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,

-against-

REBECCA HARPER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black Americans from realizing their basic civil and human rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic opportunities, criminal justice, and political participation.

LDF has been involved in precedent-setting litigation relating to representation and voting rights before state and federal courts, including lawsuits involving discriminatory redistricting plans or those otherwise implicating minority voting rights. *See*, *e.g.*, *Milligan v. Merrill*, Case No. 21-1086 (argued Oct. 4, 2022); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Rucho v. Common Cause*, 588 U.S. __, 139 S. Ct. 2484 (2019); *Lamone v. Benisek*, 585 U.S. __ (per curiam), 139 S. Ct. 783 (Mem) (2019); *Evenwel v. Abbott*, 578 U.S. 54 (2016); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United*

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[1] Pursuant to Supreme Court Rule 37.3, counsel for amicus curiae certify that all parties have consented to the filing of this brief through letters on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than amicus curiae and its counsel, made a monetary contribution to its preparation or submission.

Latin Am. Citizens v. Perry ("LULAC"), 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977) (en banc); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc).

INTRODUCTION AND SUMMARY OF ARGUMENT

Since its founding, amicus curiae LDF and other civil rights organizations have looked to the courts, including this Court, to realize the promise of a multi-racial democracy guaranteed by the Reconstruction Amendments. While the Reconstruction Amendments' Framers were transformative in their vision, they also built upon principles enshrined in our founding charter. Most fundamentally, these principles recognize that we are a nation ruled by laws, anchored in our state and federal constitutions, and safeguarded by a carefully constructed system of checks and balances that prevent the concentration of power in any single branch of government or any single element of our society. Courts, and the availability of judicial review of legislative action that violates these

foundational principles, are an essential feature of our republican form of government, guaranteed by Article IV, § 4 of the United States Constitution, and are vital to the protection of liberty. The preservation of our system of government and the protection of the democratic principles on which it is founded are the judicial branch's most vital functions.

The Petitioners, North Carolina legislators who oversaw the State's redistricting process, urge the Court to upend this carefully constructed system of checks on governmental and majoritarian abuses of power. Petitioners would have the Court embrace an interpretation of the Constitution's Elections Clause, U.S. Const. art. I, § 4, under which state courts and state constitutions would be powerless to prevent state legislatures from entrenching power to serve narrow partisan interests and effectively silence the voices of voters who disagree with them. This so-called "independent state legislature" theory defies the foundational principles of our constitutional democracy. It finds no support in the text of the Elections Clause and is flatly inconsistent with the principles of federalism and separation of powers that undergird our Constitution. To preserve our "government of laws, and not of men," Petitioner's theory must be forcefully rejected.

In the wake of this Court's decision in *Rucho v. Common Cause*, which precludes the federal judiciary from playing any role in limiting the anti-democratic excesses of partisan gerrymandering, state courts have become even more critical in protecting democratic principles and ensuring a robust political process. *See Rucho v. Common Cause*, 139 S. Ct. 2484,

2507 (2019). The *Rucho* Court recognized that partisan gerrymandering "is incompatible with democratic principles." *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)). And the Court assured the nation that its decision does not "condemn complaints about districting to echo into a void." *Id.* at 2507. Rather, this Court confirmed that the States, including state courts enforcing state constitutions, were proper forums to address such anti-democratic action. *Id.* at 2507–08. That conclusion is consistent with the basic constitutional principles described above, as well as a century of practice in state courts in which state constitutional constraints, both specific and general, have repeatedly been applied to regulate the manner by which congressional redistricting plans are adopted and the substantive requirements governing those plans.

Petitioners now ask this Court to discard decades of precedent—its own and that of the state courts—and hold that brazen anti-democratic gerrymandering is beyond the power of the States and their citizens to confront. The 2020 census revealed that the nation's population continues to become increasingly diverse, with immigrant populations andpopulations of color growing the most rapidly. Yet extreme gerrymandering, renders what should be the most democratically responsive branch of government resistant to these changes, insulating legislators from the evolving demographics of their States and the political preferences of their voters. Should the Court adopt Petitioners' view of the Elections Clause, history teaches that voters of color will inevitably be caught in the crossfire.

The Court must reject this dangerous and anti-democratic view of the Constitution and allow state courts and state constitutions to play their assigned role in our constitutional order.

ARGUMENT

I. State Courts and State Constitutions Play a Fundamental Role in Protecting Our Democratic Institutions.

A. State Judicial Review of Time, Place, and Manner Regulations Is Consistent with the Separation of Powers and Principles of Federalism.

