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 THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND FOURTEEN ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, the Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") and fourteen other organizations,[2] are civil rights organizations, labor unions or lawyers' associations committed to ensuring the protection of the right to vote and eliminating discrimination and inequality in any form.

Formed at the request of President John F. Kennedy in 1963, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make real our democracy's promises. The Lawyers' Committee has an active voting rights practice and has fought to ensure that all Americans have an equal opportunity to participate in the electoral process. *Amicus Curiae* has a direct interest

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

[2] A list of the fourteen other organizations as *amicus curiae* are set forth below in Appendix 1a.

in this case because it raises important voting rights issues central to the organization's mission.

SUMMARY OF ARGUMENT

Courts say what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803). That is as true for states as it is for the federal government. Because states "provide[] a double source of protection for the rights of our citizens," state courts play a critical role. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 503 (1977); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (Rehnquist, J.) (emphasizing "the State's . . . sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution"). Deference to rights enshrined in state law—and protected by state courts—is a basic tenet of federalism.

This principle holds especially true for voting rights, where state constitutions and laws can provide protections that build upon those set forth in the federal constitution. There are few areas where such simultaneous protections are more valuable than in ensuring that the right "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), is guaranteed. As Dr. King said, voting rights are "Civil Right No. 1."[3] Where states have chosen to protect the

[3] Martin Luther King, Jr., *Civil Right No. 1: The Right to Vote,* N.Y. TIMES MAG., Mar. 14, 1965, at 26-27, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 183 (James M. Washington ed., 1991).

right to vote through their constitutions, that choice must be respected.

The right to vote should be most fiercely safeguarded for those to whom it has been historically denied. The sad fact of this country's history is that discrimination on the basis of race, skin color, or membership in a language minority group persists, even while existing protections of the right to vote have been weakened. Recently, those in power have preserved and grown their authority with more subtle discriminatory techniques under the guise of "race neutral" restrictions on the times, places, and manner of voting, including redistricting plans purportedly justified by "party, not race" motives.

For decades, the Voting Rights Act of 1965 was critical in combatting some types of racial discrimination in voting, but its scope has been narrowed. *See Shelby County, Ala. v. Holder*, 570 U.S. 529, 557 (2013) (invalidating the formula used to determine Section 5 coverage); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (limiting Section 2). Further, partisan gerrymandering challenges, often laden with racial issues, were held to be non-justiciable in federal court in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07. (2019). However, as they have historically, state constitutions provide an additional layer of protection for plaintiffs, including voters of color, challenging discriminatory voting laws. That is a good thing, as this Court in *Rucho* made clear:

> Nor does our conclusion condemn complaints about districting to echo into a void. The States,

> for example, are actively addressing the issue on a number of fronts. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.

Id. at 2507.

In their constrained reading of the Elections Clause, Petitioners argue that state courts should be rendered powerless and state constitutions rendered ineffective, because only state legislatures should address the times, places, and manner of voting in congressional elections. Petitioners would block voters of color from a critical avenue and a critical weapon—their own states' constitutions—to vindicate their right to vote. Petitioners are wrong, because this Court meant what it said in *Rucho*: state courts and state law—especially for voters of color—prevent voting rights complaints from echoing into a void.

ARGUMENT

I. THIS COURT'S RECOGNITION OF THE ROLE OF STATE COURTS IS CONSISTENT WITH BEDROCK PRINCIPLES OF JUDICIAL REVIEW AND FEDERALISM

State courts have an essential role to play, consistent with the commands of their state constitutions, in protecting the voting rights of people of color. Two fundamental principles of our governmental system reinforce this essential role: (i) that courts have the last word on the constitutionality of actions by the other branches, and (ii) that the

federal government must defer to a state's choice on how to structure its government.

Every state has a written constitution. Most states, similar to the federal government, structure their government among three branches—legislative, executive, and judiciary—based on a separation of powers guided by checks and balances.[4] A foundational principle in such systems is that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. As Chief Justice Marshall succinctly put it: "a law repugnant to the constitution is void; and . . . . courts, as well as other departments, are bound by that instrument." *Id.* at 180.

Although *Marbury* dealt with the power of this Court to review executive action, Chief Justice Marshall made clear that the decision was based on fundamental principles applicable to all governments with a constitution and a judicial branch empowered to apply that government's constitution:

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[4] *See* National Conference of State Legislatures, *Separation of Powers – An Overview*, https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx; *see also* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993) ("The three-part division of sovereign authority among largely independent legislative, executive, and judicial branches, and the competing principle of 'checks and balances' among those branches, have been and remain cornerstones of the American system of government, both state and federal.").

> The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation . . . . Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the *theory of every such government* must be that an act of the Legislature repugnant to the Constitution is void.

Id. at 176-77 (emphasis added).

