NO. 21-1271

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR LAWYERS DEMOCRACY FUND AND STATE LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Lawyers Democracy Fund (LDF) is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. LDF seeks to ensure that all citizens can vote and that reasonable processes and protections prevent vote dilution and disenfranchisement and instill public confidence in election procedures and outcomes. To accomplish this, LDF conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. LDF also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files *amicus* briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration. LDF is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. The individuals listed in Appendix A are the Legislative *Amici*.

The decision below has the potential to revolutionize election law by affording state courts unprecedented and unchecked power over federal elections. Election-reform ideologues have recently come to view state courts as valuable allies in achieving wholesale repudiation of state election policies and ejection of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the Respondents providing consent to the filing of *amicus* briefs are on file with the Clerk of Court. Petitioners have consented in writing to the filing of this *amicus* brief.

state legislatures from their traditional and constitutionally established role in setting election policy. This would, if affirmed, undermine LDF's many election-integrity initiatives. And it would undermine the role the Legislative *Amici* have in deliberating over and voting on federal-election legislation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented comes before the Court in light of unprecedented state-court intervention in election policy, a domain that has long been understood to belong to state lawmakers. Since the constitutional framers delegated the federal power to "prescribe[]" the "Times, Places, and Manner of holding Elections for Senators and Representatives" "in each State" to "the Legislature thereof," U.S. Const. Art. I, § 4, cl. 1, all stakeholders—from state legislatures to Congress, from state courts to this Court—have recognized this power to "involve[] lawmaking in its essential features and most important aspect." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). But the decision below embodies a new and errant trend that views election regulation as the province of state courts. This is not a scenario where state courts have historically acted as the court below did and the constitutional infringement at issue was noticed only now. Rather, the decision below and the trend it represents are new, as is the need to restore the proper constitutional order.

Decisions like the North Carolina Supreme Court's are unheard of in American history. Between the ratification of the Constitution and 2018, there appears to be only *one* state-court decision, issued in 1932, that invalidated a congressional redistricting plan under an open-ended state constitutional provision, and even that decision cited a sufficient and independent federal ground to reach the same outcome. Likewise, only a small handful of state-court decisions

from the ratification until the early 2000s invalidated *any* law governing federal elections on *any* state constitutional grounds. And the most prominent examples are of dubious precedential value, because they denied Civil War servicemembers the right to vote, and of contested historical value, because other state courts and Congress rejected that outcome. Meanwhile, most of the state-court cases identified by Respondents and by the articles they cite do not support the decision below: some applied federal law, some adjudicated procedural challenges, and some did not involve federal elections.

The historical record shows that Congress and the federal courts alone guaranteed the right to vote, albeit imperfectly and belatedly. State courts had little if any meaningful role in that campaign. Still, this Court and Congress have acknowledged the primacy of state legislatures in setting election policy, avoiding interfering with discretionary choices that do not impose an unjustifiable voting burden and do not discriminate on invidious bases. But that approach dissatisfied a few well-funded ideological groups who view most any inconvenient regulation of elections as ripe for judicial revision. It is their comparatively recent effort to compel states into aggressive new ways of running elections, without the popular support needed to convince the people's elected representatives, that gives rise to this case and so many like it.

Indeed, the decision below and its 2018 Pennsylvania counterpart have the fundamental characteristics of legislation. Both decisions exercised considerable policymaking discretion without any support in

the respective state's judicial precedent. Redistricting is particularly political because of what it is, not because of who does it. The framers intentionally vested this power with state legislatures, not because they are superior institutions, but rather because they are proper forums for politics and the exercise of broad discretion it entails. Unless this Court enforces that longstanding constitutional framework, there is little chance to restrain state courts from usurping the legislative role and becoming hyper-politicized institutions.

ARGUMENT

I. The Decision Below Did Not Follow Settled Historical Practice

Respondents assert that "[s]tate courts have adjudicated claims similar to the issue decided" below "for over a century." Common Cause Respondents' Opposition to Certiorari 9; *see also* Harper Respondents' Opposition to Certiorari 28. They and the academic articles they cite, *see, e.g.*, Michael Weingartner, Liquidating the Independent State Legislature Theory, Harv. J.L. & Pub. Pol'y at 42–45 (Apr. 18, 2022) (forthcoming) (Weingartner),[2] assemble state-court decisions dating back to the 1860s, which they claim enabled the decision below. From this, they argue that Petitioners' reading of the Elections Clause is "an obscure and potentially revolutionary constitutional theory" that "conflicts with over two hundred years of historical practice." Weingartner at 1, 3.

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[2] Draft available at https://bit.ly/3LyWSqq (cited at Common Cause Respondents' Opposition to Certiorari 11–12 n.4).

That argument does not withstand scrutiny. Despite considerable effort, Respondents and the academics they cite locate no case prior to 2018 that did what the North Carolina Supreme Court did below: invalidate a congressional redistricting plan solely on state constitutional grounds under an open-ended theory of what a free or equal election might be. From an even broader perspective, the decision below is still an outlier: few state courts have ever applied state constitutions to invalidate laws governing federal elections, the circumstances in which they did so actually caution *against* that approach rather than for it, and just as many state courts have declined to follow course, citing the Elections Clause. The decision finds no support in "[l]ong settled and established practice." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020).