One of the primary preoccupations of the Founders of the American Republic was to construct a system of government that would ensure that no one branch of government and no one faction of citizens could amass power to the exclusion of others. In Federalist 51, James Madison explained that the Constitution accomplished this goal through two primary structures: on the one hand, the separation of federal governmental powers into three branches with each checking and balancing the other, and on the other, the division of governmental responsibilities between the federal government and the States. The Federalist No. 51 (Madison). The goal of these checks and balances was not only to protect the people from an abuse of power by a too powerful government, but also "to guard one part of the society against the injustice of the other part." *Id.*

The Founders further provided a guarantee that the governments of the States themselves would be

republican in form. U.S. Const. art. IV, § 4. At a minimum, this was understood to require that each State would be ruled by "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). At its most basic, the founders understood that each State would be ordered by a charter or constitution—a "fundamental law" in the words of Alexander Hamilton, *see* The Federalist No. 78 (Hamilton)—by which those exercising governmental power would be constrained. *See* Franita Tolson, *The 'Independent' State Legislature in Republican Theory* 10-11 (Sept. 21, 2022), SSRN.COM, available at https://ssrn.com/abstract=4226098 (citing evidence that Founders expected state exercises of Elections Clause power to be constrained by state constitutions).[2]

When republican institutions are functioning properly, those in power can be expected to adhere to what Professor Lani Guinier called the golden rule of reciprocity: the idea that there is not one permanent majority, but rather shifting majorities as "the losers

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[2] Cited with the permission of the author. *See also*, *e.g.*, Letter from Roger Sherman to John Adams, July 20, 1789, in 4 *The Works of John Adams* 437 (C. Adams ed., 1856) (describing a republican government as one that has three branches of government, including legislative and executive branches determined "by periodic elections, [and] agreeable to an established constitution"); Vikram D. Amar and Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State- Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 24 (2022) (arguing that at the founding, a state legislature was understood to be "an entity created and constrained by its state constitution").

at one time or on one issue join with others and become part of the governing coalition at another time or on another issue." *See* Lani Guinier, *Tyranny of the Majority* 77–80 (1994). In this understanding of shifting majorities, the self-interest of legislators in the majority leads them to pay heed to the minority in the understanding that they may at a future point become the minority themselves. *Id.*

A breakdown of democratic institutions—creating circumstances in which the majority need no longer fear that it might someday become the minority—can give rise to what Professor Guinier, borrowing from Madison, called the "tyranny of the majority." *Id.* at 3–5, 79–80 In such circumstances, elected leaders no longer concern themselves with the needs and interests of their constituents and colleagues in the minority, and the majority "sacrifice[s] to its ruling passion or interest both the public good and the rights of other citizens." The Federalist No. 10 (Madison); *cf.* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 1 *Republic of Letters* 502 (J. Smith ed.1995) (arguing that "[t]he great desideratum in Government is ... to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society" and thus prevent a fixed majority from oppressing the minority).

This situation can arise when a particular group is assured of continued reelection regardless of its level of popular support. In the South in the century after the Civil War, for example, the tyranny of the majority, in the form of one-party domination of politics by Southern Democrats, was maintained in

part through a combination of discriminatory voting rules and terror that prevented the participation of Black voters. *See*, *e.g.*, Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, 7 (New Haven: Yale Univ. Press, 1974); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966) (describing discriminatory voting practices from Reconstruction to the passage of the Voting Rights Act). This allowed a government that was not only non-responsive to a significant part of the population, but actively worked against their interests in nearly every aspect of life. *E.g., id.* at xiii–xiv, 16–17. In some places, this state of affairs persisted even after the passage of the Voting Rights Act in 1965 through gerrymandered districts that prevented Black voters from having a decisive impact on elections, particularly before the VRA was amended in 1982 to address this practice more effectively. *See* Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006* (Mar. 2006) (cited in H.R. Rep. 109-478, 173 n.49, 2006 U.S.C.C.A.N. 618, 680 n.49), *available at* http://www.aclu.org/files/votingrights/2005_report.pdf (describing expansion of minority representation in wake of 1982 Voting Rights Act amendments).

The tyranny of the majority can also be established and maintained, as in the present case, through the manipulation of districting lines such that a political party will remain in power even when it loses the support of a majority of voters. *See Harper v. Hall*, 868 S.E.2d 499, 520 (N.C. 2022), *cert. granted sub nom*. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (finding that North Carolina legislature's redistricting plan

produces a Republican supermajority that is "resilient and persists even when voters clearly express a preference for Democratic candidates."). Although the methods of partisan gerrymandering are profoundly different from the racial terror that persisted in parts of the United States for generations, it, too, can lead to the election of representatives who are not responsive to the needs of racial, ethnic, and political minorities in their districts. *See*, *e.g.*, *LULAC*, 548 U.S. at 470–71 (Stevens, J., concurring) ("Members of Congress elected from such safe districts need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district.").