Even before the Constitution came into force in 1789, state courts reviewed acts of their state legislatures and passed judgment on their validity. *See, e.g.*, *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20 (1782) (reviewing pardons granted by the Virginia legislature); *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (N.C. Super. L. & Eq. 1787) (finding a state statute unconstitutional because it violated the North Carolina constitution's guarantee of trial by jury in cases involving property loss). Since then, both state courts and this Court have repeatedly affirmed that state courts have "the power—as well as the *duty*—. . . to review, and, if necessary, nullify, the acts of [the] legislature it deemed to be inconsistent with the fundamental law of the land." *Ex parte James*, 713 So. 2d 869, 879 (Ala. 1997) (emphasis in original); *see also Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) (holding that "[t]he State courts are the appropriate tribunals, as this court has repeatedly

held, for the decision of questions arising under their local law, whether statutory or otherwise").

In this context, construing the phrase "by each State by the Legislature thereof," as used in the Elections Clause, to prohibit state constitutional review by state courts ignores the bedrock principle of judicial review set forth in *Marbury*. U.S. CONST. art. I, § 4. Indeed, it would make as much (or little) sense as construing the phrase in the Elections Clause, "Congress may at any time by Law," as allowing Congress to legislate on federal elections without this Court having the last word on the constitutionality of such a congressional act.

The construction pressed by Petitioners also violates another essential tenet of federalism:[5] that in the federal system, while the "different governments [would] control each other, at the same time . . . each [would] be controlled by itself." THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossiter ed., 1961).

Throughout our nation's history, states have enjoyed considerable autonomy in how they choose to structure their systems of government. In turn, this Court has recognized that states have latitude in

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[5] "State constitutionalism—the practice of state courts deciding cases on independent state constitutional grounds—is a vital yet underdeveloped attribute of American federalism. Our system of dual sovereignty ensures the capacity of state courts to interpret their own constitutions to provide greater protections for individual rights than the federal constitution." Clint Bolick, *Principles of State Constitutional Interpretation,* 23 FED. SOC. REV. 1 (Mar. 24, 2022), https://fedsoc.org/commentary/publications/principles-of-state-constitutional-interpretation.

allocating decision-making authority among state institutions. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Missouri v. Lewis*, 101 U.S. 22, 30 (1879) ("It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions."); *cf.* THE FEDERALIST No. 43, at 225-26 (J. Madison) (C. Rossiter ed., 1961) ("[T]he States may choose to substitute other republican forms."). Requiring states to structure and operate their governments in a particular manner, while elevating the state legislatures above other branches of state government, conflicts with the conception of federalism on which this nation was founded.

Moreover, states can provide civil-rights protections in addition to those provided by federal law.[6] State courts thus also have the right—in alignment with basic principles of federalism—to interpret their state constitutional provisions and enforce greater voting rights protections, as their constitutions may dictate.[7] These are choices made by

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[6] *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Robins*, 447 U.S. at 80-81; *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

[7] *Kahn v. Griffin*, 701 N.W.2d 815, 834 (Minn. 2005) (noting that "a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution [than under the federal Constitution]"); *see also infra* Section III.B.

each state as to the constitutional safeguards provided to those within its borders.

Petitioners, however, would eliminate such established state constitutional choices. Under their theory, a state could not act to apply its constitution to or amend its constitution to secure greater protections for voting rights in federal elections, even if that amendment was ratified in strict accordance with state constitutional law. Such a result is contrary to established precedent from this Court. *See Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916) (affirming a decision of the Ohio Supreme Court and recognizing that people of a state may veto legislation enacted pursuant to a legislature's Elections Clause Powers because the Clause empowers the entire legislative system in the state and not just the legislature); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (holding that it was appropriate under the Elections Clause for the state's governor to exercise a statutory veto empowered by the state constitution even when it affected the times, places, and manner of elections); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813 (2015) (upholding a state constitutional provision establishing an independent redistricting commission because under the Elections Clause, a state could assign congressional redistricting power to a Commission and was not required to confine that power to the state's "representative body").

To illustrate, in 2018, Michigan adopted Proposal 3, a ballot initiative that amended the state constitution to enumerate specific rights related to voting including expanded access to absentee voting,

same-day voter registration, and certain instances of automatic voter registration.[8] Proposal 3 received support from almost 67% of Michigan voters.[9] Not only would acceptance of Petitioners' theory by this Court cast doubt on whether Michigan's voters could pass such a measure as it applies to federal elections, it would also bless the Michigan Legislature's ability to nullify the popular measure by enacting legislation to circumvent Proposal 3's constitutionally protected voting policies. If Petitioners' theory were the law, Michigan courts would be powerless to find that legislation unconstitutional as it pertains to federal elections.

Adopting Petitioners' theory would render ineffective the vital protections that state constitutions give to the right to vote and would contravene this Court's longstanding deference to state courts as the tribunals for state law and enduring commitment to judicial review.[10]

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[8] House Fiscal Agency, *Ballot Proposal 3 of 2018*, https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2018-3_Promote_The_Vote.pdf.

[9] Jocelyn Benson, Secretary of State, *2018 Michigan Election Results*, https://mielections.us/election/results/2018GEN_CENR.html.