A. The Decision Below Is Like No State-Court Decision Before 2018

The decision below resembles no state-court decision before 2018. The North Carolina constitution does not speak with any clarity to congressional redistricting (as, for example, the Michigan, Florida, and Arizona constitutions do, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019)). The legislation the North Carolina General Assembly adopted *does* speak with clarity to congressional redistricting, and yet the courts below invalidated that legislation (and replaced it), citing an indeterminate theory of what free elections, equal protection, and free speech mean under the North Carolina constitution. *Harper v. Hall*, 868 S.E.2d 499, 540–51 (N.C. 2022). The only

precedent the North Carolina Supreme Court cited to justify this action was the Pennsylvania Supreme Court's similar decision in 2018. *See id.* at 540 (discussing *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737 (Pa. 2018)). The court below cited no other analogous state-court decision. *Id.* at 551–52. If "over two hundred years of historical practice" supported its approach, Weingartner at 3, one would have expected the four capable jurists in the majority to have found some of it.

In fact, there appears to be little precedent available. A leading law-review article on gerrymandering in state courts, which is favorable to state-court gerrymandering claims, catalogues "major cases" of this genre but identifies no state-court ruling striking down a congressional redistricting plan based on open-ended state constitutional provisions until the 2018 Pennsylvania case. *See* Samuel S. Wang et al., Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering, 22 U. Pa. J. Const. L. 203, 253–56 (2019) (Wang). The article does, however, provide a sizable collection of state-court decisions invalidating *state* and *local* redistricting laws on state constitutional grounds. *Id.* While the article has erroneously been cited as "listing cases striking down *congressional* maps under state constitutions," Weingartner at 41 n.328 (emphasis added), it does no such thing, and it, therefore, supports Petitioners. After all, congressional districts are at least as politically important as state legislative and local districts, and state constitutional guarantees of equal protection, free speech, and free elections are plentiful, *see* Wang at 258–89. Like the proverbial "dog that did not

bark," *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), the absence of state-court challenges to congressional redistricting laws speaks volumes.

Ultimately, it appears that only one state-court decision can arguably be analogized to the decision below before 2018: a 1932 decision inferring an equal-population rule from the Illinois free and equal elections clause. *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932). But that decision cited independent federal-law grounds to reach its result, so the outcome would have been the same regardless of that state constitutional theory. *See id.*; *see infra* § I.B.2 (explaining the difference between federal and state rules of decision in these cases). In any event, one decision issued some 143 years after the Elections Clause was ratified does not "liquidate & settle the meaning of" the Clause. *Chiafalo*, 140 S. Ct. at 2326 (quoting Letter to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)); *see also* Weingartner at 16 (acknowledging that a "course of practice" must be "settled" to demonstrate it is "the result of deliberation and acceptance").

B. Few State Court Decisions Have Invalidated Laws Governing Federal Elections Under Any State Constitutional Theory

A somewhat broader set of parameters—counting all cases applying any substantive state constitutional provision to legislation governing federal elections—yields nothing by way of settled historical practice supporting the decision below. State-court decisions invalidating state laws governing federal elections were not common until recently, and the few

cases taking that approach present a dubious and contested precedent, at best.

1. In the realm of redistricting, only three decisions beyond those discussed above invalidated a congressional plan on substantive state constitutional grounds. Two were Virginia cases that enforced a specific textual requirement that districts be of equal population and cited independent federal grounds to reach their result. *Brown v. Saunders*, 166 S.E. 105, 106 (Va. 1932); *Wilkins v. Davis*, 139 S.E.2d 849, 854 (Va. 1965). Even setting aside these cases' federal-law rationales, the presence of "clear guardrails" in these cases distinguishes them from the decision below and implicates a question Petitioners have acknowledged "[t]he Court can leave for another day." Petitioners' Reply in Support of Emergency Stay Mot. 2; *see also* Brief for Petitioners 46. The same can be said of the remaining decision, Florida's 2015 application of the fair districts amendment of the Florida Constitution, *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015), which, unlike the North Carolina constitution, expressly prohibits a congressional plan from being "drawn" with the "intent to favor or disfavor a political party or an incumbent." Fla. Const. Art. III, § 20(a). That decision was widely recognized as "one of the first decisions" of its kind, Joshua A. Douglas, State Judges and the Right to Vote, 77 Ohio St. L.J. 1, 48 n.44 (2016) (Douglas), confirming the novelty of this judicial outcome.

Even decisions *applying* and *upholding* state constitutions to congressional redistricting are hard to come by, illustrating how little impact state

constitutions have historically had in this arena. A good example is *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), where the Pennsylvania Supreme Court adjudicated a gerrymandering claim against Pennsylvania's congressional districts under the state constitution. But it applied the standard this Court had recently adopted in *Davis v. Bandemer*, 478 U.S. 109 (1986), rejected the claim as failing that standard, and recognized that it found the claim justiciable only because this Court found such claims to be justiciable in *Bandemer*. *Erfer*, 794 A.2d at 334. Both the rules of decision and the result mirrored what they would have been under federal law and in federal court. Unsurprisingly, when the Pennsylvania Supreme Court invalidated a congressional plan in 2018, it had little choice but to "expressly disavow" *Erfer*. *League of Women Voters*, 178 A.3d at 813.

2. Outside the context of redistricting, the smattering of cases prior to the early 2000s that invalidated laws governing federal elections on state constitutional grounds do more to undercut the decision below than support it.