The risk that our government will fall prey to the tyranny of the majority—or even the tyranny of a minority that entrenches itself in power when it is temporarily in the majority—is most acute when our nation undergoes the decennial process of redistricting. The redistricting process "is the very foundation of democratic decisionmaking." *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004). It is also the moment when those foundations are most vulnerable to anti-democratic decisionmaking, when "the impulse and the opportunity" to entrench power may "be suffered to coincide" in a single political party. Federalist No. 10 (Madison). Regardless of which party is in control of the process, legislators have shown that they have the "impulse" to redistrict in a way that entrenches their power. Without an effective check, the redistricting process provides legislative majorities with the "opportunity" to act on that impulse and draw gerrymandered maps, creating a permanent underclass of voters who are locked out of

expressing their will through the ballot. Indeed, limiting the electoral power of at least some of the population is the ultimate goal of gerrymandering. *See, e.g.*, *LULAC*, 548 U.S. at 469–70 (Stevens, J., concurring) (describing harms that arise when a a district obviously is created solely to effectuate the perceived common interests" of a particular group) (cleaned up). And once power is entrenched, it becomes difficult to dislodge: transient majorities become permanent majorities and elected representatives have even less incentive to consider the interests of the people as a whole or avoid taking actions that infringe on the rights of those who can no longer hold them accountable. In this world of extreme gerrymandering, raw power becomes the driver of decisionmaking.

The availability of state judicial review as a check on gerrymandering is essential to preventing this kind of anti-democratic entrenchment of power. When elected officials use their position to reduce or eliminate meaningful political competition, courts must have the ability to step in and remedy those wrongs in accordance with state constitutions. *See, e.g.,* The Federalist No. 78 (Hamilton) ("the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority"). Without the important check provided by the courts, anti-democratic legislative action would threaten the normal give and take of our majoritarian electoral system that Madison viewed as the primary protection against the tyranny of the majority. The Federalist No. 10 (Madison).

Petitioners' view of the Elections Clause threatens another principle that is fundamental to our constitutional structure and the notion of limited government: federalism. The Constitution allows the States flexibility in how they structure the relations between the judicial and the political branches. State constitutional limits on—and judicial review of—the actions of state legislatures have been part of our system of government since before the founding. *E.g.*, *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787) (exercising judicial review of and invaliding state civil forfeiture statute on constitutional grounds). The Founders saw the federalist structure of the United States, like the separation of powers, as a bulwark against the concentration of power. On this view, it is unfathomable that the federalist principles embodied in the Constitution would preclude a State from mandating judicial review of time, place, and manner regulations. A reading of the Constitution that would countenance this Court's interference in a state's choice to structure its government in a way that permits state courts to enforce state constitutions cannot be squared with the federalist vision of the Founders.

B. Permitting State Legislatures to Ignore Constitutional Constraints Would Upend the Long-Established Understanding of the Role of State Courts in Congressional Redistricting.

Consistent with constitutional principles of federalism and the separation of powers, state courts have long played a role in protecting the foundations of our democratic institutions through the power of judicial review. They have enforced state

constitutional limits on election laws enacted by their state legislatures, including laws redistricting States' congressional districts. When congressional redistricting plans are challenged, state courts apply their own law in determining whether such challenges are justiciable and have construed the meaning of relevant provisions of their own constitutions, including provisions very similar to North Carolina's "free elections" clause at issue here. In other words, state courts are and have been playing the role envisioned for them in our republican form of government: ensuring that power is not concentrated in a single branch and providing checks and balances on the elected branches.

As early as 1916, the Ohio Supreme Court enforced a generally applicable constitutional referendum rule, pursuant to which Ohio voters had rejected a congressional districting plan passed by the legislature and signed by the governor. *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 170–71, 114 N.E. 55, 60 (Ohio 1916), *aff'd sub nom. State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). Similarly, in *Koenig v. Flynn*, the New York Court of Appeals held that a congressional redistricting plan passed by the legislature was ineffective after it was vetoed by the governor in accordance with his state constitutional prerogative. 258 N.Y. 292 (1932), *aff'd* 285 U.S. 375 (1932); *accord State ex rel. Carroll v. Becker*, 329 Mo. 501, 504, 45 S.W.2d 533, 533, *aff'd sub nom. Carroll v. Becker*, 285 U.S. 380 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932).

