No. 21-1271

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, *et al.*,

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

On Writ of Certiorari
to the North Carolina Supreme Court

BRIEF OF *AMICI CURIAE* MAKING EVERY VOTE COUNT AND THE LEADERSHIP NOW PROJECT SUPPORTING RESPONDENTS

Robert A. Long, Jr.
Counsel of Record
Jonathan D. Blake
Bradley K. Ervin
Matthew C. Quallen
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Leadership Now Project ("Leadership Now") is a national membership organization of business leaders committed to ensuring that the United States has a strong democracy and economy. Leadership Now offers its members at a state and national level an innovative model for sustained and strategic engagement to strengthen democracy. Leadership Now supports a set of core principles that include defending the rule of law, increasing competitiveness in the political system to improve the quality of governance, supporting civic participation, and planting seeds for longer-term national growth and prosperity. Preserving responsive, democratic government is critical to the American economy, central to the organization's mission, and touches the lives of all Americans.

The Making Every Vote Count Foundation is a nonprofit, nonpartisan organization that studies, informs the public, and promotes discussion of the strengths and weaknesses of our current electoral system and possible reforms to the system to ensure that all American citizens' votes count equally in our representative government. Ceding to state legislatures power to gerrymander or otherwise distort elections for federal office without regard to state constitutional limitations offends this principle.

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[1] No party or counsel for any party authored any part of this brief, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have given blanket consent to the filing of *amicus* briefs.

Amici have a strong interest in the proper interpretation of the Elections Clause of the Constitution, art. I, § 4, cl. 1. The Constitution establishes a system of checks and balances designed to prevent any one branch of government from dominating the others. An essential element of this system is that each branch of government is subject to the requirements and limitations established by the Constitution. The federal Constitution was modeled on state constitutions that were already in effect in 1787, and that established similar systems of checks and balances.

Yet Petitioners contend that the drafters of the U.S. Constitution, by providing that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof," nullified provisions of state constitutions that create, define, and restrain the exercise of state legislative power. Adopting such a construction of the Elections Clause would destabilize federal elections, increase uncertainty, and undermine confidence in the reliability and resilience of our electoral system. This increased instability and uncertainty would, in turn, have negative effects on business, the national economy, and throughout American society. For these reasons, *amici* urge the Court to reject the "independent state legislature" theory and affirm the judgment of the North Carolina Supreme Court.

SUMMARY OF ARGUMENT

American business and Americans generally depend on stable institutions of government that

reliably uphold the rule of law and ensure that elections reflect the will of the voters. The so-called "independent state legislature" theory would undermine these fundamental features of U.S. government by interpreting the federal Constitution to free state legislatures from the restraints of their own state constitutions, and the oversight of their own state courts, when enacting laws concerning federal elections. The "independent state legislature" theory is not supported by the constitutional text, and is contrary to more than 200 years of practice and this Court's decisions. Adopting the theory would pose a threat to U.S. economic stability and prosperity as well as to principles of American democracy.

1. The Elections Clause of the Constitution, art. I, § 4, cl. 1, does not authorize state legislatures to enact legislation that violates the state's constitution, or free state legislatures from the checks and balances established by state constitutions. The "independent state legislature" theory rests on an unreasonable interpretation of the Elections Clause, which is best interpreted as assigning responsibility to state legislatures without nullifying state constitutions or altering the States' ordinary legislative processes. State legislatures have long complied with state constitutional requirements when enacting electoral legislation, and such legislation has long been subject to judicial review in state courts to ensure it does not violate state constitutions. This Court has also recognized that the Elections Clause does not give state legislatures a license to act in defiance of state constitutions. The "independent state legislature" theory is particularly implausible when, as in this case, the

state legislature has adopted the state constitutional provisions at issue, and has expressly provided for judicial review of election laws by the state's courts.