Most of these decisions applied textually specific constitutional provisions, and most achieved the *disenfranchisement* of federal soldiers on active duty in the Civil War. Their basic fact pattern involved a conflict between a state constitutional provision expressly mandating that voters appear in person at a polling place to vote and legislation permitting soldiers fighting in the Civil War to vote by mail. Some decisions, it is true, forbade the soldiers' votes from counting, relying on the kind of clear constitutional

text the North Carolina Supreme Court could not cite. *See In re Opinion of Justs.*, 30 Conn. 591, 591–92 (1862); *Chase v. Miller*, 41 Pa. 403, 428–29 (1862); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 142–43 (1865); *In re Opinion of Justs.*, 44 N.H. 633, 636 (1863); *see also* John C. Fortier and Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 Univ. Mich. J. L. Ref. 483, 495–97 (2003). But it is hard to see how that result *helps* Respondents' case. In arguing that Petitioners' reading of the Elections Clause "would produce absurd and dangerous consequences," *Harper*, 868 S.E.2d at 551, the North Carolina Supreme Court got things exactly backward, at least as a matter of actual historical experience.

Indeed, other state courts rejected that outcome to hold that state legislatures' extension of the franchise fits cleanly within its grant of federal power that cannot be overridden by state constitutions. *In re Opinion of Justs.*, 45 N.H. 595, 605 (1864); *Opinion of the Judges*, 37 Vt. 665 (1864); *see also State v. Williams*, 49 Miss. 640 (1873) (state legislatures may schedule congressional elections notwithstanding contrary state constitutional provisions). Congress reached the same conclusion in a contested-election case from Michigan. *See Baldwin v. Trowbridge*, H.R. REP. NO. 39–13 (1866), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866) (seating representative elected in part on the strength of absentee votes cast by servicemembers in accord with state legislation but against constitutional bar on absentee voting).

In contrast to the assertions of Respondents, this view of legislative primacy would prevail for many years with regard to federal elections. *See In re Plurality Elections*, 8 A. 881 (R.I. 1887); *Beeson v. Marsh*, 34 N.W.2d 279, 285–87 (Neb. 1948); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936). That includes when the question of absentee service-member voting arose again during World War II, *Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. 1944) (state constitution could not restrict state legislature's power to permit absentee voting). It would also prevail again in Congress. *See* Michael T. Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, 55 Ga. L. Rev. 1, 55–60 (2020) (collecting contested election decisions applying state legislation, rather than conflicting constitutional provisions). Leading treatises likewise endorsed this position. *See, e.g.*, Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 599 & n.3 (2d ed. 1871).

3. Aside from the dubious line of cases described above, Respondents and the academics they cite rely predominantly on authority with no meaningful connection to the question presented. For starters, this work often comes littered with citations to cases that did not involve federal elections and, therefore, did not implicate the Elections Clause. *See, e.g.*, *Bourland v. Hildreth*, 26 Cal. 161, 162 (1864) (county election); *City of Owensboro v. Hickman*, 14 S.W. 688, 688 (Ky. Ct. App. 1890) (municipal elections); *Jones v. Smith*, 264 S.W. 950, 950 (Ark. 1924) (county circuit clerk election); *Straughan v. Meyers*, 187 S.W. 1159 (Mo.

1916) (county judicial election). These and similar cases do not show a settled practice of applying state constitutional provisions, specific or otherwise, to federal election laws. *But see* Weingartner at 41 nn. 320, 323, and 324 (citing these cases and similar cases as supporting that showing).

Next, Respondents' briefs and academic work in this area cite state-court cases applying *federal* law. But Petitioners have not challenged state courts' application of federal law, given the backdrop principle that state courts have authority to apply federal law, subject to this Court's review, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), so that question is not before this Court, Brief for Petitioners 23–24, 48. Thus, for example, this case is unlike the typical legislative impasse case, where state courts have adopted redistricting plans when legislatures have deadlocked so as to remedy a *federal* equal-protection violation. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 30 (1993) (discussing impasse litigation); *Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992) (example of an impasse case). These cases do not show a settled practice of state-court application of state constitutional provisions to federal election laws. *But see* Common Cause Respondents Opposition to Certiorari 22–23, 30; Harper Respondents Opposition to Certiorari 24, 31–32.

Further, many cases cited in the briefs and academic articles involve disputes of state lawmaking procedure and fail to show that the North Carolina Supreme Court's application of open-ended, substantive constitutional provisions followed settled practice. As this Court held in *Smiley v. Holm*, 285 U.S.