Petitioners argue that these decisions involved merely procedural requirements deriving from state

constitutions, which they concede are permissible under the Elections Clause. Pet. Br. at 25 n.1. But state courts and state constitutions have for a century or more imposed substantive requirements on redistricting. In 1932, three decades before this court's decision in *Wesberry v. Sanders*, the Illinois Supreme Court, held that a challenge to the State's congressional plan was justiciable, and proceeded to interpret the state constitution's "free and equal elections" clause to require equally populated districts. *Moran v. Bowley*, 347 Ill. 148, 162-63, 179 N.E. 526, 531-32 (Ill. 1932) (citing 1870 Ill. Const. art. II, §18); *see Wesberry v. Sanders,* 376 U.S. 1 (1964). Also in 1932, the Supreme Court of Virginia enforced a more specific constitutional requirement of population equality in congressional districting. *Brown v. Saunders*, 159 Va. 28, 36, 166 S.E. 105, 107 (Va. 1932). Applying a provision of the State's 1902 constitution requiring congressional districts to be "composed of contiguous and compact territory, containing as near as practicable an equal number of inhabitants," 1902 Va. Const. art IV, §55, the court stated:

> The duty of dividing the State into districts corresponding in number to the number of representatives to which Virginia is entitled by the reapportionment act of 1929 is, in a sense, political, and necessarily wide discretion is given to the legislative body. Section 55 of the Constitution of Virginia places limitations on the discretion of the legislature, and whether or not the act in question exceeds those limitations becomes a judicial question when raised by the proper parties in a proper proceeding.

Brown, 159 Va. at 36, 166 S.E. at 107.

The constitutional provision at issue in *Brown* was the successor to a nearly identically worded provision in Virginia's Reconstruction-era constitution of 1868. 1868 Va. Const. art. V, § 13. The validity of a congressional redistricting plan under that provision came before the state supreme court in the 1884 case of *Wise v. Bigger*. 79 Va. 269 (Va. 1884). There, the Virginia Supreme Court of Appeals took jurisdiction and rejected the challenge—not under the Elections Clause but by applying state "political question" doctrine. *Id.* at 282; *see also Brown*, 159 Va. at 35 (discussing *Wise* and concluding, "we do not regard that decision as authority for the proposition that the legislature has unlimited discretion in dividing the State into congressional districts.").

Other States have similarly recognized the authority of state courts to impose state constitutional requirements on the congressional redistricting process. *See Watts v. O'Connell*, 247 S.W.2d 531, 532 (Ky. 1952) ("in the manner of dividing the State into congressional districts the General Assembly is supreme, except when limited by the Constitution of the State"); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232, 1243 (Colo. 2003) (en banc) ("State courts have the authority to evaluate the constitutionality of [congressional] redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones"); *Pearson v. Koster*, 359 S.W.3d 35, 40 (Mo. 2012) (en banc) (holding claims alleging violations of constitutionally imposed redistricting principles with

respect to congressional redistricting plans are justiciable).

More recently, both before and after this Court's decision in *Rucho*, state courts have turned their attention to partisan gerrymandering, invaliding congressional redistricting plans under state constitutions. Those decisions have relied on constitutional provisions specifically addressed to the problem of partisan gerrymandering as well as broadly worded provisions guaranteeing free elections. For example, in 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Florida Constitution's "Fair Districts Amendment." *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015). That Amendment provides that no congressional plan "shall be drawn with the intent to favor or disfavor a political party or an incumbent." Fla. Const. art III, § 20. Three years later, the Pennsylvania Supreme Court reached a similar result, striking down the State's 2011 congressional redistricting plan under Article I, Section 5 of the Pennsylvania Constitution, which provides, "Elections shall be free and equal." *League of Women Voters v. Commonwealth*, 645 Pa. 1 (Pa. 2018).

State courts have addressed claims of partisan gerrymandering in the current redistricting cycle as well, encouraged by this court's decision in *Rucho*. In addition to the present case, in *Harkenrider v. Hochul*, the New York Court of Appeals, finding "invidious partisan purpose," threw out the State's congressional plan pursuant to a state constitutional mandate that "[D]istricts shall not be drawn to discourage competition or for the purpose of favoring or

disfavoring incumbents or other particular candidates or political parties." 2022 WL 1236822, at *10–11 (quoting N.Y. Const., art. III § 4(c)). That amendment had been adopted by the people of New York in recognition that "the practice of partisan gerrymandering jeopardizes [t]he ordered working of our Republic, and of the democratic process, and [a]t its most extreme, the practice amounts to 'rigging elections,' which violates the most fundamental of all democratic principles — that the voters should choose their representatives, not the other way around." *Id.* at *10 (cleaned up).[3]

A decision that the Elections Clause prohibits state constitutions from imposing requirements on state legislatures engaged in congressional redistricting would displace most or all these state-court pronouncements, unsettling long-standing procedures for congressional redistricting and calling into question the legitimacy of congressional elections conducted under remedial plans adopted by state courts or pursuant to their decisions.[4]

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[3] State courts have also struck down time, place, and manner laws outside the redistricting context that are applicable to federal elections. Just this month, state courts in New York and Delaware struck down laws expanding access to absentee voting and same-day registration. *See Albence v. Higgin*, No. 342, 2022, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022); *Amedure v. State of New York*, No. 2022-2145, NYSCEF Doc. 140, at 1 (N.Y. Supr. Ct. Oct. 21, 2022).

