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 Petition for Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF AMICI CURIAE BIPARTISAN GROUP OF FORMER PUBLIC OFFICIALS, FORMER JUDGES, AND ELECTION EXPERTS FROM PENNSYLVANIA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are ten former public officials, former judges, and election experts from the Commonwealth of Pennsylvania. They include former Republican Governor Tom Corbett, four former federal judges appointed by presidents of both parties, two former United States Attorneys, and others who have been involved in election-related work throughout their careers. Spanning the political spectrum and coming from a swing state, amici seek to ensure that all Pennsylvania voters may exercise their right to vote in free and equal elections for their congressional representatives without excessive partisan gerrymandering. Amici are concerned that a broad reading of the so-called independent state legislature theory, which would eliminate state court review of redistricting maps for compliance with state constitutions, could lead to entrenched party rule that does not represent the will of the voters. They are also concerned that increased threats to election workers and elected officials, fueled by false claims of election fraud in the 2020 presidential election, are driving people from these critical positions. Some of these positions have

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for the Non-State Respondents Neal Kumar Katyal serves as the faculty advisor to the Institute for Constitutional Advocacy and Protection and sits on its Board of Directors, but did not participate in the preparation of this brief. All parties have filed blanket consents to the filing of amicus briefs in these proceedings.

been or after midterm elections may be filled by those who continue to deny or question the results of the 2020 election and refuse to commit to accepting the results of future elections. If those not acting in good faith are in positions with authority over elections and in the state legislatures, the consequences of redistricting unchecked by state courts and state constitutions could gravely undermine representative democracy in Pennsylvania and other states.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than two centuries after the nation's founding, the American democratic experiment is in peril. The legitimacy of its institutions is subject to doubt.[2] The U.S. Capitol was violently overrun in an effort to stop Congress from fulfilling its constitutional duty to count the 2020 electoral ballots for president.[3] Election workers and election administrators charged with ensuring free and fair elections are under unprecedented threat.[4] Voters face intimidation when

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[2] *See* Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. Times, https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html (Aug. 10, 2022).

[3] *See generally The Attack: Red Flags, Bloodshed, Contagion,* Wash. Post (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/.

[4] *See* Jeff Pegues, *Seven States Continue to See Unusual Levels of Threats to Election Workers*, CBS News (Oct. 3, 2022), https://www.cbsnews.com/news/election-worker-threats-7-

(cont'd)

casting their ballots.[5] And those who deny the legitimate results of the 2020 election are on the ballot in nearly every state,[6] positioning themselves to affect election outcomes and thwart the will of the people for decades to come.

Excessive partisan gerrymandering constitutes a serious threat to American democracy. Nearly nine in ten American voters oppose the use of redistricting to help one political party or certain politicians win an

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states/; Michael Wines & Eliza Fawcett, *Violent Threats to Election Workers Are Common. Prosecutions Are Not.,* N.Y. Times, https://www.nytimes.com/2022/06/27/us/election-workers-safety.html (July 21, 2022); Linda So & Jason Szep, *U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount*, Reuters Investigates (Sept. 8, 2021), https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/.

[5] *See* Tiffany Hsu & Stuart A. Thompson, *Hunting for Voter Fraud, Conspiracy Theorists Organize 'Stakeouts,'* N.Y. Times (Aug. 10, 2022), https://www.nytimes.com/2022/08/10/technology/voter-drop-box-conspiracy-theory.html.

[6] *See* FiveThirtyEight Staff, *60 Percent of Americans Will Have an Election Denier on the Ballot this Fall*, FiveThirtyEight, https://projects.fivethirtyeight.com/republicans-trump-election-fraud/ (Oct. 24, 2022); Karen Yourish, Danielle Ivory, Aaron Byrd, Weiyi Cai, Nick Corasaniti, Meg Felling, Rumsey Taylor & Jonathan Weisman, *Over 370 Republican Candidates Have Cast Doubt on the 2020 Election*, N.Y. Times (Oct. 13, 2022), https://www.nytimes.com/interactive/2022/10/13/us/politics/republican-candidates-2020-election-misinformation.html.

election.[7] Excessive partisan gerrymandering has been both practiced and decried on both sides of the political spectrum.[8] It corrupts the democratic process, creates partisan polarization, entrenches special interests, removes incentives for compromise by creating safe seats, and generally reduces the accountability *to* the people of the very offices that are meant to be representative *of* the people.[9] This Court has emphasized that excessive partisan gerrymandering is "incompatible with democratic principles." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (citation omitted).

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[7] John Kruzel, *American Voters Largely United Against Partisan Gerrymandering, Polling Shows*, The Hill (Aug. 4, 2021), https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling/.

[8] *See* Reid Wilson, *Democrats Decry Gerrymandering—Unless They Control the Maps*, The Hill (Dec. 10, 2021), https://thehill.com/homenews/state-watch/585185-democrats-decry-gerrymandering-unless-they-control-the-maps/; Brennan Ctr. for Justice, *Americans Are United Against Partisan Gerrymandering* (Mar. 15, 2019), https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering.