355 (1932), legislation enacted under the Elections Clause delegation is not legislation at all if it is not promulgated through "the legislative process," and it is within "the authority of the state to determine what should constitute its legislative process." *Id.* at 371–72; *see also State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568–69 (1916); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) ("[T]he Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes."). Petitioners do not challenge those decisions but instead contend that where an institution (e.g., a court) is concededly *not* part of the lawmaking process, it has no authority to override the federal delegation of power to the organs of the state that *are* part of the lawmaking process. Brief for Petitioners 24. For that reason, authority adjudicating whether state lawmaking processes were followed does not establish settled practice that can be used to endorse the decision below. *See, e.g.*, *Spier v. Baker*, 52 P. 659, 661 (Cal. 1898) (single-topic limit); *State v. Polley*, 127 N.W. 848, 850–51 (S.D. 1910) (referendum); *State ex rel. Carroll v. Becker*, 45 S.W.2d 533, 533–34 (Mo.), *aff'd sub nom. Carroll v. Becker*, 285 U.S. 380 (1932) (gubernatorial veto); *Assembly of State of Cal. v. Deukmejian*, 639 P.2d 939, 948 (Cal. 1982) (referendum); *In re Opinion of the Justs.*, 107 A. 705, 707 (Me. 1919) (referendum); *see also Brady v. N.J. Redistricting Comm'n*, 622 A.2d 843, 848–49 (N.J. 1992) (venue provision for judicial review).[3]

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[3] Another arguable example is *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), found that a bar on mid-decade

The remaining authority that can be sifted out of the amalgamation of decisions identified by Respondents or the articles they cite is anomalous at best. One Illinois case struck down candidate-qualification fees under the Illinois Constitution's free and equal elections clause, *People ex rel. Breckton v. Bd. of Election Comm'rs of Chicago*, 77 N.E. 321, 324–25 (Ill. 1906), but the decision "employed the *Lochner*-esque logic of the day" and has not won the test of time: "fees remain a staple throughout the United States." Mark R. Brown, Ballot Fees As Impermissible Qualifications for Federal Office, 54 Am. U.L. Rev. 1283, 1303, 1307 (2005). Other cases found no liability and did not distinguish state and federal elections (which was unnecessary, given the ultimate outcome). *See, e.g.*, *De Walt v. Bartley*, 24 A. 185 (Pa. 1892); *Morrison v. Lamarre*, 65 A.2d 217, 225 (R.I. 1949). Indeed, these decisions illustrate why the Elections Clause problem is only now surfacing as a national issue: they affirmed "[t]he presumption is that the people trust the legislature equally with the courts, and all the more so because the legislature is more directly amenable to the people.'" *Morrison*, 65 A.2d at 222–23. It is only because the North Carolina Supreme Court does not

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redistricting forbade the state legislature from adopting a mid-decade congressional plan after a court had adopted a plan to remedy a federal one-person, one-vote violation due to prior legislative impasse. The decision may arguably withstand an Elections Clause challenge as a procedural ruling. Regardless, three Justices of this Court would have granted certiorari to review this "debatable" ruling. *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari).

hold this view that this case now comes before this Court.

II. The Decision Below Belongs to a Recent Trend of Enlisting State Courts To Achieve Aggressive Partisan Ends

Far from adhering to settled constitutional practice, the decision below follows a new and troubling trend of state-court usurpation of legislative prerogatives. For generations, Congress and the federal courts have taken the lead in guaranteeing the right to vote and remedying violations of that right when necessary. At the same time, both Congress and this Court have acknowledged the primacy of state legislatures in establishing election policy and deferred to the reasonable political choices of state legislatures, so long as they are not tainted by invidious discriminatory intent, do not unreasonably burden the right to vote, and otherwise comport with the discrete congressional interventions in the election-law domain. But, more recently, an ideological campaign has come to view that deference with skepticism, if not disdain. Having failed to convince this Court, Congress, and state legislatures to adopt their aggressive policy preferences, these ideologues have turned to the state courts. This is a new development that raises a new Elections Clause problem.

A. Congress and This Court Have Preserved the Right To Vote Without Rejecting State Legislatures' Role in Setting Election Policy

State courts have not historically served as the principal bulwark of the right to vote. That Respondents' best (and only meaningful) historical precedent involves state courts *forbidding* on-duty servicemembers from voting is just one piece of evidence bearing this point out. Another is that the North Carolina free elections clause relied on below "was included in the 1776 Declaration of Rights" and was "modeled on a nearly identical clause in Virginia's declaration of rights," many generations before Congress received authority to guarantee civil rights under the Reconstruction Amendments. *Harper*, 868 S.E.2d at 540. Yet the North Carolina and Virginia courts did little if anything to seize on these guarantees in service of the principal gains in voting equality that were achieved since the late 1950s, which were instead achieved through federal law.

The U.S. Constitution's framers did not look to state courts or constitutions as proper bodies to regulate federal elections but instead "checked" the primary grant of power to state legislatures with a secondary grant of power to "the Federal Congress." *Rucho*, 139 S. Ct. at 2496. The framers of the Reconstruction Amendments likewise did not rest their hopes for racial equality in voting (or otherwise) with state courts or state constitutions. They instead worked to amend the federal charter to guarantee these things directly, as enforceable in federal

litigation, and to make Congress "chiefly responsible for implementing the rights created" in the Fourteenth and Fifteenth Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); U.S. Const. Amend. XV, § 2. Applying these Amendments, this Court invalidated numerous forms of racial discrimination, including in state constitutions. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347, 360–65 (1915) (grandfather clause in Oklahoma constitution); *Myers v. Anderson*, 238 U.S. 368, 378–79 (1915) (similar clause in Maryland constitution); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330–31 (2021) (collecting cases). And, pursuant to its authority, Congress enacted numerous election laws, most notably the Voting Rights Act of 1965, which "employed extraordinary measures to address an extraordinary problem." *Shelby Cnty. v. Holder*, 570 U.S. 529, 534 (2013). The voting-rights regime Congress fashioned views state courts with no less suspicion than other organs of state government. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 264–65 (2003) (affirming federal-court injunction against state-court implemented redistricting plan under Section 2 of the Voting Rights Act).

