No. 22-362

In the Supreme Court of the United States

MATT HUFFMAN, PRESIDENT OF THE OHIO SENATE, ET AL., PETITIONERS,

v.

MERYL NEIMAN, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR NEIMAN RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Article XIX of the Ohio Constitution, which was approved by a near-unanimous Ohio General Assembly and a supermajority of Ohio voters in 2018, expressly prohibits partisan gerrymandering and empowers the Ohio Supreme Court to invalidate congressional districting plans that violate the article. Does the Elections Clause of the U.S. Constitution preclude judicial enforcement and interpretation of Article XIX?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

In 2018, in a near-unanimous vote, the Ohio General Assembly approved an amendment to the state constitution that, if adopted by Ohio voters, would expressly prohibit partisan gerrymandering. The amendment would also authorize the Ohio Supreme Court to invalidate congressional districting plans that violate the amendment's provisions, while according the legislature responsibility for any subsequent redraw. This legislative effort was led by then-Senator, now Senate President, Matt Huffman, the lead Petitioner in this case. A supermajority of Ohio voters supported the amendment, and it is now enshrined in Article XIX of the Ohio Constitution.

This petition arises out of the Ohio Supreme Court's enforcement of that article, as designed and approved by Petitioner Huffman and the state legislature. Petitioners now ask this Court to undo the standard they themselves created. This Court should decline the invitation.

First, this case is not a proper vehicle to consider the question Petitioners seek to present: That question was not addressed or even raised below, likely because it was never implicated. Second, the question itself is not appropriate for consideration: It does not concern issues of importance that this Court should decide and there is no division of authority. Third, Petitioners' underlying theory lacks merit: Constitutional text and history, an unbroken line of this Court's precedent, and congressional enactments refute the notion that the Elections Clause aggrandizes to state legislatures the untrammeled power to violate their state constitutions, as construed by state courts. Not to mention that Petitioners' preferred outcome would have pernicious

consequences far beyond Ohio and the redistricting context. The petition should be denied.

STATEMENT

A. Ohio's Redistricting Reforms

Four years ago, Ohio amended its state constitution to add substantive and procedural requirements for congressional redistricting. *See* Ohio Const. art. XIX. These reforms came on the heels of a state legislative redistricting amendment that was adopted three years earlier. *See* Ohio Const. art. XI. Both initiatives were the culmination of pervasive dissatisfaction with partisan gerrymandering during the 2011 redistricting cycle, and both received widespread support in the General Assembly and among Ohio voters. *See Adams v. DeWine*, 167 Ohio St.3d 499, 195 N.E.3d 74, 2022-Ohio-89, ¶ 3.

The General Assembly initiated and drove Ohio's congressional redistricting reforms. *See id.*, ¶ 6. Petitioner Huffman proposed the constitutional amendment language in a joint resolution, which the General Assembly passed with near-unanimous support.[1] Ohio voters approved the amendment by a margin of three to one. *Adams*, 2022-Ohio-89, ¶ 6 (citing election results).

The amendment became Article XIX of the Ohio Constitution and took effect in 2021. As Petitioners describe, Article XIX gives the General Assembly primary responsibility for congressional redistricting and for any redraw that is required in the event a map

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[1] *See* S.J.R. 5, 132nd Leg. (Ohio 2018), as introduced, *available at* https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_132/resolutions/sjr5/IN/00/sjr5_00_IN?format=pdf; *see also* Final Analysis, Ohio Leg. Serv. Comm., Sub. S.J.R. 5 (2018), *available at* https://www.legislature.ohio.gov/download?key=8806&format=pdf.

is invalidated. *See* Pet. 4–7; *see also* Ohio Const. art. XIX, § 1. It also gives the Ohio Supreme Court "exclusive, original jurisdiction" over congressional redistricting cases. Pet. 6; *see also* Ohio Const. art. XIX, § 3.

B. 2021-2022 Congressional Redistricting in Ohio

Pursuant to Article XIX's congressional redistricting process, the General Assembly has the initial and final opportunity to pass a congressional map, with different voting thresholds applicable at various stages of the process. *See* Pet. 4–7. During the 2021-2022 congressional redistricting cycle, that process unfolded as follows:

Although Article XIX tasked the General Assembly with approving a congressional map with bipartisan support by September 30, 2021, Ohio Const. art. XIX, § 1, the General Assembly took no public action at all that month, *Adams*, 2022-Ohio-89, ¶ 13. The Ohio Redistricting Commission (the "Commission"), to which the responsibility for redistricting passed in October, Ohio Const. art. XIX, § 1, and which could pass a plan only with bipartisan support, similarly took no action to consider or pass a map. *Adams*, 2022-Ohio-89, ¶ 14. The process then returned to the General Assembly, which then had the power to pass a four-year congressional map without bipartisan support, pursuant to Article XIX, Section 1(C)(3). The General Assembly did just that, passing a plan on a party-line vote (the "First Plan"), which Governor DeWine signed into law. *Id.*, ¶ 21.

Within days of the Governor's signature, the Neiman Respondents[2] challenged the First Plan in

[2] The Neiman Respondents are twelve individual Ohio voters.

the Ohio Supreme Court, alleging violations of two provisions of Article XIX—one prohibiting the undue favoring of a political party or its incumbents, Ohio Const. art. XIX, § 1(C)(3)(a), and the other prohibiting the undue splitting of governmental units, *id.*, § 1(C)(3)(b). *See Adams*, 2022-Ohio-89, ¶ 23.

