for federal congressional elections. Here, the Ohio Legislature, through a state constitutional amendment, expressly directed the Supreme Court of Ohio to review its congressional district plans for partisan gerrymandering, and prescribed the substantive standard the court should apply in doing so. The Supreme Court of Ohio merely exercised the judicial function that the Ohio Legislature specifically assigned it, and directed the Legislature to draw a lawful plan.

Unlike *Moore v. Harper*, Dkt. 21-1271 (argued Dec. 7, 2022), this is not a case where the state supreme court invoked a general constitutional provision to invalidate a plan. Instead, the Ohio Legislature proposed (and the people of Ohio adopted via ballot initiative) a specific standard to guard against partisan gerrymandering—and authorized the Supreme Court of Ohio to apply that standard.

Moreover, while the state court in *Moore* imposed a remedial plan of its own devising, the Supreme Court of Ohio simply held that the enacted plan did not meet the legal standard set by the Legislature itself. It then remanded the matter for the Legislature to draw a new plan in compliance with the state constitutional standard.

In these circumstances, there is not only no basis for certiorari, but no basis for holding this case pending the outcome in *Moore*. The Supreme Court of Ohio

acted with the consent and pursuant to the specific direction of the Ohio Legislature.

Certiorari should be denied in this case for four reasons.

First, Petitioners have waived any argument that the Elections Clause bars what the Supreme Court of Ohio did here. In the proceedings below, Petitioners conceded that identifying legal defects in a plan was the legitimate role of the Ohio court—and they made no argument that the Elections Clause barred this narrow exercise of traditional and legislatively assigned judicial authority.

Second, the Supreme Court of Ohio did not violate the Elections Clause. The court merely exercised its limited and traditional judicial role by reviewing a congressional plan based on specific partisan gerrymandering standards approved by the Legislature itself and embodied in the state constitution. Moreover, the court *remanded* the task of adopting a new plan back to the Legislature.

Third, the Supreme Court of Ohio's interpretation of its own state constitution was reasonable, and there is no basis to second-guess it. The Ohio court reasonably concluded that the Legislature's plan violated the constitutional prohibition on "unduly favor[ing]" one party, where Republicans typically make up 53 percent of the state's voters, Pet. App. 18a, but the Legislature's first plan created twelve Republican-leaning seats and only three Democratic-leaning seats. *See Adams v. DeWine*, 195 N.E.3d 74, 100 (2022) (explaining that under the first plan, Republicans would "reliably win anywhere from 75 percent to 80 percent of

the [15] seats"). And even after that plan was found to "unduly favor" the Republican Party, the second attempt, through continued "cracking" and "packing" of Democratic voters, created a plan that would likely result in only four Democratic-leaning seats and eleven Republican-leaning seats. Pet. App. 19a–23a. In applying the specific standards regarding redistricting set forth in the Ohio Constitution, the Supreme Court of Ohio did not engage in a "distortion" of state law or reach a novel result.

Fourth, there is no split regarding the authority of a state supreme court to invalidate a plan pursuant to specific anti-gerrymandering provisions in its state constitution.

For these reasons, the Court should deny certiorari.

Moreover, because this case differs from *Moore*, as noted above, there is no basis for holding this petition while the Court considers *Moore*. Here, the Supreme Court of Ohio applied the standard the Legislature itself approved for this very question, and remanded for the Legislature to draw a new plan. Accordingly, this case will not be affected by the Court's forthcoming decision.

Indeed, a hold would reward a misuse of the certiorari process by permitting Petitioners to circumvent compliance with a state-court order without having sought, much less obtained, a stay from the Supreme Court of Ohio or this Court. Petitioners have refused to re-draw a new plan in compliance with the Ohio court's order so long as this petition remains pending.

Their conduct should not be rewarded with a hold.

STATEMENT

A. The Ohio Legislature Enacts, and the Voters Approve, Article XIX of the Ohio Constitution.

1. In 2018, the Ohio General Assembly adopted a joint resolution that sought to end the "partisan process for drawing congressional districts" and to implement strict anti-gerrymandering criteria when a plan is adopted without bipartisan support. Ohio Sec'y of State, *Statewide Issue, Issue 1*, https://bit.ly/3hFsUHt (accessed Dec. 18, 2022); Government Reform and Oversight Comm., *S.J.R. 5 Votes* (Feb. 6, 2018), http://bitly.ws/jM53 (accessed Dec. 18, 2022). It passed unanimously in the Ohio Senate, and by a vote of 83 to 10 in the Ohio House. Ohio Legis., 145th Gen. Ass'y, *Senate Joint Resolution 5*, https://bit.ly/3WwGFr3 (accessed Dec. 18, 2022). The joint resolution was then submitted as a ballot initiative to Ohioans, who endorsed the joint resolution in May 2018 by a fifty-point margin (75% to 25%). Ohio Sec'y of State, *May 8, 2018 Primary Election Official Canvass, Issue 1*, https://bit.ly/3hz0DT0 (accessed Dec. 18, 2022). The approved ballot measure was then adopted as a constitutional amendment, Article XIX. Ohio Const. art. XIX.

2. Under Article XIX, the General Assembly must adopt a congressional district plan by a three-fifths vote in each house—including by the affirmative vote of at least one-half of the members of each of the two largest political parties—by September 30. Ohio Const. art. XIX, § 1(A). If it fails to do so, the Ohio

Redistricting Commission (the "Commission") shall adopt a plan by October 31. *Id.* § 1(B).[1] That plan also requires bipartisan support, namely, the affirmative vote of four members of the Commission, and at least two members of the Commission who represent each of the two largest political parties in the General Assembly. *Id.*

If the Commission does not adopt a bipartisan plan by October 31, the map-drawing function reverts to the General Assembly, which is required to adopt a plan by November 30. *Id.* § 1(C)(1). At that point, the General Assembly has two options.

