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, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

REPLY BRIEF

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The Elections Clause assigns to state legislatures the authority to draw congressional district maps. The Ohio Supreme Court arrogated that authority to itself when it (1) made up rules for the Ohio legislature to follow as it draws congressional district maps and (2) commandeered the state legislature's pen by dictating the number of Republicans and Democrats to represent Ohio in Congress. Because the Ohio Supreme Court is not the state legislature, those policymaking acts violated the Elections Clause even if, as Respondents assert, state courts can generally "apply specific constitutional anti-gerrymandering provisions by invalidating an unconstitutional map and sending it back to the state legislature to redraw." Neiman BIO 32. The questions presented by this case are properly before this Court, the issues here cry out for the Court's resolution, and this case is an excellent vehicle to address them. If nothing else, the Court should hold the petition in this case pending the resolution of *Moore v. Harper*, 142 S. Ct. 2901 (2022), which addresses related—yet distinct—issues.

I. Petitioners preserved their Elections Clause claim.

Despite Respondents' assertions to the contrary, Petitioners squarely presented their Elections Clause claim below. At the Ohio Supreme Court, Petitioners explained that the Elections Clause prohibits that court—"a judicial body, not a legislative body"—from becoming the "invisible hand" drawing

the districts and from "vest[ing] itself with the authority to draw congressional boundary lines" either "under its own pen or indirectly through a line-by-line mandate." Pet.App.66a, 68a–69a.

The Ohio Supreme Court nonetheless decided to do what the Elections Clause prohibits. As explained in the next section, the court both created its own rules governing Ohio's congressional district maps and dictated the electoral outcomes that Ohio's map must produce. Before this Court, Petitioners challenge precisely that conduct in the second Question Presented: "Whether state courts violate the Elections Clause by dictating the results that congressional district maps must achieve or by crafting extraconstitutional rules for state legislatures to follow when drawing such maps." Pet. i. There is no failure to preserve.

Respondents claim otherwise from Petitioners' reference, in the briefing below, to a "role" for that court to play. LWV BIO 11; Neiman BIO 5, 9. But that argument goes solely to the more general first Question Presented, and it is wrong. The first Question is also properly before the Court because Petitioners raised their Elections Clause claim to the Ohio Supreme Court, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

II. The Ohio Supreme Court usurped the legislature's role in drawing congressional district maps.

A state court's interference with the legislature's authority to draw congressional district maps is "an exceptionally important and recurring question of constitutional law." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from denial of application for stay). For that reason, the Court granted certiorari in *Moore v. Harper* to delineate the boundaries of that interference. 142 S. Ct. 2901 (2022).

So rather than contest the importance of that question, Respondents spend most of their briefs arguing that the Ohio Supreme Court did not interfere with the legislature's authority but merely "interpret[ed] and appl[ied] the rule of decision to the facts at hand" and then sent Ohio's congressional district map "back to the state legislature to redraw." Neiman BIO 13, 32; LWV BIO 34. That's not what happened. Instead, the Ohio Supreme Court made up the rule of decision and then forced the legislature to act as its puppet in ensuring that at least six Democrats from Ohio serve in the U.S. House of Representatives.

A. The Ohio Supreme Court dictated election results.

Respondents claim that the Ohio Supreme Court neither dictated the outcome for a congressional district map nor "set forth any performance

benchmarks for congressional maps generally." Neiman BIO 13–14; LWV BIO 28. Not so.

The court invalidated a congressional district map with ten Republican-leaning districts and five Democratic-leaning districts not because of any language in the Ohio Constitution, but because—in the Court's view—*that outcome* was a "statistical outlier" that exhibited undue partisan bias. Pet.App.17a–19a. The court then adopted one expert's opinion that "any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier." Pet.App.19a.

The court did not stop with the raw seat allocation. It also dictated the vote share of the Democratic-leaning districts, concluding that Democrats were not really favored to win districts with Democratic vote shares of 52.15%, 51.04%, and 50.23%. Pet.App.18a. Contrary to Respondents' argument, the court was not merely concerned with the "partisan imbalance" of Democratic- and Republican-leaning districts. LWV BIO 30–31. Rather, the court concluded that with those vote shares, "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."[1] Pet.App.19a. That is, the Democratic-leaning seats were not Democratic enough. Again, no words from the Ohio Constitution supported any of those percentages.

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[1] Democrats won 5 seats in the 2022 election, including all three of the "too close" Democratic-leaning districts.

The court went on to analyze and critique the way the map splits urban counties, but only insofar as those splits "maximized the number of Republican-leaning districts." Pet.App.19a–23a. The mere fact that the map split urban counties was not itself problematic. Pet.App.19a, 32a. Indeed, the court's chief complaint about the county splits was that the "safe" Democratic-leaning districts were *too* safe, which was evidence of undue bias by "packing" Democratic voters. Pet.App.21a–23a. Here, the Ohio Constitution specifically authorized the splitting of counties—but included nothing limiting those splits on partisanship or any other basis.