2. The "independent state legislature" theory poses a threat to the stability and predictability of federal elections, and the principles on which American democracy is founded. If adopted, it would allow state legislatures to engage in extreme forms of partisan gerrymandering free of any federal or state constitutional restraints. Such gerrymandering has the potential to entrench a minority political party in power, thereby eroding public faith in the fairness and legitimacy of elections. State legislatures could also disregard other state constitutional limits on enacting election laws that favor one political group over another, including laws that assign to the state legislature authority to decide claims of election fraud. While this case concerns the Elections Clause, the Electors Clause, art. II, § 1, cl. 2, contains similar language. If the "independent state legislature" theory were extended to the Electors Clause, state legislatures could ignore state constitutions and potentially grant themselves authority to interfere with the results of popular elections for President. The disruptive consequences of such a holding are incalculable.

3. The "independent state legislature" theory also poses a threat to U.S. economic prosperity, which affects not only small and large businesses but also employees and consumers. Comparative research shows that economic flourishing is strongly linked to a system of government that adheres to the rule of

law, provides a system of checks and balances, and conducts elections that reflect the will of the voters. Such systems of government have a robust positive effect on economic growth. The world's largest companies are overwhelmingly based in democracies, where it is easier for them to do business. If state legislatures were no longer subject to state constitutional restrictions designed to uphold the rule of law and ensure that elections reflect the will of the people, the adverse consequences could include significant harm to the U.S. economy and business.

U.S. economic stability and prosperity also depend on the predictability of U.S. governmental institutions. As political risk increases, the cost of business investment and the risk of capital flight increase, while rates of innovation and economic growth decrease. By making U.S. elections more unpredictable, the "independent state legislature" theory would further increase the risks to the health and stability of the country's governance, democratic institutions, and economy.

ARGUMENT

Petitioners ask this Court to adopt a radical interpretation of the Constitution that would undermine the stability and predictability of U.S. elections by granting state legislatures unchecked authority to enact partisan election laws without regard to state constitutional requirements, and without the possibility of judicial review by state courts to ensure compliance with those requirements. *Amici* are deeply concerned that adoption of the so-called "independent state legislature" theory would have serious

adverse consequences for democracy. *Amici* also recognize that the success of the American economy and American business is due in large measure to stable, predictable, and responsive institutions of government that reliably adhere to the rule of law and reflect the will of voters. Adoption of the "independent state legislature" theory would undermine these core values, and for that reason—among others—it should be rejected.

I. The Elections Clause Does Not Nullify State Constitutional Provisions Concerning Elections.

It is an axiom of our constitutional system that governments derive their powers from, and are constrained by, the constitutions that created them. As Chief Justice Marshall explained, "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law . . . , and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

This fundamental principle is not limited to the U.S. Constitution. It also applies to state constitutions, on which the U.S. Constitution was largely modeled. State constitutions, like the U.S. Constitution, create state governments and establish systems of checks and balances to ensure that no branch exceeds the constitutional powers conferred by the people. The creation of a state constitution—like the creation of the U.S. Constitution—is an act of "the people in their sovereign character," which imposes

binding limits on the legislature it creates. *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 88–89 (1823).

Within our federal system, each government—whether national or state—"is entirely a creature" of the constitution that creates it. *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) (Black, J.). Each governmental department "can only act in accordance with all the limitations imposed" by its foundational constitution. *Id.* Indeed, the U.S. Constitution divides sovereignty between the federal government and the states, and "[t]he independent power of the States . . . serves as a check on the power of the Federal Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

These principles are so firmly established that they are rarely questioned. Yet in this case, Petitioners argue that the Elections Clause of the U.S. Constitution empowers state legislatures to ignore state constitutional requirements when legislating concerning congressional elections. There are multiple reasons to reject this argument.

First, it rests on an unreasonable interpretation of the text of the Elections Clause, which provides that "[t]he 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. As Respondents and their *amici* explain in detail, this language is best interpreted to assign responsibility for determining the times, place and manner of holding elections to the

state legislature, acting through its ordinary legislative process. That process may include not only the possibility of a veto by the State's governor, but also the availability of judicial review in the State's courts to ensure compliance with state constitutional requirements.

