No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, *et al.*,

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the U.S. territories. They include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.

The ABA's mission since 1878 has included a commitment to advancing the rule of law. In furtherance of this mission, the ABA adopted in 2008 the "advance[ment] of the rule of law" as one of its official goals.[2] The organization also has a dedicated Rule of Law Initiative and frequently issues reports, hosts events, and leads other activities related to the rule of law.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

[2] ABA Resolution 08A121 (adopted 2008), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2008/2008_am_121.pdf

The ABA also has a significant interest in, and substantial formal policy on, the regulation of elections. In 2001, it adopted Resolution 01M104, which calls for fair and expeditious judicial review of significant disputes in federal elections. In 2008, it adopted Resolution 08M102A, which calls for the assignment of redistricting responsibilities to independent commissions. Recently, it adopted Resolutions 22M800 and 22M801, which call for other critical reforms in election law and protections against state legislation that could restrict the fundamental right to vote.

The ABA files this brief to provide the perspective on the rule of law and election regulation that it has developed over its long history and to protect the integrity of federal elections from potential legislative overreach.

SUMMARY OF ARGUMENT

Petitioners' position would undermine the rule-of-law constraints that protect the integrity of federal elections, and that, in turn, would pose a severe threat to republican democracy. Relying on the novel, ahistorical, and dangerous "independent state legislature theory" ("ISLT"), Petitioners propose that—apparently only with respect to federal elections—state legislatures are exempt from the checks and balances that the Framers carefully established at all levels of government. But state legislatures' authority to regulate some aspects of federal elections has never been,

and was never intended to be, unconstrained. The consequences of this farfetched theory for the American republic would be dire.

I. The Framers of the United States Constitution established a system of republican government with the rule of law and regular elections as two of its mutually reinforcing pillars. Fearing the growth of legislative power, the Framers intended to make federal legislators accountable to the people through regular elections that would be kept free and fair through the rule of law—including by state constitutional rules enforced by independent state courts. The ISLT, in contrast, would effectively give state legislatures absolute power over federal elections, gut the rule of law by prohibiting state courts from enforcing state constitutions' regulations of those elections, and undermine electoral integrity. Cutting state legislatures free from the bedrock American system of three-branch checks and balances in the vital realm of federal election regulation would place legislative, executive, and judicial power in the same hands, and thus be contrary to foundational principles of the rule of law. The Framers rightly saw this as a recipe for tyranny.

II. The diminishment of the rule of law in federal elections would have severe practical consequences. The ISLT would give partisan majorities in state legislatures unchecked power to gerrymander Congressional districts. Those majorities could also, if unchecked by independent judicial review, set rules for federal elections that ignore many state constitutional

protections—including the openness of voter registration, the availability of absentee voting, and the secret ballot. Giving unrestrained partisan majorities full control over federal elections would be anathema to the Framers' vision of a republic built on the rule of law.

ARGUMENT

To the founding generation, republican government meant a system that constrained the power of those in office. This required elections. It also required enforceable legal limits on how representatives use their power once elected—the rule of law.

Part of the Framers' genius was to recognize that elections and the rule of law must work in tandem. Without limits on elected representatives' authority, a faction in power could insulate itself from democratic accountability by manipulating the rules of the next election. The Framers gave state legislatures the power to regulate federal elections with the understanding that those legislatures would be duly constrained by their state constitutions. They also provided explicit authority to Congress to rein in restrictive election laws.

Relying on a radical new proposition, the ISLT, Petitioners ask this Court to nullify state constitutional restrictions on federal elections by stripping state courts of the power to enforce them. If the ISLT were the law of the land, state legislators could manipulate

the partisan makeup of Congress, undermining Congress's ability to act as a check on state legislatures' unrestrained exercise of political power. This theory is alien to the Framers' vision of a federal republic in which constitutional checks and balances protect the rule of law.