[9] *See* Editorial, *Three Reasons Gerrymandering Is Bad for Democracy (No Matter Who Does It)*, The Christian Century (Apr. 18, 2022), https://www.christiancentury.org/article/editors/three-reasons-gerrymandering-bad-democracy-no-matter-who-does-it; Ryan Snow, Essay, *Legislative Controls Over Redistricting as Conflicts of Interest: Addressing the Problem of Partisan Gerrymandering Using State Conflicts of Interest Laws*, 165 U. Pa. L. Rev. Online 147, 151-54 (2017), https://perma.cc/SYC9-FK3S.

In the midst of these threats to democracy, state courts fulfill two critical democracy-enhancing functions when they review challenges to redistricting plans. First, they act as the final bulwark against partisan gerrymandering, a role that this Court recognized as necessary to prevent "condemn[ing] complaints about districting to echo into a void." *Rucho*, 139 S. Ct. at 2507. Second, state courts vindicate rights that are guaranteed to a state's citizens under their state constitutions, ensuring that the compact between citizens and their representatives is respected and enforced. In fulfilling these functions, state courts operate as the Founders intended, preserving both the benefits of federalism and republicanism, while also fortifying the accountability between government and the people it serves.

Accepting petitioners' broad view of the so-called independent state legislature theory would destroy these important democracy-enhancing roles for state courts. It would remove the last bulwarks against excessive partisan gerrymandering and entrench those who would hold on to political power at the cost of free and fair elections. And it would bestow state legislatures with unaccountable power by rendering them impervious to the constraints imposed by the very constitutions that created them.

This Court should eschew petitioners' bid to place the outcome of elections in the hands of those who would use excessive political gerrymandering to rig outcomes and entrench their power. And it should reject the undemocratic and lawless notion that state legislatures are somehow "independent" and thus no longer beholden to the legal constraints imposed

through state constitutions that bind every other organ of state government. Instead, this Court should affirm that state legislatures, when they exercise power to make laws in their own states, must do so consistent with state constitutions, and that state courts play the critical judicial role of ensuring that legislatures do not stray from the constitutional compact that citizens of a state make between themselves and their government representatives.

ARGUMENT

I. STATE COURTS AND STATE CONSTITUTIONS ARE THE FINAL BULWARK AGAINST THE UNDEMOCRATIC PRACTICE OF EXCESSIVE PARTISAN GERRYMANDERING.

Three years ago, in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), this Court reiterated its conclusion that excessive partisan gerrymandering is "incompatible with democratic principles." *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC)*, 576 U.S. 787, 791 (2015)). Finding no federal jurisdiction to review claims of such gerrymandering because there was no relevant standard to apply, *Rucho* emphasized that it did not thereby "condemn complaints about districting to echo into a void," but instead identified the appropriate remedy for the anti-democratic practice: "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." 139 S. Ct. at 2507.

Rucho echoed similar sentiments in prior cases going back nearly three decades, in which the Court endorsed both the role of courts and the applicability of state constitutions in the review of redistricting plans. In *AIRC,* this Court stated that "[n]othing in th[e Elections] Clause instructs . . . that a state legislature may prescribe regulations, on the time, place, and manner of holding federal elections in defiance of the provisions of the State's constitution." 576 U.S. at 817-18. In *Branch v. Smith*, 538 U.S. 254 (2003), Justice Scalia, writing for a plurality, explained that when a court redistricts "[i]t must follow the policies and preferences of the State, as expressed in statutory and constitutional provisions . . . except, of course, when adherence to state policy . . . detract[s] from the requirements of the Federal Constitution." *Id.* at 274-75 (alterations in original) (internal quotation marks and citation omitted). And in *Growe v. Emison*, 507 U.S. 25 (1993), this Court recognized that "[i]n the reapportionment context, the Court has required federal judges to 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. Indeed, as *Growe* noted, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but . . . has been specifically encouraged." *Id.* (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

State courts have long reviewed congressional redistricting plans under state constitutional provisions. In the state from which amici hail, the Penn-

sylvania Supreme Court concluded that a 2011 congressional redistricting plan violated the Free and Equal Elections clause of the Pennsylvania Constitution, noting that "while federal courts have, to date, been unable to settle on a workable standard by which to assess claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 741 (Pa.), *subsequent determination*, 181 A.3d 1083 (Pa. 2018)*, stay denied sub nom.*, *Turzai v. League of Women Voters of Pa.*, 138 S. Ct. 1323 (2018) (no dissents noted); *see also* Samuel S.-H. Wang, et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. Pa. J. Const. L. 203, 253-56 (2019) (identifying more than two dozen "major cases striking down redistricting plans under state constitutional protections" dating to 1910).

In the absence of federal jurisdiction post-*Rucho*, the final defense against the undemocratic practice of excessive partisan gerrymandering lies with the state courts. To adopt petitioners' view and remove state courts and state constitutions from the framework for review of legislative attempts at redistricting would, as *Rucho* aptly put it, "condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. It would, moreover, do significant damage to "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *AIRC*, 576 U.S. at 2677 (internal quotation marks and citation omitted). Recognizing the danger to democracy posed by excessive partisan gerrymandering, this Court was unwilling to allow such claims to wither on the vine in *Rucho*, explicitly

acknowledging that state courts and state constitutions provide avenues for relief. 139 S. Ct. at 2507. It should affirm that conclusion here.

