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 Supreme Court of North Carolina

BRIEF OF GOVERNOR ARNOLD SCHWARZENEGGER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Governor Arnold Schwarzenegger served as the Governor of California from 2003 to 2011. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California.

Governor Schwarzenegger experienced firsthand the pernicious effects of partisan gerrymanders – from never-ending redistricting disputes to the partisan political atmosphere that results from gerrymanders. He also has first-hand experience with state government reforms that can eliminate, or at least minimize, partisan gerrymanders. In 2008 and 2010, Governor Schwarzenegger successfully advocated for two ballot initiatives, discussed *infra*, that established a non-partisan redistricting commission for California's Legislature, Board of Equalization, and U.S. House Members. These reforms ended decades of partisan gerrymanders, to the benefit of California's citizens and political system. Governor Schwarzenegger retains a continuing interest in the survival and success of these reforms.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* 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 *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY

The American constitutional tradition of checks and balances is "informed by centuries of political thought and experiences." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 116 (2015) (Thomas, J., concurring in the judgment). Consistent with that tradition, States have developed careful balances in their constitutions to allocate and constrain the exercise of legislative power under the Elections Clause in order to combat the pernicious effects of partisan gerrymanders. And they have relied on more than a century of this Court's precedent upholding their ability to do so. Among other checks and balances, ten States now assign congressional redistricting to commissions that are less beholden to self-interested partisan politicians and that are prohibited by law from enacting partisan gerrymanders. This Court favorably cited these independent commissions as a way in which States are "actively addressing" the problems of "excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

Petitioners' theory of the Elections Clause posits that state legislatures may act independently of these state constitutional provisions when exercising powers under the Elections Clause. This theory would eliminate state efforts to curtail partisan gerrymandering, imperiling the checks and balances needed for a functioning redistricting process that places voters' interests over legislators'. It would upset this Court's longstanding precedent upholding States' checks and balances on the exercise of legislative power for congressional redistricting – through popular referenda, gubernatorial vetoes, and independent redistricting commissions. *See Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932);

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787 (2015). And the theory itself is incoherent and standardless. It admits that *some* state constitutional provisions continue to apply to States' exercise of powers under the Elections Clause but arbitrarily excludes other provisions.

This Court should adhere to its precedents upholding state-level checks and balances because those precedents were correctly decided, they have engendered significant reliance by States that have organized their self-governance around them, and our political system would suffer harm if partisan gerrymanders were left entirely without state-level checks and balances.

The California Citizens Redistricting Commission – the type of commission cited favorably in *Rucho* – illustrates why. As Governor of California, *amicus* Arnold Schwarzenegger took the lead in urging voters to approve the constitutional amendments creating the Commission so that California could move beyond a shameful history of partisan gerrymandering that yielded frequent deadlocks, embroiled courts, and disserved the public. Millions of Californians voted to create this Commission. It has improved California's maps by neutral standards, while avoiding the self-serving map-drawing and partisan conflicts of past redistricting cycles. In 2021, the Commission – with five Republican, five Democratic, and four independent commissioners – unanimously approved the State's legislative maps. Petitioners' Elections Clause theory would call into serious question this well-functioning body and create the specter that California would have to revert to the divisive and dysfunctional redistricting process of the past. This Court should reject that theory and affirm the decision below.

ARGUMENT

I. State Constitutional Provisions Constrain States' Exercise Of Legislative Power Under The Elections Clause

A. This Court's Precedents Uphold The Applicability Of State Constitutions

1. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4. The text of that provision is silent as to whether other sources of state law may constrain "the Legislature thereof" in the exercise of its powers. But this Court's precedents are not silent. In three cases spanning a century, this Court has held that "the [state] Legislature thereof" is bound by state constitutional provisions. These decisions reflect the fundamental principle that a state legislature is "an entity *created and constrained by the state constitution*." Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 19 (2022).

In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court rejected an Elections Clause challenge to an Ohio constitutional provision allowing the people to vote down congressional redistricting plans by popular referendum. *See id.* at 566-67; Ohio Const. art. II, §§ 1, 1c. This Court explained that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." 241 U.S. at 567-68. The state constitutional referendum provision thus constrained the State's exercise of power under the Elections Clause.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Minnesota Supreme Court had adopted the independent state legislature theory that is advanced here to reject a gubernatorial veto of a congressional redistricting plan. *See id.* at 365 ("'The word "legislature" has reference to the well-recognized branch of the state government . . . and when the framers of the Federal Constitution employed this term, we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof.'") (quoting *State ex rel. Smiley v. Holm*, 238 N.W. 494, 499 (Minn. 1931)). This Court reversed because neither the text of the Elections Clause nor the original intent behind that provision displaced the principle that "the exercise of the [state legislative] authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367, 369-70.