[10] *See, e.g.*, *Long,* 463 U.S. at 1040 (explaining that "[r]espect for the independence of state courts" has been the "cornerstone[] of this Court's refusal to decide cases where there is an adequate and independent state ground"); *Murdock*, 87 U.S. at 618-19; *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 293, 296-97 (1832) (holding that federal courts must respect state courts' interpretations of state statutes).

II. STATE CONSTITUTIONAL PROTECTIONS ARE ESSENTIAL TO PROTECT VOTERS OF COLOR FROM DISCRIMINATORY "TIMES, PLACES AND MANNER" VOTING LAWS ENACTED BY STATE LEGISLATURES

History has taught us that state legislatures have exercised their authority to pass times, places, and manner laws in elections for Congress[11] that discriminate against voters of color. This is true as to laws governing voting practices as well as those defining electoral district lines, where legislatures—through increasingly subtle techniques—have discriminated on the basis of race to achieve partisan goals.

Although federal law—most notably the Voting Rights Act of 1965—provides important protections against discriminatory voter suppression, the availability of relief under federal law has diminished over the years.

Given the breadth of state legislative power bestowed in the Elections Clause, and the pervasive

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[11] This Court has held that "[t]he Elections Clause has two functions. Upon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona v. Inter Tribal Council of Ariz. Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley*, 285 U.S. at 366). The Elections Clause invests the States, subject to congressional preemption, with the power to set the "mechanics of congressional elections," *id.* at 9, including drawing congressional district lines. *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 787.

use of that power to disadvantage them, voters of color need access to state judicial review, in accordance with state constitutions.

A. Facially Neutral "Times, Places and Manner" Legislative Enactments Have Discriminated Against Voters of Color

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, state governments engaged in the "insidious and pervasive evil" of "racial discrimination in voting," "which had been perpetuated . . . through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). The ratification of the Fifteenth Amendment promised that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV. Almost immediately, however, many states enacted laws to systematically undermine that promise.

In the most extreme examples, some states simply refused to allow Black men to vote. *See United States v. Reese*, 92 U.S. 214, 216, 221 (1875) (finding no "appropriate legislation" to punish two election workers who refused to count a Black voter's vote). The Supreme Court has endorsed this approach, holding that the "Fifteenth Amendment does not confer the right of suffrage upon anyone," ushering in the era of Jim Crow laws: facially neutral but unambiguously intended to prevent people of color from voting. *Id.* at 217; *see also Williams v.*

Mississippi, 170 U.S. 213, 224-25 (1898) (upholding the constitutionality of Mississippi laws targeted at people of color, including poll taxes and literacy tests). Many of these laws remained in place for decades, until prohibited by constitutional amendment or decision of this Court, including grandfather clauses, laws prohibiting people of color from voting in primary elections, literacy tests, and poll taxes.[12]

In 1965, Congress passed the landmark Voting Rights Act of 1965, which sought to proscribe racial discrimination in voting. Notwithstanding the VRA's broad language, jurisdictions evaded its reach by placing "heavy emphasis on facially neutral techniques."[13] These "techniques" included everything from "setting elections at inconvenient times" to "causing . . . election day irregularities" to "moving polling places or establishing them in inconvenient . . . locations."[14] In one Mississippi county, voters were forced to "travel 100 miles

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[12] *See, e.g.*, U.S. CONST. amend. XXIV (prohibiting poll taxes in federal elections); Voting Rights Act § 4(e)(2) (outlawing literacy tests); *Guinn v. United States*, 238 U.S. 347, 356-67 (1915) (striking down Oklahoma's discriminatory literacy test exemption but declining to strike down literacy test itself); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (holding a Texas statute that allowed only white people to be members of the Democratic party and thus vote in primary elections unconstitutional because "[c]onstitutional rights would be of little value if they could be thus indirectly denied"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665-66 (1966) (prohibiting poll taxes in state elections).

[13] Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 552 (1973).

[14] *Id.* at 557-58.

roundtrip to register to vote."[15] In one Alabama county, "the only registration office in the county [was] closed weekends, evenings and lunch hours."[16] These regulations that ostensibly governed the times, places and manner of voting in a neutral way had a particular impact on voters of color.[17]

More recently, states have passed unnecessarily strict voter identification laws. These laws have been empirically shown to reduce voter turnout in general and to increase the racial turnout gap because voters of color disproportionately lack access to the types of identification these laws require.[18]

Voters of color have been purged from voter rolls at disproportionately high rates[19] and targeted by

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[15] Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORD. L. REV. 93, 93 (1983).

[16] *Id*. at 93-94.

[17] *Id*. at 96.

[18] *See, e.g.*, Zoltan Hajnal et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 10 POL., GROUPS, & IDENTITIES 10 (2019) (demonstrating that racial turnout gap grew when states enacted strict voter ID laws); Matt A. Barreto et al., *The Racial Implications of Voter Identification Laws in America*, 47 AM. POL. RSCH. 238 (2019) (using survey data to demonstrate that voters of color in states across the country lacked access to the needed identification to vote in their states).