II. STATE COURTS AND STATE CONSTITUTIONS VINDICATE THE RIGHTS OF THE PEOPLE BY SAFEGUARDING THE ELECTORAL PROCESS.

A. State Courts Play a Critical Role in Ensuring the Protection of Rights Guaranteed to the State's Citizens.

As this Court has long recognized, the states are laboratories of democracy whose citizens may establish rights and protections beyond those guaranteed by the federal constitution. *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *see also AIRC*, 576 U.S. at 817 (outlining the benefits of having states serve as "laboratories for devising solutions to difficult legal problems" (citation omitted)). As Professor Charles Fried noted in an amicus brief filed in the North Carolina Supreme Court at an earlier stage of this case, "[t]his two-tiered system is a defining feature of American governance. State constitutions' independent protection of individual rights reflects the best of our federalist traditions: people of a state can organize and restrain their government beyond what the federal Constitution requires."[10] *See also Gregory v. Ashcroft*, 501

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[10] Amicus Br. of Professor Charles Fried in Supp. of Pls.-Appellants, *Harper v. Hall*, 868 S.E.2d 499 (N.C.) (No. 2022-NCSC-17), 2022 WL 376054, *3-4, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022).

U.S. 452, 458 (1991) (cataloguing the advantages of the "federalist structure of joint sovereigns").

North Carolina has done just that. Its Constitution, in its Declaration of Rights, provides that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The North Carolina Supreme Court has recognized both that "the state judiciary . . . has the responsibility to protect the state constitutional rights of its citizens," and that the North Carolina Constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. Of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992) (citation omitted). Moreover, "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is *never permitted* by anyone who might be invested under the Constitution with the powers of the State." *Id.* (emphasis added) (citations omitted). The legislative power of the State of North Carolina is "vested in the General Assembly," i.e., North Carolina's state legislature. N.C. Const. art. II, § 1.

Under North Carolina law, therefore, violation of the right to free elections is "never permitted" by the General Assembly, either when it enacts state legislative redistricting plans or when it enacts congressional ones. The same is true for North Carolina's rights to assembly and petition, N.C. Const. art. I, § 12, freedom of speech and press, *id.* § 14, and equal protection of the laws, *id.* § 19. *See Harper v. Hall*, 868 S.E.2d 499, 544-45 (N.C.), *cert. granted sub nom., Moore v. Harper*, 142 S. Ct. 2901 (2022) (construing these provisions as providing "greater protection" than their federal counterparts).

Pennsylvania's constitution similarly provides that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. This right has "no federal counterpart," *League of Women Voters*, 178 A.3d at 802, and provides additional protections to the citizens of Pennsylvania beyond those guaranteed by the federal Constitution. As the Pennsylvania Supreme Court has stated, Pennsylvania's "autonomous state Constitution . . . stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth." *Id.* The rights protected by the Pennsylvania Constitution are part of the "social contract between government and the people . . . which is of such general, great, and essential quality as to be ensconced as inviolate." *Id.* at 803 (internal quotation marks and citation omitted). Thus, "the General Assembly's . . . legislative power is subject to the restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth." *Id.* (citing Pa. Const. art. III, §§ 28-32).

Just as in North Carolina, then, under Pennsylvania law, the state legislature is bound by the state constitution, including the Free and Equal Elections clause, whether it is enacting state legislative redistricting plans or whether it is enacting congressional ones. And, just as in North Carolina, the same is true as to other provisions of the Pennsylvania Constitution that might govern the legislature's redistricting activity. *See, e.g.*, Pa. Const. art. I, § 1 (inherent rights of mankind); *id.* § 7 (freedom of press and

speech); *id.* § 20 (right of petition); *id.* § 26 (no discrimination by Commonwealth and its political subdivisions).

There is no appreciable reason—and certainly not one dictated by the federal Constitution—why such state-guaranteed rights and protections should be applied differently (and with disparate results) to the election of state officials than to the election of federal officials. Indeed, *AIRC* questioned whether the Elections Clause would ever require such a result. *See* 576 U.S. at 819 (finding that "[t]he Elections Clause is not sensibly read" to "'deprive . . . States of the convenience of having elections for their own governments and for the national government' held at the same times and places, and *in the same manner*" when holding that Arizona's redistricting commission would lawfully regulate both state and federal elections (emphasis added) (quoting The Federalist No. 61, at 374 (Alexander Hamilton)).

Pursuant to their authority to review acts of state legislatures and vindicate state constitutional rights, state courts have interpreted and applied state constitutional provisions to redistricting activity for both state and federal elections for decades. Legislatures have acted with these judicial interpretations in mind.[11] These interpretations would not simply disappear if state courts are eliminated from the review

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[11] *See* Vikram D. Amar & Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 27 (2022) ("state legislatures have chosen to incorporate into *(cont'd)*

process, as petitioners would have it. If the Court adopts petitioners' view, are state legislatures to ignore judicial interpretation of applicable constitutional provisions when taking on the task of congressional redistricting—and only congressional redistricting—while they remain bound and beholden to such interpretations when engaging in state legislative redistricting? And, as the law evolves, are they to incorporate revisions or clarifications of constitutional requirements only as to state maps and not as to federal maps?