The Ohio Supreme Court found for Respondents on both claims, *id.*, ¶ 102,[3] concluding based on "incontrovertible evidence" that "[t]he General Assembly produced a plan that is infused with undue partisan bias and that is incomprehensibly more extremely biased than the 2011 plan that it replaced," *id.*, ¶ 101. The Ohio Supreme Court thus sent the First Plan back to the General Assembly to redraw as needed to cure the identified constitutional violations within thirty days, as provided by Article XIX, Section 3. *Adams*, 2022-Ohio-89, ¶ 102; *see also* Pet.App.1a–2a.

The General Assembly failed to pass (or even consider) a new map within thirty days of the Ohio Supreme Court's decision in *Adams*. Pet.App.4a. Accordingly, the responsibility passed to the Commission, a body comprised of Petitioners and other statewide and legislative elected officials. Pet. 5–7. There, Petitioner Huffman introduced a proposed congressional map that closely resembled the First Plan, arguing that the standards set forth in Article XIX, Sections 1(C)(3)(a) and 1(C)(3)(b) did not apply to the Commission at the redraw stage of the redistricting process. Pet.App.6a–10a. With only minor tweaks, the Commission passed Petitioner Huffman's map (the "Second Plan") on a party-line

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[3] Contrary to Petitioners' representation, Pet. 8, the court found two constitutional violations. *Adams*, 2022-Ohio-89, ¶ 102

vote. Pet.App.10a–11a. Neither Petitioners nor any other party sought this Court's review of the Ohio Supreme Court's invalidation of the First Plan.

C. *Neiman* Proceedings and Decision

The Neiman Respondents filed a new complaint challenging the Second Plan.[4] Pet.App.12a. Although the court issued an expedited scheduling order, its briefing schedule concluded after Ohio's scheduled primary and thus allowed the 2022 elections to proceed under the challenged Second Plan. Pet.App.12a–13a.

At the briefing stage, the parties addressed the scope of the Ohio Supreme Court's remedial authority, should it find in Respondents' favor. Petitioners took a position directly contrary to the one they offer here. Petitioners argued that they "do not challenge that there is a role for [the Ohio Supreme Court] to play in congressional redistricting. What [they] challenge is a particular role: the court adopting the role of a legislative authority and, in violation of the Elections Clause, *drawing a congressional district plan itself*." Pet.App.68a (emphasis added). Moreover, Petitioners acknowledged that the Ohio Supreme Court has "plenary jurisdiction to invalidate a congressional district or group of congressional districts" and even invited the Ohio Supreme Court to "follow Article XIX, Section 3 and evaluate whether there are any specific legal defects in the Second Plan—defects that if found can be remedied by one of Ohio's map-drawing authorities in due course." Pet.App.68a–69a. Petitioners never argued that the Ohio Supreme

[4] The Neiman Respondents' case was later consolidated with *League of Women Voters of Ohio v. LaRose*, No. 22-303.

Court could not invalidate the Second Plan or that it could not interpret and enforce Article XIX.

By contrast, the Neiman Respondents argued that the Ohio Supreme Court *could* draw its own map if it deemed that to be appropriate relief. The Ohio Supreme Court did not address that request, did not engage with the Elections Clause directly, and resolved the case precisely as Petitioners argued it could. *See* Pet.App.33a. The court first rejected Petitioners' argument that Article XIX, Sections 1(C)(3)(a) and 1(C)(3)(b) did not apply to the Commission at the redraw stage of the redistricting process. Pet.App.14a–16a. To do so, the court relied on traditional statutory interpretation tools, including text, structure, history, legislative purpose, and precedent. *Id.* Next, it recounted Respondents' experts' analysis of the Second Plan's expected performance, additional comparisons, and metrics of partisan bias, Pet.App.17a–27a, noting that the constitutional deficiencies the court identified in the First Plan "persist" in the Second Plan, Pet.App.23a.

Given its analysis of the constitutional text and the record evidence, the Ohio Supreme Court found that Respondents met their high burden to show beyond a reasonable doubt that the Second Plan unduly favored the Republican Party, though it did not rule in Respondents' favor on their renewed undue splits claims. Pet.App.27a, 31a–32a. As it did in *Adams*, the court ordered the General Assembly to redraw the map within thirty days, after which the task would pass to the Commission for thirty days. Pet.App.33a. Neither body complied with the court's order. Petitioners instead now seek this Court's review.

REASONS TO DENY THE PETITION

The Court should deny certiorari for numerous reasons. First, Petitioners' claims are barred from review in this Court because they were never presented to or addressed by the court below. Second, this petition is an especially poor vehicle to decide the question presented because it is divorced from the facts of the case. Third, Petitioners have not provided compelling reasons for this Court to exercise its discretionary review, as there are no questions that this Court should decide and no division of authority over the petition's question. Fourth, Petitioners' extreme theory lacks merit and, fifth, would have correspondingly extreme and pernicious consequences if adopted.[5]

A. Petitioners' federal claim is barred from review because it was not presented to or addressed by the Ohio Supreme Court.