[19] Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 866-78 (2020) (discussing discriminatory effects of voter purging).

measures requiring proof of citizenship;[20] by closures or changes to polling places in neighborhoods with large populations of people of color;[21] by restrictions on early voting and requirements that voting take place only on certain days;[22] and by changes to the

[20] Ana Henderson, *Citizenship, Voting, and Asian American Political Engagement*, 3 U.C. IRVINE L. REV. 1077 (2013) (discussing challenges Asian American voters face in registering to vote and casting a ballot).

[21] Kevin Morris & Peter Miller, *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin*, 58 URB. AFFAIRS REV. 597 (2021) (showing that polling place consolidation severely depressed turnout in Milwaukee's presidential primary and that the impact on turnout rates for Black voters was greater than it was for white voters); Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 AM. ECON. J.: APPLIED ECON. 61 (2020) (showing that voters of color are disproportionately impacted by distances they must travel to polling locations)

[22] *Voter ID – The Major Impact on Women of Color*, S. Coal. Soc. Just., https://southerncoalition.org/nc-women-voters-heavily-burdened-by-new-voting-restrictions/ (finding early voting restrictions disproportionately affected all women, but particularly women of color); Kevin Morris, *Georgia's Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center (Mar. 6, 2021), https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most (showing that voters of color were substantially more likely to vote on Sundays in Georgia than white voters).

rules for provisional[23] and absentee ballots.[24] For example, the Fourth Circuit found that the North Carolina General Assembly enacted a law weeks after the *Shelby County* decision containing several restrictions that "target[ed] African American [voters] with almost surgical precision." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *see also Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (finding that a voter identification law had a "discriminatory effect on minorities' voting rights" in violation of the Voting Rights Act).

B. "Partisan" Gerrymanders Can Obscure Racial Gerrymanders

The exercise of a state's times, places, and manner power to redraw congressional district lines also presents serious problems for voters of color. Indeed, the use of race to achieve partisan goals has been a recurring theme in redistricting litigation over the years that shows no sign of abating. As this Court has explained, "political and racial [reasons for redistricting] are capable of yielding similar oddities in a district's boundaries." *Cooper v. Harris,* 137 S. Ct. 1455, 1473 (2017).

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[23] Thessalia Merivaki & Daniel A. Smith, *A Failsafe for Voters? Case and Rejected Provisional Ballots in North Carolina*, 73 POL. RES. Q. 65 (2020).

[24] *See also* U.S. COMM'N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 262 (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (identifying barriers).

Proponents of redrawn districts have capitalized on this correlation by arguing that redistricting maps were created with political affiliation, not race, in mind. While employing race to further partisan interests is evidence of discriminatory intent,[25] courts have recognized that "[proving racial gerrymandering] is particularly hard to do when the State offers a defense rooted in partisan gerrymandering." *Ga. State Conf. of NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1364 (N.D. Ga. 2018).[26] This has allowed redistricting with extreme racial effects to evade review.[27]

The instant case illustrates the effect of partisan gerrymandering on voters of color. The trial court found the challenged congressional and legislative maps were "more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina." *Harper v. Hall*, 868 S.E.2d 499, 519 (N.C. 2022) (citation omitted). Plaintiffs

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[25] *See Bush v. Vera*, 517 U.S. 952, 968 (1996) (finding strict scrutiny obtained because legislators used race as a "proxy for political characteristics" when redistricting).

[26] Although Plaintiffs had provided "compelling" evidence of a racial gerrymander, the court declined to grant a preliminary injunction because the case "turn[ed] on a credibility determination, where one side has taken an oath that race was not a factor in how the redistricting lines were drawn, and the other side is not in a position to swear that it was." *Id.* at 1367-68.

[27] *See also Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (overturning North Carolina Supreme Court's finding that "race rather than politics predominantly explains" gerrymandered map, in part because "racial identification is highly correlated with political affiliation in North Carolina") (emphasis omitted).

argued that the enacted maps were the product of "intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals." *Id.* at 514. In enjoining implementation of the maps, the North Carolina Supreme Court held that the maps violated the state constitution's guarantee of the right to vote because the maps were gerrymandered along partisan lines. *Id.* at 559. Although that court did not reach the racial discrimination claims, *see id.* at 559 n.17, Plaintiffs and *amici* demonstrated that "[t]he elective will of Black voters will . . . be significantly diluted" due to the "cracking [of] Black voters" into different districts, and that at least one of the two Black representatives was likely to lose his seat in the U.S. House of Representatives. Brief of NC NAACP *Amicus Curiae* Supporting Plaintiffs-Appellants North Carolina League of Conservation Voters, Inc. et al., Common Cause, and Rebecca Harper, at 26, 30, *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Jan. 31, 2022).