State constitutional requirements cannot be so fickle. Nor would the Founders have envisioned them to be so. By creating a republic, the Founders intended that the branches of government would operate together to protect both the rights of the people, as set out in a founding constitution that could not be set aside by a simple majority, as well as the rights of minorities within the constitutional structure. *See* Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 868 (1994) ("an integral part of solving the dangers of democracy is having a republican form of government where people elect representatives and representatives make laws that must comply with state and federal constitutional provisions" (citing The Federalist No. 10 (James Madison)); Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, 64 Bos. Coll. L. Rev. (forthcoming Mar.

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state statutes state constitutional norms and state judicial involvement, in both federal and state elections, to vindicate those norms").

2023) (draft at 13) ("when American political leaders of the revolutionary era had a choice, they did not choose to empower freestanding legislatures as the basis of their government. Instead, they wrote individual state constitutions in which the legislature's authority was subordinate to, and derived from, the authority of the state constitution, which in turn, received its authority from the people.").[12]

State legislatures remain bound by the provisions of the state constitutions to which they owe their very existence. *AIRC*, 576 U.S. at 817-18 ("Nothing in th[e Elections] Clause instructs . . . that a state legislature may prescribe regulations on the time, place and manner of holding federal elections in defiance of provisions of the State's constitution."). As this Court has held, the power to "prescribe" regulations as to the time, place and manner of elections, U.S. Const. art. I, § 4, cl. 1, falls within the lawmaking power of the state legislatures, "to be performed in accordance with the State's prescriptions for lawmaking." *AIRC*, 576 U.S. at 808; *accord id.* at 841 (Roberts, C.J., dissenting) (when the legislature "prescribes election regulations, [it] may be required to do so within the ordinary lawmaking process").[13] Those prescriptions plainly include the provisions of the state constitution which the legislature is "never permitted" to violate.

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[12] https://perma.cc/BZF6-ZTLZ.

[13] As the *AIRC* court noted, it is distinct in this way from the power of legislatures to ratify amendments to the federal Constitution, which is not "an act of legislation." 576 U.S. at 806 (quoting *Hawke v. Smith*, 253 U.S. 221, 229 (1920)).

Constraints imposed by state court review for compliance with state constitutional provisions further another value embraced by the Founders: accountability.[14] State courts (unlike federal courts) tend to be directly accountable to the people; many state judges are elected or are subject to periodic retention elections or to recall. *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 Mich. St. L. Rev. (forthcoming 2022) (draft at 20).[15] State legislatures, while also directly accountable to the people, are fundamentally self-interested and will act to preserve the rules under which their members get elected. *S*ee *id.* at 21. State constitutions, as enforced by state courts, reflect the people's will to constrain legislatures in substantive ways to alleviate some of this self-interest.

To adopt a view of the so-called independent state legislature theory that requires the application of different rules to state and federal elections would be head-spinningly complicated and chaos-inducing. In such a world, the free elections clause and other state constitutional provisions that might be applied to regulate redistricting would continue to bind legislatures

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[14] It is one of the great ironies of the litigation around excessive partisan gerrymandering that those who argue that legislatures best reflect the will of the people are also those who would entrench a system that has the effect of making legislatures less representative and less responsive to the people who elect them. *See* Jane Mayer, *State Legislatures Are Torching Democracy*, New Yorker (Aug. 15, 2022), https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy.

[15] https://perma.cc/93D5-52E4.

when enacting state legislative districts and state courts would continue to interpret and apply those provisions to state legislative redistricting plans. But if those interpretations did not apply to congressional elections, or if the legislature was free to ignore them, then the reasonable conclusion of citizens, seeing rules applied by courts in one election to guarantee the constitutional right to a free election, but not in another, would be that the elections to which the rules did not apply simply are not free. The legitimacy of the elections process could hardly take a worse blow than to be mired in a system where the people's rights to seek review of what is free or fair—or compliant with any other constitutional provision that governs a state's redistricting activity—is available as to one set of elections in which they vote but unavailable as to another set of elections in the same state.

While petitioners deride provisions such as North Carolina's Free Elections clause as "vaguely worded," Pet'r's. Merits Br. 2, state courts find no difficulty in applying these provisions of law to the cases before them based on the language of the clause, history of the incorporation of the clause into the state constitution, previous cases in which the clause has been applied, and the interpretive principles applicable under the state's jurisprudence. *See League of Women Voters*, 178 A.3d at 802-18 (reviewing text, history, structure, and purpose of state constitutional provisions at issue); *Harper*, 868 S.E.2d at 534-44 (same). Just as this Court has put meat on the bones of the federal Constitution's Equal Protection, Free Exercise, and Free Speech clauses, so too have state courts established precedent and principles to apply when interpreting provisions of their own constitutions. And, as

both the North Carolina Supreme Court and this Court have affirmed, it is that Court, not this one, that is "the ultimate interpreter of [its] State Constitution." *Corum*, 413 S.E.2d at 290 (citation omitted); *accord Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) ("The highest state court is the final authority on state law . . ." (citations omitted)); *see also Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").

Nor should this Court dictate the manner in which state courts should exercise their power when interpreting and applying those constitutional provisions. As the Conference of Chief Justices explained in its amicus brief before this Court, state court judges may apply different rules or interpretive principles when they exercise their judicial power than a federal court might, Br. of Amicus Curiae Conf. of Chief Justices in Supp. of Neither Party 5, but that does not render their exercise of power any less judicial. *See also League of Women Voters*, 178 A.3d at 802-03 (setting out the principles governing constitutional interpretation in Pennsylvania courts).