Petitioners' theory would also make federal elections less democratic and thus less capable of holding the government accountable—precisely what the Framers feared. It is no exaggeration to say the ISLT would eviscerate the rule of law where it is most needed and threaten the foundations of our republic.

I. Petitioners' Position Threatens Rule-of-Law Protections That the Framers Intended to Safeguard Federal Elections

A. American Republicanism Depends on the Rule of Law to Make Political Leaders Democratically Accountable

The founding generation understood that "[t]he very definition of a republic is 'an empire of laws, and not of men.'" John Adams, Thoughts on Government (1776), *as reprinted in* Revolutionary Writings of John Adams 288 (C. Bradley Thompson, ed. 2000). Only a government ruled by law can support "[t]he elective mode of obtaining rulers," which the Framers identified as "the characteristic policy of republican government." The Federalist No. 57, at 277 (James Madison)

(Terence Ball ed., 2010); *see also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 825 (2002) (Framers understood both "ultimate control by the citizenry" and "adherence to the rule of law" as "core requirements" of republican government); *accord* Thomas A. Smith, Note, *The Rule of Law and the States*, 93 Yale L.J. 561, 561 (1984).

The Framers focused intensely on making the rule of law a sustainable reality. James Madison explained that, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself." The Federalist No. 51, at 252 (James Madison).

The Framers' answer to this challenge was a robust system of checks and balances. The Framers believed that the "accumulation of all powers legislative, executive and judiciary in the same hands … may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 234 (James Madison). They sought to guard against this tyranny by "divid[ing] and balanc[ing]" "the powers of government … among several bodies … as that no one could transcend their

legal limits, without being effectually checked and restrained by the others." The Federalist No. 48, at 243 (James Madison).[3]

These republican principles were understood to apply equally at the state level. The Constitution's Guarantee Clause makes this explicit: "The United States shall guarantee to every State in this Union a Republican Form of Government[.]" U.S. Const. art. IV, § 4. Although not independently justiciable, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), this clause "was understood throughout the [constitutional] debate" as an effort "to accomplish the crucial goal of ensuring legal government in the states." Smith, *The Rule of Law and the States*, 93 Yale L.J. at 569.[4] The drafters and

[3] This view is consistent with the conclusions of theorists whom the Framers studied, for example, Charles de Montesquieu, The Spirit of the Laws, pt.2, bk.11, ch.6, at 157 (Anne M. Cohler et al., eds., 2019) (1748); *see also* The Federalist Nos. 9, 47 (each citing Montesquieu), and theorists who have followed, *e.g.*, Philip Pettit, Republicanism 177 (Oxford Univ. Press 2010) (1997) (discussing the separation of powers as protection for the rule of law and citing Montesquieu).

[4] Prominent state officials embraced the Constitution's commitment to republicanism and the rule of law when debating its ratification. *See* Natelson, *supra*, at 825 & n.91. For example, former North Carolina Attorney General (and future Justice of this Court) James Iredell explained that "in [a republican] government, the law is superior to every man." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (J.B. Lippincott ed., 1941) (1836). In Virginia, former Speaker of the House of Delegates Edmund Pendleton

ratifiers of the Constitution thus enshrined the rule of law at both the state and federal levels.

As the Framers recognized, the need for the rule of law was at its height in the context of ensuring free and fair elections—the "characteristic policy" and cornerstone of republican government. The Federalist No. 57, at 277. The general population's primary check against legislatures' tendencies toward self-aggrandizement and tyranny is elections that determine who will serve in those legislatures. *See* The Federalist No. 21, at 95 (Alexander Hamilton) ("[T]he natural cure for an ill administration, … is a change of men.").

But free and fair elections do not occur automatically. As Hamilton explained, absent a constitutional "guarantee" of elections, "[a] successful faction may erect a tyranny on the ruins of order and law." *Id.* But, together, "legislative balances and checks" and "the representation of the people in the legislature by deputies of their own election" would serve as "powerful means" of securing "the excellences of republican government." The Federalist No. 9, at 36 (Alexander Hamilton). In other words: The rule of law and free elections depend upon each other. Elections keep elected officials accountable, and the rule of law keeps elections free and open.