The text of the Constitution provides considerable support for this conclusion. For one thing, the Elections Clause provides that "Congress may at any time by Law make or alter" regulations prescribing the time, place, and manner of congressional elections." *Id.* No one suggests that the reference to "Congress" authorizes Congress to ignore the requirements of the U.S. Constitution when enacting election laws, or prevents this Court from entertaining constitutional challenges to such laws. Moreover, the drafters of the Constitution knew how to give a legislative body plenary power in a specific area by, for example, providing that "[t]he Senate shall have the *sole* Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6 (emphasis added). The Elections Clause does not employ such language.

Second, state constitutions have long restricted the power of state legislatures to legislate concerning both state and congressional elections, and state courts have long reviewed state legislation for compliance with these constitutional requirements. *See* Br. of Non-State Resps. 28–41; Br. of State Resps. 38–49; *see also*, *e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. Ct. Rev. 1, 24

(2021) (reporting that "more than half of the eleven states that ratified the Constitution in 1787-88 . . . had state constitutions that expressly regulated state legislatures in the context of federal elections in the 1780s and early 1790s"). This long-established practice provides an additional reason to conclude that the Elections Clause does not decouple state legislatures from the requirements for valid legislation under their state constitutions.

Third, Petitioners' argument runs counter to the decisions of this Court. The Court recently went out of its way to emphasize the availability and importance of state law remedies, enforceable by state courts, for partisan gerrymandering of congressional districts. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (explaining absence of federal constitutional limitations on partisan gerrymandering does not "condemn complaints about districting to echo into a void," because the States "are actively addressing the issue," including through state supreme court decisions invalidating redistricting plans as inconsistent with the State's constitution). The Court's statements in *Rucho* reaffirmed longstanding principles recognized in earlier decisions. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817–18 (2015), the Court rejected the argument that the Elections Clause permits state legislatures to act "in defiance of provisions of the State's Constitution," and held that a State's voters may adopt, by initiative, a state constitutional amendment providing that redistricting will be performed by an independent commission. *See also id.* at 841 (Roberts, C.J., dissenting) (concluding that when

a state legislature prescribes regulations for congressional elections, it "may be required to do so within the ordinary lawmaking process"); *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that congressional redistricting legislation is subject to gubernatorial veto); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916) (upholding the disapproval, pursuant to a popular vote authorized by the state constitution, of a congressional redistricting law adopted by the state legislature).

Fourth, arguments that the Elections Clause grants state legislatures a license to disregard state constitutional requirements, and renders state courts powerless to prevent them from doing so, are particularly implausible where—as in this case—the State's constitution has been adopted by the legislature itself (as well as by the State's citizens), and the state legislature has adopted laws expressly providing for review of election laws by the state courts. *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4(a1).

These arguments are sufficient to decide this case. But there are additional reasons to reject Petitioners' argument, and this *amicus* brief focuses on one of them: interpreting the Elections Clause to nullify state constitutional restraints on state legislatures would undermine the stability and predictability of federal elections, which would have a range of harmful and destabilizing effects, including adverse effects on U.S. businesses and the national economy.

II. The "Independent State Legislature" Theory Threatens the Stability and Predictability of Federal Elections.

Petitioners argue that the Elections Clause implicitly rejects a bedrock principle of American constitutional government: that legislatures must comply with the constitutions that created them. A decision holding that state legislatures may disregard state constitutional requirements when enacting legislation concerning federal elections, and that state courts are powerless to review such legislation, would jeopardize the stability and reliability of the electoral process. Surveys show that Americans increasingly doubt the reliability of elections.[2] A decision invalidating state constitutional limitations on partisan legislation concerning federal elections is likely to increase those doubts.[3]

These doubts are not answered by noting that state legislatures would remain subject to federal constitutional requirements and to election rules that Congress chooses to adopt. Congress—perhaps influenced by the same political considerations that caused state legislatures to create highly gerrymandered congressional districts—might not impose limitations on

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[2] *See*, *e.g.*, Gabriel R. Sanchez et al., Brookings Inst., *Misinformation Is Eroding the Public's Confidence in Democracy* (July 26, 2022), https://brook.gs/3SzpbaX (finding that a majority of the respondents have "little or no confidence" that U.S. elections represent the will of the people.).