It is axiomatic that state courts occupy a very different place in state governance than the federal courts do in federal governance; unlike federal courts, *see Flast v. Cohen*, 392 U.S. 83, 94 (1968), state courts are not courts of limited jurisdiction, they are not limited in their adjudication to cases or controversies, and they are not constrained by the principle that "[t]here is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 8 n.2

(1988) ("the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts." (citations omitted)). To complain that state courts exceed their judicial authority when they act to vindicate state constitutional rights against violation by a state legislature is to fundamentally misconceive the role of state courts in our federal system.

It would upend federalism for this Court to deny state courts the opportunity to vindicate rights of its citizens guaranteed by a state constitution. It would similarly turn the notion of federalism on its head for this Court to deprive state courts of the ability to interpret and apply their own laws to state actors who derive their powers from those same laws. *See Harper*, 868 S.E.2d at 551 (argument that state courts lacked authority to enforce state constitutional provisions against state legislatures is "repugnant to the sovereignty of state, the authority of state constitutions, and the independence of state courts"). For the so-called independent state legislature theory to drive such radical adjustments to these fundamental principles would be, in a word, revolutionary—but most assuredly not any revolution the Founders imagined.

B. State Court Review of Congressional Redistricting Plans For Compliance with State Constitutions Does Not Violate the Elections Clause.

The federal Constitution entrusts the states with the primary role in carrying out elections. U.S. Const. art. I, § 4, cl. 1; *see Gregory*, 501 U.S. at 461-62 ("[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970). When it comes to redistricting, states have chosen to deploy this authority in a variety of ways. *See AIRC*, 576 U.S. at 816 ("it is characteristic of our federal system that States retain autonomy to establish their own governmental processes" (citation omitted)). This Court has previously approved every such arrangement that has been brought before it. Thus, with this Court's blessing, a State may choose to: (1) allow a Governor to veto a congressional redistricting plan, *Smiley v. Holm*, 285 U.S. 355 (1932); (2) subject redistricting decisions to ratification by popular referendum, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); or (3) create an independent commission to prepare redistricting plans, *AIRC*, 576 U.S. at 793; *see also Rucho*, 139 S. Ct. at 2507-08 (describing various redistricting commission schemes).

The judiciary's ordinary role in reviewing state legislative enactments for their compliance with constitutional rights guaranteed by the State is no different than these other arrangements. *See Smiley*, 285 U.S. at 367-68 ("We find no suggestion in the [Elections Clause] . . . of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."). None of these choices run afoul of the Elections Clause.

Maintaining a role for state courts is crucial to the efficient conduct of elections. State courts serve as the critically important forum whereby citizens may challenge legislative activity relating to redistricting,[16] and they serve as the mechanism through which appropriate maps can be adopted if the legislature is unable to produce one in the time allotted. The time for map drawing is, by necessity, limited; a useable map must be in place before election day. Indeed, laws enacted by Congress under its Elections Clause power themselves account for the important role state courts play in reviewing congressional redistricting. *See Branch*, 538 U.S. at 277-78 (plurality op.) (under 2 U.S.C. § 2a(c), states must be redistricted "in the manner provided by the law thereof," which encompasses "[a] State's substantive policies and preferences for redistricting, as expressed in a State's statutes [and] constitution," and includes review by state courts as well as federal courts (internal quotation marks and citations omitted)).

A decision by this Court that state courts have no role to play in assessing congressional redistricting plans for compliance with state law would be extraor-

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[16] *See* Chemerinsky, 65 U. Colo. L. Rev. at 865 ("The judiciary is the only institution obligated to hear the complaints of a single person. . . . In contrast, the legislature and executive are under no duty to hear the complaints of a single person. An individual or small group complaining of injustice to a legislator or [executive] could be, and often is, easily ignored. The courts, however, are obligated to rule on each person's properly filed complaint. It does not matter whether the litigant is rich or poor, powerful or powerless, or among few or many." (footnote omitted)).

dinarily disruptive to the efficient conduct of elections. It would, moreover, be incompatible with how this Court has envisioned and characterized the framework that governs redistricting in *Rucho*, *AIRC, Branch*, *Growe, Smiley,* and *Hildebrant*.

To be sure, there are federal interests inherent in how states choose to carry out their obligation to administer federal elections. *See Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring). But the vindication of that federal interest is allocated by the Constitution in two ways. First, as this Court has recognized, while the Elections Clause "invests the States with the responsibility for the mechanics of Congressional elections," it does so "only so far as Congress declines to pre-empt state legislative choices." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (citation omitted). Second, of course, this Court, along with federal courts and state courts, can assess whether state actions comply with the applicable precepts of the federal Constitution. *Baker v. Carr*, 369 U.S. 186, 201-03 (1962).

But the federal interest in federal elections does not compel exclusive review of state congressional redistricting enactments only for compliance with *federal* law. As this Court has repeatedly remarked in the cases cited above, as with any other state legislative enactment, congressional redistricting plans are subject to review for compliance with state law. *See Smiley*, 285 U.S. at 364 ("the exercise of the authority [to regulate the manner of elections] must be in accordance with the method which *the state has prescribed* for legislative enactments" (emphasis added)). And, just as in any other circumstance involving the

application of state law, that review is best carried out by state courts.