Pursuant to Section 1(C)(2), it may adopt a ten-year plan if supported by three-fifths of each house, and if at least one-third of the members of the two largest parties in each house vote in favor of the plan. *Id.* § 1(C)(2).

Alternatively, it may adopt a four-year plan by a simple majority in each house of the General Assembly—subject to two constitutional constraints on partisan gerrymandering. *Id.* § 1(C)(3). First, Section 1(C)(3)(a) prohibits the passage of a simple-majority plan that "unduly favors or disfavors a political party

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[1] The Commission comprises seven members: one individual appointed by the Senate President, one individual appointed by the Speaker of the House, one individual appointed by the Senate Minority Leader, one individual appointed by the House Minority Leader, the Governor, the Auditor, and the Secretary of State. Ohio Redistricting Commission, https://bit.ly/3PJ9M8k (accessed Dec. 18, 2022).

or its incumbents." *Id.* § 1(C)(3)(a). And second, Section 1(C)(3)(b) prohibits the passage of a simple-majority plan that "unduly split[s] governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations." *Id.* § 1(C)(3)(b).

3. Section 3 of Article XIX vests "exclusive, original jurisdiction in all cases arising under [that] Article" to the Supreme Court of Ohio. *Id.* § 3(A). Section 3(B) authorizes that court to invalidate plans that violate the Article's anti-partisan-gerrymandering provisions. It further provides that if a congressional district plan or any district or group of districts is "determined to be invalid by an unappealed final order of a court of competent jurisdiction," the General Assembly must pass a new plan in accordance with Article XIX. *Id.* § 3(B)(1). It must do so within 30 days of the Ohio court's invalidation of the then-enacted plan. *Id.* If the General Assembly is unable to pass a revised plan in that time frame, the Commission shall be reconstituted to adopt a congressional district plan in accordance with Article XIX. *Id.* § 3(B)(2).

Article XIX does not affirmatively authorize the Ohio court to *adopt* a congressional district plan itself, but instead provides that both the General Assembly and Commission shall "remedy any legal defects in the previous plan identified by the court." *Id.* § 3(B)(1)–(2).

B. The State Supreme Court Applies the Constitutional Standard and Invalidates Two Congressional District Plans.

1. On November 20, 2021, Governor DeWine signed into law S.B. 258, enacting a congressional district plan that positioned the Republican Party, which "generally musters no more than 55 percent of the statewide popular vote" in Ohio, "to reliably win anywhere from 75 percent to 80 percent of the seats in the Ohio congressional delegation." *Adams*, 195 N.E.3d at 100.

Respondents filed suit before the court of original jurisdiction, the Supreme Court of Ohio, in November 2021, alleging that the then-enacted plan unduly favored the Republican Party in violation of Section 1(C)(3) of Article XIX. *See* Complaint, *Adams v. DeWine*, No. 2021-1428 (Ohio Nov. 22, 2021); Complaint, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, No. 2021-1449 (Ohio Nov. 30, 2021). That plan created twelve districts with Republican majorities and only three with Democratic majorities.

On January 14, 2022, the Supreme Court of Ohio interpreted the terms of Article XIX—and in particular, Section 1(C)(3)—for the first time. It looked to the "common and ordinary meaning" of the text and dictionary definitions to interpret the "unduly favors" provision of Section 1(C)(3)(a). *Adams*, 195 N.E.3d at 84. It defined "undue" as "[e]xcessive or unwarranted," *id.* (citing *Black's Law Dictionary* 1838 (11th ed. 2019)), and, reading Sections 1 and 2 of Article XIX together, held that Section 1(C)(3)(a) prohibits the passage of a simple-majority plan that "favors or disfavors a political party or its incumbents to a degree

that is in excess of, or unwarranted by, the application of Section 2's and Section 1(C)(3)(c)'s specific line-drawing requirements to Ohio's natural political geography," *id.* at 85. Section 1(C)(3)(a), the state court explained, "bar[s] plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria." *Id.* Under that standard, the court invalidated the simple-majority plan enacted by the General Assembly "in its entirety," *id.* at 77, because the "evidence overwhelmingly shows that the enacted plan favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by Article XIX's line-drawing requirements and Ohio's political geography," *id.* at 85. In reaching that conclusion, the court looked to a multitude of factors, including the fact that certain "oddly shaped districts" lead to "the inescapable conclusion . . . that they are the product of an effort to pack and crack Democratic voters" to achieve an undue partisan advantage for the Republican Party. *Id.* at 91.

2. Following the Ohio court's invalidation of the first plan on January 14, 2022, the General Assembly did not enact a new plan within 30 days, as required by Article XIX. Pet. App. 4a. Accordingly, on March 2, 2022, the Commission adopted a new plan (the "March 2 plan") without bipartisan support. Pet. App. 10a–11a.

On July 19, 2022, the Supreme Court of Ohio invalidated the plan drawn by the Commission. Pet. App. 1a. In that decision, the court explained that the March 2 plan continued to pack and crack voters for partisan advantage, this time resulting in five Democratic-leaning districts and ten Republican-leaning

districts. Pet. App. 18a, 23a. Three of those five Democratic-leaning districts, the court noted, have vote shares "very close to 50 percent (52.15, 51.04, and 50.23 percent)." Pet. App. 18a. By contrast, the "most competitive Republican-leaning district has a 53.32 percent Republican vote share." Pet. App. 19a. Thus, "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," while Republican candidates would likely win eleven out of fifteen congressional seats. Pet. App. 19a. The March 2 plan represented only a "modest improvement over the invalidated plan." Pet. App. 19a. And the Supreme Court of Ohio, when invalidating the March 2 plan, looked to a multitude of factors—particularly, the packing and cracking of Democratic voters to achieve undue partisan advantage for the Republican Party in violation of Section 1(C)(3) of Article XIX. Pet. App. 19a–27a.