At the same time, neither Congress nor this Court deemed itself either entitled or equipped to occupy the field of election law and administration. In the Voting Rights Act and its amendments, Congress "compromised," choosing against "uproot[ing] facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States." *Brnovich*, 141 S. Ct. at 2332, 2339. Meanwhile, acts of Congress under the Elections Clause

have achieved discrete goals, such as guaranteeing servicemembers the right to vote absentee, *see* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Pub. L. 99–410, title I, § 101, Aug. 28, 1986, 100 Stat. 924; 52 U.S.C. § 20301 *et seq.*

Following the same middle path, this Court in interpreting the Fourteenth Amendment has rejected the idea "that the right to vote in any manner" is "absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Recognizing that "there must be a substantial regulation of elections if they are to be fair and honest," *id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)), this Court's precedent condemns only "excessively burdensome requirements," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (plurality opinion) (citation omitted). In *Crawford*, six Justices of this Court had little trouble concluding that a photo-identification requirement—which consistently enjoys robust, bipartisan endorsement among voters in public opinion polls[4]—is not an unreasonable voting burden, *id.* at 202–03; *see also id.* at 204–09 (Scalia, J., concurring in the judgment), notwithstanding the assertion that the identification law in that case was enacted with partisan intent, *id.* at 203–04 (plurality opinion). Similarly, this Court's redistricting "precedent teaches that redistricting is a legislative function," *Ariz. State Legislature*, 576 U.S. at 808, commands lower courts to "defer to…

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[4] *See* Rasmussen Reports, 75% Support Voter ID Laws (Mar. 17, 2021), *available at* https://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/march_2021/75_support_voter_id_laws.

legislative judgments," *Upham v. Seamon*, 456 U.S. 37, 40 (1982), and directs them in correcting violations of federal law not to "pre-empt the legislative task nor 'intrude upon state policy any more than necessary,'" *White v. Weiser*, 412 U.S. 783, 795 (1973) (citation omitted); *see also Perry v. Perez*, 565 U.S. 388, 393 (2012). Following that doctrine, this Court held in *Rucho* that federal courts lack the "competence" to invalidate state redistricting legislation on the basis of those legislative judgments, no matter how partisan they may be. 139 S. Ct. at 2508.

B. Ideological Actors Have Recently Turned to State Courts To Advance Theories Rejected in Congress and This Court

Moderation does not please everyone. It certainly did not please a very well-funded group of political activists who view virtually any effort to ensure the integrity of elections, no matter how minor, as an affront to the franchise. Having failed to enlist this Court and Congress in their campaign, they have now turned to state courts. The result is what academics (including those in favor of this trend) have called "a burgeoning field of litigation involving election administration." Douglas at 13–14. And, as the term "burgeoning" implies, that trend is new, dating back to, in the most generous telling, the 2000 presidential recount. *See id.*

Advocates for this trend freely acknowledge the theories they espouse are rarely to be found in state constitutions, nor are they readily discernible through ordinary interpretive methods. A leading article advocating for using state courts to obtain their desired

ends is most notable for what it omits: any suggestion that state constitutions be examined in text, context, and history to assess *whether* the supposed rights at issue actually exist. *See id.* at 1–47. Instead, the article devotes 15 pages to "Judicial Ideology, Selection, and the Right to Vote." *Id.* at 32 (boldface omitted). It declares that "[l]iberal judges tend to view individual rights broadly," "that we should select judges who espouse this value," and therefore that these outcome-oriented goals should "inform the debate over how we select our judiciary." *Id.* at 33, 46, 47. The point, stated differently, is that activists should put like-minded individuals on state courts and expect their goals to be achieved irrespective of what state constitutions provide. Whatever may be said of the uncommon case where citizens amend their constitutions to codify new definitions of the right to vote, *see Rucho*, 139 S. Ct. at 2507–08, in cases like the one below, "this wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

This boundless theory has produced incessant litigation, as the only limiting principles are the partisan aims of those bringing cases and the ideology of judges in the states where they file suit. Lawsuits have targeted photo identification laws, *see Weinschenk v. State*, 203 S.W.3d 201, 222 (Mo. 2006); *Martin v. Kohls*, 444 S.W.3d 844, 852 (Ark. 2014), laws denying the franchise to convicted felons, *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008), the use of commonly used voting machines, *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009), the hours polls are open, *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798, 801 (Ark. 2002), basic ballot-casting

requirement, *Stuart v. Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 685 (Tenn. Ct. App. 2009), ballot-access laws, *Nader for President 2004 v. Md. State Bd. of Elections*, 926 A.2d 199, 215 (Md. 2007), and, of course, laws establishing congressional district boundaries, *In re 2012 Legislative Districting*, 80 A.3d 1073, 1094 (Md. 2013). These suits often undermine the right to vote, such as where extending polling hours in some parts of a state, but not others, inevitably affords some voters an opportunity denied to others. *See State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 413 (Mo. Ct. App. 2000). Yet "[j]udges throughout the country regularly extend polling hours…without facing reversal from appellate courts." Douglas at 28.

