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 OF *AMICUS CURIAE* WOMEN4CHANGE INDIANA, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Women4Change Indiana, Inc. ("Women4Change") is an Indiana non-profit 501(c)(3) organization dedicated to educating and mobilizing Indiana's citizens, known as Hoosiers, to create positive change for women. It is comprised of Hoosier men and women of all ages and walks of life, with views that span the political spectrum, who have come together to envision a state where women of all backgrounds achieve equity in, among other things, political and civic leadership. While its members may disagree on matters of politics, they agree on the importance of free and fair elections as critical to realizing equality for women.

After the 2020 Census, Women4Change mobilized Hoosiers to participate in Indiana's congressional redistricting process—a process it viewed as an opportunity to reinvigorate Indiana's electoral democracy. As Indiana's General Assembly began considering new congressional maps in 2021, Women4Change advocated for maps that would accurately and fairly represent Indiana's voting population. It renewed its support for the establishment of an independent citizen redistricting commission, testified before the Indiana House Committee on Elections and Apportionment and the Indiana Senate Committee on

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All of the parties have provided written consent to the filing of this brief.

Elections, and commissioned and released to the public an independent study on partisan gerrymandering in Indiana. In particular, Women4Change sought to demonstrate to Indiana's lawmakers the negative effects that gerrymandered maps have on all Hoosiers and the state's democratic foundation. As Women4Change Board Member Chris Paulsen testified before Indiana's General Assembly, extreme partisan gerrymandering "leave[s] people feeling that their voice doesn't matter, that our system does not support everyone, and . . . continue[s] the narrative that voting doesn't do anything." Tom Davies, *Critics say Indiana redistricting dilutes minority influence*, ASSOCIATED PRESS (Sept. 27, 2021).[2] Indeed, surveys of non-voters show that the belief that "my vote doesn't matter" is the most commonly cited excuse for not voting, and 24.8% of non-voting Hoosiers surveyed for the 2021 Indiana Civic Health Index responded with "Not interested, felt my vote wouldn't make a difference." Ellen Szarleta, *2021 Indiana Civic Health Index*, at 15.[3]

Despite Women4Changes's efforts, and those of thousands of other Hoosiers, Indiana's General Assembly adopted, in October 2021, congressional maps that were even more partisan and less competitive than previous maps. And, as Women4Change explains in this brief, Hoosiers have few paths to rectify that

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[2] *Available at*: https://apnews.com/article/elections-indiana-race-and-ethnicity-senate-elections-legislature-0bbfa5472e3e22ee2eb25c97390ba1fa.

[3] *Available at*: https://www.ncoc.org/wp-content/uploads/2022/01/INCHI_2021_FINAL_1.26.2021.pdf.

inequitable end product, which silences the voices of hundreds of thousands of voters across the State. If the Court adopts Petitioners' interpretation of the Elections Clause that problem will only get worse, and it will be increasingly difficult for states like Indiana to have the voices of all citizens heard in Congress.

Accordingly, based on its intimate knowledge of Indiana politics, its experience with the profound negative consequences of unchecked partisan gerrymandering, and its concern for preserving and promoting Indiana's democratic institutions, *amicus* offers this submission as further support for Respondents' positions.

SUMMARY OF ARGUMENT

The Court should not adopt Petitioners' interpretation of the Elections Clause because it will disturb the balance that has served Indiana for over two centuries. Since its establishment in 1816, Indiana has long deemed its legislative branch to have only the authority that the state's citizens conferred on it through Indiana's Constitution. Indiana has empowered its judiciary to adjudge whether the legislature has acted within those limits. Petitioners' argument that state legislatures acting under the Elections Clause to enact redistricting legislation are bound only by the federal Constitution and certain select provisions of their respective state constitutions—selectively exempting those laws from judicial review—undermines the

Hoosier state's democratic structure as created by the Indiana state constitution.

Preservation of that structure is critical to safeguarding Hoosiers' constitutional rights to equal say in their representative government. For decades, Indiana's legislature has gerrymandered Indiana's state and federal legislative districts along highly partisan lines, depriving hundreds of thousands of Hoosiers of voting power and, thus, fair representation. Hoosiers have few avenues available to check these legislators. Indiana has a weak gubernatorial veto that a heavily gerrymandered legislature, essentially guaranteed to be veto-proof, can and does consistently override. The Indiana Constitution does not allow ballot initiatives or public-initiated referenda. Nor do Hoosiers have any reason to expect that their partisan-entrenched legislature will undertake to amend Indiana's Constitution to rein in the very gerrymandering that keeps them in power. Indiana's judiciary is Hoosiers' last line of defense against a state legislature willing to disregard them for political power. The Court should preserve that last line of defense and continue to read the Elections Clause as allowing state judiciaries to check state legislatures when they exceed state constitutional limits.