State courts' role in ensuring that the rights guaranteed by state constitutions are vindicated when state legislatures exercise their lawmaking power to establish the districts applicable to congressional elections in which their citizens will vote is wholly consistent with the Elections Clause and with the role that the Founders envisioned state courts would play in a democratic republic.

III. VALIDATING THE ROLE OF STATE COURTS AND STATE CONSTITUTIONS IN THE CONGRESSIONAL REDISTRICTING PROCESS ENHANCES THE LEGITIMACY OF THE ELECTORAL PROCESS AND STRENGTHENS OUR DEMOCRACY.

The dangerous consequences of the broad view of the so-called independent state legislature theory advocated by petitioners are antithetical to the Framers' intent to establish a representative government reflective of the will of the people. The electoral process is the essence of American democracy, but it is under attack.[17] The same baseless allegations of voter fraud in the 2020 presidential election that fueled the violent attack on the U.S. Capitol on January 6, 2021,

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[17] *See generally* Sabine Lawrence, Lucy Cooper, Isabel Jones, Ciaran O'Connor & Jared Holt, *Eight Trends From Election Denialists to Watch in the US Midterm Elections*, Inst. for Strategic Dialogue (Oct. 4, 2022), https://www.isdglobal.org/digital_dispatches/eight-trends-from-election-denialists-to-watch-in-the-us-midterm-elections/.

continue to fuel threats of violence against election workers and elected officials and their families at the local, state, and federal levels. Those driven from office by fear are being replaced—or may be replaced after midterm elections—by those who deny the results of the 2020 election and refuse to commit to accepting the results of future elections. Some of these people are running for offices that will put them in positions to control the outcome of future elections, while others are running for positions in state legislatures. A broad view of the independent state legislature theory would essentially hand the future of democratic representation in the states to those motivated to entrench political power in a single party through the unchecked authority over redistricting. This is not the representative government the Framers intended. Validating the role of state courts and state constitutions in the congressional redistricting process enhances the legitimacy of the electoral process and strengthens our democracy.

The atmosphere of threats, fear, and intimidation has affected the ability to recruit and retain election workers, who are essential to the proper functioning of our elections.[18] Nearly one in six election workers

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[18] *CISA Election Security Warns of the Impact of Threats to Poll Workers,* CBS News (Sept. 12, 2022), https://www.cbsnews.com/video/cisa-election-chief-warns-of-workforce-problem-due-to-threats-to-poll-workers/#x.

has reported experiencing threats.[19] The Senior Election Security Lead for the U.S. Cybersecurity and Infrastructure Security Agency recently said that as many as one in three election workers have left their positions ahead of the midterm elections because of fears for their safety.[20] As of August 1, 2022, the Elections Threats Task Force launched by the U.S. Department of Justice in June 2021 had reviewed over 1,000 reports of hostile or harassing conduct directed at election officials and had opened criminal investigations into 11 percent of those.[21] The Task Force reported that 58 percent of the total potentially criminal threats were in states with close elections and post-election contests, such as Pennsylvania.[22]

Amici from Pennsylvania are all too familiar with these threats. Republican city commissioner of Philadelphia, Al Schmidt, was one of those threatened. After he defended the integrity of the 2020 election,

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[19] Brennan Ctr. for Justice, *Local Election Officials Survey (March 2022)* 3 (Mar. 10, 2022), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022.

[20] CBS News, *supra* note 18; *see also* Linda So, Joseph Tanfani, & Jason Szep, *Pro-Trump Conspiracy Theorists Hound Election Officials Out of Office*, Reuters Investigates (Oct. 19, 2022), https://www.reuters.com/investigates/special-report/usa-election-nevada-washoe/.

[21] Press Release, U.S. Dep't of Just., Readout of Election Threats Task Force Briefing with Election Officials and Workers (Aug. 1, 2022), https://www.justice.gov/opa/pr/readout-election-threats-task-force-briefing-election-officials-and-workers.

[22] *Id.*

he and his family received death threats so serious that his wife and children had to relocate and a 24-hour security detail remained at Schmidt's and his parents' houses well into 2021.[23] Rural Tioga County's three commissioners received death threats after they declined to turn over voting machines for a "forensic investigation" after the 2020 election.[24] Washington County officials received similar threats after seeking more information before opening an investigation into accusations of irregularities in the county's handling of the 2020 election.[25] An investigative report by Reuters recently identified that more than 50 county election directors or assistant directors had left Pennsylvania's 67 counties since the 2020 election.[26]

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[23] James Verini, *He Wanted to Count Every Vote in Philadelphia. His Party Had Other Ideas.*, N.Y. Times Magazine (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/magazine/trump-election-philadelphia-republican.html; Brennan Ctr. for Justice, *Election Officials Under Attack* (June 16, 2021), https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack.

[24] Nathan Layne, *Threats Rattle Pennsylvania County Targeted in Election Audit*, Reuters (July 22, 2021), https://www.reuters.com/world/us/threats-rattle-pennsylvania-county-targeted-election-audit-2021-07-22/.