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agreed that "regular government" is a "true principle of republicanism, and the greatest security of liberty." 3 Debates in the Several State Conventions at 295-96.

The importance the Framers placed on using the rule of law to protect federal elections is evident in the Elections Clause. The Framers feared that state legislatures could use unchecked power over federal elections to destroy the federal government. The Federalist No. 59, at 290-91 (Alexander Hamilton) ("With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men, in a few of the most considerable States … might accomplish the destruction of the Union, by seizing the opportunity … to discontinue the choice of members for the federal House of Representatives."). They recognized that an "incontroulable power over the elections for the federal government could not without hazard be committed to the state legislatures," The Federalist No. 60, at 291 (Alexander Hamilton). The Elections Clause provided "insurance" against this outcome by giving Congress the power to alter or supplant state regulations of federal elections. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). Given their "very real concern" about unchecked state legislatures, *id.*, the Framers would not have delegated election regulation to those legislatures without the understanding that they would be constrained by their state constitutions.

This understanding is borne out by state practice following the adoption of the Constitution. "Of the states that held constitutional conventions in the decade after ratification—Georgia (1789 and 1798),

South Carolina (1790), Pennsylvania (1790), Delaware (1792), New Hampshire (1792), Kentucky (1792 and 1799), Vermont (1793), and Tennessee (1796)—all but South Carolina adopted constitutional provisions that regulated federal elections[.]" Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 494 (2022). The Virginia Constitution of 1830 similarly imposed rules for the state legislature's apportionment of congressional seats. *Id.* at 485-86. Far from objecting to these state constitutional provisions, the Framers helped establish them: The Delaware Constitution was ratified by two delegates to the federal Convention, and Madison voted for Virginia's constitutional provision on redistricting over objections based on the Elections Clause. *Id*. at 484-86. This history confirms the Framers' clear understanding that the Elections Clause did not exempt state legislatures from state constitutional constraints when regulating federal elections. Any such exemption would have been inconsistent with the Framers' belief that the rule of law was essential to republicanism.

As this history also shows, the Framers believed that state constitutional law was an important mechanism for protecting the rule of law in elections. They were right. Maintaining the rule of law requires that laws "be promulgated and made known in advance" and be "consistent[] and not subject to constant change." Pettit, *supra*, at 174; *see also* Joseph Raz, The Authority of Law 214 (2d ed. 2009) (rule of law

requires that "[l]aws should be relatively stable"). Constitutions are more stable and less subject to ad hoc, last-minute change than statutes, because the process for amending the former is more onerous than for passing the latter. *Compare, e.g.*, N.C. Const. art. XIII, §§ 3-4 (constitutional amendment requires constitutional convention or supermajority vote in legislature, followed by vote of the people), *with id.* art. II (legislation requires Senate and House approval, subject to veto). Regulating elections through state constitutions—and not exclusively through statutes—thus helps ensure that election laws are made in advance, subject to careful democratic consideration, and not subject to frequent change.

The need for state constitutional protections for elections cannot be dismissed simply because the federal Constitution also governs elections. To be sure, the federal Constitution's sweeping guarantees of equal protection, due process, and freedom of association are important to elections. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 789, 806 (1983). But state constitutions often speak to electoral matters in greater specificity, adopting clear rules that the federal Constitution does not attempt to prescribe at a national level. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 102 (2019) (collecting state constitutional provisions on elections).

Nor did the Framers intend to make Congress the sole check against state legislatures' abuse of their

power over federal elections when they vested Congress with some power to regulate federal elections in the Elections Clause. They also envisioned a role for courts. Petitioners admit that courts have well-established power to rule on challenges to state election rules under federal law. Pet'rs Br. at 48. As the Elections Clause does not implicitly exclude federal judicial supervision, nothing in the Clause's text or history supports drawing the opposite conclusion about state judicial supervision. The logical reading of the Elections Clause—and the one most resonant with the Framers' philosophy—is that it aims to establish more checks on state power over elections, not fewer.