And, finally, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), this Court upheld an Arizona constitutional provision (enacted by popular ballot) that "remove[d] congressional districting authority from the state legislature, lodging that authority, instead, in a new entity," the Arizona Independent Redistricting Commission. *Id.* at 796-97; *see* Ariz. Const. art. IV, pt. 2, § 1, ¶¶ 3-23. There, both the majority *and* Chief Justice Roberts' dissent agreed that state constitutional provisions may properly constrain the exercise of States' legislative powers under the Elections Clause. *See Arizona State Legislature*, 576 U.S. at 816-17 (majority) ("[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes."); *id.* at 841-42 (Roberts,

C.J., dissenting) (agreeing with the "straightforward rule" that "'the Legislature' is a representative body that, when it prescribes election regulations, *may be required to do so within the ordinary lawmaking process*" as set forth in the state constitution) (emphasis added).

Recently, in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), this Court relied on that principle from those prior decisions. This Court explained that its decision regarding the non-justiciability of federal constitutional challenges to partisan gerrymanders did not "condemn complaints about districting to echo into a void" because "*States* . . . are actively addressing the issue on a number of fronts." *Id.* at 2507 (emphasis added). The Court proceeded to cite favorably state constitutional provisions affecting States' exercise of legislative power under the Elections Clause, including voter-approved constitutional provisions prohibiting gerrymandering, *see*, *e.g.*, 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 . . . ."), and creating independent redistricting commissions like the one in *Arizona State Legislature*. *See Rucho*, 139 S. Ct. at 2507 (citing voter-approved commissions in Colorado and Michigan).

2. *Davis*, *Smiley*, and *Arizona State Legislature* were correctly decided, and *Rucho* persuasively relied upon state-level innovations to combat partisan gerrymanders. The principle of those decisions – that States' legislative powers are created and constrained by state constitutions – is consistent with the Framers' original intent and with historical practice shortly before enactment of the Constitution.

At the time of the Constitution's enactment in 1787, the Nation was operating under the Articles of Confederation, which had a similarly worded predecessor to the Elections Clause. The Articles of Confederation provided that "delegates" to the Congress "shall be annually appointed in such manner as the legislatures of each State shall direct." Articles of Confederation art. V. The contemporaneous understanding of this provision was that state legislatures were constrained by their state constitutions when selecting delegates to the Continental Congress that promulgated the Articles of Confederation. Ten of 11 state constitutions – including North Carolina – in effect in the period 1776 to 1787 imposed such constraints. *See* N.C. Const. art. XXXVII (1776) ("That the Delegates for this State, to the Continental Congress while necessary, shall be chosen annually by the General Assembly, by ballot; but may be superseded, in the mean time, in the same manner; and no person shall be elected, to serve in that capacity, for more than three years successively."); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 476-80 & n.152 (2022); Non-State Resp. Br. 29 & n.2. Moreover, during this period, there was a prevailing practice and view that these constitutional constraints would be enforced through judicial review. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 929-39 (2003) (surveying public sentiment and seven States that recognized judicial review by 1787).

The Elections Clause – drafted in 1787 – closely mirrors the text of Article V of the Articles of Confederation. *Compare* U.S. Const. art. I, § 4 (electoral regulations "shall be prescribed in each State by the Legislature thereof"), *with* Articles of Confederation

art. V (delegates "appointed in such manner as the legislatures of each State shall direct"). As this Court has noted, whether the Elections Clause imposed limitations on "the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate" by the Framers. *Arizona State Legislature*, 576 U.S. at 816. The Framers' choice of nearly identical language for the Elections Clause as Article V of the Articles of Confederation indicates they intended the established understanding of Article V to carry forward with the Elections Clause.