Consistent with Section 3(B) of Article XIX, the Ohio court, having invalidated the March 2 plan, ordered (i) the General Assembly to pass a plan that complies with the Ohio Constitution within 30 days, and (ii) the Commission to adopt a plan within the next 30 days should the General Assembly fail to do so. Pet. App. 33a.[2]

Petitioners did not comply with the Ohio court's July 19 order to re-draw a constitutionally compliant plan. Instead, they filed a petition for certiorari with

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[2] The court did not entertain the Neiman Respondents' request that the court itself adopt a plan. *See* Br. of Resp'ts 29–45, *Neiman v. LaRose*, No. 2022-0298 (Ohio May 5, 2022).

this Court, and asserted that they are not obligated to draw a new plan until this Court rules on their petition. *See* Speaker Bob Cupp, *Mem. to House Republican Members* (Aug. 17, 2022), http://bitly.ws/xrud (stating that there is "no state constitutional requirement to draw new congressional districts for the 2024 election cycle" before seeking U.S. Supreme Court review). Petitioners have not sought a stay from the Supreme Court of Ohio or this Court, and have continued to ignore the order of the Ohio court.

As a result of Petitioners' refusal to comply with the Ohio court's order, Ohio conducted its November 2022 mid-term election using a plan that the Ohio court had ruled to be unconstitutional under the state constitution.

REASONS FOR DENYING THE PETITION

I. Petitioners Waived the Elections Clause Argument.

As an initial matter, Petitioners have waived their Elections Clause argument by failing to advance it in the Supreme Court of Ohio. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances . . . we will not entertain arguments not made below." (quotations and citations omitted)); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." (quotations and citations omitted)).

This general rule applies with added force in this case, because Petitioners seek to raise an argument that directly *contradicts* their position in state court.

There, Petitioners conceded that the Supreme Court of Ohio has the authority to invalidate unconstitutional plans, contesting only whether, under the Elections Clause, the Ohio court has "authority to *draw* congressional boundary lines." Pet. 9 (citations omitted) (emphasis added). Specifically, Petitioners stated that they "do not challenge that *there is a role for this Courts* [sic] *to play in congressional redistricting*," and conceded that the Supreme Court of Ohio should "follow Article XIX, Section 3 and *evaluate whether there are any specific legal defects* in the [March 2 plan]—defects that if found can be remedied by one of Ohio's map-drawing authorities in due course." Pet. App. 68a (emphases added). That is precisely what the Supreme Court of Ohio did here: it evaluated the Legislature's plan for legal defects by applying the Legislature's own standards as set forth in the Ohio Constitution; and it refrained from drawing its own plan, leaving that task to Ohio's map-drawing authorities.

Petitioners never maintained, as they do here, that the Ohio court lacked authority even to *review* the March 2 plan. Where, as here, Petitioners not only fail to present an available argument under the federal Constitution in the court below, but take the *opposite* position in state court, they cannot plausibly claim that they have preserved the argument for review by this Court. *See Webb v. Webb*, 451 U.S. 493, 501 (1981) ("At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.").

II. The Supreme Court of Ohio Did Not Displace the Legislature When It Invalidated an Unconstitutional Plan, Pursuant to a Process and Substantive Standard Supplied by the Legislature Itself.

Petitioners seek to link their petition with the Court's pending review of *Moore*. But this case differs materially from *Moore*, and presents no Elections Clause issue regardless of how *Moore* is resolved.

A. This Case is Materially Distinct from *Moore*.

This case differs from *Moore* in at least three material respects.

First, the nature of the state-law constraints on partisan gerrymandering in *Moore* and this case are wholly unalike. In this case, the Legislature (and the people of Ohio) expressly addressed the issue of partisan gerrymandering and specifically authorized the Supreme Court of Ohio to do precisely what it did here. Section 3 of Article XIX vests in the Supreme Court of Ohio the authority to invalidate a congressional plan that violates Article XIX's clear prohibition of partisan gerrymandering. And Section I of Article XIX supplies the substantive standard that governs its review (whether the plan "unduly favors or disfavors a political party").

Both the Ohio Legislature and Ohio voters overwhelmingly supported constitutionalizing this specific prohibition of partisan gerrymanders and the authorization of judicial review under Ohio law in 2018. The Legislature's approval was unanimous in the Senate,

and 83 to 10 in the House. Ohio Legis., 145th Gen. Ass'y, *Senate Joint Resolution 5*, https://bit.ly/3WwGFr3. And the people of Ohio approved the ballot referendum by a 75-to-25% margin. Ohio Sec'y of State, *May 8, 2018 Primary Election Official Canvass*, *Issue 1*, https://bit.ly/3hz0DT0. Proponents of the measure, including Petitioner Huffman himself, argued that "[v]oting **YES on Issue 1** will limit gerrymandering by requiring that congressional districts be drawn with **bipartisan approval or utilizing strict anti-gerrymandering criteria**." Ohio Sec'y of State, *Statewide Issue, Issue 1*, at 2, https://bit.ly/3hFsUHt.

By contrast, North Carolina's prohibition on partisan gerrymandering and the substantive standard employed by the North Carolina Supreme Court in the decision below in *Moore* were based on more general rights incorporated into the state constitution of 1776 that did not specifically address partisan gerrymandering. *See Harper v. Hall*, 868 S.E.2d 499, 510–11 (N.C. 2022).