In short, state constitutions provide essential guardrails on state legislative power over elections. By doing so, they help achieve the Framers' vision of a republic ruled by law.

B. Unchecked Legislative Power Over Elections Would Cripple the Rule of Law

The ISLT would remove state courts' ability to enforce state constitutional provisions in cases involving federal elections, making those provisions nullities. *See Marbury v. Madison*, 5 U.S. 137, 178-79 (1803) (enforcement of rights requires judicial review). This theory is irreconcilable with the Framers' aspiration to "a government of laws and not of men," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), and the fundamental rule-of-law principle that "the government shall be

ruled by the law and subject to it," Raz, *supra*, at 212. The ISLT's concentration of all power over federal elections in the state legislature is precisely the "accumulation of all powers legislative, executive and judiciary in the same hands" that the Framers viewed as the "definition of tyranny." The Federalist No. 47, at 234.

The ISLT posits that, despite the Framers' belief in the separation of powers as a critical safeguard against tyranny, they opted to prohibit state constitutional checks on legislative power. This position is grossly inconsistent with the Framers' writings. It is particularly absurd to posit that the Framers would impose this anomalous prohibition and hand state legislatures plenary power solely when legislatures deal with "the fundamental right" to vote in federal elections, *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

This theory is irreconcilable with the Framers' intent to limit legislative power. The Framers singled out legislatures as the branch of government most in need of restraint: "The legislative department is every where extending the sphere of its activity and drawing all power into its impetuous vortex.... [I]t is against this department that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No. 48, at 241. Republican government would falter "[i]f therefore the Legislature assumes executive and judiciary powers." *Id.* at 243. Yet the ISLT would facilitate precisely that—placing all

state-level power over federal elections in the legislature's hands. Legislators would have incentives to use that power to advance their prospects for reelection and entrench themselves and their allies in power. *See, e.g.*, Anthony Downs, An Economic Theory of Democracy (1957); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 650 (1998). Empirical evidence confirms that state legislatures attempt to use their power for such counter-majoritarian ends. *See, e.g.*, Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1762-66 (2021). A check on legislatures is necessary to prevent such abuses of power.

The state constitutional checks threatened by the ISLT are particularly important in protecting elections from the legislative overreach that Madison feared. In arguing that regular constitutional conventions would be an ineffective guard against legislative power, he explained that "the legislative party … would probably be constituted themselves the judges" and "would gain … a seat in the convention," meaning that "[t]he convention in short would be composed chiefly of men, who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned." The Federalist No. 49, at 247-48 (James Madison). The ISLT would create this type of risk by leaving state legislatures as the sole guard against state legislative power over federal elections.

The ISLT is also incompatible with the Framers' understanding of the importance of judicial review. The Framers recognized that "the judiciary department" stood as an "excellent barrier to the encroachments and oppressions of the representative body" and represented "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." The Federalist No. 78, at 377 (Alexander Hamilton). After a legislature makes a rule, judges "must of necessity expound and interpret that rule," and "if a law be in opposition to the constitution[,] … the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury*, 5 U.S. at 177-78. To hold the contrary—that "courts must close their eyes on the constitution, and see only the law"—"would subvert the very foundation of *all* written constitutions." *Id.* at 178 (emphasis added). As *Marbury* illustrates, the Framers understood that judicial review applies under any constitution to any legislative act pursuant to that constitution.