That is what happened. In the decades following the Constitution's enactment, the large majority of state constitutions constrained state legislatures' exercise of power under the Elections Clause. *See* Non-State Resp. Br. 31-33; Smith, 53 St. Mary's L.J. at 484-92. That practice continued throughout the 1800s. *See id.* at 505-09, 525-28. As but one more-recent example, 13 States adopted women's suffrage by constitutional amendment in advance of the Nineteenth Amendment. Those venerable efforts would have been unconstitutional under petitioners' theory.[2]

More generally, the independent state legislature theory also would have been antithetical to the Framers' prevailing views. The Framers well understood the necessity of retaining checks and balances on the Legislature: "it is against the enterprising ambition

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[2] *See* Idaho Const. art. VI, § II (1896); Utah Const. art. IV, § 1 (1896); Wash. Const. art. VI, § 1, amend. V (1910); Cal. Const. art. II, § 1 (1911); Ariz. Const. art. VII, §§ 2, 15 (1912); Kan. Const. art. V, § 8 (1912); Ore. Const. art. IV, § 2 (1912); Mont. Const. I, art. IV, § 2 (1914); Nev. Const. art. II, § 1 (1914); N.Y. Const. art. II, § 1 (1917); Mich. Const. art. II, § 1 (1918); Okla. Const. art. III, § 1 (1918); S.D. Const. art. VII, § 2 (1918).

of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions." The Federalist No. 48 (James Madison). And they viewed judicial enforcement of constitutional constraints as "keep[ing] the [legislature] within the limits assigned to [its] authority." The Federalist No. 78 (Alexander Hamilton); *see id.* ("[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."). There is no basis to believe the Framers abandoned those views and the contemporaneous practices of States to single out the Elections Clause as an instance in which legislatures were granted exclusive powers without checks and balances, and did so without any recorded debate.

B. Petitioners' Independent State Legislature Theory Would Upset Established Precedent

Petitioners urge this Court to adopt the independent state legislature theory of the Elections Clause. *See* Pet. Br. 4 ("*[I]nherently legislative* decisions about the manner of federal elections in a State are committed to 'the Legislature thereof.'"); *see id.* (Constitution "place[s] the regulation of federal elections in the hands of state legislatures, Congress, and no one else"). In petitioners' view, "*[a]ny* delegation" of a state legislature's "authority to regulate congressional elections" to another entity is "unconstitutional under the Elections Clause." *Id.* at 12. Thus, the only "check against any potential abuse" by a state legislature is "congressional review." *Id.* at 18.[3]

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[3] *See also* Pet. Br. 17 ("state constitutions [cannot] impose substantive limits on the legislature's authority"); *id.* at 21 (state "judicial review" of redistricting "*reallocate[s]* a portion of the authority assigned specifically to its legislature by the federal

Petitioners' theory cannot be squared with this Court's longstanding precedent that faithfully implements the Framers' intent. Their theory means that the citizens of a State cannot override the Legislature's congressional map by popular referendum, contrary to *Davis v. Hildebrandt*; a governor cannot veto a Legislature's congressional map, contrary to *Smiley v. Holm*; and voters cannot assign congressional redistricting to an independent commission, contrary to *Arizona State Legislature*. Indeed, the theory renders States incapable of imposing *any* constitutional restraints on their Legislatures' natural proclivity to gerrymander, contrary to *Rucho*'s recognition of the many such innovative ways States have been "actively addressing" those problems. 139 S. Ct. at 2507.

Petitioners attempt to avoid the inevitable consequences of the independent state legislature theory by making a remarkable concession. They "do not dispute that each State's constitution may properly govern such procedural questions as whether a bicameral vote is required to enact a law, whether the legislation is subject to gubernatorial veto, and, perhaps in the extreme case, whether some lawmaking entity other than the ordinary institutional legislature has authority to legislate on the subject." Pet. Br. 24 (citation omitted). Petitioners must make this concession because, as they acknowledge, "the federal

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Constitution and parceled it out instead to its courts"); *id.* at 23-24 (state legislatures' exercise of power under the Elections Clause "cannot be controlled by the constitution and laws of the respective states") (internal quotation marks omitted); *id.* at 39 ("[T]he power to regulate federal elections lies with State legislatures alone, and the Clause *does not* allow the state courts, or any other organ of state government, to second-guess the legislature's determinations.").

Constitution . . . of course does not create *the state legislatures themselves*." *Id.* State constitutions (enacted by the people) decide which bodies exercise legislative powers and what constraints are imposed on those legislative bodies – as this Court held in *Davis*, *Smiley*, and *Arizona State Legislature*.

Having conceded that *some* state constitutional provisions must continue to apply to States' exercise of legislative powers under the Elections Clause, petitioners have no basis to exclude other state constitutional provisions. They seek to draw a distinction between state constitutional provisions that concern "procedural questions" (permissible) and those that impose "*substantive* limits" (impermissible). *Id.* at 24-25. But they offer no coherent theory to justify that distinction or standards to evaluate the constitutionality of future limits. Their argument "begin[s]" and "end[s]" with the text of the Elections Clause, *id.* at 13, and the text of that Clause does not draw any distinction between "procedure" and "substance." Nor do petitioners cite any historical support for their distinction.