C. Depriving Non-legislative State Actors of Authority to Respond to Emergency Circumstances Would Have Disastrous Consequences, Especially for Voters of Color

It is not just deliberate legislative acts as to the times, places, and manner of federal elections that may imperil the right to vote of voters of color. It may be natural events, such as hurricanes, blizzards, and pandemics. Under such circumstances, members of a state's executive branch and state courts, acting

within their constitutional powers, often must make quick decisions to ensure access to the ballot.

While these events are "race neutral," their impacts often are not. Those with fewer economic resources are more likely to be affected by such events, because they do not have the same access to transportation, doctors and hospitals, or the resources to rebuild their lives in the face of such disasters. And, in this country, people of color are more likely to live in poverty and less likely to have a necessary support network.[28]

In situations like the ones described above, executive branch officials such as Governors and Secretaries of States, acting within their state constitutional powers, must be able to take action. In many cases, legislatures are not in session and cannot act. In others, legislatures simply do not act. A theory that state legislatures, and only state legislatures, set the times, places, and manner of federal elections, carried to its full extent, would prevent crucial executive action.

In the aftermath of Hurricane Michael in 2018, for example, the Florida governor used power derived from the state's constitution and laws to safeguard the

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[28] *See, e.g.*, Steven Ross Johnson, *The Demographics of Disaster*, U.S. NEWS (June 22, 2022), https://www.usnews.com/news/health-news/articles/2022-06-22/disaster-disparities-natural-hazards-climate-change-threaten-underserved-communities (showing indigenous communities and persons of color most at risk from natural disasters and extreme weather events based on analysis of FEMA's 2022 "healthiest communities" index).

electoral process and expand voting options for voters in affected counties.[29] Under Petitioners' theory, the Governor could not have taken these actions because "[a]ny delegation of the legislative power would be itself unconstitutional under the Elections Clause." Brief for Petitioners at 12, *Moore v. Harper*, No. 21-1271 (Aug. 29. 2022). Thus, the Governor could not have acted to protect voters, even if the legislature had authorized him to do so.

III. STATE COURTS PROVIDE AN ESSENTIAL AVENUE OF RELIEF FOR VOTERS OF COLOR

A. Access to Relief Under Federal Law From Discriminatory "Times, Places and Manner" Legislation Has Diminished

In recent years, voters of color's access to relief under federal law from state legislative enactments concerning voting practices, including redistricting, has diminished.

For instance, in *Shelby County, Ala. v. Holder*, 570 U.S. 529, 550, 557 (2013), the Court ruled that the coverage formula in Section 4(b) of the VRA (which determined which jurisdictions were subject to Section 5's preclearance requirement) was unconstitutional. Although Chief Justice Roberts acknowledged the "nationwide ban on racial

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[29] Fla. Exec. Order No. 18-283 (Oct. 18, 2022), https://www.flgov.com/wp-content/uploads/orders/2018/EO_18-283.pdf.

discrimination in voting" found in Section 2 of the VRA in *Shelby County*, *id.* at 557, in *Brnovich v. Democratic National Committee*, the Court construed Section 2 of the VRA as subject to new and even more demanding "guideposts." 141 S. Ct. 2321, 2325 (2021). Whether one agrees or disagrees with the Court's construction of Section 2 of the VRA, there is no doubt that *Brnovich* made it more difficult for voters of color to successfully challenge discriminatory voting laws under federal law.[30]

Further, in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." As a result, such claims—which, as shown, so often impact voters of color adversely—can no longer be heard in federal court. *Id.* at 2509.

B. State Courts Provide an Essential Avenue of Relief for Voters of Color

Critically, in concluding that partisan gerrymandering claims are beyond the reach of federal courts, the *Rucho* Court emphasized that state courts have offered meaningful recourse to disenfranchised voters and that suit in state court is an appropriate method for protecting the right to vote. 139 S. Ct. at 2507 (observing that "[p]rovisions in state statutes and state constitutions can provide

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[30] *See, e.g.*, Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 STAN. L. REV. ONLINE 37, 44 (2022) (noting that "*Brnovich* erects significant barriers to a successful Section 2 . . . claim").

standards and guidance for state courts to apply" when hearing partisan gerrymandering cases).[31] The Court emphasized that it did not—and would not—"condemn complaints about districting to echo into a void." *Id.* at 2507.

The *Rucho* Court's referral of litigants to state courts for redress of partisan gerrymandering claims was well-taken. State courts have historically provided a vital avenue for protecting and vindicating voting rights. Indeed, "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." Brennan, *supra* p. 2, at 503.

State constitutions in 49 states textually guarantee citizens the right to vote. *See, e.g.*, DEL. CONST. art. V § 2 ("Every citizen . . . shall be entitled to vote."); MD. CONST. art. I, § 1 ("[E]very citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."). Some state constitutions contain due process and equal protection clauses, similar to those in the Fourteenth Amendment to the U.S. Constitution, which state courts have applied in voting rights cases. *See, e.g.*, MICH. CONST. art. I, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national

[31] *See also Rucho*, 139 S. Ct at 2507 (emphasizing that "States . . . are actively addressing the issue on a number of fronts" and citing with approval *League of Woman Voters of Florida v. Dretzner*, discussed *infra* in Section III).

origin."); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 462 (Mich. 2007) (conducting an analysis of a voter identification law under the Michigan constitution's equal protection clause).