[4] *Cf.*, *e.g.*, *N.C. State Conf. of NAACP v. Moore*, 876 S.E.2d 513, 540 (N.C. 2022) (holding that the validity of "acts proposing

II. Depriving State Courts of the Ability to Enforce State Constitutional Limits on Congressional Redistricting Undermines Democratic Institutions and Threatens the Rights of Voters of Color.

Interpreting the Elections Clause to preclude state constitutions and state courts from regulating congressional redistricting and other time, place, and manner requirements, would threaten a critical check on state legislatures. Moreover, it would amount to a disavowal of the assurance this Court gave in *Rucho* that such avenues remain open, undermining confidence in the Court. Citizens in many States have acted to eliminate or at least limit partisan gerrymandering. In others, the state courts—which, in North Carolina as in many States, are directly or indirectly accountable to the people[5]—have acted to fill the void left by this Court in Rucho, thereby encouraging the prospect of political compromise. Petitioners' unsupported construction of the Elections Clause, however, would thwart the efforts of these democratic institutions to control partisan gerrymandering through the political process, instead giving free reign to a practice that has been shown time and again to subordinate the rights and interests

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constitutional amendments passed by a legislature composed of a substantial number of legislators elected from unconstitutionally racially gerrymandered legislative districts" are subject to challenge).

[5] See BRENNAN CENTER FOR JUSTICE, *Judicial Selection: Significant Figures* (May 8, 2015, updated Oct. 11, 2022), *available at* https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.

of Black Americans and other citizens of color to a partisan quest for power.

To fulfill the promise of the Constitution that the people of each State in the union shall live under "a government of laws and not of men," and to protect the respect for the Court that is so critical to its institutional role in our multi-racial democracy, that construction of the Elections Clause must be rejected.

A. The Court Must Uphold Its Assurance That States Have the Power to Regulate Partisan Gerrymandering.

In *Rucho*, this Court held for the first time that claims of partisan gerrymandering based in the Constitution are categorically "beyond the reach of the federal courts," abrogating nearly 50 years of precedent. *Rucho*, 139 S. Ct. at 2506-07 (holding partisan gerrymandering claim nonjusticiable, contrary to decisions beginning with *Gaffney v. Cummings*, 412 U.S. 735 (1973) and expressly overruling *Davis v. Bandemer*, 478 U.S. 109 (1986)). The Court held such claims are nonjusticiable political questions under the Constitution, regardless of the evidence of invidious intent and regardless of the constitutional basis for the claim. *Rucho*, 139 S. Ct. at 2508.

While it forbade the federal courts from adjudicating partisan power-grabs by state legislatures, the *Rucho* Court recognized that "partisan gerrymandering … is 'incompatible with democratic principles.'" 139 S. Ct. at 2506 (quoting *Ariz. State Legislature*, 576 U.S. at 791). Yet despite the Court's assertion that its "conclusion does not

condone excessive partisan gerrymandering," *Rucho*, 139 S. Ct. at 2506, state legislatures and partisan map drawers have proceeded to do exactly that: enact congressional maps that entrench their party's power.[6] For example, in defending their state legislative and congressional redistricting plans, New York's Democratic majority suggested that engaging with the minority would have amounted to "time-wasting political theater." *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *2 n.3 (N.Y. Apr. 27, 2022).

In holding partisan gerrymandering nonjusticiable, this Court assured the American public that it was not "condemn[ing] complaints about districting to echo into a void." *Rucho*, 139 S. Ct. at 2507. The Court then specifically highlighted state constitutional provisions aimed at controlling partisan gerrymandering. By way of example, the court cited constitutional provisions prohibiting partisan favoritism in redistricting, *id.* at 2507–08 (citing Fla. Const., art. III, § 20(a); Mo. Const., art. III, § 3, voter initiated constitutional amendments assigning responsibility for redistricting, including congressional redistricting, to independent commissions), *id.* at 2507 (citing Colo. Const., art. V, §§ 44, 46; Mich. Const., art. IV, § 6), and Missouri's creation of an independent "state demographer" with

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[6] *E.g.*, David A. Graham, *Republicans Are Grabbing Power Because SCOTUS Said Go for It*, *THE ATLANTIC* (Nov. 6, 2021), https://www.theatlantic.com/ideas/archive/2021/11/republicans-gerrymandering-north-carolina-supreme-court/620625/ (last visited Oct. 14, 2022); Adam Liptak, Court, Ruling 5–4, Gives Green Light to Gerrymander, *N.Y. TIMES*, A1 (June 28, 2019).

responsibility for drawing redistricting plans, *id.* (citing Mo. Const., art. III, § 3).