The distinction would lead to absurd textual inconsistencies within the Elections Clause. The first half of the clause provides that electoral regulations "shall be prescribed in each State by the Legislature thereof," and the second half provides "Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4. There is no reason why petitioners' distinction would not apply to both halves of the Elections Clause. And, if that is so, Congress could "make or alter" electoral regulations unbounded by any "substantive" provision in the rest of the federal Constitution – presumably including the First and Fourteenth Amendments.

Nor do petitioners provide a workable rule for dividing "procedure" from "substance." They argue that state judicial review of congressional redistricting "seizes the power to regulate the manner of congressional elections," Pet. Br. 49, and thus falls on the "substance" side of the ledger. But judicial review no less "seizes the power to regulate" than a governor vetoing a map, the public rejecting a map by referendum, or the public vesting congressional redistricting power in an independent commission by initiative – all of which supposedly fall on the "procedure" side of the ledger. Petitioners' dividing line has no guiding principle; it is drawn solely to achieve their desired outcome here.

C. *Stare Decisis* Should Compel This Court To Reject Petitioners' Invitation To Overrule Well-Established Precedent

This Court should reject petitioners' invitation to overrule longstanding precedent "[t]o the extent" it "is not distinguishable." Pet. 40 n.9. This Court should be guided by *stare decisis*, "'an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.'" *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 69 (1765)). This "[r]espect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation marks omitted).

"The question today . . . is not whether" *Davis*, *Smiley*, and *Arizona State Legislature* were "right

or wrong, but whether to adhere to [them] in deciding the present case." *Id.* at 2133. "[F]or precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly." *Id.* at 2134.

To overrule this Court's precedents, there must be a "special justification"; that remains true even for constitutional decisions where "the doctrine of *stare decisis* is not as 'inflexible.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part). "[T]hree broad considerations . . . help guide the inquiry and help determine what constitutes a 'special justification' or 'strong grounds' to overrule a prior constitutional decision." *Id.* at 1414. Each of these considerations weighs against petitioners.

First, *Davis*, *Smiley*, and *Arizona State Legislature* are not "grievously or egregiously wrong." *Id.* They stand on the firm principle that a State may enact constitutional checks and balances on the exercise of the State's legislative power. That principle is "workab[le]," *id.* at 1414-15, and guides the proper result in this case. North Carolina's Constitution "vest[s]" the "legislative power" in the "General Assembly," N.C. Const. art. II, § 1, and the "judicial power" in "a General Court of Justice," *id.*, art. IV, § 1. That judicial power includes "judicial review" of state legislative actions for compliance with the state constitution. *See State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989) (citing *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)). The North Carolina Supreme Court acted consistently with this constitutional structure when it held the congressional re-

districting plan violated Articles X, XII, XIV, and XIX of North Carolina's Constitution.[4]

Petitioners attempt to show that their theory of the Elections Clause best accords with its original intent. *See* Pet. Br. 25-39. But their claim (at 26) that "*no State* [constitution] appears to have imposed . . . rules governing *congressional* districts" is inaccurate. *See supra* pp. 7-9. Respondents thoroughly demonstrate the flaws in petitioners' arguments. *See* Non-State Resp. Br. 28-41; State Resp. Br. 38-49. At the very least, this Court's reading of that historical evidence in *Smiley* and *Arizona State Legislature* was not grievously or egregiously wrong. *See Arizona State Legislature*, 576 U.S. at 814-19; *Smiley*, 285 U.S. at 369-70.

Second, these decisions have not "caused significant negative jurisprudential or real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). These decisions allow States to impose checks and balances on congressional redistricting. These checks – particularly voter-approved state constitutional provisions like California's independent redistricting commission – express the will of the people, which are "the font of governmental power." *Arizona State Legislature*, 576 U.S. at 819. That is a positive consequence of this Court's decisions that should not be disturbed. *See infra* pp. 23-26.