The court did examine what it termed "other measures of partisan bias." Pet.App.26a–27a. But none of those metrics did any actual work in the court's analysis because the court declared that any map must include six safe Democratic seats; anything else is a "statistical outlier" demonstrating undue bias. Pet.App.19a. And the court concluded that Democrats are favored to win only those seats where they are expected to receive more than 52% of the vote share. Pet.App.18a. But at the same time, Democratic-leaning seats could not be *too* safe, lest the legislature be accused of improper "packing." Pet.App.23a.

Contrary to Respondents' claims, all of that ***is*** the court's dictating an outcome and setting performance benchmarks while leaving to the legislature only the now-secretarial task of putting lines on paper.

B. The Ohio Supreme Court made up extraconstitutional rules to govern congressional district maps.

Even if state courts have some ability to ensure that state laws regulating federal elections abide by state constitutional provisions,[2] the Elections Clause prohibits state courts from significantly departing from a reasonable interpretation of a state constitution such that the court, in effect, acts as a legislature. *See Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (arguing that "[a] significant departure from the [Florida] legislative scheme for appointing Presidential electors present[ed] a federal question" under Article II, § 1 cl. 2.).

During oral argument in *Moore*, the United States Solicitor General and all the parties agreed that, at some point, a state court can act contrary to the Elections Clause by nullifying a congressional district plan through a far-fetched misapplication of a state constitution. Arg. Tr. at 122, 130–31, 177–79, 189–90, *Moore* (No. 21-1271). Respondents likewise recognize that reality. By arguing that redistricting is "primarily" the province of state legislatures, Neiman BIO 28, they concede that at some point a court's interference with congressional redistricting can

[2] As explained in the Petition, that assumption is wrong. The Elections Clause grants the power to regulate federal elections to state legislatures and Congress, not state courts. But because Respondents focus their merits arguments on the second Question Presented, the merits arguments of this reply focus on that Question as well.

impermissibly take that "primary" responsibility for regulating federal elections from the state legislature.

Regardless of where the line is drawn to determine when a state court goes too far, it is clear on this record that the Ohio Supreme Court crossed it. The court did so by significantly departing from state law and ignoring its own precedents for interpreting its constitution.

How so? As the Petition explained, the court created new requirements nowhere found in Article XIX of the Ohio Constitution. Those included a proportionality requirement that the General Assembly and voters had included in Ohio's constitutional provisions controlling***state legislative districting***, but which is nowhere found in Ohio's constitutional provisions controlling ***congressional districting***. Pet. 27–29. By lifting that concept from one provision of the constitution and applying to another, the court departed from its consistently recognized principle of interpretation[3] that a legislature "is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *NACCO Indus., Inc. v. Tracy*, 681 N.E.2d 900, 902 (Ohio 1997).

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[3] *Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 56 N.E.3d 950, 954 (Ohio 2016) ("Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes.").

After reading a nonexistent proportionality requirement *into* Article XIX, §1(C)(3), the court paradoxically read the phrase "or its incumbents" *out of* §1(C)(3). Pet. 29–30. Here too it ignored the consistently recognized principle that courts "must give effect to all of the statute's words." *Onderko v. Sierra Lobo, Inc.*, 69 N.E.3d 679, 684 (Ohio 2016).

The court also disregarded the legislature's "fair" reading of Article XIX in which the legislature determined that the challenged map did not unduly favor a political party because the map created competitive districts. Pet. 30. Again, the court abandoned its own precedents. *Wilson v. Kasich*, 981 N.E. 2d 814, 821 (Ohio 2012) (explaining that an Ohio court must sustain a redistricting plan if its constitutionality may be established by "any fair construction" of the constitution. (quoting *Voinovich v. Ferguson*, 586 N.E.2d 1020, 1024 (Ohio 1992))). And that fair reading rendered it impossible for the court to find that the congressional district map was unconstitutional beyond a reasonable doubt. *Id.* ("[I]n resolving claims contesting the constitutionality of a statute, [an Ohio court] presume[s] the constitutionality of the legislation, and the party challenging the validity of the statute bears the burden of establishing beyond a reasonable doubt that the statute is unconstitutional.").

Nor was it a case of the court's finding a competing line of precedent upon which to ground its holding. *Neiman* cites only two cases: a 2022 decision on state redistricting, and its earlier congressional redistricting case, *Adams v. DeWine*, 195 N.E.3d 74

(Ohio 2022), which it cited more than 30 times. *Adams* likewise repeatedly ignored longstanding precedent to reach its outcome. Thus, for example, the Ohio Constitution gave the legislature the authority to split up to five counties twice. Article XIX, §2(B)(5). The General Assembly had split two counties twice—not five counties. Although those divisions were authorized by § 2(B)(5), the court found them illegal because they affected political scores of the resulting districts. 195 N.E.3d at 95, 99. Again, the court acted contrary to the words in the Ohio Constitution and against consistent Ohio precedents requiring that those words be given effect.

III. This case is a prime vehicle to examine the boundaries of state court interference with congressional district maps.