Petitioners' arguments are jurisdictionally barred or, at the very least, forfeited and waived because Petitioners never raised below their current claim that the Ohio Supreme Court violated the

[5] Notably, Petitioners LaRe and McColley were not named parties to the action below, Pet.App.14a n.5, and do not independently have standing to bring Elections Clause claims as legislators without authorization to represent the entire General Assembly's interests. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (holding private citizens do not have standing to bring Elections Clause challenge); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (finding lack of standing where legislators do not allege individual injury and have not been authorized by legislature to allege institutional injury). Nevertheless, Petitioners Senate President Matt Huffman and Ohio House Speaker Robert Cupp have standing to press this appeal, and only one petitioner need have standing for the case to proceed. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651, 1650 (2017).

Elections Clause by invalidating a congressional map or interpreting Article XIX of the Ohio Constitution.

Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), which limits this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." *Id.* (emphasis added); *see* Pet. 4. "[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)); *see also Robertson,* 520 U.S. at 90 ("It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." (quotation omitted)).[6]

Here, the Ohio Supreme Court did not "expressly address the question" now raised by

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[6] Although this Court has not resolved the question of "whether [the] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential," *Howell*, 543 U.S. at 445–46 (quoting *Robertson*, 520 U.S. at 90), the best interpretation of precedent is that the limitations are jurisdictional in character, *see id.* at 445 (noting "the long line of cases clearly stating that the presentation requirement is jurisdictional"); Wright & Miller, 16B Federal Practice & Procedure § 4022 (3d ed. April 2022 update). In any event, as in *Howell*, "even treating the rule as purely prudential, the circumstances here justify no exception." 543 U.S. at 446.

Petitioners. *See Robertson*, 520 U.S. at 86. Because the court below was "silent on [the] federal question" the petition now raises, the burden shifts to Petitioners to demonstrate that the issues were nonetheless "properly presented" and that "the state court 'had a fair opportunity to address the federal question that is sought to be presented here.'" *Id.* at 87–88 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). Petitioners cannot carry that burden, as neither they nor any other party raised the arguments that Petitioners now manufacture in a bid for certiorari.

Rather, Petitioners argued only that the Elections Clause does not permit the Ohio Supreme Court to *draw a map itself*. Pet.App.60a–69a. Regardless of the merits of that argument, it is not relevant here: The Ohio Supreme Court did not draw a map. *See* Pet. 9. Instead, the Court acted entirely consistently with Article XIX, as well as with Petitioners' own assertions about what the Court could do *in these very proceeding*s. Indeed, Petitioners expressly explained to the Ohio Supreme Court below that they did "not challenge that there is a role for [the Ohio Supreme Court] to play in congressional redistricting." Pet.App.68a. They acknowledged it has "plenary jurisdiction to invalidate a congressional district or group of congressional districts" and even invited it to "follow Article XIX, Section 3 and evaluate whether there are any specific legal defects in the Second Plan." Pet.App.68a–69a. That is precisely what the Ohio Supreme Court did. Accordingly, this Court does not have jurisdiction over the petition.

Even setting the requirements of Section 1257(a) aside, Petitioners' arguments are forfeited. This Court ordinarily "does not decide questions not raised or resolved in the lower courts." *Taylor v.*

Freeland & Kronz, 503 U.S. 638, 646 (1992) (cleaned up). The arguments Petitioners raise here were "never presented to any lower court" and thus are forfeited. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015).

Finally, because Petitioners not only failed to raise their present arguments below, but made arguments squarely at odds with them, their new arguments are waived. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted). When a lower court "follow[s] the course which [Petitioner] himself helped to chart and in which he acquiesced," a challenge to the lower court's decision is "plainly waived." *Johnson v. United States*, 318 U.S. 189, 201 (1943); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (explaining "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested"); 14 Cyc. of Fed. Proc. § 67:12 (3d ed.) ("[A]n appellant will not ordinarily be permitted to complain of an alleged error that she invited or that the court committed at her instance or inducement.").[7]

That is the case here. In the *Neiman* proceedings below, Petitioners limited their Elections Clause objection to the Ohio Supreme Court imposing

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[7] Petitioners' brazen about-face goes so far as to judicially estop them from asserting the arguments they now raise. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment" in order to prevent "the perversion of the judicial process," "playing fast and loose with the courts," and "improper use of judicial machinery" (cleaned up)).

its own map—which never happened. Pet.App.68a. And they advocated that the state court refrain from taking any actions other than those explicitly described in Article XIX, Section 3—which is exactly what happened. Pet.App.68a–69a. Moreover, in *Adams v. DeWine*, Petitioners "acquiesced" in the very course of action they now challenge: There, the Ohio Supreme Court invalidated a General Assembly-drawn map under Article XIX, Section 3, and throughout the constitutionally-prescribed remedial process, Petitioners never once raised Elections Clause concerns. *See* Pet.App.3a–11a.

Petitioners now seek this Court's review, not because they think the Ohio Supreme Court misinterpreted a question of federal law, but because they do not like the outcome of that court's decision *despite* the fact that it followed Petitioners' own suggested course of action to get there. The above-described doctrines prevent this use of certiorari review. At the very least, they counsel strongly against this Court's exercise of its discretion to grant the petition.