But there would be serious negative consequences to adopting the independent state legislature theory. That theory deprives States of any ability to enact meaningful checks and balances on congressional redistricting to prevent harmful gerrymanders that

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[4] The North Carolina Supreme Court also acted permissibly in drawing its own remedial congressional map. *See* State Resp. Br. 23-26; Non-State Resp. Br. 58-61; Chief Justices Br. 17-18.

prioritize partisan advantage or incumbent protection. *See infra* pp. 16-17. Virtually all the States' methods for "actively addressing" those gerrymanders discussed in *Rucho* would be rendered unconstitutional. *See* 139 S. Ct. at 2507 (citing state constitutional constraints like Florida's Fair Districts Amendment and independent redistricting commissions). The States could no longer serve their "'role . . . as laboratories for devising solutions to difficult legal problems'" like partisan gerrymandering. *Arizona State Legislature*, 576 U.S. at 817 (citation omitted).[5]

Third, overruling these prior precedents would "unduly upset reliance interests." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). Many States have longstanding constitutional provisions that carefully allocate and constrain the exercise of state legislative power under the Elections Clause. Voiding those constitutional provisions will spawn litigation about the validity of the congressional maps currently in use. It will cause great uncertainty in upcoming election cycles about where congressional lines fall. This would be extraordinarily disruptive at any time but especially so shortly on the heels of the 2020 decennial redistricting cycle. If existing congressional maps are invalid, new maps may need to be redrawn for a second time in a matter of years wherever state constitutional provisions have constrained the state legislature's redistricting power.

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[5] Numerous other state constitutional provisions affecting voting would also be jettisoned. *See Arizona State Legislature*, 576 U.S. at 822-23 (citing provisions addressing "voting by 'ballot' or 'secret ballot,' voter registration, absentee voting, vote counting, and victory thresholds") (footnotes omitted).

II. States Have Legitimate Reliance Interests In Their Constitutional Provisions That Provide Checks And Balances

Overruling any of *Davis*, *Smiley*, and *Arizona State Legislature* would cause significant harm to our political system and the legitimate reliance interests of States and voters in those precedents.

A. The Independent State Legislature Theory Will Impede States' Efforts To Eliminate Partisan Gerrymanders

Partisan gerrymanders threaten our political system. They are "incompatib[le] . . . with democratic principles." *Veith v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality) (Scalia, J.); *see also Rucho*, 139 S. Ct. at 2506 ("[partisan] gerrymandering is 'incompatible with democratic principles'") (quoting *Arizona State Legislature*, 576 U.S. at 791). Instead of voters "participat[ing] equally in the political process . . . to choose their political representatives," self-interested politicians "entrench themselves in office" by choosing their voters. *Id.* at 2509 (Kagan, J., dissenting). This insulates incumbents in safe districts, minimizes electoral competition, and heightens partisanship.

State reforms to combat partisan gerrymandering cannot be effective if they cannot impose checks and balances on a self-interested state legislature's congressional redistricting powers – as did the referendum in *Davis*, the veto in *Smiley*, the independent commission in *Arizona State Legislature* (and California), and the state constitutional constraints cited favorably in *Rucho*. *See Arizona State Legislature*, 576 U.S. at 824 (commission "sought to restore the core principle of republican government, namely, that the voters should choose their representatives, not the other way around") (internal quotation marks omitted).

This need for checks and balances on state legislatures is "informed by centuries of political thought and experiences." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 116 (2015) (Thomas, J., concurring in the judgment). The Framers who crafted the Elections Clause, along with the rest of our Constitution, gleaned lessons from Revolution-era state constitutions that did not constrain their state legislatures with checks and balances. *See id.* at 117-18. They knew well the "'many *legal infractions* of sacred right'" and "'many wanton abuses of legislative powers'" that occur when state legislatures are left unchecked. *Id.* at 117 n.3 (quoting Giles Hickory (Noah Webster), *Government*, The American Magazine 206 (Mar. 1788)). But the independent state legislature theory rejects any state check or balance.

B. Many States Rely On Independent Commissions To Address Gerrymandering

In reliance on this Court's precedents, ten States have adopted nonpartisan or bipartisan commissions independent of legislatures to draw their congressional maps. *See* Christopher T. Warshaw et al., *Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021–22 Redistricting Cycle*, 52 Publius 428, 436 tbl.1 (2022). Studies have shown that these independent commissions have significant benefits. Independent commissions "generally produce less biased and more competitive plans than when one party controls the process" and "ensure a consistent process from one redistricting cycle to the next," *id.* at 447; *see Arizona State Legislature*, 576 U.S. at 798 (citing Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. Irvine L. Rev. 637, 661, 663-64 (2013)), while also reducing the partisanship of congressional representatives, *see* David G. Oedel et al., *Does the*

Introduction of Independent Redistricting Reduce Congressional Partisanship, 54 Vill. L. Rev. 57, 87 (2009). Recent studies based on more robust data show that "independent commissions are 2.25 times more likely to have competitive elections and decrease incumbent party wins by 52%." Matthew Nelson, *Independent Redistricting Commissions Are Associated with More Competitive Elections,* PS: Pol. Sci. & Pol. at 1 (2022) (forthcoming).[6]