Put simply, the Ohio Legislature's adoption of the state constitution's express prohibition on partisan gerrymandering and its authorization of review distinguish this case from *Moore*, and foreclose Petitioners' Elections Clause claim. Even under the "broad reading" of the Elections Clause that Petitioners urge this Court to adopt—namely, that the Elections Clause "vests the Ohio legislature with 'plenary authority to establish the manner of conducting' congressional elections," Pet. 25 (citations omitted)—there is no Elections Clause violation where, as here, a state legislature expressly authorizes state-court judicial

review pursuant to a substantive standard that specifically addresses partisan gerrymandering and was adopted by the legislature itself.

Second, unlike the state court in *Moore*, at no point did the Ohio court propose a remedial plan of its own. Rather, it did what the Legislature had directed it to do—assess whether the plan unduly favored one party in violation of Article XIX.

Third, the Supreme Court of Ohio expressly stated that it was for the Legislature (or Commission, should the Legislature fail) to draw a new plan. The court directed: "We order the General Assembly to pass a new congressional-district plan that complies with the Ohio Constitution, as required under Article XIX, Section 3(B)(1)." Pet. App. 2a–3a. Accordingly, the map-drawing power of the Legislature was never curtailed; it was expressly preserved.

Thus, this case differs from *Moore* in material ways that are dispositive of this petition. However *Moore* is decided, there is no Elections Clause violation where, as here: (i) the Legislature expressly authorizes judicial review of partisan gerrymandering and specifies the substantive gerrymandering standard to apply, (ii) the Supreme Court of Ohio merely exercises the responsibility the Legislature assigned it by invalidating a plan that violates the Legislature's own substantive standard, and (iii) the Ohio court

leaves to the Legislature the task of adopting a new plan consistent with the Ohio Constitution.[3]

B. This Case Presents No Elections Clause Issue.

Regardless of the outcome in *Moore*, the text of the Elections Clause, this Court's precedents, and history point to the same conclusion: There is no Elections Clause problem in this case.

1. The Text of the Elections Clause Does Not Preclude State-Court Review of State Constitutions Where the Legislature Specifically Authorizes Review of Gerrymandering Claims and Provides the Substantive Standard for That Review.

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. It says nothing about precluding state judicial review of the legislature's decisions.

Nor is there any support for the notion that, when the Framers used the term "Legislature," they meant

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[3] Defining an unconstitutional outcome does not constitute a limitation on the "manner" in which an election takes place where the state legislature itself imposes the constitutional limit and retains authority to determine the specific contours of a constitutional plan.

a state legislature untethered from the state constitution that creates, defines, and constrains it. At the time the federal Constitution was drafted, the authority of state legislatures was commonly understood to be subordinate to, and derived from, the state constitutions. *See, e.g.*, Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 127–43, 313–35 (1969).

Against this textual backdrop, Petitioners ask this Court to proclaim that "courts cannot enforce state constitutional limits on the power of state legislatures to regulate congressional elections," Pet. 2—even when the legislature itself has expressly authorized the courts to do just that. But there is no basis for such an unprecedented and counterintuitive result. The Elections Clause does not prohibit state courts from carrying out the very task of judicial review that the legislature assigned to them.

Indeed, by asking this Court to overturn the Supreme Court of Ohio's reasonable interpretation of a state constitutional provision enacted by the Legislature, Petitioners turn their own reading of the Elections Clause on its head. Rather than bestowing upon the Ohio Legislature the power to establish its chosen manner of conducting congressional elections, the Elections Clause (as they would read it) would function here to *deny* the Legislature that authority.

2. This Court's Precedents Squarely Affirm the Role of State-Court Review of State Redistricting Enactments.

Petitioners' broad reading of the Elections Clause is also foreclosed by this Court's precedents.

More than a century ago, this Court recognized that the Elections Clause did not displace state constitutions. *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916). In *Hildebrant*, Ohio's Constitution empowered voters to reject congressional redistricting legislation by popular referendum. *Id.* at 566–67. Hildebrant argued—as Petitioners do here—that the Elections Clause's use of the term "Legislature" allowed the state legislature to bypass the state constitution. *Id.* at 568–69. This Court unanimously rejected that argument, with Chief Justice White explaining that a state legislature may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the State." *Id.* at 568.

Indeed, this Court has made clear that the Elections Clause contains "no suggestion" that it "endow[s] 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." *Smiley v. Holm*, 285 U.S. 355, 367–68 (1932); *accord Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (state courts have the authority to invalidate congressional redistricting legislation that violates "the requirements of the Constitution of the state in relation to the enactment of laws").

In *Smiley,* this Court held that where the state constitution provides for a gubernatorial veto, that conventional check on the power of the legislature is not barred by the Elections Clause. 285 U.S. at 368. So too, where the state constitution affords state courts the authority to invalidate a plan, solely on the ground that it does not comport with the state constitutional standard promulgated by the state legislature—and authorizes only remand to the legislature as a remedy—the Elections Clause is not offended.

Decades later, the Court reaffirmed that "[n]othing in [the Elections] Clause instructs . . . 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." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) (*"AIRC"*). And while some Justices disagreed on the scope of what constitutes the "Legislature," all nine agreed that state constitutions bind state legislatures' exercise of Elections Clause authority. *See id.* at 841 (Roberts, C.J., dissenting) ("Under the Elections Clause, 'the Legislature' . . . may be required [when it prescribes election regulations] to do so within the ordinary lawmaking process.").

Most recently, in *Rucho*, every Justice agreed that state courts have the authority to apply the substantive provisions in state constitutions to determine the lawfulness of congressional redistricting where there has been partisan gerrymandering—precisely what the Ohio court did here. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *id.* at 2524 (Kagan, J., dissenting).

Put simply, judicial review is "a check on the Legislature's power," not a usurpation of it. *See Nixon v. United States*, 506 U.S. 224, 233 (1993). That traditional check raises no issue under the Elections Clause—at least when the Legislature itself has expressly stated that the Ohio court should apply specific standards set forth in the Ohio Constitution to claims of partisan gerrymandering.