B. This petition is an especially poor vehicle to decide the issues presented.

Even if the petition's question was not barred from review, this case is an especially poor vehicle for considering theoretical Elections Clause restrictions because the facts are inconsistent with Petitioners' proffered theory.

1. The Ohio General Assembly specifically authorized judicial review of congressional plans and retains full control over congressional redistricting.

Although Petitioners assert that the Ohio Supreme Court violated "the Ohio legislature['s] 'plenary authority to establish the manner of conducting' congressional elections," Pet. 25 (quoting *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020)), the facts tell a different story. The General Assembly retained its authority over congressional redistricting at every step: It drafted and approved the reforms that were ultimately codified as Article XIX, including the provision establishing that "[t]he supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article." Ohio Const. art. XIX, § 3(A). It drew and passed the First Plan. Its leaders defended that map in the Ohio Supreme Court, never once questioning that court's authority to review it. *See Adams*, 2022-Ohio-89. After the First Plan was invalidated, the General Assembly had the first opportunity to draw a revised map but chose instead to delay and let its leaders draw the Second Plan as members of the Commission. Pet.App.4a–11a. And its leaders defended the Second Plan in the Ohio Supreme Court, delaying the litigation to extend beyond the 2022 primaries but, all the while, accepting and even expressly recognizing that court's role in reviewing the map for legal defects. Pet.App.68a–69a. When the court invalidated the Second Plan, the General Assembly once again retained the authority to redraw the map. Pet.App.33a. It failed to do so and, rather than comply with the remedial process provided in the legislatively-approved Article XIX, decided to file this

petition. Notably, even though the Ohio Supreme Court did not once rule in the General Assembly's favor, Ohio still held its 2022 elections under the unconstitutional Second Plan.

This is not the case to test a new legal theory premised on the idea that state legislatures should retain control over congressional redistricting; in Ohio, the state legislature already does. It thus does not present any issue under the Elections Clause that warrants this Court's exercise of its discretionary review.

2. The Ohio Supreme Court did not itself prescribe any new rule governing the time, place, or manner of elections.

The same is true with respect to Petitioners' second asserted Elections Clause violation—that the Ohio Supreme Court "*itself* prescribe[d] rules governing the times, places, and manner of [congressional] elections." Pet. 26. It did no such thing.

The Ohio Supreme Court has prescribed no new rules beyond those approved by the General Assembly and Ohio voters in Article XIX. Its work was no more than a court interpreting and applying the rule of decision to the facts at hand. Petitioners' scattershot attempts to distort the Ohio Supreme Court's opinion badly miss the mark.

First, at no point did the Ohio Supreme Court "dictat[e] the result that any congressional district map in Ohio must achieve." Pet. 26. The portion of the opinion that Petitioners cite simply recounts Respondents' experts' multi-faceted analysis of the Second Plan's expected partisan performance. Pet.App.18a–19a. The court could scarcely assess

whether the Second Plan unduly favored a political party in violation of Article XIX without assessing evidence indicating the degree to which the Second Plan disproportionately favored that party. The Ohio Supreme Court relied on that evidence to find an Article XIX violation, but it did not set forth any performance benchmarks for congressional maps generally. *See* Pet.App.27a–30a. Indeed, the court relied on two sets of simulations that predicted different seat allocations, finding both "probative of whether the [Second Plan] unduly favors or disfavors a political party." Pet.App.29a. Far from "dictat[ing] the substantive outcome of the election" and "le[aving] the legislature with the comparatively limited power to draw lines that accomplish that pre-selected allocation," Pet. 27, the Ohio Supreme Court simply ordered the General Assembly to "pass a plan that complies with the Constitution," Pet.App.33a. Petitioners' citation to the dissent only proves this point, as the dissenting justices took issue not with the majority setting requirements that were too stringent, but with the majority supposedly failing to "present 'any workable standard about what it means to unduly favor a political party.'" Pet. 10 (citing Pet.App.40a (citing *Adams*, 2022-Ohio-89, ¶ 107)).

Second, and relatedly, the Ohio Supreme Court did not "incorporate a proportionality requirement" into Article XIX. Pet. 27. It considered the gap between the challenged map's seat share and the statewide vote share as *one piece of evidence*—one of multiple "[c]omparative analyses and other metrics" that, together, demonstrate an undue Republican advantage. Pet.App.27a–28a; *see also Adams*, 2022-Ohio-89, ¶ 70 ("[O]ur judgment here rests not on 'proportional representation' but rather on the Constitution's explicit text stating that a plan cannot

unduly favor or disfavor a political party or unduly split governmental units for partisan advantage.").

Petitioners' remaining arguments fare no better. The Ohio Supreme Court did not "read the phrase 'or its incumbents' *out of*" the provision at issue. Pet. 29. To the contrary, it considered treatment of incumbents and credited expert analysis that the Second Plan treated Republican incumbents more favorably than Democratic incumbents. Pet.App.27a. Likewise, the court did not "ignore[]" any language in applying the anti-gerrymandering provision to a Commission-drawn plan. Pet. 30. Rather, it assessed and dismissed Petitioners' arguments pursuant to long-settled state rules of interpretation—evaluating text, structure, history, purpose, and precedent. Pet.App.14a–16a. Nor did the court make "a policy decision" by rejecting the legislature's theory that its map was "politically neutral" due to its number of competitive seats. Pet. 30. Consistent with its judicial role, the court rejected the legislature's theory because "competitiveness . . . does not appear within Article XIX, and rules of statutory construction forbid us from adding to the text of Article XIX." *Adams*, 2022-Ohio-89, ¶ 45. Accordingly, it was the legislature—not the court—that sought to read "extra-constitutional" standards into Article XIX.[8] Finally, the Ohio Supreme Court applied the proper standard of review, holding Respondents to the highest burden of proof and finding that their burden was met. *See* Pet.App.13a, 27a.