California's commission is a model example of the success of these state reforms. Californians enacted the commission by ballot initiative to do away with decades of partisan gerrymanders. Governor Schwarzenegger was a strong proponent of the ballot initiative for the same reason that it resonated with

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[6] *See also* Robin E. Best et al., *Do Redistricting Commissions Avoid Partisan Gerrymanders?*, 50 Am. Pol. Rsch. 379 (May 2022) (preprint at 16-17) ("[s]ubstantial evidence suggests redistricting commissions do a good job delivering on the charges they have been given—e.g., meeting population equality, drawing contiguous and reasonably compact districts, preserving jurisdictional boundaries, and creating competitive districts," and independent commissions designed like California's also "can work to avoid a [partisan] gerrymander"); Nathaniel Rakich, *Did Redistricting Commissions Live Up To Their Promise?*, FiveThirtyEight (Jan. 24, 2022) ("According to two common measures of map fairness, congressional maps enacted by commissions (or courts that took over from failed commissions) have been less biased than those that have emerged from legislatures."), https://53eig.ht/3Dr189L; Christian R. Grose & Matthew Nelson, *Independent Redistricting Commissions Increase Voter Perceptions of Fairness* (June 2021) (finding "[i]ndependent redistricting commissions cause voters to perceive the process as fairer"), https://bit.ly/3VU161r; Eric Lindgren & Priscilla Southwell, *The Effect of Redistricting Commissions on Electoral Competitiveness in U.S. House Elections, 2002-2010*, 6 J. Pol. & L. 13, 16 (2013) (independent commissions "led to margins of victory that are on average over 10-12 points closer than those districts redrawn under the traditional legislative process").

millions of Californians: the Commission would vest the power to create electoral districts in an independent commission consisting of qualified citizens that do not depend on gerrymanders to obtain their office.

Before the Commission, California was like many other States. Every decennial census brought a new opportunity to re-gerrymander the State's electoral districts to entrench one political party. Not only did these gerrymanders hurt California politics, but they tied up state courts for years.

After the 1970 Census, the Democratic legislature and Republican governor deadlocked, leading the California Supreme Court to appoint special masters to draw the maps after two years of stalemate and one election cycle without any redrawn maps after a census. *See Legislature v. Reinecke*, 516 P.2d 6 (Cal. 1973); *Legislature v. Reinecke*, 492 P.2d 385 (Cal. 1972); Eric McGhee, *California's Political Reforms: A Brief History*, Pub. Pol'y Inst. of California, App'x A at 1 (Apr. 2015) ("McGhee, *California's Political Reforms*"), https://bit.ly/3z9m56J.

After the 1980 Census, a Democratic legislature and governor passed maps, "squeez[ing] every last Democratic seat [they] could out of the process." McGhee, *California's Political Reforms*, App'x A at 1. But voters used their referendum power to reject the maps, requiring the legislature to redraw the maps "in the middle of the campaign season." *Id.*; *see* Cal. Const. art. II, § 9 (referendum power); *see also* Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 Harv. L. & Pol'y Rev. 109, 112 (2014). The California Supreme Court eventually was forced to draw temporary districts for the 1982 election. *See Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982).

The 1990 Census was followed by a recurrence of the impasse in the 1970s, with a Republican governor vetoing a Democratic legislature's maps and the state supreme court needing to intervene by appointing special masters to draw maps. *See Wilson v. Eu*, 823 P.2d 545 (Cal. 1992) (after veto, failed veto override, and legislative recess, court appointed retired judges as special masters to create maps); McGhee, *California's Political Reforms*, App'x A at 4; Ancheta, 8 Harv. L. & Pol'y Rev. at 112.

The map-drawing after the 2000 Census failed in a different way: an "incumbency-protective 'bipartisan gerrymander,'" Ancheta, 8 Harv. L. & Pol'y Rev. at 114, in which legislators reached "a deal . . . that largely preserved the status quo by making districts less competitive, especially for Congress, while seeming to satisfy no one but the authors," McGhee, *California's Political Reforms* 7.[7] This gerrymander harmed voters by maximizing the protection of incumbents, while diluting the voting power of California's increasing numbers of voters of color. *See* Jason P. Casellas, Michael D. Minta & Christian R. Grose, *The California Citizens Redistricting Commission: Fair Maps, Voting Rights, and Diversity,* USC Schwarzenegger Inst. for State & Glob. Pol'y, at 12-13 (2021), https://bit.ly/3TNiD9I.