Rucho also expressly recognized the capacity of state courts to enforce state constitutional rules governing congressional redistricting and adjudicate claims of partisan gerrymandering. The Court cited with approval the Florida Supreme Court's 2015 decision rejecting the state legislature's congressional redistricting plan under the State's "Fair Districts Amendment." *See Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015)).

Indeed, this Court has long recognized the authority of state courts to review and, where required, invalidate state laws regarding congressional redistricting. In *Growe v. Emison*, Justice Scalia, writing for a unanimous court, explained that that state courts, as much as state legislatures, play an important role in the redistricting process. 507 U.S. 25, 33–34. (1993). *Growe* reversed a district court order enjoining a state court from considering a challenge to Minnesota's congressional districts, holding that federal courts must "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Id. at* 33 (emphasis in original). The Court based this ruling on "principles … which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional … districts." *Id.* at 34. Likewise, this Court has recognized the power of a State's citizens, through their state constitutions, to

direct or alter the manner in which congressional districts are apportioned. *Ariz. State Legislature*, 576 U.S. at 817.

Petitioners invite this Court to render hollow its assurances in *Rucho* and hold that the state courts are not open to hear state-law challenges to extreme partisan gerrymandering. Withdrawing from state courts the ability to apply their own state constitutions to control partisan gerrymandering so soon after offering those courts as a bulwark against this anti-democratic practice would undermine trust in this Court as a protector of democratic principles and the rule of law. Moreover, by suggesting that state legislatures are not bound by state constitutions, it would cast doubt on the continued vitality of *Arizona State Legislature*, calling into question the Court's commitment to the principle of *stare decisis*. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

Indeed, it was in part a concern for the "public acceptance" of the decisions of the federal courts that animated the Court's reluctance in *Rucho* to intrude "into a process that is the very foundation of democratic decisionmaking." *Rucho*, 139 S. Ct. 2500 (quoting *Vieth*, 541 U.S. at 291). That concern is only heightened in this case, where the Court is asked to displace the role traditionally assigned to state courts

in our federal system: interpreting their own state constitutions and applying them to legislation enacted by their own state legislatures. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874) (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").

The Constitution guarantees to the States a republican form of government, and in that form of government, it is the role and responsibility of the state courts to ensure state legislative enactments are consistent with state constitutions. This Court must decline Petitioners' invitation to render the promises of *Rucho* and the Constitution meaningless.

B. Prohibiting State Constitutional Regulation of Gerrymandering Would Make Voters of Color Vulnerable to Partisan Maneuvering.

History, including recent history, has shown that in the absence of meaningful limits on invidious partisan gerrymandering, both major political parties—Democratic and Republican—have drawn electoral districts in pursuit of their excessive partisan interests in ways that have harmed minority voters. Indeed, voters of color frequently become pawns in the redistricting process, where their historically reliable party alignments have been repeatedly manipulated for partisan gain.

It is indisputable, and Petitioners do not contest, that in America "racial identification is highly correlated with political affiliation." *Cooper v. Harris*,

137 S. Ct. 1455, 1473 (2017) (citing *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)); *see also*, *e.g.*, *Abbott v. Perez*, 253 F. Supp. 3d 864, 945 (W.D. Tex. 2017) (noting evidence that "race and political party affiliation are strongly correlated in Texas"); *United States v. Charleston Cnty.*, 365 F.3d 341, 352 (4th Cir. 2004) (Wilkinson, J.) (noting evidence that in South Carolina, party affiliation and race were "inextricably intertwined"). Importantly, the relationship between race and party has remained significantly static for Black Americans.[7] For over two decades, Black Americans have identified as Democratic or Democratic-leaning at a rate of 81% to 88%.[8] Since 1976, the proportion of Black voters who supported Democratic presidential candidates over sixteen general election cycles averaged 86.8%.[9]

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[7] See PEW RSCH. CTR., *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines* 11 (June 2, 2020), available at https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines/.

[8] PEW RSCH. CTR., Report Materials, *Party Identification Among Registered Voters 1994–2019,* available at https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/(last visited Oct. 20, 2022).

[9] See David A. Bositis, JOINT CTR. FOR POL. & ECON. STUD., *Blacks & the 2012 Democratic National Convention* 9 tbl.1 (2012), https://jointcenter.org/wp-content/uploads/2020/10/Blacks-and-the-2012-Democratic-National-Convention.pdf (nonpartisan quadrennial research report); ROPER CTR., *How Groups Voted*, https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted (last visited Oct. 25, 2022) (presenting statistics from exit polls in each presidential election from 1976 to 2020).