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[8] The issue of competitiveness as a measure of political neutrality was addressed not in *Neiman*, but in *Adams*, which Petitioners did not appeal and which is not the subject of this petition.

As the immediately preceding analysis makes clear, Petitioners' "narrow" questions are nothing more than attempts to dress up their gripes with the Ohio Supreme Court's interpretation of the Ohio Constitution in the garb of Elections Clause violations. *See* Pet. 26–31. In other words, so long as the Ohio Supreme Court's opinion is consistent with Article XIX of the Ohio Constitution, Petitioners' "narrow" questions answer themselves.

Crediting Petitioners' arguments would therefore require this Court to interpret Article XIX *de novo*. But it is the Ohio Supreme Court that is the final arbiter of the Ohio Constitution, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) (similar), and this Court lacks jurisdiction to second-guess that court's interpretation, *see, e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (explaining that this Court is "bound to accept the interpretation of [state] law by the highest court of the State"); *see also* 28 U.S.C. § 1257(a) (limiting this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State . . . where," in relevant part, "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States"). Thus, reviewing the question presented—especially in this case—would force this Court to reckon not just with history, precedent, and congressional enactments, *see infra* Argument D, but with its own constitutionally-prescribed role, *see* U.S. Const., art. III, § 2.

C. Petitioners have not demonstrated a compelling reason to grant certiorari.

Under this Court's rules, "[a] petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Such a compelling reason might exist where a state court of last resort has decided an "important" federal question that either (1) "has not been, but should be, settled by this Court" or (2) conflicts with a decision of a state supreme court or federal appellate court, or this Court. *Id.* Even setting aside that *no* state court of last resort has decided the federal question presented, *see supra* Argument A, neither subsequent consideration is true here.

1. The petition does not present any question of importance that this Court should decide.

The question presented does not merit this Court's attention. To the extent the question poses important federal issues, they have either already been settled by this Court or are entirely hypothetical given the posture of this case. And to the extent this case poses any new considerations, they are either questions of state law which this Court cannot decide or limited to the unique Ohio context and undeserving of this Court's discretionary review. Indeed, it is telling that Petitioners can cite *only* non-precedential dissents and concurrences in support of their question's "importance." *See* Pet. 11–12.

Taking Petitioners' "broad" articulation first, *see* Pet. 2, this Court declared in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), that "'[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply'" in evaluating partisan gerrymandering challenges to congressional

plans. *Id.* at 2507. If Petitioners are asking anything that *Rucho* does not already answer, then their inquiry is specific to Ohio's unique constitutional standard, which has no analog in any other state. Accordingly, what Petitioners ask this Court to do is weigh in on a question that is inextricably bound to the facts of this case and will not arise elsewhere. This Court rarely indulges such requests and should not do so here, where any analysis would necessarily involve interpreting state law.

Petitioners' "narrow" concerns, *see* Pet. 2, which philosophize about the outer limits of a state court's authority, are entirely academic given the actual events in this case. The Ohio Supreme Court acted pursuant to a specific constitutional authorization, which Petitioners initiated, approved, and recognized up until the filing of this petition. In doing so, the Ohio Supreme Court engaged in principled judicial review to reach the outcome Petitioners expressly invited and *Rucho* expressly endorsed. *See* Pet.App.68a–69a. Whatever limiting principle constrains a state court's authority to interpret its own constitution is of no moment here, where the court acted within the metes and bounds established by the legislature itself. Petitioners' apparent belief that the Ohio Supreme Court got Ohio law wrong, *see* Pet. 26–31, is thus untethered to *any* federal question, let alone an "important" one.

State-court interpretations of state law are generally "considered as final by this court." *Green v. Neal's Lessee*, 31 U.S. 291, 298 (1832). Particularly given the deference owed to a state supreme court's interpretation of its own constitution, *see supra* Argument B.2, the decision below does not justify federal-court intervention.

2. There is no division of authority over the question presented.

There is no division of authority over the question presented for a simple reason: No court has ever considered Petitioners' version of the Elections Clause argument—that a court cannot interpret and apply an express provision of the state constitution, initiated and approved by the legislature itself, to invalidate a congressional map and return the redraw process to the state's political branch map-drawing authorities. The outlier nature of Petitioners' arguments is further underscored by the way Petitioners attempt to force the Ohio Supreme Court's decision into a Procrustean bed until it resembles those issued by the three state supreme courts with which the Ohio Supreme Court has allegedly "aligned itself." Pet. 12–13. But all three of those courts imposed court-designed election regulations or maps as remedies. *See id.* (citing Pennsylvania, Florida, and North Carolina cases). The Ohio Supreme Court did not; just as Petitioners wanted. Pet.App.68a.