3. Founding-Era Federalism and Separation-of-Powers Principles Affirm the Propriety of State-Court Review.

Even before the federal Constitution was drafted, state courts had established the practice of conducting judicial review of legislative acts. *See, e.g.*, William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455 (2005). If the Framers intended for the Elections Clause to strip state courts of their reviewing role (and to strip the legislatures prescribing the manner of holding elections from assigning state courts such a role), they would have been explicit.

Indeed, as Alexander Hamilton explained in the Federalist Papers: It "cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution," that "the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments." *The Federalist No. 78*, at 467 (A. Hamilton) (C. Rossiter ed. 1961). "It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority," than to assume that "the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents." *Id.*

In line with Hamilton's reasoning, this Court has recently described "stripping state courts of jurisdiction to hear their own *state* claims" as an "extraordinary step" that it "would not expect Congress to take . . . by implication." *Atl. Richfield Co. v. Christian*, 140

S. Ct. 1335, 1351 (2020). There is similarly no basis to construe constitutional silence to achieve this "extraordinary" result.

As the Founders recognized, state legislatures are "mere creatures of the State Constitutions, and cannot be greater than their creators." *See* 2 *Records of the Federal Convention of 1787*, at 88 (M. Farrand ed. 1911). A state legislature's powers are limited, and those powers are defined by the state's constitution. Reading the Elections Clause to bar states from subjecting legislative action to state constitutional constraints, even when the legislature itself has adopted those constraints, would undermine the core federalism principle that a state can "define[] itself as a sovereign" "[t]hrough the structure of its government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *AIRC*, 576 U.S. at 816; *see also Alden v. Maine*, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance."); *The Federalist No. 43*, at 272 (J. Madison) (C. Rossiter ed. 1961) ("Whenever the States may choose to substitute other republican forms, they have a right to do so . . . .").

Application of the Elections Clause to preclude state-court review of redistricting is particularly inappropriate where, as here, a state's "governmental process" includes a state court applying a substantive redistricting standard through judicial review, and following the process for remand—both of which were expressly authorized by the legislature itself.

III. There Is No Basis for This Court to Supplant the Supreme Court of Ohio's Reasonable Interpretation of Ohio Law.

Petitioners criticize the Supreme Court of Ohio's interpretation and application of the "unduly favors" provision of Article XIX. But even assuming arguendo that some outer-bound interpretation would permit federal-court nullification of a state supreme court's interpretation of its own constitution, this case is not a close call.

A. The Elections Clause Does Not Prohibit the Supreme Court of Ohio from Interpreting and Applying the Ohio Constitution.

Petitioners argue that when the Supreme Court of Ohio evaluated the expert evidence before it and concluded that the Ohio Legislature's congressional district plan violated Article XIX, it effectively "prescribe[d] rules governing the times, places, and manner of elections." Pet. 21. They contend that the court's "distort[ion]" of Article XIX violates the Elections Clause. At bottom, though, Petitioners ask this Court to second-guess the Ohio court's interpretation of the Ohio Constitution. Pet. 22–23. If such a request is ever appropriate, it would have to be limited to extreme outlier interpretations. Petitioners have shown nothing close to that here.

Petitioners assert that under the Elections Clause, state courts must unquestioningly "give[] effect" to the legislature's actions, rather than "modif[y]" or "distort[]" them. Pet. 22. But the Elections Clause authorizes state legislatures to regulate the redistricting process; it does not require the state judiciary to be a

mere rubber stamp within that process, or preclude it from interpreting the state constitution—particularly where the legislature has expressly directed it to do so on the very matter at issue, partisan gerrymandering. Just as Congress must act in compliance with the federal Constitution, the Ohio Legislature also must abide by the state constitution. It is the proper role of the Supreme Court of Ohio to enforce that obligation.

Petitioners' "distortion" theory rests primarily on Chief Justice Rehnquist's concurrence in *Bush v. Gore*, 531 U.S. 98 (2000) ("*Bush II*") (per curiam). As an initial matter, the decision in *Bush II* was based on the equal protection clause and did not even address the Elections Clause. Moreover, that concurrence does not suggest that the Elections Clause exempts state legislatures from the requirements of their state constitutions. Rather, this Court takes state legislatures as it finds them: as creations of the people of each state, organized by and subject to the boundaries of the state constitutions that constitute them. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("The legislative power is the supreme authority, except as limited by the constitution of the state."); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Chief Justice Rehnquist did not question that proposition. He argued only that this Court should ensure that state courts do not "depart[] from the statutory meaning" of state legislatures' enactments regulating elections. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring). And even under those circumstances, he acknowledged that this Court's review

should be "deferential" to state courts' interpretations of state statutes. *Id.* at 114. He did not suggest that the Elections Clause precluded state courts from exercising their traditional role as arbiters of state constitutions, or that it immunized state legislatures from the limits of their own constitutions. *See Smith v. Jennings*, 206 U.S. 276, 278 (1907) ("[T]he conformity with the state Constitution of the proceedings in the enactment of the law is a question for the determination of the state court, and its judgment is final."); *Hannis Distilling Co. v. City of Baltimore*, 216 U.S. 285, 294–95 (1910) (finding no federal question where "the entire argument . . . rests upon the assumption that the conclusion of the state court . . . was not sustained by the reasoning which the court gave for its conclusion, or that the reasoning was inherently unsound because it proceeded upon a misconception of the state Constitution"). As the Court explained in *Bush v. Palm Beach County Canvassing Board*, "*[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions*." 531 U.S. 70, 78 (2000) ("*Bush I*") (citation omitted) (emphasis added).