The higher the stakes, the greater the incentive to sue. The 2020 federal elections saw a staggering number of lawsuits, making it already by September 2020 "the most litigated election ever." Sam Gringlas, Audi Cornish, Courtney Doring, Step Aside Election 2000: This Year's Election May Be The Most Litigated Yet, National Public Radio (Sept. 22, 2020).[5] "There were over 400 cases in forty-four states about the 2020 election during the COVID-19 pandemic." Joshua A. Douglas, Undue Deference to States in the 2020 Election Litigation, 30 Wm. & Mary Bill Rts. J. 59, 88 (2021). The result was good for law firms but not for the nation. *See* Dylan Jackson and Dan Roe, Big Firms Bring in Millions as Hundreds of Election

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[5] *Available at* https://www.npr.org/2020/09/22/914431067/step-aside-election-2000-this-years-election-may-be-the-most-litigated-yet.

Lawsuits Rage Across the Country, The American Lawyer (October 15, 2020) (reporting that "Jones Day has billed the Republican Party $12.1 million since 2019, while Perkins Coie has received roughly $41 million from various Democratic organizations").

The examples of judicial usurpation of duly passed election legislation were stark. Lower federal courts issued multiple rewrites of state election codes, but this Court and the courts of appeals repeatedly stepped in to stay those dangerous decisions. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1279 (11th Cir. 2020). Hence the flow of suits to selectively chosen state courts, which activists view as an end-run around this Court's review.

Pennsylvania provides a prominent example. The General Assembly procured a bipartisan compromise in 2019 to allow "all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020) (citing Act 77 of 2019, 25 P.S. §§ 3150.11-3150.17). The General Assembly then liberalized that system further in response to the 2020 Covid-19 pandemic, *see* 2020 Pa. Legis. Serv. Act 2020-12

(approved Mar. 27, 2020). But this did not satisfy the Pennsylvania Democratic Party (whose legislative members had supported the compromise), which brought suit. Nor did it satisfy the Pennsylvania Supreme Court, which rewrote the section "requir[ing] mail-in and absentee ballots to be returned to Boards no later than 8:00 p.m." to achieve "a three-day extension." *Pa. Democratic Party*, 238 A.3d at 362, 371. The court recognized that state law was clear as day and that "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." *Id.* at 369. Nevertheless, the court relied on the state's free and equal elections clause to wield a legislative pen "to craft meaningful remedies when required," *id.* at 371 (citation omitted), so "Tuesday at 8:00pm" became "Friday at 8:00pm."

Similar extensions were obtained in North Carolina, Michigan, and Minnesota. *See Wise v. Circosta*, 978 F.3d 93, 97 (4th Cir. 2020)*; Mich. All. for Retired Americans v. Sec'y of State*, 964 N.W.2d 816, 821 (Mich. Ct. App. 2020); *Carson v. Simon*, 978 F.3d 1051, 1056 (8th Cir. 2020). The Michigan order was reversed on appeal in state court, *Mich. All.*, 964 N.W.2d at 830–31, and the Minnesota order was enjoined by the Eighth Circuit under the Constitution's Electors Clause, *Carson*, 978 F.3d at 1062–63. The North Carolina and Pennsylvania orders, however, remained in effect after split decisions from this Court denied relief. *See Moore v. Circosta*, 141 S. Ct. 46 (2020); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020).

These 2020 cases were without precedent in United States history, at least the first 211 years or so. No foundation in "a regular course of practice" can be found. *Chiafalo*, 140 S. Ct. at 2326 (citation omitted). Unlike the contested Civil War-era absentee cases enforcing discrete constitutional prohibitions, these were not cases where state constitutions contained one ballot-receipt deadline and state election laws another. The courts of Pennsylvania, North Carolina, and Minnesota also ignored the "presumption…that…the legislature is more directly amenable to the people,'" *Morrison*, 65 A.2d at 222–23, and jettisoned legislative compromises in favor of judicial choices. There is nothing about the phrase "[e]lections shall be free and equal," Pa. Const., Art. I, § 5, that favors a November 6 deadline over a November 3 deadline. Furthermore, no one could seriously deny that *some* deadline must exist. The courts believed they had identified a better deadline and favored their judgment over the legislature's. But the choice of a receipt deadline "is a matter of legislative judgment which cannot be properly decided under" a constitutional provision guaranteeing freedom or equality. *Oregon v. Mitchell*, 400 U.S. 112, 127 n.10 (1970) (plurality opinion). The decisions amounted to legislation, no more, no less.

III. The Decision Below Is Legislative, Not Judicial, in Character

The decision below and its 2018 Pennsylvania counterpart represent a policy disagreement with state legislatures, not the application of "judicially discoverable and manageable standards" of "the manner traditional for English and American courts" to apply. *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion) (citation omitted). Both decisions employed contrived legal theories with no precedent in their respective state jurisprudence. Both decisions can hardly be viewed apart from the underlying partisan aims motivating the parties who brought them, and neither cited anything like a comparable historical analogue.

The practical effect of these decisions was to legislate, in the first instance, by promulgating new redistricting standards not approved by the states' respective legislative channels and, in the second instance, by fashioning new redistricting legislation to govern elections. To resolve this case, it is sufficient for the Court to recognize these "hallmarks of legislation" for what they are, *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from denial of stay application), and find them *ultra vires* usurpation of "powers over the election of federal officers," which "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995). The Court should recognize that this is among the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government," and "the text of the

election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring).