Petitioners strain to mischaracterize the Ohio Supreme Court's opinion because *every* court to have addressed the question of whether the Elections Clause forbids state courts from reviewing the validity of congressional plans under their state constitutions for nearly a century has held that the Elections Clause does not bar state judicial review. *See infra* Argument D.2 (describing unbroken line of precedent originating with *Smiley v. Holm*, 285 U.S. 355 (1932)); *see also, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 370 & n.2 (Fla. 2015). This case is hardly the first time a state court has applied a state constitutional provision to invalidate a congressional map. *E.g.*, *Moran v. Bowley*, 179 N.E. 526, 531–32 (Ill. 1932) (citing cases and applying the Illinois

Constitution's Free and Equal Elections Clause, pre-*Wesberry*, to require population equality).

Petitioners rely on *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), but that case did not involve either the Elections Clause or a state court's invalidation of a state election law under the state constitution. Instead, *Carson* concerned a consent decree entered by the Minnesota Secretary of State extending the statutory deadline for receipt of mail-in ballots, which a state court approved without deciding the statute's validity. *Id.* at 1055–56. In defending the consent decree against collateral attack in federal court, the Secretary of State "argue[d that] the Minnesota Legislature [] delegated its authority to the Secretary." *Id.* at 1060 (quoting Minn. Stat. § 204B.47). The Eighth Circuit's conclusion that the consent decree violated the Electors Clause hinged solely on the interpretation of the Minnesota statute in question—it "d[id] not reach" whether "the Legislature's Article II powers concerning presidential elections can be delegated in this manner," *id.*, and it never addressed whether a state court would be empowered to invalidate the challenged ballot-receipt deadline under the state constitution. Therefore, *Carson* has no relevance to Petitioners' claim.[9]

Nor do any of Petitioners' other cases establish a conflict. Petitioners rely (at 15) on two dissents from federal courts of appeals, both from cases that, like *Carson*, involved executive alterations of statutory

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[9] *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948), is likewise distinguishable because it not only involved the Electors Clause rather than the Elections Clause, but arose in the context of parties seeking a writ of mandamus to direct a state election official to act outside the scope of any statutory scheme, *id.* at 280–81, 286.

ballot-receipt deadlines; neither questioned the power of state courts to review election laws under state constitutions. *Id.* Of the majority opinions Petitioners cite, several pre-date *Smiley* and the long line of decisions that followed. Pet. 19–20 (citing state court decisions from 1864, 1873, and 1887). And their sole post-*Smiley* Elections Clause decision does not remotely support Petitioners' theory: *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), stated that the "legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment," *id.* at 694, and held that the statute at issue did not violate any state constitutional provision, *id.* at 696.

D. Petitioners' theory lacks merit.

Jurisdictional and vehicle problems aside, Petitioners' theory lacks merit as a matter of text, history, and precedent. Nothing in the Elections Clause permits a state legislature to violate the state constitution, as interpreted by the state's highest court, in enacting congressional redistricting legislation. This Court has so held many times, and Petitioners present no persuasive argument for revisiting those holdings.

1. The text of the Elections Clause permits state judicial review under state constitutions.

The Elections Clause provides that 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. In the founding era, like today, a "Legislature" "prescrib[ed]" legislation subject to

restrictions imposed by the state constitution, as construed by the state courts and enforced through judicial review.

Prior to ratification of the U.S. Constitution, the courts of at least seven states had not only engaged in judicial review of legislation but had "deemed a state statute to violate a fundamental charter (or other species of higher law)." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 & n.169 (2003) (citing, among other decisions, *Bayard v. Singleton*, 1 N.C. 5, 7 (1787)). The Framers during the drafting and ratification debates cited these decisions favorably. *Id.* at 934–35. Hamilton's defense of judicial review in *The Federalist* applied equally to state judicial review. *Id.*; *The Federalist* No. 81, at 481–82 (Clinton Rossiter ed., 1961) ("[T]his doctrine" of constitutional supremacy "is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most if not to all the State governments."); *id.* No. 78, at 469 ("The benefits of the integrity and moderation of the judiciary have already been felt in more States than one ...."). And several state constitutions in the eighteenth century specifically imposed substantive restrictions *on elections*, including federal congressional elections.[10]

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[10] Delaware's constitution established rules for electing "representatives ... in Congress." Del. Const. of 1792, art. VII, § 2. Others required elections for all offices to be by ballot, Ga. Const. of 1789, art. IV, § 2; Pa. Const. of 1790, art. III, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art. IV, § 2, and regulated the apportionment of congressional seats, Va. Const. of 1830, art. III, § 6. *See* Hayward H. Smith, *Revisiting the History of the*

Petitioners stress that "the Legislature" means a legislative entity rather than a judicial or executive one. Pet. 19. But that merely leads to the question of whether the relevant act of the "Legislature" is subject to state judicial review under the state constitution. To prevail, Petitioners must show that the Elections Clause supplants that ordinary state constitutional constraint. Pet. 1 (state courts cannot "second-guess" a legislature's authority to make rules for congressional elections), 20 ("[C]ourts cannot enforce state constitutional provisions limiting the power to regulate congressional elections that the Constitution vests in state legislatures.").