This Court reaffirmed the appropriate role of state courts as interpreters and enforcers of their state constitutions in the precise context presented here in *Rucho*. There, the Court insisted that the fact that federal courts "have no license" to adjudicate partisan gerrymandering claims did not "condemn complaints about districting to echo into a void," *Rucho*, 139 S. Ct. at 2507, because state courts retain the power to apply "standards and guidance" arising from "state statutes and state constitutions" to check partisan gerryman-

dering, *id.* In other words, state constitutional provisions that govern the functions of their legislatures in the elections context are perfectly enforceable—and state courts remain authorized to strike down congressional districting plans that violate them. *See id.* (discussing, approvingly, one such ruling in Florida); *Democratic Nat'l Comm. v. Wisc. State Legis.* 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) (explaining that this Court's review was not appropriate where the issue "implicated the authority of state courts to apply their own constitutions to election regulations").

Here, the Supreme Court of Ohio did not depart from its legislatively assigned function. Ohio's Constitution expressly prescribes the process and the substantive standard by which the Supreme Court of Ohio is to review claims of partisan gerrymandering. The Ohio court found that the March 2 plan violated the state constitution's specific constraints on partisan gerrymandering by "unduly favoring" the Republican Party.

Petitioners invite this Court to effectively second-guess the state court's construction of its own state constitution, with no clear limiting principle. To do so would not only contravene *Rucho*; it would discard more than a century of jurisprudence honoring states' authority to determine their own government processes and distribution of power. *See, e.g.*, *McPherson*, 146 U.S. at 25; *Highland Farms Dairy*, 300 U.S. at 612. Even under the approach proposed by Chief Justice Rehnquist in *Bush II*, the Court cannot simply substitute its own judgment for that of the Supreme Court of Ohio with respect to its reasonable interpretation of the Ohio Constitution.

B. The Supreme Court of Ohio Invalidated the March 2 Plan Based on a Reasonable Interpretation of Article XIX.

The Supreme Court of Ohio's interpretation of Section 1(C)(3) of Article XIX is not an unreasonable (much less a "distorted") interpretation of state law. It did not reverse a well-settled interpretation of a state constitutional provision. *Cf. Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting) (suggesting that state court reinterpreted a free elections clause). Rather, it performed its traditional role—as authorized and constrained by Article XIX—of interpreting a state constitutional question of first impression. *See Adams*, 195 N.E.3d at 106 (dissenting opinion) (noting that the questions before it were "questions of first impression").

In finding that the "unduly favors" provision prohibits "'favoritism not warranted by legitimate, neutral criteria,'" Pet. App. 16a (quoting *Adams*, 195 N.E. at 85), the state court relied on traditional tools of interpretation under Ohio law. It looked to the plain meaning of the text, dictionary definitions, and the structure of Article XIX to interpret the "unduly favors" provision of Section 1(C)(3)(a). *See, e.g.*, *Adams*, 195 N.E.3d at 84–85 (looking to the text and plain meaning of "unduly" and "favors"); *id.* at 107 (dissenting opinion) ("The parties agree on these definitions.").

That Petitioners disagree with the Ohio court's interpretation does not make it any less an exercise of traditional judicial power. This Court has long recognized that "those who apply [a legal] rule to particular cases[ ] must of necessity expound and interpret that

rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Adams*, 195 N.E.3d at 82 ("We may not override the General Assembly's judgment on policy questions . . . . [b]ut that does not mean that we must defer to the General Assembly on questions of law."). This Court has no authority to second-guess a state court's reasonable interpretation of state constitutional law.

C. The Supreme Court of Ohio Did Not Impose a Proportional Representation Standard.

Petitioners incorrectly assert that the Ohio court misconstrued Ohio law when it "set forth a standard of 'proportional representation' for Ohio's legislature to meet," Pet. 18, and "manufactured a proportionality standard for Article XIX," Pet. 27–29. The Ohio court did no such thing.

Petitioners' only citation in support of this charge is to a passage in the court's opinion noting the significant gap between Democrats' recent statewide vote share (47%) and expected seat share (27%), and finding that the March 2 plan represented a statistical outlier. Pet. 27 (citing Pet. App. 19a & 17a–27a). But citing such evidence is not an instruction or requirement that the Legislature must adopt a plan based on proportional representation—which would require creating *seven* Democratic-leaning districts. The Supreme Court of Ohio never even intimated that such a result was required. To be sure, it is virtually impossible to assess whether a plan "unduly favors" one party without at least considering that party's proportional representation in the relevant jurisdiction, but considering that factor is a far cry from mandating proportionality.

The petition also points to one line in the court's opinion noting that, according to Dr. Imai, "any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier." Pet. 27. But again, the court never indicated that any plan with five or fewer Democratic-leaning seats would constitute undue favoritism. On the contrary, "expected performance" was only one of several considerations in its overall assessment of undue partisan bias.

Proportionality played a limited role in the majority's analysis: It provides a common-sense baseline for considering whether a plan favors one party or another. The Ohio court considered that factor *only* as a starting point in determining whether the plan "unduly favor[ed]" a political party—not as a single-factor test or a sole basis for invalidation. As in *Adams*, the court looked to expected performance as only one metric for measuring partisan advantage and whether results are likely to be "skewed" in a manner that neutral criteria cannot explain. 195 N.E.3d at 85–88, 100. And it proceeded to evaluate a series of other indicators to assess whether the expected partisan bias qualifies as undue—including evidence of efforts to "pack" and "crack" Democratic voters in several urban counties using non-compact districts, Pet. App. 19a–23a; evidence of gamesmanship in the partisan tilt of districts presented as "competitive," Pet. App. 23a–25a; and multiple measures of compactness and partisan bias, Pet. App. 26a–27a.