[3] *See* J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, The Atlantic (Oct. 3, 2022), https://bit.ly/3W0E1du.

state legislatures. And the federal Constitution is an imperfect substitute for state constitutions. For example, this Court has said that the U.S. "Constitution does not confer the right of suffrage upon any one" and thus "the right to vote, *per se*, is not a constitutionally protected right." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quotation marks and citations omitted)). Rather, the U.S. Constitution "confers only 'negative' rights" that limit a state's ability to restrict the vote, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 95 (2014), "once the franchise is granted to the electorate" by a State, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). Currently, "[f]orty-nine states explicitly grant the right to vote through specific language in their state constitutions."[4] Douglas, *supra*, at 101. Adoption of the "independent state legislature" theory could enable state legislatures to disregard these state constitutional guarantees in federal elections.

Likewise, the federal Constitution imposes no judicially enforceable limitations on political gerrymandering. *Rucho,* 139 S. Ct. at 2506–08. But each State possesses a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81

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[4] "Only Arizona's constitution does not explicitly grant the right to vote," but it includes language that "implicitly grants the right to vote, albeit in the reverse of all other states, because it provides who may *not* vote." Douglas, *supra*, at 102 (citing Ariz. Const. art. VII, § 2).

(1980). More than half the States secure to their citizens a constitutional right to "free" or "free and equal" elections.[5] And such provisions have been interpreted to preclude partisan gerrymandering. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803–21 (Pa. 2018).

The "independent state legislature" theory leaves state legislatures free to engage in the most extreme forms of partisan gerrymandering, without regard to any federal or state constitutional restraints. Such extreme gerrymandering can entrench a political party's control of the state legislature, even if that party consistently receives less than 50 percent of the popular vote. *See*, *e.g.*, Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm.

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[5] *See* Ariz. Const. art II, § 21 ("free and equal" elections); Ark. Const. art. III, § 2 (same); Cal. Const. art. II, § 3 ("free" elections); Colo. Const. art II, § 5 ("free and open" elections); Conn. Const. art. VI, § 4 ("free" suffrage); Del. Const. art I, § 3 ("free and equal" elections); Idaho Const. art. I, § 19 ("free" suffrage); Ill. Const. art. III, § 3 ("free and equal" elections); Ind. Const. art. II, § 1 (same); Ky. Const. § 6 (same); Md. Const. art. VII ("free" elections); Mass. Const. pt. 1, art. IX (same); Mo. Const. art. I, § 25 ("free and open" elections); Mont. Const. art. II, § 13 (same); Neb. Const. art. I, § 22 ("free" elections); N.H. Const. pt. 1, art XI (same); N.M. Const. art. II, § 8 ("free and open" elections); N.C. Const. art. I, § 8 ("free" elections); Okla. Const. art. III, § 5 ("free and equal" elections); Or. Const. art. II, § 1 (same); Pa. Const. art. I, § 5 (same); S.C. Const. art. I, § 5 ("free and open" elections); S.D. Const. art. VII, § 1 ("free and equal" elections); Tenn. Const. art. I, § 5 (same); Tex. Const. art. VI, § 2(c) ("free" elections); Utah Const. art. I, § 17 (same); Vt. Const. ch. 1, art. VIII (same); Va. Const. art. I, § 6 (same); Wash. Const. art. I, § 19 ("free and equal" elections); Wyo. Const. art. I, § 27 ("open, free and equal" elections).