Petitioners identify no textual or historical support for that theory. They cite nothing suggesting that the Elections Clause was intended to silently abrogate the regime of state judicial review that the Framers not only understood, but cited during the framing and ratification process. And Petitioners identify no way in which the process here defied the text of the Elections Clause as originally understood. The "Legislature" here "prescribed" a congressional districting plan through the ordinary process governing redistricting legislation. The plan was then subjected to judicial review under Ohio's Constitution—pursuant to an express provision granting the Ohio Supreme Court "exclusive, original jurisdiction" over congressional plans. Ohio Const. art. XIX, § 3. The General Assembly even "prescribed" all relevant aspects of the judicial review—by drafting and passing the language of the constitutional amendment that governs everything from the

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Independent State Legislature Doctrine, 53 St. Mary's L.J. 445, 455, 484–85 (2022).

procedures by which challenges are heard, *id.*, to the substantive constitutional protections, *id.*, § 2.

Petitioners' interpretation also ignores key textual differences between the Elections Clause and other constitutional provisions that grant *unreviewable* power to the legislature. The U.S. House and Senate, for example, have "the *sole* Power" to impeach and to try impeachments, respectively. U.S. Const. art. I, §§ 2-3. The Elections Clause is different. It simply designates "the Legislature" and "Congress" as the entities that may legislate on the subject of congressional elections. The Clause thus resembles other grants of legislative power in the Constitution, which contemplate legislation subject to ordinary constitutional checks. For example, "Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* § 8. Although no other branch of government can enact Commerce Clause legislation, Congress's Commerce Clause legislation is nonetheless subject to other constitutional restrictions, including judicial review. When courts strike down such legislation, they do not usurp Congress's power under the Commerce Clause. Indeed, federal courts permissibly review Congress's election legislation to secure rights in the U.S. Constitution—and do not "make or alter" legislation in violation of the Elections Clause when they do so, *id.* § 4, cl. 1; *see Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction.").

Although Petitioners' primary argument is categorical, Pet. 20–21, they raise a second "narrower"

theory that purportedly would not bar judicial review of rules governing congressional elections altogether but would constrain state courts from prescribing their own rules in that space. Pet. 21. However, in practice, that theory, too, would make it impossible for state courts to rule on partisan gerrymandering claims (or any other election-related claim), because it improperly conflates normal judicial practice with legislating. In other words, Petitioners point to no principled line that would separate permissible judicial interpretations from impermissible ones, besides citing nonbinding dissents and concurrences that are limited to their specific contexts and, besides, stand only for the uncontroversial proposition that egregious, bad faith judicial misinterpretations by state courts that implicate federal rights are subject to federal-court intervention. Pet. 22–23; *see also Bush v. Gore*, 531 U.S. 98, 119 & n.4 (2000) (Rehnquist, C. J., concurring).

No text in the Elections Clause or anywhere else in the U.S. Constitution defines the scope of state constitutional review. Nor could it. Deciding the contours of state constitutional provisions is a matter wholly for state courts. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Stripping state courts of the ability to conduct traditional judicial review in favor of a more limited approach would invite unprecedented intrusions by federal courts into the structure of state government, requiring federal courts to decide the nebulous question of whether a state court is simply "giv[ing] force to the rules that another entity adopted," Pet. 22, or stepping into a prescriptive role. That is not and cannot be the law.

2. Petitioners' theory conflicts with a century of this Court's precedents.

For over 100 years, this Court has repeatedly held that the Elections Clause does not prevent state courts from conducting judicial review of congressional districting plans under the state's constitution.

Most recently, *Rucho v. Common Cause* held that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering challenges to congressional districting plans enacted by state legislatures. 139 S. Ct. at 2507 (emphases added). *Rucho* concerned North Carolina's 2016 congressional plan, and as an example of state courts' power in this realm, the Court pointed to another state supreme court's decision striking down the state's legislatively enacted congressional plan under the state's constitution. *Id.* (citing *League of Women Voters of Fla.*, 172 So.3d at 363).

Even before *Rucho*, an unbroken line of precedent dating back nearly a century confirmed that state courts may review state laws governing federal elections to determine whether they comply with state constitutions and that state courts may adopt court-drawn remedial plans. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided," which may include the participation of other branches of state government. *Id.* at 368. The Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when

exercising the lawmaking power," *id.* at 369. In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans that violate "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *see Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (same). Even before *Smiley*, the Court—in a case arising from Ohio no less—held that state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

The Court recently reaffirmed *Smiley*'s principle, holding that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015). Although Petitioners strain to fit *Arizona* into their theory, Pet. 23–24, their effort fails: No justice asserted that the Elections Clause immunizes congressional redistricting legislation from the "ordinary lawmaking process," *Ariz. State Legis.,* 576 U.S. at 841 (Roberts, C.J., dissenting), including judicial review for compliance with state law. Indeed, Petitioners can hardly claim the Ohio provision "*supplant[s]* the legislature altogether," *id.* (Roberts, C.J., dissenting), where the General Assembly crafted and endorsed the voter-approved provision creating substantive standards for congressional redistricting and granting the Ohio Supreme Court jurisdiction to review congressional maps for compliance with those standards.

This Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), moreover, makes clear that state courts have a greater role to play than federal courts in adjudicating congressional redistricting claims. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (quotations omitted). Writing for a unanimous Court, Justice Scalia expressly recognized state courts' role in redistricting—not only to review legislative enactments, but also to craft remedial plans on their own—and held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id.* at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Court affirmed that congressional reapportionment may be conducted "through [a state's] legislative *or* judicial branch," *id.* at 33 (emphasis in original), and held that the district court erred in "ignoring the . . . legitimacy of state *judicial* redistricting," *id.* at 34 (emphasis in original). The error Petitioners make here—where judicial map-drawing is not even on the table—is far more egregious.

In essence, Petitioners' authority stands for the unremarkable and uncontested proposition that redistricting in Ohio is primarily the province of the General Assembly. *See, e.g.*, Pet. 18–19. But when the General Assembly violates the state constitution, it is the obligation of the Ohio Supreme Court to exercise the "exclusive, original jurisdiction" granted to it by the General Assembly itself and the people of Ohio. Ohio Const. art. XIX, § 3. Nothing in the Elections

Clause prevents the state's highest court from exercising that duty. Petitioners' unprecedentedly expansive reading of that provision—to essentially allow for *de novo* federal court review of state constitutional provisions—cannot be squared with this Court's precedent.

3. Congress has independently exercised its Elections Clause power to mandate compliance with state constitutions.

Regardless of the meaning of "Legislature" in the first part of the Elections Clause, the second part allows Congress "at any time" to make its own regulations related to congressional redistricting. U.S. Const. art. I, § 4. Using this authority, Congress has mandated that states' congressional districting plans comply with substantive state constitutional provisions. Accordingly, Petitioners' Elections Clause theory can get them nowhere in the context of congressional redistricting.

Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting unless a state, "after any apportionment," has redistricted "in the manner provided by the law thereof." As this Court explained in *Arizona State Legislature*, a predecessor to Section 2a(c) had mandated those default procedures "unless 'the legislature' of the State drew district lines." 576 U.S. at 809 (quoting Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided by [state] law." *Id.* at 809–10. Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the

very serious evils arising from gerrymanders." *Id.* at 810 (quotation marks omitted).

And as Justice Scalia explained for the plurality in *Branch v. Smith*, "the manner provided by state law" encompasses substantive restrictions in state *constitutions*: "[T]he word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" 538 U.S. 254, 277–78 (2003) (citations omitted). Justice Scalia rejected the argument that "the word 'manner' … refer[s] to *process* or *procedures*, rather than *substantive requirements*." *Id.* Thus, unless a state's congressional plan complies with the substantive provisions of the state's constitution, Section 2a(c)'s default procedures kick in. Petitioners' theory, contrary to Congress's text and Justice Scalia's instruction, would have the Elections Clause swallow entirely each state's "policies and preferences" for redistricting, as expressed "by the law thereof," and nullify Section 2a(c).[11]

In short, any question as to whether the first part of the Elections Clause permits state courts to review congressional districting plans under state constitutions is academic, because Congress (pursuant to its power under the second part of the Elections Clause) has declared that state courts can do so.

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[11] In fact, Congress went even further to authorize state courts to establish remedial congressional plans. *See* 2 U.S.C. § 2c; *Branch*, 538 U.S. at 270, 272. But the Ohio Supreme Court did not employ that federal grant of authority, instead adhering strictly to the state constitutional provision deferring remedial map-drawing to the General Assembly and Commission. *See supra* Statement.

E. Petitioners' theory would have grave consequences.

Petitioners' unprecedented exercise in self-aggrandizement would upend this nation's federalist system and nullify a dozen state constitutional provisions in the redistricting context alone. *See, e.g.*, *Rucho*, 139 S. Ct. at 2507–08 (highlighting examples). Indeed, it would strip courts of jurisdiction to apply any election-related state constitutional provision. *See, e.g.*, Cal. Const. art. II, § 5(a) (eliminating partisan primaries for congressional elections); Mich. Const. art. II, § 4 (guaranteeing "[t]he right . . . to vote a secret ballot in all elections," "[t]he right to a 'straight party' vote option on partisan general election ballots," and "[t]he right . . . to vote an absent voter ballot without giving a reason"). And it threatens to hamstring courts' ability to interpret election-related state law provisions altogether, whether constitutional or statutory.

Strip away Petitioners' rhetoric, and what they are saying is that state legislatures, and not citizens, are supreme. They argue that the supermajority of Ohioans that passed constitutional checks on their state legislature by popular vote were powerless to do so, and this is because the state legislature best represents the people's wishes. This is patently illogical, even more so when the state legislature itself—with Petitioner Huffman leading the way—initiated and supported the very constitutional checks it now disparages.[12]

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[12] That Petitioners now assert that Section 1(C)(3) is binding because members of the legislature swear an oath, *see* Pet. 26, is disingenuous given Petitioners' actions throughout the 2021-2022 redistricting cycle, *see supra* Statement B, and ignores the constitution's jurisdictional provision.

Contrary to Petitioners' view, the Elections Clause is not an escape hatch for a state legislature to wriggle free of its own state constitution, particularly of constitutional provisions the legislature itself established and endorsed in an effort to reflect the will of the voters. Under any plausible reading of the Elections Clause, it leaves room for state courts to apply specific constitutional anti-gerrymandering provisions by invalidating an unconstitutional map and sending it back to the state legislature to redraw. That is all this case is about.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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