Going even further, a number of state constitutions guarantee the right to a free and fair election. *See, e.g.*, DEL. CONST. art. I, § 3 ("All elections shall be free and equal."); MD. CONST. DECL. OF RIGHTS art. VII ("elections ought to be free and frequent"). While some state courts construe their constitution's voting protections as coterminous with the voting protections found in the U.S. Constitution, others have construed their constitutions as providing greater protections than the federal Constitution. *See, e.g.*, *League of Women Voters of Delaware, Inc. v. Dep't of Elections*, 250 A.3d 922, 931 (Del. Ch. 2020) ("The [Free and Fair Elections Clause] should not be interpreted in lockstep with the federal jurisprudence that has developed under the Fourteenth Amendment because it has independent content that is more protective of electoral rights than the federal regime."); *Maryland Green Party v. Maryland Bd. of Elections,* 832 A.2d 214, 228 (Md. 2003) ("Article 7 has been held to be even more protective of rights of political participation than the provisions of the federal Constitution.").

Some states' constitutions expressly go beyond federal guarantees prohibiting partisan gerrymandering. *See, e.g.*, Mo. Const. art. III, § 3 ("Districts shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness. . . . 'Partisan fairness' means that

parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Fla. Const. art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."). Others mandate absentee balloting. S*ee, e.g.*, HAW. CONST. art. II, § 4 ("The legislature shall provide for the registration of voters and for absentee voting. . . . "); N.H. CONST. pt. I, art. 11 ("The general court shall provide by law for voting by qualified voters who . . . are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election.").

Voters have sought relief in state courts from times, places, and manner state legislative enactments under such state constitutional provisions and have obtained relief greater than that afforded under federal law—often in cases with racial overtones—even before *Shelby County, Brnovich*, and *Rucho*. For example, in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), this Court rejected a federal constitutional challenge to Indiana's voter identification law.[32] However, both before and

[32] Plaintiffs challenged the statute under the *Anderson* and *Burdick* line of cases. *See Anderson v. Celebrezze,* 460 U.S. 780, 788-89 & n.9 (1983) (adopting a balancing test between a state's justification for a statute against the burden on the right to vote and holding that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are constitutional); *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (applying the balancing test and noting that ballot access laws are generally "presumptively valid").

after *Crawford*, voters have successfully brought suit in state courts challenging similar voter identification laws.

Before *Crawford*, Missouri voters successfully argued in *Weinschenk v. Missouri* that a restrictive voter identification law violated the Missouri constitution's equal protection clause and "free and open" elections clause. 203 S.W.3d 201 (Mo. 2006); MO. CONST. art. I, § 25; art. VIII, § 2. The trial court held that the voter identification requirement was unconstitutional. *Weinschenk*, 203 S.W.3d at 204. The Missouri Supreme Court affirmed. *Id.*

This holding was essential to people of color in Missouri because, as the NAACP and other groups argued in *amicus* briefing, strict voter identification laws can disparately impact vulnerable populations, including people of color. The NAACP provided the court with the example of a Black woman who did not have a birth certificate "due to inadequate record-keeping practices for persons of her. . . race" and would therefore be unable to vote if the law was enforced. Brief of *Amicus Curiae*-Women's Voices Raised for Social Justice et al. *9-10, *Weinschenk v. Missouri*, No. SC88038, 2006 WL 2923145 (Mo. Oct. 16, 2006).[33]

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[33] Similarly, the Arkansas Supreme Court upheld a preliminary injunction against stricter voter identification laws as violative of the Arkansas Constitution where *amici* noted the laws "impact on Arkansas's Black voting population" and other "vulnerable groups." *See Martin v. Kohls*, 444 S.W.3d 844, 852 (Ark. 2014); *Amicus Curiae* Brief in Support of Appellees, by the

After *Crawford* was decided, a Pennsylvania state court found its state constitution afforded greater protection to voters than the federal constitution, holding that a voter identification law violated the Pennsylvania Constitution's requirement that "[e]lections be free and equal and no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage." *Applewhite v. Commonwealth of Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988, at *3, 18 (Pa. Commw. Ct. Jan. 17, 2014). Although the case was not decided on racial discrimination grounds, it was brought by (among others) the Pennsylvania NAACP, who in briefing filed on appeal with the Pennsylvania Supreme Court, highlighted the burden of the voter identification requirement on voters of color. *See, e.g.*, *Amicus Curiae* Brief of Common Cause of Pennsylvania in support of Reversal, *Applewhite v. Pennsylvania*, No. 71 MAP 2012, 2012 WL 8685083, at *13 (Pa. Aug. 30, 2012) *Amici* cited statistics that "in the ten states including Pennsylvania with restrictive photo ID laws, 1.2 million eligible black voters and 500,000 eligible Hispanic voters live more than 10 miles from the nearest ID-issuing office that is open more than twice a week," to show that the facially neutral voter identification laws disproportionately burden people of color who have a harder time obtaining the identification required by the law. Brief of *Amicus Curiae* Anti-Defamation League et al., *Applewhite v. Pennsylvania*, No. 71 MAP 2012, 2012 WL 8685084, at *3 (Pa. Sept. 18, 2012).