& Mary L. Rev. 2115, 2143–49 (2018). Over time, this state of affairs has the potential to erode public perceptions about the fairness, effectiveness, and even the continuing legitimacy of the democratic process, which has already eroded in recent years. *See* Sanchez et al., *supra*.

The destabilizing consequences of adopting the "independent state legislature" theory would not be limited to the right to vote or political gerrymandering. State legislatures would also be free to adopt other types of election laws that favor one political party or group of voters over another, and that would otherwise be subject to judicial review for compliance with state constitutional requirements. For example, a state legislature could provide for only one ballot drop-off box per county, even if such a restriction would impose a disproportionate burden on voters in large urban areas,[6] or require voters in rural areas to travel excessively long distances to cast their votes. A state legislature could also restrict voting hours and the number of poll locations, impose additional voter identification requirements, and aggressively purge voter rolls in certain areas even if such laws are designed to benefit one political party and disadvantage others, and would otherwise violate state constitutional requirements. A state legislature could also increase the burdens of voting through ballots for certain voters. For example, by imposing facially neutral administrative burdens on absentee voting, a state

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[6] *See*, *e.g.*, Stephen Fowler et al., *A New Georgia Voting Law Reduced Ballot Drop Box Access in Places That Used Them Most*, *NPR* (July 27, 2022), https://n.pr/3Daq97Z

legislature may harm voters who disproportionately vote absentee (e.g., elderly voters and members of the military). A state legislature could even assign itself the authority to investigate and decide claims of election fraud, without regard to state constitutional provisions assigning that responsibility to the State's courts.

Adoption of the "independent state legislature" theory also threatens to create significant confusion in the administration of federal and state elections. State constitutional protections would continue to apply to state elections, but a state legislature would be free to adopt different provisions governing federal elections conducted at the same time (and often on the same ballot). *See* Amar, *supra*, at 29 ("[T]he federal election parts of the ballot should be controlled by the state constitution because legislatures have chosen to create unified ballots, with unified electoral timetables and unified electoral logistics and unified electoral implementation." (emphasis omitted)). In addition, eliminating state judicial review of state election laws complicates the application of those laws to unique circumstances that may not be addressed specifically in the state's election statutes. Sowing such confusion into each citizen's casting of their state and federal votes again undermines trust in electoral outcomes.

Petitioners themselves appear to recognize that their argument, taken to its logical conclusion, leads to untenable consequences. For example, they concede that the Elections Clause does not invalidate state constitutional provisions authorizing the State's

governor to veto legislation, Pet'r Br. 24, even though under Petitioners' theory the term "Legislature" cannot refer to the State's governor. They also suggest distinctions between "procedural" and "substantive" provisions of state constitutions, and between specific and "vague" constitutional provisions, even though the text of the Elections Clause draws no such distinctions, and even though this Court and other courts regularly consider whether legislation complies with provisions of the U.S. Constitution that are at least as broad as the requirements of "fair," "equal," and "free" elections.

While this case concerns the Elections Clause, the Electors Clause contains similar language.[7] Currently, every state—pursuant to state law—appoints its presidential electors through a popular election. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020). If the "independent state legislature" theory were extended to Presidential elections, state legislatures could enact legislation granting themselves the power to reject the results of popular elections based on unsubstantiated allegations of fraud, or for other reasons, without regard to state constitutional limitations and requirements. This would run counter to

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[7] The Electors Clause provides in relevant part that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]" U.S. Const. art. II, § 1, cl. 2. *See* J. Michael Luttig, *The Republican Blueprint to Steal the 2024 Election*, *CNN* (Apr. 27, 2022), https://cnn.it/3TYxaj5 (arguing that "the independent state legislature doctrine is as applicable to redistricting as it is to presidential elections").

the "expressions of hostility" at both the Constitutional Convention and state ratifying conventions "to giving [state legislatures] a decisive role in the process" of selecting the President. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 459 (2022).