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[7] To illustrate the process following the 2000 Census: a U.S. Representative's brother charged California members of Congress $20,000 each to draw good seats, one of whom explained that $20,000 was a good investment compared to the $2 million typically spent on a reelection campaign. *See* Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 Election L.J. 472, 482 & n.71 (2012) (citing Editorial, *Prop. 27 Would Strangle Redistricting Reform in the Cradle*, Orange Cnty. Register (Oct. 8, 2010)).

After decades of flawed redistricting, Californians decided that they had had enough. In 2008, California voters approved Proposition 11, the Voters FIRST Act, which created the Commission to conduct redistricting for the California State Assembly, Senate, and Board of Equalization. *See* Cal. Const. art. XXI, § 2; Ancheta, 8 Harv. L. & Pol'y Rev. at 114. In 2010, California voters approved Proposition 20, the Voters FIRST Act for Congress, extending the Commission's authority to redistricting for the State's congressional seats. *See* Ancheta, 8 Harv. L. & Pol'y Rev. at 115.

More than six million Californians voted in favor of the independent redistricting process in 2008. *See* California Sec'y of State, *Statement of Vote, Nov. 4, 2008, General Election* 13 (Dec. 2008), https://bit.ly/3gq4yAz. Two years later, the independent redistricting commission's authority was extended to congressional elections by a large margin (61% to 39%). *See* California Sec'y of State, *Statement of Vote, Nov. 2, 2010, General Election* 18 (rev. Jan. 2011), https://bit.ly/3eY8VTf. In the same election, a similarly large margin rejected Proposition 27 that would have repealed the Commission and returned redistricting to the Legislature. *See id.*

Propositions 11 and 20 succeeded because their supporters built "a broad bipartisan coalition before going to the voters." McGhee, *California's Political Reforms* 2, 13, 24-25. The successful votes in 2008 and 2010 followed decades of unsuccessful efforts to win voter approval of redistricting bodies independent of the California Legislature. *See* Ancheta, 8 Harv. L. & Pol'y Rev. at 113-14 (describing failed propositions in 1982, 1984, 1990, and 2005); McGhee, *California's Political Reforms*, App'x A at 2-6 (same). In these past instances, voters discerned a partisan valence to each

proposition, with the Republican Party in favor and the Democratic Party opposed. *See* McGhee, *California's Political Reforms*, App'x A at 2-6. Unlike these prior unsuccessful propositions, Proposition 11 was drafted by "an extraordinarily wide range of potential stakeholders, including Republicans, Democrats, business, unions, civil rights organizations, and good government groups," involving both supporters and opponents of the failed 2005 proposition. *See* McGhee, *California's Political Reforms* 24. Its drafters learned from the prior failures, replacing a reliance on judicial and partisan actors with citizen members, carefully screened to eliminate possible connections to political officeholders.

In approving the Commission, California voters exercised their initiative power enshrined in the California Constitution. *See* Cal. Const. art. II, § 8. The initiative power dates to 1911, when California's then-Governor promised voters he would create it, the Legislature placed the proposed constitutional amendment on the ballot, and voters approved it. *See* California Sec'y of State, *Statewide Initiative Guide: 2022*, at i (rev. Nov. 2021), https://bit.ly/2NPWmra; J. Fred Silva, *The California Initiative Process: Background and Perspective*, Pub. Pol'y Inst. of California, at 1 (Nov. 2000) (1911 amendment "gave the voters a power equal to the power of [the] legislative branch of state government"), https://bit.ly/3TQNVfT.[8]

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[8] California's constitutional reform in the early twentieth century was part of a broader movement across the western States to place greater legislative power in the hands of voters. *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 27 (1997) ("Progressives in the new states of the West sought to divest their legislatures of their monopoly on policy-making authority.").

The Commission has imposed valuable checks and balances that protect voters' rights and interests:

- The Commission must use neutral redistricting criteria. *See* Cal. Const. art. XXI, § 2(d)-(e) (requiring districting according to equal population; then Voting Rights Act compliance; then contiguity; then geographic integrity of cities, counties, and communities of interest; then compactness; then "nesting," *i.e.*, forming Senate districts out of Assembly districts and Board of Equalization districts out of Senate districts; while prohibiting consideration of incumbents' and candidates' residences and partisan advantage).
- "The selection process" for the Commission "is designed to produce a commission that is independent from legislative influence." Cal. Const. art. XXI, § 2(c)(1); *see id.* § 2(c)(2)-(3) (14 members, of which five are from the largest party by registration, five from the second-largest, and four unaffiliated); *id.* § 2(c)(4) (single terms); *id.* § 2(c)(6) (barring commissioners from holding elective office for ten years or appointive office, paid staff positions, or paid consultancies for five years); Cal. Gov't Code § 8252(a) (selection process overseen by State Auditor).[9]

Arizona's ballot-proposition mechanism, used a century later to create the Arizona Independent Redistricting Commission, traces to the same constitutional reform era. *See Arizona State Legislature*, 576 U.S. at 793-96.