NAACP Legal Defense & Educational Fund, Inc., et al., *Martin v. Kohls*, No. CV-14-462, 2014 WL 4950020 (Ark. Aug. 11, 2014).

In *Holmes v. Moore*, a trial court panel ruled that North Carolina's restrictive voter identification law violated Article I, § 19 of the North Carolina Constitution because it was enacted with a racially discriminatory purpose. No. 18-15292 at 74-92 (N.C. Super. Sep. 17, 2021), *appeal filed* (No. 342PA19-2). As part of its analysis, the court noted that the voter identification law would disparately impact Black voters, who were 39% more likely than white voters to lack forms of qualifying ID under the law. *Id.* at 89.

The importance of state constitutional protections in voting cases has not been limited to voter identification cases. In *Western Native Voice v. Stapleton*, No. DV 20-0377, 2020 WL 8970685 (Mont. Dist. Sept. 25, 2020), Native American plaintiffs challenged a law restricting who could collect and deposit a voter's absentee ballot. *Id.* at *11. The court found that the law violated the Montana Constitution's fundamental constitutional rights of suffrage, speech, and due process. *Id.* at 20-21 (citing MONT. CONST. art. II, §§ 13, 7, 17). It also found that the statute would have a disparate impact on Native American voters. *Id.* at *1 (concluding "the costs of [the law]" are too "burdensome" because of the "clear limitations Native American communities in Montana face").

On appeal, after consolidation with another case, the Montana Supreme Court agreed with respect to the ballot-collection requirements, finding that the law "unconstitutionally burden[ed] the right of suffrage, particularly with respect to Native American communities." *Driscoll v. Stapleton*, 473 P.3d 386,

394-95 (Mont. 2020). Thus, the Montana Supreme Court affirmed the lower court's injunction against that law. *Id.* Since *Driscoll*, courts have ruled that other voting laws that hinder Native electoral participation violate the Montana Constitution.[34]

In *State v. Arctic Village Council*, voters in Alaska were granted a preliminary injunction to stop the state from enforcing a statute requiring absentee ballots to be signed in front of a witness. 495 P.3d 313 (Alaska 2021). The superior court found that the statute violated the Alaska Constitution's equal protection clause and requirement that "[e]very citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election." *Id.* at 318-19; ALASKA CONST. art. V, § 1. In its opinion, the court acknowledged that the unconstitutional voting requirements had a disparate impact on voters of color, noting that "[s]tatistics provided by Plaintiffs are illustrative of COVID-19's disproportionate impact on Alaska Natives: in Alaska, Indigenous people make up approximately 15.6% of the population but 43% of the deaths." *Arctic Vill. Council v. Meyer*, No. 3AN-20-07858 CI, 2020 WL 6120133, at *1 (Alaska Super. Oct. 5, 2020).

In affirming the ruling below, the Alaska Supreme Court too noted that because COVID-19 had

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[34] *See, e.g.*, Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Jacobsen,* No. DV 21-0451 (Mont. Dist. Sept. 30, 2022).

disparately impacted "racial minority groups, such as Native Americans and Alaska Natives," voters of color were more likely to be affected by the statute, which made it especially suspect under Alaska's Constitution. *Arctic Vill. Council*, 495 P.3d at 317 (citations omitted).

Voters of color have also won victories in state courts to overturn gerrymandered maps. For example, in *League of Women Voters v. Detzner*, plaintiffs successfully argued that the state's congressional map was gerrymandered in violation of the Fair Districts Amendment to the Florida Constitution. 172 So. 3d 363, 371 (Fla. 2015); *see also* FLA. CONST. art. III, § 20. Although the case focused on the fact that the maps were drawn unconstitutionally to favor the Republican Party, plaintiffs also argued that one district at issue "overpack[ed] Democratic-leaning black voters into the district . . . [,] thereby diluting the influence of Democratic minorities in surrounding districts." *Detzner*, 172 So. 3d at 402. The Florida Supreme Court agreed. It found that—at least for that one district—what defendants argued was only partisan gerrymandering had a negative impact on the rights of voters of color. The court then affirmed the trial court's finding that "the Legislature has failed to meet its burden to demonstrate that [the district at issue] passes constitutional muster." *Id.* at 403.

The instant case provides another clear example of a state court applying state constitutional protections to overturn a legislature's congressional redistricting. While the claim was not decided on grounds of racial discrimination, racial discrimination

was very much a factor in the proofs. *See supra* p. 17 (discussing the racial impact of the North Carolina maps in the case at hand). State constitutions, applied by state courts, continue to provide essential protections to voters—particularly voters of color, against discriminatory times, places, and manner legislation.