Congress's constitutional authority to "determine the Time of chusing the Electors," U.S. Const. art. II, § 1, cl. 4, may limit the authority of state legislatures after the congressionally-mandated Election Day. Nevertheless, the "independent state legislature" theory would allow a state legislature to make fundamental, destabilizing changes before that date free from state constitutional constraints. Destabilizing changes may also be made to voting practice. Pursuant to state law, the availability and use of absentee and early voting procedures have expanded in recent elections.[8] But the "independent state legislature" theory could permit a state legislature to reject

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[8] *E.g.*, Nat'l Conf. of State Legislatures, *Early In-Person Voting* (Aug. 30, 2022), https://bit.ly/3DwYQWL ("Forty-six states . . . offer early in-person voting (this includes states with all-mail elections)."); Nat'l Conf. of State Legislatures, *States with No-Excuse Absentee Voting* (July 12, 2022), https://bit.ly/3N4YtFY ("Twenty-seven states and Washington, D.C., offer 'no-excuse' absentee voting, which means that any voter can request and cast an absentee/mail ballot . . . ."); MIT Election Data & Sci. Lab, *Voting by Mail and Absentee Voting* (Mar. 16, 2021), https://bit.ly/3FbMMvn (illustrating percentage of ballots cast by different modes of voting since 1992).

all votes cast or otherwise submitted by these means prior to the federal Election Day.[9]

These scenarios are not purely hypothetical. Following the 2020 presidential election, some advocates urged state legislatures to take similarly drastic steps to ignore the popular vote in some states. Indeed, "[t]he independent-state-legislature theory gained traction as the centerpiece of President Donald Trump's effort to overturn the 2020 presidential election." Luttig, *The Atlantic*, *supra*. That effort culminated in a violent attack on the U.S. Capitol that resulted in the deaths of Capitol police officers and a protestor, the temporary suspension of Congress's constitutionally-directed counting of electors, threats to the safety and security of members of Congress and the Vice President, and damage to the Capitol building. Adoption of the "independent state legislature" theory could open the door to even worse consequences.

III. The "Independent State Legislature" Theory Poses a Threat to U.S. Economic Prosperity.

In addition to its other defects, the "independent state legislature" theory poses a threat to U.S. economic prosperity. The need to build a strong, national economy was the "purpose for which Virginia initiated

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[9] Federal constitutional provisions such as the Fourteenth Amendment's Equal Protection and Due Process Clauses place some limits on actions by state legislatures, but do not replicate the full range of state constitutional protections.

the movement which ultimately produced the Constitution." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). For the reasons explained in Part II above, adoption of the "independent state legislature" theory would undermine the stability and predictability of U.S. elections. Such a development would, in turn, pose a threat to U.S. business, the economy, and nearly all Americans whose livelihoods depend upon its success or who depend upon it directly or indirectly as consumers.

A. Democratic Governance Is Closely Correlated with Economic Flourishing.

Researchers have extensively studied the relationship between democracy and economic flourishing, and have reached a consistent conclusion: a system of government that incorporates strong adherence to the rule of law, a system of checks and balances, and elections that reflect the will of the voters, is highly correlated with a thriving economy.

This finding persists across a range of measures of democracy and democratic institutions. For example, in a study of the relationship between institutional quality and national income, researchers examined two samples of 80 and 140 nations and measured the quality of their institutions through metrics that focused on "the strength of the rule of law." Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9305, 2002), https://bit.ly/3suW1PC. The researchers found that "the quality of institutions

trumps everything else." *Id*. at 4. Strong rule of law principles, reflecting confidence that people, governments, and companies abide by the rules of society, promote economic growth and are associated with lower income inequality. *See* Sanjai Bhagat, *Economic Growth, Income Inequality, and the Rule of Law*, Harv. Bus. L. Rev. (Nov. 18, 2020), https://bit.ly/3DsYeBr. This finding is consistent using different approaches to measuring the rule of law. *Ibid*.