What convinced the majority that "the March 2 plan allocates voters in ways that unnecessarily favor the Republican Party," was the largely unrebutted evidence of packing and cracking, along with the lack of

compactness—not a simple departure from proportionality. Pet. App. 27a–28a.

IV. The Supreme Court of Ohio Did Not Engage in *De Facto* Map-Drawing.

Petitioners maintain that the Supreme Court of Ohio overstepped its authority by dictating the result that a valid congressional district plan must achieve. But the Ohio court did no such thing. It never directed that a valid plan must provide for a specific number of Democratic-leaning seats. Nor did it prescribe what it means for a seat to be Democratic-leaning, as Petitioners falsely charge. Petitioners' arguments rest on radical mischaracterizations of the Ohio court's decision that should not be credited.

A. The Supreme Court of Ohio Did Not Mandate That Democratic Candidates Must Likely Win at Least Six of Ohio's Fifteen Apportioned House Seats.

Petitioners assert that "the court said that for a plan to pass muster, Democratic candidates must be likely to win at least six of Ohio's fifteen apportioned House seats." Pet. 10. It did not. The only support Petitioners muster for this contention is a single quotation from the court's decision that merely *describes* an expert's opinion that "'any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier.'" Pet. 10 (citing Pet. App. 19a).

Contrary to Petitioners' misrepresentation, the Ohio court did not adopt this single observation from

one expert's report as a bright-line rule for determining whether a plan violates the Ohio Constitution. Rather, the court credited overwhelming expert analysis that had been submitted as evidence of undue favoritism, including but not limited to:

- Other comparative statistical analyses regarding the expected outcomes of the March 2 plan. Pet. App 18a, 25a.

- The lack of compactness of Districts 1, 15, 7, and 11 and of the plan as a whole. Pet. App. 21a–22a, 26a.

- Indications that problems with "oddly shaped districts," which were the product of an effort to pack and crack Democratic voters, "persist in the March 2 plan." Pet. App. 23a.

- An in-depth review focusing on packing and cracking of Democratic voters in three urban areas. Pet App. 20a–22a.

- A sample congressional district plan showing "it is possible to apply Article XIX of the Ohio Constitution to Ohio's political geography without favoring the Republican party to the degree the March 2 plan does." Pet. App. 23a.

- Other metrics that revealed partisan bias. Pet. App. 26a–27a.

Put simply, the Ohio court evaluated the totality of the evidence and determined that those challenging

the validity of the plan had met their burden of showing that the March 2 plan violated Article XIX, Section 1(C)(3)(a) by "unduly favor[ing]" the Republican Party. Pet. App. 27a. It never set forth a requirement that "Democratic candidates must be likely to win at least six of Ohio's fifteen apportioned House seats," Pet. 2, as applied to the March 2 plan, much less on any subsequent congressional district plan enacted pursuant to Article XIX.

B. The Supreme Court of Ohio Did Not Mandate That Democratic Candidates Must Be Expected to Receive More Than 52% of the Vote in Democratic-Leaning Districts.

Petitioners also misrepresent the Supreme Court of Ohio's decision as defining a Democratic-leaning seat as requiring more than a 52% Democratic vote share. Pet. 17, 26. Again, this is simply false.

The Ohio court did not mandate particular partisan vote shares in districts. Rather, it simply cited evidence identifying the vote shares of districts created in the March 2 plan, and noted the differences between the Democratic- and Republican-leaning districts. In explaining how the March 2 plan violated the "unduly favors" provision, the court noted that the plan created "just three [Democratic-leaning] seats with Democratic vote shares over 52%." Pet. App. 18a. "By contrast, all the Republican-leaning seats comfortably favor Republican candidates. The most competitive Republican-leaning district has a 53.32 percent Republican vote share." Pet. App. 19a. It cited these facts as evidence that "the March 2 plan favors Republicans by turning Democratic-leaning districts

into toss-up districts while making slightly Republican-leaning districts into safe Republican districts." Pet. App. 24a.

The fact that the Ohio court was concerned with the partisan imbalance in the way the Legislature composed Democratic- and Republican-leaning districts does not come close to imposing a strict numerical criterion. And it certainly did not impose a vote-share requirement on any subsequent congressional district plan enacted pursuant to Article XIX.

In short, Petitioners' attempts to take single statements out of context fail to confront what the Supreme Court of Ohio actually did here—namely, consider the totality of evidence to assess whether the March 2 plan unduly favored one party in violation of the Ohio Constitution.

V. There Is No Split of Authority as to Whether State Courts Can Invalidate Unconstitutional Plans Pursuant to an Express Delegation of That Power by the Legislature.

Petitioners' attempt to manufacture a lower-court split, where none exists, also weighs against a grant of certiorari here.

As an initial matter, many of the cases relied on by Petitioners relate to the *Electors* Clause in Article II—which is not at issue here—rather than the *Elections* Clause in Article I. *See, e.g.*, *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (members of a state's *executive* branch "cannot re-write the state's election code,

at least as it pertains to selection of *presidential* electors," absent a grant of authority from the federal Constitution or the state legislature (emphasis added)); *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948) (quoting *McPherson*, 146 U.S. at 25). And even those decisions predating *AIRC* have been called into doubt. *See, e.g.*, *AIRC*, 576 U.S. at 788, 840–41 (Roberts, C.J., dissenting) (describing pre-*AIRC* precedents including *McPherson* as establishing that a state constitution may "constrain[]" the legislature but not "depos[e] it entirely"); *In re Opinion of the Justices*, 113 A. 293, 298–99 (N.H. 1921) (calling into doubt *In re Opinions of Justices*, 45 N.H. 595 (1864)).[4]