This phenomenon has made Black Americans a frequent target of manipulation by both major parties as they try to construct districts that will maximize their political power. From the passage of the Voting Rights Act, Democrats in the South and elsewhere split Black voters and other disenfranchised communities across districts for the purpose, often express, of preventing the election of minority candidates. *See White v. Regester*, 412 U.S. 755, 766 (1973) (affirming district court's invalidation of a multi-member districting scheme that was constructed so as to keep Black and Mexican American voters in the minority). More recently, Democrats in control of redistricting have exploited the reliability of Black voters to solidify Democratic majorities in a greater number of districts for the purpose of entrenching Democratic political power, despite the detrimental impact on Black political power. *See e.g., McConchie v. Scholz*, 577 F. Supp. 3d 842, 878–79 (2021) (three-judge court) (Black population around East St. Louis, Illinois was reduced in one legislative district in order to bolster the Democratic base in two nearby districts to create additional safe Democratic seats, reducing ability of Black voters to influence the electoral process in any of the districts). Republicans, in contrast, have preferred to pack Black voters into reliably Democratic districts in order to create more Republican seats elsewhere. *See e.g., Cooper*, 137 S. Ct at 1476–77 (legislature's demographer moved Black voters into two majority-Black districts and a third strong Democratic district to bolster Republican majorities in remaining congressional districts, thereby limiting the total number of districts in which Black voters had an opportunity to elect candidates of choice or otherwise influence the electoral process).

Racial discrimination, of course, is morally, historically, and legally distinct from partisan subordination. Partisan impulses have, however, provided disturbing incentives for legislatures to draw districts that disadvantage minority voters, leading to less responsive representation at all levels of government. The absence of any limitations on partisan gerrymandering at the federal level has fostered this abuse. Disallowing States from addressing the problem will lead to further detrimental impacts for these voters.

The Voting Rights Act and the Fourteenth and Fifteenth Amendments have played and will continue to play an essential role in remedying the deepest and most pernicious forms of racial discrimination in voting. *See*, *e.g.*, *LULAC*, 548 U.S. at 438–42 (finding vote dilution in violation of Section 2 of the VRA with respect to Congressional District 23 in Texas); *Gingles*, 478 U.S. at 34, 80 (finding vote dilution in violation of Section 2 of the VRA with respect to state legislative districts in North Carolina); *Rodgers v. Lodge*, 458 U.S. 613, 621–22 (1982) (finding vote dilution in violation of Fourteenth and Fifteenth Amendments with respect to county commission in Georgia); *White v. Regester*, 412 U.S. at 765–70 (finding vote dilution in violation of the Fourteenth Amendment with respect to state house districts in Texas). These protections remain an important and vital part of the national project to ensure that "citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality).

Unchecked partisan gerrymandering can, however, harm minority voters in ways those protections cannot reach. In *Easley v. Cromartie*, the Court held that where a legislature redistricts predominantly for the purpose of achieving partisan advantage, its actions do not run afoul of the Equal Protection Clause, even if racial demographic data is used to achieve those partisan goals. 532 U.S. at 241 ("Race must not simply have been *a* motivation for the drawing of a majority-minority district, but the '*predominant* factor' motivating the legislature's districting decision.") (emphasis in original) (cleaned up). To be sure, a State may not "intentionally target [] a particular race's access … because its members vote for a particular party." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016). But, in some cases, disentangling racial and partisan motives, and whether one predominated over the other, is challenging. *E.g.*, *McConchie*, 577 F. Supp. 3d at 883 (rejecting racial gerrymandering challenge to state legislative plan despite evidence that legislators relied on correlation between race and partisan affiliation to achieve predominantly partisan goals). Many of these plans will also not be amenable to challenge under Section 2 of the Voting Rights Act because, for one reason or another, this Court's test in *Thornburg v. Gingles* cannot be satisfied. *See*, *e.g.*, *id.* (rejecting Section 2 claim by Black and Latinx voters where legislature failed to create majority-minority districts for partisan reasons, despite evidence of polarized voting); *Fusilier v. Landry*, 963 F.3d 447, 462–463 (5th Cir. 2020) (reversing judgment for Section 2 plaintiffs on grounds that state had interest in at-large elections and where state had argued that lack of Black representation was due to partisanship); *cf. NAACP v.*

Fordice, 252 F.3d 361, 374 (5th Cir. 2001) (denying Voting Rights Act challenge despite satisfaction of all three *Gingles* factors and "an undeniable history of official discrimination from which its African–American citizens still suffer the effects").