Another study found that "inclusive regimes" in which government is "democratically elected, transparent, capable, and responsive," yield stable economic growth and greater social welfare. William A. Galston & Elaine Kamarck, Brookings Inst., *Is Democracy Failing and Putting Our Economic System at Risk?* (Jan. 4, 2022), https://brook.gs/3gDevea (citing Rebecca Henderson, *Reimagining Capitalism*, Mgmt. & Bus. Rev. (Dec. 23, 2020), https://bit.ly/3TQJAt4). The practical consequences of this relationship are significant and broad-ranging:

- Democracy has a robust positive effect on Gross Domestic Product (GDP). Undemocratic nations that adopt democratic government experience increases in GDP per capita of about 20 percent.[10]

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[10] Daron Acemoglu et al., *Democracy Does Cause Growth*, 127 J. Pol. Econ. 47 (2019).

- The world's largest companies are overwhelmingly headquartered in democracies.[11]

- It is significantly easier for companies to do business in democracies. Researchers determined that 20 of the 25 countries that received the highest rankings for ease of doing business are democracies, while only one of the 25 lowest-ranked countries is a democracy.[12]

- Famines do not occur in robust democracies, which are more responsive to the needs of their peoples.[13]

These results are not limited to non-U.S. countries. Researchers have documented economic harms to Americans flowing from gerrymandered congressional districts. Economists at major universities and the Federal Reserve found that "[c]onsumers lose access to credit when their congressional districts are irregularly redrawn to benefit a political party." Pat Akey et al., *Pushing Boundaries: Political Redistricting and*

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[11] *See* PricewaterhouseCoopers, *Global Top 11 Companies - by Market Capitalisation* 8 (May 2022), https://pwc.to/3D5gb7H (reporting that 88 of the 100 largest companies are located in democracies).

[12] *Compare* World Bank, *Doing Business 2020: Comparing Business Regulations in 190 Countries* 4 tbl. .01 (2020), https://bit.ly/3TTlFJB (ranking ease of doing business), *with* Economist Intel. Unit, *Democracy Index 2020: In Sickness and in Health?* 8–13 (2021), https://bit.ly/3D8iy9T (classifying nations by form of government).

[13] Amartya Sen, *Democracy as a Universal Value*, 10(3) J. Democracy 3, 7–9 (1999).

Consumer Credit 1 (Mar. 2018), https://bit.ly/3TzJFSr. The cost of reduced credit access is steep. A one standard-deviation increase in congressional district irregularity reduced spending power due to credit access as much as a $3,400 decrease in annual income. *Id.* at 3.[14]

The researchers posit that in highly-gerrymandered districts "elected politicians become less accountable to their constituents" at large "and lose incentive to advocate for goods and services" that benefit their constituents. *Id.* at 21. Consumers with representatives who need not meaningfully compete for their votes lose access to goods and services, including consumer credit, which research shows is "susceptible to . . . political intervention." *Id.* at 1.

Researchers have also studied so-called "[e]xtractive regimes," defined as regimes that "concentrate both political and economic power in the hands of an elite few." Henderson, *supra.* They have found that economic "growth under crony regimes is highly unstable and often stalls." *Ibid.*

By severing state legislatures from fundamental state constitutional protections and judicial review that promotes the rule of law, the "independent state legislature" theory would imperil the responsiveness and representative character of institutions that drive American economic prosperity, threatening businesses, their employees, and consumers.

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[14] The researchers observed similar effects flowing from highly gerrymandered state legislative districts. *Id.* at 22–23.

B. Political Uncertainty and Instability Disrupt Economic Growth and Capital Formation.

U.S. economic prosperity depends on institutional predictability. "The simple fact is that it is hard to plan and invest for the future in volatile, unstable circumstances." Galston & Kamarck, *supra*.