The ISLT would create an unwarranted and dangerous anomalous exception to judicial review of state regulation of federal elections. This Court long ago rejected such an approach. In *Smiley v. Holm*, this Court concluded that state legislative action under the Elections Clause is "the making of laws" and thus "must be in accordance with the method which the state has prescribed for legislative enactments"—including the state constitution. 285 U.S. 355, 367-68 (1932) ("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."). *Smiley* confirms that the actions of state legislatures under the Elections Clause are legislation subject to the state constitution, *id.*, hence subject to judicial review, *Marbury*, 5 U.S. at 177-78.

The ISLT also would create an unacceptable disparity between the rule-of-law constraints on Congress and those on state legislatures. The Framers understood that the rule of law was as vital to state government as to the federal government. Writing about the Elections Clause, Hamilton recognized that "[i]f we are in a humour to presume abuses of power, it is as fair to presume them on the part of the State Governments, as on the part of the General Government." The Federalist No. 59, at 288. Madison excoriated state legislatures for "decid[ing] rights which should have been left to judiciary controversy." The Federalist No. 48, at 243 (emphasis omitted). Yet Petitioners would exempt state legislatures from state judicial review, while leaving Congress fully subject to federal judicial review. This theory cannot be squared with the text of the Elections Clause, which vests both "Congress" and "the Legislature []of" "each State" with powers over federal elections. U.S. Const. art. I, § 4. Petitioners read the Clause as exempting state legislatures from traditional state constitutional

checks but do not argue that it exempts Congress from other provisions of the federal Constitution—and they do not explain this inconsistent interpretation.

The ISLT would leave election regulation anomalously unconstrained by the rule of law, contrary to this Court's recognition that "the political franchise" is "a fundamental political right, because preservative of all rights." *Yick Wo*, 118 U.S. at 370. When state legislatures act, they are generally constrained by the popular vote and the checks and balances of the other branches. When state legislatures regulate elections, however, the popular vote is a weak check: State legislatures can pass election regulations that reduce or eliminate the ability of their constituents to object to those regulations at the ballot box. This weakness leaves structural checks and balances as the most meaningful restraint on state legislative power over elections. The ISLT would eliminate these checks and balances, allowing state legislatures to regulate federal elections without structural constraint. Such an exemption from the rule of law would be completely incompatible with the Framers' view that "[t]he elective mode of obtaining rulers is the characteristic policy of republican government" and must be protected. The Federalist No. 57, at 277.

Finally, as a practical matter, the ISLT would undermine the ability of Congress to "alter" partisan state regulations of federal elections. U.S. Const. art. I, § 4. If state legislatures could freely regulate congressional elections to entrench their political allies in

Congress, they could potentially make Congress so unaccountable to public opinion that it could not function as an effective check against state legislatures' manipulation of elections. Federal legislators who have benefited from state legislators' manipulative election legislation would have no incentive to exercise their authority under the Elections Clause to rein in that legislation.

To put it starkly, the ISLT would bring to life the Framers' fear of "elective despotism" where "[a]ll the powers of government … [are] concentrate[ed] in the same hands [of the legislature]." The Federalist No. 48, at 242-43. It would allow state legislatures to entrench their allies in federal office without regard for the rules set forth by the people of their States in their state constitutions. The ISLT is an affront to the rule of law, and this Court should reject it.

II. Removing State Constitutional Constraints on Legislative Control of Federal Elections Would Imperil American Democracy

Because the ISLT would cripple the rule of law in federal elections, it would create new opportunities for state legislators to insulate their political allies from democratic accountability. The resulting damage to federal elections—and so to American republicanism—would be concrete and severe.

To begin with, the ISLT would remove state constitutional limits on partisanship in congressional redistricting, clearing the way for extreme gerrymanders like the one struck down by the North Carolina Supreme Court. Beyond redistricting, the ISLT would empower opportunistic partisan majorities to manipulate all aspects of the time, place, and manner of federal elections, notwithstanding state constitutional provisions to the contrary. Unchecked reconfiguration of federal elections by partisan legislators is incompatible with republican government and the rule of law.