IV. ADOPTION OF THE INDEPENDENT STATE LEGISLATURE THEORY WOULD LEAD TO ABSURD RESULTS

If this Court were to accept Petitioners' theory that federal election times, places, and manner enactments by state legislatures are not subject to state court review for compliance with state constitutions, it would lead to absurd results that could not have been intended by the Framers of the Constitution.

When a state legislature enacts a generally applicable election law, it acts under two sources of power: sovereign police power reserved to the states and the Elections and Electors Clauses of the U.S. Constitution. *See* U.S. CONST. art. I, § 4; art. II § 1; *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992). As discussed above, the Elections Clause grants the state legislature the power to regulate the times, places, and manner" of holding federal elections. However, virtually all times, places, and manner enactments at the state level are intended to apply to *both* federal and state elections.[35] These include

[35] Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. ___ at 39 (forthcoming

registration procedures, voter identification laws, absentee ballot requirements, and more.

Under Petitioners' theory, if a state court were to hold that any such enactment violated the state's constitution, in circumstances where it did not violate the federal Constitution, the legislature could respond by instituting one set of requirements—those not subject to state constitutional review—to govern federal elections, and another set of requirements—subject to state constitutional review—to govern state elections. Because federal and state elections are typically held at the same time and historically use the same procedures, the prospect of administrative burden and voter confusion in such a system with inconsistent rules would be impermissibly high.

Conceivably, having lost on state constitutional grounds, the state could conform its federal processes to match re-enacted state processes that comport with the state constitution. However, that is not how states have chosen to respond in analogous circumstances.

For example, in the immediate aftermath of *Inter Tribal Council of Arizona*,[36] where this Court held

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2022), https://ssrn.com/abstract=4041062; Carolyn Shapiro, *ISLT, Federal Courts, & State Law*, 90 U. CHI. L. REV. ___ at 43 (forthcoming 2023) (noting the absence of "a single example of a state or federal court interpreting or reviewing the same state law differently as to state versus federal elections"), available at: https://ssrn.com/abstract=4047322.

[36] 570 U.S. 1, 20 (2013).

that Arizona's evidence-of-citizenship requirement[37] as applied to a federal form developed by the Election Assistance Commission was preempted by the National Voter Registration Act's mandate that the States "accept and use" the federal form, Arizona adopted two distinct voter registration systems for federal and state elections. Thereafter, Arizona state officials used two different forms for registration, either the state form (which required documentary evidence of citizenship) or the federal form (which did not), rather than conform its state registration practices to comport with federal requirements. This meant that those using the federal form without documentary evidence of citizenship were allowed to register only for federal elections, and were given ballots with only congressional races on them. Indeed, it is possible that voters who simply were unaware that the federal form did not suffice to register for both elections might be prevented from voting for state officers such as the governor or state legislators.[38] It

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[37] The challenged evidence-of-citizenship requirement required voters to present documentary evidence of citizenship when registering to vote and when voting on election day. *Id.* at 6-7.

[38] *See Young v. Fordice*, 520 U.S. 273, 291 (1997) ("The appellants and the Government argue that in context and in light of their practical effects, the [different requirements for federal voter registration] and the way in which Mississippi administers them could have the 'purpose [or] effect of denying or abridging the right to vote on account of race or color.'"); *see also Fish v. Kobach*, 840 F.3d 710, 717 (10th Cir. 2016) (enjoining a similar dual registration system in Kansas and noting plaintiff's argument that confusion around dual registration procedures disproportionately affects voters of color).

took a civil-rights lawsuit and consent decree in 2018 for Arizona to abandon this dual system.[39]

Adoption of the Independent State Legislature Theory would risk encouraging more states to adopt similar burdensome, confusing, and inconsistent rules for simultaneously held state and federal elections. This would put an impermissible onus on voters to navigate arbitrarily complex procedures to ensure their voices are heard in all elections. Petitioners' theory could make it more complex and confusing to cast one's vote, because the theory would remove state-promulgated federal elections regulation from the purview of state courts—which then, perversely, would be allowed to review all state laws under their state constitutions *except* those election laws.

CONCLUSION

For the above reasons, *Amici* respectfully submit that the Court should deny Petitioners' requested relief.

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[39] Consent Decree, *League of the United Latin American Citizens of Arizona v. Michele Reagan,* No. 2:17-CV-04102-DGC (D. Ariz. June 4, 2018).

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APPENDIX

APPENDIX

COMPLETE LIST OF ADDITIONAL *AMICI CURIAE*

Advancement Project
Asian American Legal Defense and Education Fund
Asian Americans Advancing Justice
Demos
LatinoJustice
Leadership Conference
National Association for the Advancement of Colored People
National Education Association
National Urban League
Native American Rights Fund
New York County Lawyers' Association
North Carolina State Conference of the NAACP
People for the American Way
The Workers Circle