The history of congressional redistricting in North Carolina is a case in point. Beginning in 1993, North Carolina's congressional maps were repeatedly struck down as unconstitutional racial gerrymanders. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017); *see also Shaw v. Hunt*, 517 U.S. 899, 905–18 (1996); *Bartlett v. Strickland* 556 U.S. 1 (2009); *see generally Common Cause v. Rucho*, 318 F. Supp. 3d 777, 801–10 (M.D.N.C.), *vacated and remanded*, 139 S. Ct. 2484 (2019) (tracing the history of North Carolina congressional redistricting). Eventually, the North Carolina legislators, then under Democratic control, redrew the map using political affiliation as well as race to divide the population into districts, with the understanding that "race and politics are highly correlated." *Easley*, 532 U.S. at 257. That map was upheld. *Id.*

In the 2010 redistricting cycle, after Republicans gained control of the North Carolina state legislature, the State returned to using race as the predominant basis for drawing district lines in the State's congressional redistricting plan, in the knowledge that doing so would enable them to produce a map that strongly favored their party. *See Cooper*, 137 S. Ct. at 1502*; see also Common Cause*, 318 F. Supp. 3d at 804 ("This goal [of creating two majority-Black districts] worked hand-in-hand with the General Assembly's partisan objective because, as

Legislative Defendants acknowledge, race and politics are highly correlated.") (cleaned up). The result was that the Black population was increased in two reliably Democratic districts where Black voters were already electing their candidates of choice, limiting their ability to impact elections in surrounding districts. Cooper, 137 S. Ct. at 1460. After this Court again struck that plan down as a racial gerrymander, *id.* at 1481–82, the state legislature achieved nearly the same result using partisan affiliation, rather than race, as the means to their anti-democratic end. *Common Cause*, 318 F. Supp. 3d at 805–06.

In the 2021 redistricting cycle, history has once again repeated itself. The plan invalidated by the North Carolina courts in this case bore all the hallmarks of racial and partisan discrimination that have been present in North Carolina congressional maps for decades. After this court's suggestion in *Rucho* that state courts remained available to adjudicate claims of partisan gerrymandering, the North Carolina courts did just that, rejecting the proposition that the North Carolina Constitution gives the legislators "unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want." *Hall*, 868 S.E.2d at 508. And in its ruling, the North Carolina Supreme Court found "that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." *Id.* at 554. Consistent with past redistricting cycles in North Carolina and elsewhere, this partisan advantage was, according to some of the Respondents, "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.

Petitioners ask this Court to hold that the North Carolina courts were powerless to prevent the harm to Black voters perpetrated by partisan actors blatantly seeking to entrench their own power. Adopting such a construction of the Elections Clause will undermine state courts' ability to prevent legislators from building partisan gerrymanders on the backs of their citizens of color.

CONCLUSION

The ability of the people to control anti-democratic action through their state constitutions and to have those constitutions enforced through judicial review in state courts is vital to protect against anti-democratic and discriminatory power grabs. Most of the recently enacted restrictions on partisan gerrymandering, such as partisan fairness amendments and redistricting commissions, have been adopted not through the self-restraint of state legislators but as a result of voter initiatives. This Court has suggested that partisan gerrymandering is a political problem in need of a political solution. *E.g.*, *Rucho*. But for political solutions adopted at the state level to be effective, and for the States to play their role in our federal system as "laboratories of democracy," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), those solutions must be enforceable through the state courts. Preventing the people from controlling the redistricting process in their own States would make congressional redistricting a tool for the anti-democratic

entrenchment of power and contradicts the Founders' vision to ensure a republican form of government.

In *Rucho*, the Court explained its decision holding partisan gerrymandering claims nonjusticiable in part by reference to concerns that federal courts are an "unelected and politically unaccountable branch of the Federal Government" that would assuming the power to overrule state decisionmaking in the politically fraught domain of redistricting. "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Rucho*, 139 S. Ct. at 2498–99 (quoting *Vieth*, 541 U.S. at 307 (opinion of Kennedy, J.)).

That consideration likewise counsels against intervention here. If, after retreating from adjudicating partisan gerrymandering claims because it is "unelected and politically unaccountable," this Court were to reinsert itself and override state constitutional provisions designed to check excessive partisan gerrymandering, it would further foster "ill will and distrust" of the Court. Such a profound intrusion into a role traditionally committed exclusively and conclusively to state courts would constitute a betrayal of the federalist principles long championed by this Court in cases equally consequential for our system of government. Such a decision—particularly in light of the Court's insistence in *Rucho* that avenues for controlling partisan gerrymandering remain open and the many decades of state court decisions to the contrary—would suggest to many that "[p]ower, not reason, is the new currency of

this Court's decisionmaking." *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

For the foregoing reasons, the Petitioners' challenge to the decision of the North Carolina Supreme Court should be rejected.

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