Political risk is a key component of the uncertainty that businesses face. As political risk increases, businesses must spend more to acquire capital, making all forms of investment more expensive.[15] Unsurprisingly, scholars have found that businesses are less likely to engage in capital investment or borrowing when faced with uncertainty—political or otherwise.[16]

Heightened uncertainty also reduces innovation. Researchers examining data from 4,000 companies over more than 30 years found that heightened political risk reduced the number of patents filed by companies, as well as their scientific and monetary

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[15] *See* Courtney Rickert McCaffrey, Ernst & Young, *How Political Risk Affects Five Areas at the Top of the C-Suite* (Oct. 29, 2020), https://go.ey.com/3UdlXeH (noting "policy uncertainty increases the average weighted cost of capital").

[16] *See*, *e.g.*, Ben S. Bernanke, *Irreversibility, Uncertainty, and Cyclical Investment*, 98(1) Quarterly J. Econ. 85 (1983); Bryan Kelly et al., *The Price of Political Uncertainty: Theory and Evidence from the Option Market* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19812, 2014), https://bit.ly/3zi5JsC.

value.[17] Supply chains, which can be the result of significant investment and delicate calibration, also become more difficult to maintain in volatile circumstances.[18]

These economic effects are systemic. Economists, studying a dataset of 113 countries over more than three decades, found that growth in GDP per capita is significantly lower in countries experiencing greater political instability.[19] Increased political uncertainty has also been found to depress stock market performance.[20] And researchers have found that political uncertainty leads to capital flight, often with drastic consequences for the market from which capital departs.[21]

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[17] *See* Vivek Astvansh et al., *Research: When Geopolitical Risk Rises, Innovation Stalls*, Harv. Bus. Rev. (Mar. 3, 2022), https://bit.ly/3TC0Rql.

[18] PricewaterhouseCoopers, *PwC's 25th Annual Global CEO Survey* (Jan. 17, 2022), https://pwc.to/3DuaWA0 (71% of surveyed CEOs anticipate geopolitical instability may "inhibit [their] ability to sell products/services").

[19] Alberto Alesina et al., *Political Instability and Economic Growth*, 1 J. Econ. Growth 189 (1996).

[20] Lubos Pasto & Pietro Veronesi, *Political Uncertainty and Risk Premia* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17464, 2013), https://bit.ly/3W5HXcT.

[21] *See*, *e.g.*, Quan Vu Le & Paul J. Zak, *Political Risk and Capital Flight*, 25 J. Int'l Money & Fin. 308, 309 (2006) (explaining "the quantitatively most important factors affecting capital flight are, in order, political instability, economic risk, and policy uncertainty"); John Cuddington, *Capital Flight: Estimates, Issues, and Expectations*, 58 Princeton Studies Int'l Fin. 11 (1986) ("When there is political or financial instability . . . mobile capital will

Again, these effects are not limited to foreign countries. Researchers have found that political uncertainty in the United States increases the costs of government borrowing.[22] Even small fluctuations in the cost of borrowing can have significant effects given the high level of government indebtedness.[23]

In sum, the "independent state legislature" theory poses a threat not only to U.S. elections, but also to U.S. economic prosperity. For that reason, among many others, the Court should reject the "independent state legislature" theory.

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move quickly from the risky country to a safe haven. These movements induce large and rapid adjustments in interest rates and exchange rates . . . .").

[22] Pengjie Gao et al., *Political Uncertainty and Public Financing: Evidence from U.S. Gubernatorial Elections and Municipal Bond Markets* (Feb. 2019).

[23] *See* Alan Rappeport & Jim Tankersley, *U.S. National Debt Tops $31 Trillion for First Time*, N.Y. Times (Oct. 4, 2022), https://nyti.ms/3D9ipTw.

CONCLUSION

The Court should affirm the judgment of the North Carolina Supreme Court.

Respectfully submitted,

Robert A. Long, Jr.
Counsel of Record
Jonathan D. Blake
Bradley K. Ervin
Matthew C. Quallen
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for Amici Curiae

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