A. Petitioners' Position Would Permit Unchecked Gerrymandering of Congressional Districts

Partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015). Because gerrymandering interferes with the ability of the people to hold their representatives accountable, this Court has repeatedly recognized that the practice is "incompatible with democratic principles." *Id.* (cleaned up); *accord Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (same); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("Excessive partisanship in districting leads to results that reasonably seem unjust," although not justiciable in federal court).

State constitutional law is, by far, the most important and effective check against partisan gerrymandering available under this Court's precedents. In *Rucho*, the Court held that there is no cause of action under the federal Constitution to challenge partisan gerrymanders. 139 S. Ct. at 2506-07. But the Court expressly stated that state constitutions, enforced by state courts, could address partisan gerrymandering of congressional districts, so that concerns about districting would not be "condemn[ed] … to echo into a void." *Id.* at 2507.[5]

This Court recognized that state constitutions can impose both substantive and procedural constraints on gerrymandering. Substantively, "state constitutions can provide standards and guidance for state courts to apply" in litigation challenging redistricting plans as gerrymanders. *Id.* at 2507-08 (citing *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015) (striking down congressional redistricting plan as an unconstitutional gerrymander under the Florida Constitution); Fla. Const. art. III, § 20(a); Mo. Const. art. III, § 3). Procedurally, state constitutions can create nonpartisan or bipartisan offices or commissions

[5] The theoretical possibility of federal anti-gerrymandering legislation, *see id.* at 2508, is no substitute for judicial enforcement of already-existing state constitutional law. Nor can one assume that Congress would adopt such legislation, as representatives have an inherent "conflict of interest" in regulating their own elections. *Ariz. State Legislature*, 576 U.S. at 815.

"responsible in whole or in part for creating and approving district maps for congressional and state legislative districts." *Id.* at 2507 (citing Colo. Const. art. V, §§ 44, 46; Mich. Const. art. IV, § 6; Mo. Const. art. III, § 3).

The ISLT would eviscerate state constitutions' substantive "standards and guidance" for congressional redistricting. *Id.* at 2507. Many state constitutions directly prohibit or limit partisan gerrymandering. *See, e.g.*, Fla. Const. art. III, § 20(a); Mo. Const. art. III, § 3; Ohio Const. art. XI, § 6(A); N.Y. Const. art. III, § 4(c)(5). Others provide protection for equal political opportunity. *See, e.g.*, N.C. Const. art. I, § 10; Pa. Const. art. I, § 5. State courts have interpreted and developed robust bodies of law regarding these constitutional provisions and routinely enforce them to invalidate gerrymanders benefiting both major political parties. *See, e.g.*, *Harkenrider v. Hochul*, --- N.E.3d ---, 2022 WL 1236822, at *11 (N.Y. Apr. 27, 2022) (striking down pro-Democratic gerrymander under state constitution); *League of Women Voters v. Pennsylvania*, 645 Pa. 1, 8 (2018) (same for pro-Republican gerrymander). Without such enforceable standards—which state courts have manageably applied—majority parties in state legislatures would be free to draw congressional maps that entrench their political allies in power. *See Harkenrider*, 2022 WL 1236822, at *1 (noting that, before the state court intervened, Democrats in the New York legislature "creat[ed] and enact[ed] maps in a nontransparent

manner controlled exclusively by the dominant political party").

The ISLT would also frustrate state constitutions' procedural provisions that assign constitutional responsibility to independent officers or commissions—a practice this Court has specifically upheld. *Ariz. State Legislature*, 576 U.S. at 793; *see also Rucho*, 139 S. Ct. at 2507 (collecting examples of state constitutions that "plac[e] power to draw electoral districts in the hands of independent commissions" or "creat[e] a new position … to draw state legislative district lines"). Regardless of whether the ISLT would require overruling *Arizona State Legislature*, it could prevent judicial enforcement of state constitutional provisions that regulate redistricting, allowing partisan actors to violate those procedural rules with impunity.