A. The decision below was made possible because of recent turnover on the North Carolina Supreme Court in highly contested, partisan elections. *See* Wang at 249. The state trial court rejected the gerrymandering claim in the first instance—twice. First, the trial court denied a motion for preliminary injunction, finding the plaintiffs failed on *every element* of preliminary relief. Pet.App.257a–268a. Five days later, the North Carolina Supreme Court reversed that order and "grant[ed] a preliminary injunction" itself, with no findings under the standard preliminary-injunction factors, Pet.App.250a, despite a mandatory court rule directing that a preliminary-injunction order "set forth the reasons for its issuance," N.C. Gen. Stat. 1A-1, Rule 65(d); *see, e.g.*, *Wilson v. N.C. Dep't of Com.*, 768 S.E.2d 360, 364–65 (N.C. 2015), and a statute requiring that "[e]very order…declaring unconstitutional or otherwise invalid" a redistricting law "identify every defect found by the court, both as to the plan as a whole and as to individual districts," N.C. Gen. Stat. § 120-2.3. The North Carolina Supreme Court demanded that the trial court bring the case to final judgment in one month and three days. Pet.App.251a. Complying with that unreasonable demand, the trial court again determined that judicial relief was unwarranted. Pet.App.269a. Indeed, this case was a uniquely bad candidate for judicial intrusion in redistricting, since the North Carolina General Assembly had adopted a

criterion forbidding partisan considerations in redistricting. *See* Brief for Petitioners 6.

The North Carolina Supreme Court promptly delivered the result that it had already signaled was a foregone conclusion and invalidated the plan. North Carolina justices run and serve as members of political parties, and only justices belonging to the party not in control of the General Assembly voted to jettison the congressional plan. *See Harper*, 868 S.E.2d at 563–91 (dissenting opinions). The legal theory employed in the decision below was novel and contrived. North Carolina precedent had held that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002), and found a gerrymandering claim non-justiciable (a case in which Anita Earls, who cast a deciding vote below, was a lawyer challenging the redistricting plan), *Dickson v. Rucho*, 781 S.E.2d 404, 440 (N.C. 2015). The North Carolina Supreme Court identified no intervening constitutional amendment altering that result. In fact, central to its reasoning is that North Carolina is a state "without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments." *Harper*, 868 S.E.2d at 509. "Accordingly, the only way that partisan gerrymandering can be addressed is through the courts." *Id.* That the court genuinely views itself as above the constitutional amendment process was confirmed more recently; the same majority just rejected a constitutional amendment authorizing voter-identification laws *enacted by an overriding majority vote of the*

people as unconstitutional. *N.C. State NAACP v. Moore*, 2022-NCSC-99, 2022 WL 3571116, -- S.E.2d -- (Aug. 19, 2022).

And the standard the court employed was equally befuddling. On the one hand, it insisted that it imposed "neither proportional representation for members of any political party, nor…guarantee[d] representation to any particular group." *Harper*, 868 S.E.2d at 511. But it also insisted that the state constitution's equal-protection, free-elections, and free-speech guarantees "necessarily encompass[] the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views," *id.* at 544, that is, proportional representation, *see Rucho*, 139 S. Ct. at 2499 ("Partisan gerrymandering claims invariably sound in a desire for proportional representation."). A remedial plan was imposed in breakneck-speed proceedings and emerged from the judiciary with no prior adversarial vetting. Pet.App.269a.

B. The only true historical precedent the North Carolina Supreme Court could (and did) cite for this transparent act of "force" and "will," The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed., 1961), was the 2018 Pennsylvania decision. And it was similar in material respects. It involved a congressional redistricting plan enacted seven years earlier, in 2011, when members of the Republican Party controlled the General Assembly, but the plan obtained bipartisan support: "36 Democrats vot[ed] in favor of passage," and the plan "would not have passed…without Democratic support." *League of*

Women Voters, 178 A.3d at 744, 784 (citation omitted). No suit was commenced for years, and that was surely due to the fact that, for years, the majority of seats on the Pennsylvania Supreme Court were held by Republicans. Suit was filed only after Democratic candidates won three seats in one election on the state Supreme Court in efforts to make quick work of the bi-partisan congressional plan.

The trial court had ordered the case stayed during the pendency of *Whitford v. Gill*, No. 16–1161, in this Court—citing Pennsylvania precedent treating federal and state standards as coterminous—but the Pennsylvania Supreme Court vacated that stay and, like the North Carolina Supreme Court, ordered the case brought to final judgment in less than two months. *See League of Women Voters*, 178 A.3d at 766–67. After an expedited trial, the lower court recommended that the claim be rejected in full on the merits. *Id.* at 781–87. The Pennsylvania Supreme Court promptly reversed and enjoined the plan, without further remand. Unlike the bi-partisan plan it jettisoned, its decision was along partisan lines, as no Republican justice joined.