Petitioners' remaining state supreme court cases have either been reconsidered or are consistent with the Supreme Court of Ohio's enforcement of a state constitutional constraint on legislative action. *See In re Opinion to the Governor*, 103 A. 513, 514–15 (R.I. 1918) (questioning the court's advisory opinion in *In*

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[4] In passing, Petitioners quote *McPherson* for the proposition that the "legislature's power" under the *Electors* Clause "cannot be taken from them or modified" "even through their state constitutions." Pet. 14 (citing 146 U.S. 1 at 35 (cleaned up)). But that case did not involve any state constitutional limitation or concern the express delegation of authority by the legislature itself. At most, the statements Petitioners quote are simply dicta, and they provide no reason to question this Court's more recent decisions squarely holding that state legislatures are subject to state constitutional checks when acting pursuant to the Elections Clause.

re Plurality Elections, 8 A. 881 (R.I. 1887), and explaining that the Elections Clause does not allow the legislature to regulate elections "entirely unrestrained by the limitations of the state Constitution"); *State v. Williams*, 49 Miss. 640, 669 (1873) (recognizing that the legislative regulation at issue complied with the state constitution).[5]

In the absence of a split in authority among state supreme courts, Petitioners are left with a handful of dissenting opinions among lower federal courts. Pet. 15. Petitioners cannot manufacture a circuit split based on mere "signal[s]" of support in nonbinding law. Pet. 15.

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[5] Petitioners cite a decision of a Kentucky intermediate court of appeals for the proposition that a state law granting service members absentee voting rights may be implemented notwithstanding provisions of the state constitution. Pet. 14 (citing *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692 (Ky. Ct. App. 1944)). But that same decision also recognized that the legislative process of enacting time, place, and manner regulations "must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment." *Dummit*, 181 S.W.2d at 694. Moreover, no circuit split exists as this decision was issued by an intermediate court of appeals and not a state supreme court.

VI. The Petition Should Not Be Held Pending a Decision in *Moore*.

For the above reasons, the Court should deny certiorari. Moreover, the Elections Clause challenge presented here is so insubstantial that the Court should deny certiorari at once, and not hold this petition pending its resolution of *Moore*.

A. The Outcome in *Moore* Will Not Affect the Outcome in This Case.

A hold pending the decision in *Moore* is not appropriate in this case because, given the clear, material differences in the cases, the resolution of *Moore* will not affect the result here.

As detailed above, *see supra* Part II.A, the Supreme Court of Ohio acted pursuant to a specific state constitutional provision on partisan gerrymandering *approved by the Legislature and codified in the state constitution by the voters*—which expressly provided for judicial review of gerrymandering claims, and dictated the substantive standard the court should use to assess such claims. Moreover, the Ohio court did not draw a plan itself, but remanded the task of drawing a new plan to the Legislature.[6]

All of these factors—a constitutional provision authorizing judicial review of partisan gerrymandering

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[6] While Respondent sees no constitutional problem with the North Carolina courts adopting a temporary plan as an interim measure, the question of whether the Elections Clause bars such action is not presented here.

claims in particular, a substantive standard specifically applicable to such claims, and a remedial scheme that provides for a remand to the legislature—were established by the Legislature itself, which fundamentally distinguishes this case from *Moore*. The resolution of that case will accordingly not change the outcome here, and it provides no basis for a hold.

B. A Hold Would Endorse and Incentivize Petitioners' Continued Defiance of the Supreme Court of Ohio's Order.

The Court should not hold this case for the additional reason that Petitioners are using the certiorari process to defy a provision of the Ohio Constitution and an order of the Supreme Court of Ohio—without ever seeking a stay.

Petitioners attempt to justify their defiance of the order of the Supreme Court of Ohio by pointing to this petition. They have publicly asserted that they are not required to draw a new plan until this Court has acted on this petition. *See* Speaker Bob Cupp, *Mem. to House Republican Members* (Aug. 17, 2022), http://bitly.ws/xrud. That is plainly incorrect. It is elementary that the filing of a petition for certiorari does not automatically stay the effect of a lower court's decision. *See Lawrence v. St. Louis-S.F. Ry. Co.*, 278 U.S. 228, 232 (1929). And contrary to settled practice, Petitioners never sought a stay from the Supreme Court of Ohio or this Court.

Petitioners' continuing defiance of the Ohio court's order also lacks support in Ohio law. Section 3 of Article XIX of the Ohio Constitution provides that, when

the Supreme Court of Ohio has invalidated a redistricting plan, the General Assembly "shall" pass a new plan "not later than the thirtieth day after the last day on which an appeal of the court order could have been filed or, if the order is not appealable, the thirtieth day after the day on which the order is issued." Ohio Const. art. XIX, § 3(B). The order in this case is not among the relatively few orders that are appealable to this Court. *See* 28 U.S.C. § 1253.[7] Accordingly, Petitioners have failed to abide by the requirements of the Ohio Constitution.

This Court should not allow itself to be used as an excuse for Petitioners' continued defiance of an order of the Supreme Court of Ohio and a clear requirement of the Ohio Constitution.

CONCLUSION

The petition for writ of certiorari should be denied.

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[7] To the extent Petitioners contend that "appealable" refers to a petition for certiorari, they are wrong. In a redistricting case, Petitioners may pursue an appeal to this Court only from a decision of a three-judge panel pursuant to 28 U.S.C. § 1253. Such a situation might arise if a three-judge federal panel were to issue a ruling regarding an impasse in the state-redistricting process under *Growe v. Emison*. *See* 507 U.S. 25, 36 (1993) (allowing for federal-court intervention by a district court where the state failed to "develop a redistricting plan in time for the primaries"). Accordingly, the language of Article XIX, Section 3 regarding an "appealable" order simply does not apply to this case.

Respectfully submitted,

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