[9] The Legislature is not wholly excluded. Once a final pool of the most qualified applicants is determined, leaders of the majority and the minority in each chamber each may strike two applicants from each of the Democratic, Republican, and unaffiliated sub-pools. *See* Cal. Gov't Code § 8252(e). Eight of the Commission's final members then are drawn by lottery from

- The Commission has a transparent process, must explain the basis for its decision, and can enact maps only with bipartisan support. *See* Cal. Const. art. XXI, § 2(b) (Commission must "conduct an open and transparent process enabling full public consideration"); Cal. Gov't Code § 8253(a) (Commission required to comply with state open-meetings law and provide "immediate and wide-spread public access" to all records and data); Cal. Const. art. XXI, § 2(c)(5) (final maps must be approved by three commissioners of each party registration and by three unregistered commissioners); *id.* § 2(h) (Commission must accompany final maps with "report that explains the basis on which the commission made its decisions").[10]

In each of these respects, the California Commission resembles the Colorado and Michigan redistricting commissions that this Court cited approvingly in *Rucho*. *See* 139 S. Ct. at 2507; Colo. Const. art. V, §§ 44.1-44.3; Mich. Const. art. IV, § 6(1)-(2), (8)-(9), (13)-(14).[11]

Moreover, assessments of the Commission's work confirm that it has improved California's maps by

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the remaining applicants, and those eight choose the last six. *See id.* § 8252(f)-(g).

[10] *See*, *e.g.*, 2020 California Citizens Redistricting Comm'n, *Report on Final Maps* (Dec. 26, 2021), https://bit.ly/3z9nYQR.

[11] *Amicus* supported the commissions in Michigan and Colorado. *See* Edward-Isaac Dovere, *Arnold Schwarzenegger's War on Gerrymandering Is Just Beginning*, The Atlantic (Nov. 9, 2018), https://bit.ly/2OPsTfE; Lauren Gibbons, *Let's terminate gerrymandering, Arnold Schwarzenegger says in Michigan*, MLive (Oct. 20, 2018), https://bit.ly/3VW5xJb; Ernest Luning, *Schwarzenegger endorses Colorado ballot measures to 'terminate gerrymandering,'* Colo. Springs Gazette (Sept. 23, 2018), https://bit.ly/3z9t3ZA.

traditional neutral standards. Its maps after the 2010 Census were more competitive than the prior maps. *See* Eric McGhee & Lunna Lopes, *Assessing California's Redistricting Commission: Effects on Partisan Fairness and Competitiveness*, Pub. Pol'y Inst. of California, at 17 (Mar. 2018), https://bit.ly/3Fc30Vo. Those maps significantly reduced split cities and counties compared to maps drawn by special masters and the Legislature after the 1990 and 2000 Censuses, respectively. *See* Miller & Grofman, 3 U.C. Irvine L. Rev. at 658-59. Those maps were "more congruent with geographic communities of interest than the districts they replaced." Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 Stan. L. & Pol'y Rev. 281, 313-14 (2012). And the maps resulted in legislative diversity more closely matching California's population. *See* Sara Sadhwani & Jane Junn, *Structuring Good Representation: Institutional Design and Elections in California*, PS: Pol. Sci. & Pol. 318, 320-21 (Apr. 2018).

In all respects, the Commission meaningfully improved California's maps compared to the traditional legislative process to which California would be returned under the independent state legislature theory. This Court should continue to allow States to "actively address[]" partisan gerrymanders, *Rucho*, 139 S. Ct. at 2507, and should not terminate California's and other States' "innovation and experimentation," *Arizona State Legislature*, 576 U.S. at 817. The consequences of petitioners' aggressive theory would be drastic. State legislatures would be able to draw districts that protect parties and incumbents so that the people have no realistic recourse at the ballot. That legislature would be unchecked by any other branch, contrary to the fundamental separation-of-powers principle on which the country was founded

and which appears in the test that Governor Schwarzenegger took to obtain his citizenship in 1983. As James Madison admonished: "you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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