The legal theory it employed bordered on incoherent. The court cited the state constitution's free and equal elections clause, but after recognizing the clause contains no "standards which are to be used in the creation of congressional districts," *id.* at 814, it looked to a different constitutional provision requiring that districts "shall be composed of compact and contiguous territory" and that no district may divide any "county, city, incorporated town, borough,

township or ward" "[u]nless absolutely necessary," Pa. Const., Art. II, § 16, which it found the 2011 plan contravened, 178 A.2d at 814–25. However, this provision expressly applies only to *state legislative* districts. Pa. Const., Art. II, § 16. Furthermore, Pennsylvania precedent had recognized that "no analogous, direct textual references to…neutral apportionment criteria" govern congressional districts." *Erfer*, 794 A.2d at 334 n.4. Indeed, recent Pennsylvania precedent had held that "nothing in the [Pennsylvania] Constitution" prohibits partisan redistricting. *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A.3d 1211, 1236 (Pa. 2013). The court admitted it had never "held that a redistricting plan violates the Free and Equal Elections Clause—for example, because it is the product of politically-motivated gerrymandering," *League of Women Voters*, 178 A.3d at 811, notwithstanding that "[p]olitical gerrymanders are not new to the American scene" and scholars have traced "them back to the Colony of Pennsylvania at the beginning of the 18th century," *Vieth*, 541 U.S. at 274. As noted, the court had little choice but to "disavow" all precedent contrary to its novel holding. 178 A.2d at 813.

That set the stage for remedial proceedings, which, like the North Carolina proceedings, simply involved a legislative-style cramdown of new law. The Pennsylvania Supreme Court afforded the Pennsylvania General Assembly only 18 days to enact a new plan, and it withheld its 138-page opinion—which stated such rudimentary points as what provision of the Pennsylvania Constitution the 2011 plan violated and the new legal standard it fashioned—until two days prior to that deadline. *See League of Women*

Voters of Pa. v. Commonwealth, 175 A.3d 282, 284 (Pa. 2018); *League of Women Voters*, 178 A.3d at 741. When the General Assembly could not meet that deadline, the Pennsylvania Supreme Court promptly enacted its own plan, which it declared by fiat, with no adversarial proceedings, was compliant with state law and superior to the plans proposed by the litigants. *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1084 (Pa. 2018). The court's map transparently favored the Democratic Party. The *New York Times* declared that "Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves."[6] Elections analyst Sean Trende observed that the court "repeatedly made choices that increased the Democrats' odds of winning districts."[7]

These actions delivered on campaign promises of at least one justice. One of the deciding votes on significant case issues was cast by Justice David Wecht, who attacked the Commonwealth's congressional plan during his 2015 election campaign.[8] When these

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[6] Nate Cohn et al., *The New Pennsylvania Congressional Map, District by District*, N.Y. Times: The Upshot (Feb. 19, 2018), *available at* https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

[7] Sean Trende, *How Much Will Redrawn Pa. Map Affect the Midterms?*, Real Clear Politics (Feb. 20, 2018), *available at* https://www.realclearpolitics.com/articles/2018/02/20/how_much_will_redrawn_pa_map_affect_the_midterms_136319.html.

[8] Eric Holmberg, *Forums Put Spotlight on PA Supreme Court Candidates*, PUBLICSOURCE (Oct. 22, 2015), *available at*

statements came to light, the legislative parties defending the plan moved for Justice Wecht's recusal. In response, Justice Wecht issued an opinion standing by his prior statements and concluding, *inter alia*, that they were permissible under Pennsylvania law and the First Amendment as judicial campaign speech. *League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080, 1091 (Pa. 2018) (Wecht, J.). Under that theory, nothing would stop any future justice from delivering such promises, and delivering *on* such promises, in the future—just as a legislator might within the scope of the proper legislative role.

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None of that should be a surprise. Nor need "a respect for the constitutionally prescribed role of state *legislatures*" "imply a disrespect for state *courts*." *Bush*, 531 U.S. at 115 (Rehnquist, J., concurring). The fundamental fact remains, however, that "redistricting involves lawmaking in its essential features and most important aspect." *Ariz. State Legislature*, 576 U.S. at 807 (quotation marks omitted). When state courts take charge, redistricting does not abruptly become judicial. It remains legislative and, hence, political. Recognizing this fact, the framers delegated this essentially legislative function to "the Legislature" of each state. U.S. Const. Art. I, § 4, cl. 1. Unless this Court enforces that delegation, the inevitable result

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www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates; Media Mobilizing Project, *Neighborhood Networks Supreme Court of PA Forum*, YouTube (Apr. 25, 2015), at 18:43, *available at* https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be.

will be to transform state courts into super-legislatures selected for their eagerness to achieve political, not judicial, ends.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX A

LIST OF LEGISLATIVE *AMICI CURIAE*

Sen. Cindy O'Laughlin, *Missouri Senate District 18*.

Rep. Kerry Benninghoff, *Pennsylvania House District 171 (Majority Leader)*.

Rep. G. Murrell Smith, Jr., *South Carolina House District 67 (Speaker of the House of Representatives)*.

Rep. Thomas E. Pope, *South Carolina House District 47 (Speaker Pro Tempore)*.

Rep. David R. Hiott, *South Carolina House District 4 (Majority Leader, South Carolina House GOP Caucus)*.

Rep. Briscoe Cain, *Texas House District 128 (Chair of Elections Committee)*.

Rep. Matthew Krause, *Texas House District 93 (Chair of General Investigating Committee)*.

Rep. Steve Toth, *Texas House District 15*.

Rep. Matthew Schaefer, *Texas House District 6*.

Rep. Brian Harrison, *Texas House District 10*.

Rep. Valoree Swanson, *Texas House District 150*.

Matt Rinaldi, *Texas House District 115 (2015-2019)*.