Respondents assert that this case is a poor vehicle for answering the Questions Presented because "the Ohio General Assembly specifically authorized judicial review of congressional plans and retains full control over congressional redistricting." Neiman BIO 11–12. They are wrong. First, the General Assembly could not delegate away the plenary authority to regulate federal elections granted it by the U.S. Constitution. Second, when the General Assembly acted, it did so knowing the rules of construction that a court in Ohio was to apply to the constitutional language—not believing that a court would wholly ignore those precedents. Third, even if Article XIX authorizes some state judicial review, it does not permit the Ohio Supreme Court to make up the rules as it goes along or pick how many Republican

and Democrat representatives Ohio sends to the House. Fourth, while the General Assembly retained the ability to jot down lines on a map, the Ohio Supreme Court took away the legislature's "control" over congressional redistricting by forcing the legislature to act as the court's puppet in ensuring that at least six Democrats from Ohio are in the House.

Relatedly, Respondents argue that this case is a poor vehicle because the Ohio Supreme Court did not itself prescribe any new rule governing the time, place, or manner of elections; did not "dictat[e] the result that any congressional district map in Ohio must achieve"; and did not "incorporate a proportionality requirement" into Article XIX. Neiman BIO 13–14. But as explained, a simple reading of the Ohio Supreme Court's opinion shows that the court did all those things. If this Court permits what the Ohio Supreme Court did here, *Neiman* will serve as the blueprint for state courts to control federal elections yet evade Elections Clause restraints. Indeed, this case may be a better vehicle than *Moore* for defining the scope of the Elections Clause because the Ohio Supreme Court so clearly misinterpreted Article XIX and took it upon itself to dictate election outcomes.

Respondents also assert that the issues here are specific to Ohio's unique constitutional framework, which has no analogue in other states. Neiman BIO 18. While Ohio's constitutional framework is unique, judicial usurpation is not. For instance, the Ohio constitution forbids a map that "unduly favors or disfavors a political party or its incumbents," while

North Carolina's constitution guarantees that "All elections shall be free." Ohio Const., art. XIX, §1(C)(3)(a); North Carolina Const. art. I, §10. But both states' supreme courts read those different provisions to require the same kind of proportionality in a congressional district map.

Last, the Respondents point out that state-court interpretations of state law are generally "considered as final by this court." Neiman BIO 18. That is true. *Green v. Neal's Lessee*, 31 U.S. 291, 298 (1832). But the Ohio Supreme Court did not "interpret" state law. It made it up. And if a court makes up election law—rather than interprets it—then it violates the Elections Clause.

IV. The Questions Presented require this Court's attention.

Respondents argue that there is no division of authority over the question presented because the three state supreme courts with which the Ohio Supreme Court has "aligned itself" imposed court-designed election regulations or maps as remedies. Neiman BIO 19.[4] But as explained, the Ohio Supreme Court de facto drew a map too. In fact, what it did—commandeer the legislature—may be worse. And even if it is not "aligned" with other courts, the Ohio Supreme Court still *split* from the courts that permit

[4] Respondents also try to distinguish past cases that dealt with the Electors Clause. LWV BIO 31. But the Electors Clause uses the same language to grant analogous authority to state legislatures, so those decisions are relevant.

no state constitutional limits on election laws. *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *Com. ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692 (Ky. 1944) (concluding that a state law could grant service members absentee voting rights despite a contrary state constitutional provision); *State v. Williams*, 49 Miss. 640, 666–67 (1873) (holding that the Mississippi constitution did not limit the state legislature's power under the Elections Clause to schedule congressional elections).[5]

Respondents further argue that the Court already answered the questions presented in *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), *Smiley v. Holm*, 285 U.S. 355 (1932), *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). LWV BIO 16–18. But those cases dealt with the state constitutional underpinnings of legislative action and whether the state-constitution-prescribed process for that legislative action was consistent with the Elections Clause. Petitioners do not dispute that the legislature must pass a law according to state constitutional procedures (*e.g.*, the legislature must jump through the hoops for a bill becoming law). The second

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[5] Respondents attack the Petition's characterization of *Com. ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944). LWV BIO 33. The attack is flatly wrong: the absentee voting laws were "found to be obnoxious to some provision of the state Constitution," just not the free and equal elections clause. *Id.* at 695–96. Further, the Kentucky Court of Appeals was the highest court in Kentucky when *Dummit* was decided. Kentucky did not have an intermediate court of appeals until 1975.

Question Presented here deals with whether, even if the Ohio Supreme Court can exercise judicial review, it can make up rules or dictate election results. None of those cases comes close to addressing that issue.

Finally, Respondents argue that a hold pending this Court's decision in *Moore* is not appropriate because "given the clear, material differences in the cases, the resolution of *Moore* will not affect the result here." LVW BIO 34. That is simply wrong. If the Court holds in *Moore* that state constitutions cannot limit state legislature's Elections Clause power, then the Court should grant the petition here, vacate the decision below, and remand this matter to the Ohio Supreme Court. Moreover, the admitted differences between this case and *Moore* are reasons the Court should grant certiorari here, not reasons to deny certiorari without holding the petition pending *Moore*.

CONCLUSION

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

Respectfully submitted,

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