[25] Mike Jones, *County Officials Receive Threats After Feb. 17 Elections Meeting*, Observer-Reporter (Apr. 3, 2022), https://observer-reporter.com/news/localnews/county-officials-receiving-threats-after-feb-17-elections-meeting/article_8837ee58-95a2-11ec-bb42-c340a3067b9c.html.

[26] So, Tanfani & Szep, *supra* note 20.

Today, election officials across the country are on the lookout for "disruptive poll watchers . . ., aggressive litigation strategies, voter and ballot challenges, and vigilante searches for fraud," all being deployed to monitor voting in a systematic effort to confirm outlandish conspiracy theories and baseless claims of election manipulation.[27] Disinformation and misinformation, including persistent rumors about widespread voter fraud, irregularities in mail-in voting, and errors in vote tabulation or counting—even when repeatedly and convincingly debunked[28]—undermine voters' confidence in American democracy and discourage voting because of the mistaken assumption

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[27] Alexandra Berzon & Nick Corasaniti, *Right-Wing Leaders Mobilize Corps of Election Activists*, N.Y. Times (Oct. 17, 2022), https://www.nytimes.com/2022/10/17/us/politics/midterm-elections-challenges.html. In Arizona, local officials referred for investigation by the U.S. Department of Justice incidents where voters were approached and followed by groups of people when they tried to use ballot drop boxes. Maggie Astor, *Arizona Sends Report of Voter Intimidation to Justice Dept. for Investigation*, N.Y. Times (Oct. 20, 2022), https://www.nytimes.com/2022/10/20/us/politics/arizona-voter-intimidation-report.html. In Washington, local officials in Seattle were forced to remove intimidating signs falsely warning that ballot drop boxes were under surveillance. Steve Hunter, *King County Elections Calls For Removal of Unauthorized Signs Near Ballot Drop Boxes*, Seattle Weekly (July 19, 2022), https://www.seattleweekly.com/news/king-county-elections-calls-for-removal-of-signs-near-ballot-drop-boxes/.

[28] *See* David F. Levi, Amelia Ashton Thorn & John Macy, *2020 Election Litigation: The Courts Held*, Judicature (Spring 2021), at 8, https://judicature.duke.edu/articles/2020-election-litigation-the-courts-held/.

that votes do not matter.[29] A February 2022 poll found that a majority of respondents (56 percent) said they have little or no confidence that American elections reflect the will of the American people.[30] Among young Americans surveyed in one poll, 42 percent believed that their vote did not make a difference.[31]

In her remarks at the October 13, 2022, hearing of the Select Committee to Investigate the Attack on the United States Capitol, Congresswoman Liz Cheney (R.-Wyo.) said that "our institutions" held because "men and women of good faith [made] them hold," but warned that there was no guarantee that such men and women would be in place the next time.[32] Across the nation, people who refuse to accept or continue to

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[29] *See* Gabriel R. Sanchez, Keesha Middlemass, & Aila Rodriguez, *Misinformation Is Eroding the Public's Confidence in Democracy*, Brookings (July 26, 2022), https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/.

[30] Jennifer Agiesta, *CNN Poll: A Growing Number of People Lack Confidence in American Elections*, CNN (Feb. 11, 2022), https://www.cnn.com/2022/02/10/politics/cnn-poll-democracy/index.html.

[31] Sanchez, Middlemass & Rodriguez, *supra* note 29.

[32] Chris Cillizza, *Liz Cheney's Dire Warning About Future Elections*, CNN (Oct. 13, 2022), https://www.cnn.com/2022/10/13/politics/liz-cheney-warning-future-elections.

question the legitimacy of the result of the 2020 election are running for office.[33] These "[e]lection deniers will be on the ballot in 48 of 50 states and make up more than half of all Republicans running for congressional and state offices in the midterm elections."[34] Sixty percent of Americans will vote in elections in November where election deniers are on the ballot.[35] Some of these candidates are running for offices that will put them in positions to control the outcome of future elections, such as governors or secretaries of state,[36] while others are running for positions in state legislatures.[37]

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[33] Sue Halpern, *Behind the Campaign to Put Election Deniers in Charge of Elections*, New Yorker (Sept. 20, 2022), https://www.newyorker.com/news/daily-comment/behind-the-campaign-to-put-election-deniers-in-charge-of-elections.

[34] Adrian Blanco & Amy Gardner, *Where Republican election deniers are on the ballot near you*, Wash. Post (Oct. 12, 2022), https://www.washingtonpost.com/elections/interactive/2022/election-deniers-running-for-office-elections-2022/; *see also* Yourish, Ivory, Byrd, Cai, Corasaniti, Felling, Taylor & Weisman, *supra* note 6.

[35] FiveThirtyEight staff, *supra* note 6.

[36] *Id.*; Blanco & Gardner, *supra* note 34; Yourish, Ivory, Byrd, Cai, Corasaniti, Felling, Taylor & Weisman, *supra* note 6.