These risks are not hypothetical. This year, for example, the New York legislature responded to a deadlock in the state's independent redistricting commission by passing new maps directly through the single-party-controlled legislature. *Harkenrider*, 2022 WL 1236822, at *1. It fell to the New York Court of Appeals to correct this "procedural violation" and stop the legislature from "effectively nullify[ing]" the provisions of the New York Constitution empowering the redistricting commission. *Id.* at *9. Other state courts similarly have enforced state constitutional provisions regulating the appointment and removal of redistricting commissioners, thus protecting the independence of those commissions. *See, e.g.*, *Adams v.*

Comm'n on Appellate Court Appointments, 254 P.3d 367, 371 (Ariz. 2011) (enforcing Arizona constitutional prohibition on public officeholders serving as redistricting commissioners); *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267 (Ariz. 2012) (striking down governor's attempt to remove independent chairman of redistricting commission). Gutting state courts' ability to enforce constitutionally mandated redistricting procedures would make the process vulnerable to hijacking by partisan actors.

Adopting the ISLT thus would turn congressional redistricting into a political free-for-all, cut loose from the rule of law. Voters of all political viewpoints could lose the opportunity to cast meaningful ballots in congressional elections, shattering the foundation of American republican democracy. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking down congressional malapportionment because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live").

B. The Harmful Consequences of Petitioners' Theory Threaten All Aspects of Federal Elections

The ISLT's damage to the rule of law that is guaranteed by state constitutions would not be limited to congressional redistricting. It would extend to all aspects of the time, place, and manner of federal elections. While state legislation affecting voting rights

would remain subject to federal law, removing state constitutional checks would create opportunities for mischief.

Some state constitutions, for example, provide that voter registration must remain available either through Election Day or until a specific date preceding the election. *See, e.g.*, Mich. Const. art. II, § 4 (registration through Election Day); Va. Const. art. II, § 2 (registration at least until 30 days before the election). Prospective voters and political organizers reasonably rely on, and plan around, these predictable deadlines in the lead-up to an election. If a minority party in such a State were conducting a successful campaign to register voters in advance of a congressional election, the majority party could shorten the registration period—without legal consequence under state law.

Numerous state constitutions also guarantee a right to vote by absentee ballot for some voters who would otherwise be effectively disenfranchised. *See, e.g.*, N.J. Const. art. II, § 1 ("In time of war no elector in the military service of the State or in the armed forces of the United States shall be deprived of his vote by reason of absence from his election district."); Pa. Const. art. VII, § 14 (right to absentee voting for voters who cannot vote in person on Election Day "because [of] their duties, occupation or business," "because of illness or physical disability," or "because of the observance of a religious holiday"). If majority legislators believed that absentee voters would tend to

vote against their party, they could roll back or eliminate absentee voting rights.

Many state constitutions also require that federal elections be held by secret ballot, *see, e.g.*, Ala. Const. art. VIII, § 177; Cal. Const. art. II, § 7; Ky. Const. § 147; Mont. Const. art. IV, § 1; Pa. Const. art. VII, § 4—an important safeguard against voter intimidation and vote-buying schemes. *See Burson v. Freeman*, 504 U.S. 191, 200-06 (1992) (plurality opinion) (discussing historical background and continuing need for secret-ballot laws). Under the ISLT, if the majority party in such a State believed that it could benefit from discovering and publicizing how individual citizens voted, the legislature could revoke the secret ballot.

As these examples illustrate, the ISLT would enable legislatures to revoke voters' well-established state constitutional rights. Federal law—which was designed as a floor for voting rights, not a ceiling—would become the sole protection against legislative interference in free and fair elections, contrary to this Court's precedents. *See Rucho*, 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" where the federal Constitution is silent.). The ISLT would thus make election rules murkier, less protective of voters, and easier to manipulate for partisan advantage—all at the expense of American republicanism.

* * *

CONCLUSION

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

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Respectfully submitted,

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