[37] Elaine Kamarck & Norm Eisen, *Democracy on the Ballot—How Many Election Deniers Are on the Ballot in November and What is Their Likelihood of Success?*, Brookings (Oct. 7, 2022), https://www.brookings.edu/blog/fixgov/2022/10/07/democracy-on-the-ballot-how-many-election-deniers-are-on-the-ballot-in-november-and-what-is-their-likelihood-of-success/ (including

(cont'd)

In Pennsylvania, the Republican gubernatorial candidate denies the results of the 2020 election and has repeatedly spread baseless claims of election fraud.[38] If elected, he will have the power under Pennsylvania law to directly appoint the Secretary of the Commonwealth who serves as the chief election officer and must certify election results, including for state legislative offices.[39] In states where secretaries of state are elected rather than appointed, nearly half of the races have an election denier on the ballot.[40] The prospect of election deniers controlling the results of both federal and state elections elevates the importance of the question raised by Congresswoman

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state legislators running for office in November 2020 who wrote to Vice President Mike Pence urging him to postpone the counting of electoral ballots on January 6 based on purported violations of election laws in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin); *see also* Letter from state legislators to Vice President Michael R. Pence (Jan. 5, 2022), https://wisconsinexaminer.com/wp-content/uploads/2021/01/Letter-to-Pence-1.pdf.

[38] Rosalind S. Helderman, Isaac Arnsdorf & Josh Dawsey, *Doug Mastriano's Pa. Victory Could Give 2020 Denier Oversight of 2024*, Wash. Post. (May 18, 2022) https://www.washingtonpost.com/politics/2022/05/18/doug-mastrianos-pa-victory-could-give-2020-denier-oversight-2024/; *see also Election Deniers in Governor Races*, States United Democracy Ctr. (Oct. 15, 2022), https://statesuniteddemocracy.org/resources/governors/.

[39] *See* 71 Pa. Stat. and Cons. Stat. § 67.1 (West 2022) (gubernatorial appointments); 25 Pa. Stat. and Cons. Stat. § 2621 (West 2022) (duties of Secretary of the Commonwealth).

[40] *Replacing the Refs*, States United Democracy Ctr. (Oct. 15, 2022), https://statesuniteddemocracy.org/resources/replacingtherefs/.

Cheney—"[w]hy would we assume that [our] institutions will not falter next time?"[41]

It is not hyperbolic to warn that those who wish to act in bad faith to favor their party may soon be in a position to do just that. A broad view of the so-called independent state legislature theory, depriving state court enforcement of state constitutional provisions from serving as a check on legislative redistricting, would essentially hand the future of democratic representation in the states to those motivated to entrench political power in a single party. The federal Constitution provides no check on excessive partisan gerrymandering, *see Rucho*, 139 S. Ct. at 2507, and Congress has thus far failed to use its Elections Clause power to intervene. What those of one party might do, so could those of the opposing party.

Adopting petitioners' view of the Elections Clause would upend the nation's election system, which is already reeling from the impacts of disinformation and misinformation about election fraud, threats against election workers and elected officials, efforts at voter intimidation, and election denialism. There is considerable reliance throughout the United States on what should be the noncontroversial principle that, where the Constitution gives states substantial authority to regulate elections, *see Gregory*, 501 U.S. at 461-62, they should be free to do so through a framework that

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[41] *Here's Every Word from the 9th Jan. 6 Committee Hearing on its Investigation*, NPR (Oct. 13, 2022), https://www.npr.org/2022/10/13/1125331584/jan-6-committee-hearing-transcript.

is consistent with their own laws, the provisions of their own constitutions, and the will of their own people. If this Court acts to remove state courts and state constitutions from that framework, elections would be thrown into disarray, undermining further the faith of the American public in the strength of our democratic system.[42] Nothing in the Elections Clause, the Constitution more generally, or this Court's jurisprudence requires such a radical and destabilizing result.

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[42] *See* Mark S. Krass*, Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1103-04 (2022) ("adopting a literalist reading of the Elections Clause would invalidate seven independent redistricting commissions, at least six voter-passed elections statutes modifying the rules of federal elections, and tens of state constitutional provisions") (citing Nathaniel Persily, et al., *When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 715-18 (2016)).

CONCLUSION

For the foregoing reasons, this Court should affirm the North Carolina Supreme Court.

Respectfully submitted,

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APPENDIX: LIST OF AMICI CURIAE

Robert J. Cindrich, Former United States District Judge, United States District Court for the Western District of Pennsylvania.

Tom Corbett, Former Governor of Pennsylvania, former U.S. Attorney for the Western District of Pennsylvania.

Kenneth E. Davis, Former Chairman, Montgomery County Republican Party.

David J. Hickton, Former United States Attorney for the Western District of Pennsylvania.

John E. Jones, III, President, Dickinson College; Former United States District Chief Judge, United States District Court for the Middle District of Pennsylvania.

Timothy K. Lewis, Former United States Circuit Judge, United States Court of Appeals for the Third Circuit; Former United States District Judge, United States District Court for the Western District of Pennsylvania.

Joseph Sabino Mistick, Associate Professor, Duquesne University, Thomas R. Kline School of Law; Former Elected Member of East McKeesport Borough Council, former Chairman of the Pittsburgh Zoning Board, former Chief of Staff to the Mayor of Pittsburgh.

Frederick Thieman, Former United States Attorney, Western District of Pennsylvania.

David Thornburgh, Former Chair, Pennsylvania Redistricting Reform Commission; Former President and Chief Executive Officer, Committee of Seventy; Former Chair, Draw the Lines PA; Professor of Practice, Temple University Masters of Public Policy Program;

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