BACKGROUND

The Elections Clause vests the power to determine the "Times, Places, and Manner" of federal elections "in each State by the Legislature thereof," subject to Congress's authority to "make or alter such regulations" "at any time by Law." U.S. CONST. art. I, § 4, cl. 1 ("Elections Clause"). At issue is the meaning of the Elections Clause's opening phrase: whether its reference to each State's "Legislature" bestows in state legislative assemblies plenary authority to determine the manner of federal congressional elections through districting, subject to check only by Congress and perhaps certain select state constitutional provisions but in no event by state judiciaries.

As Petitioners would have it, state legislatures' exercise of authority under the Elections Clause "cannot be controlled by the constitution and laws of the respective states." Pet'rs' Br. at 23-24 (quotations and citation omitted). However, Petitioners concede that "each State's constitution may properly govern" certain aspects of its legislature's exercise of its authority under the Elections Clause, including "whether a bicameral vote is required to enact a law, whether legislation is subject to gubernatorial veto, . . . and, perhaps in the extreme case, whether some lawmaking entity other than the ordinary institutional legislature has authority to legislate on the subject." Pet'rs' Br. at 24; *see also*, *e.g.*, *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (discussing an interpretation of the Elections Clause under

which *only* state legislative bodies, "not state judges, not state governors, not other state officials . . . bear primary responsibility for setting election rules").

Though Petitioners advance this interpretation of the Elections Clause, known as the "independent state legislature doctrine," specifically to overturn the North Carolina Supreme Court's adoption of redistricting maps following the 2020 census, ratification of Petitioners' formulation will reverberate far beyond that lone decennial congressional redistricting process. Like North Carolina's, Indiana's Constitution guarantees Hoosiers "free and equal" elections where each vote equally influences each election's outcome. *Blue v. State ex rel. Brown*, 188 N.E. 583, 589 (Ind. 1934), *overruled on other grounds by Harrell v. Sullivan*, 40 N.E.2d 115 (Ind. 1942); Ind. Const. art. 2, § 1. And for over a century, Indiana citizens have relied on their judiciary to protect their constitutional rights, like those under Article 2, § 1, from legislative acts that exceed the authority they bestowed on the legislature when they established Indiana's tripartite system of government. This judicial guardrail is more critical than ever to preserving Indiana's democratic foundation for at least two reasons: Indiana's political parties have entrenched their power in the legislature through extreme partisan gerrymandering, depriving Hoosiers of their constitutionally guaranteed voice in their governance; and the state constitutional checks Petitioners agree would survive their interpretation of the Elections Clause are practically unavailable to Hoosiers to

check their legislature's exercise of congressional districting authority.

Petitioners' interpretation of the Elections Clause would eliminate this oversight on Indiana's legislature's congressional redistricting efforts and gravely undermine Indiana's democratic foundation.

ARGUMENT

I. Petitioners' interpretation of the Elections Clause is incompatible with Indiana's separation of powers.

A. Indiana's legislature derives its power from, and is bound by, Indiana's Constitution.

One hundred and thirty years ago, Indiana's Supreme Court declared that, "[n]o court in the Union has maintained more vigorously than this the independence of the three several departments of the state government." *Parker v. State ex rel. Powell*, 32 N.E. 836, 839 (Ind. 1892). Yet that Court saw no daylight between that proclamation and its next one: "where the act of either of the three departments is in violation of the constitution of the state, such act is not within the discretion confided to that department." *Id.* In other words, Indiana's courts have long construed Indiana's co-equal branches of government, including its legislative body, referred to as the General Assembly, to exist solely within the confines Indiana's Constitution provides. *See*, *e.g.*, *Ellingham v. Dye*, 99 N.E. 1, 3 (Ind.

1912) ("[T]he governmental power inhering in the people was divided, and the three elements of it, the executive, legislative, and judicial authority, in so far only as the people deemed it wise and were willing to surrender or delegate power to agents. . . .").

Consequently, since the earliest days of its statehood, Indiana has recognized that "[t]here are some propositions that may be regarded . . . as being settled; as having passed into the rank of maxims or axioms in American jurisprudence. Among them are these:

> That the constitution of the state, relatively to the acts of the legislature, is the paramount or supreme law:
>
> That when the two conflict, the acts of the legislature must yield as utterly void: [and]
>
> That it is the duty of the Courts, in every case arising before them for decision, to decide and declare the law governing the case."

Rice v. State, 7 Ind. 332, 333-34 (1855).

Indiana's courts, ever reticent to wade into the political-question waters, have nonetheless consistently held the General Assembly to the bounds of Indiana's Constitution. *See*, *e.g.*, *Ballard v. Lewis*, 8 N.E.3d 190, 195 (Ind. 2014) ("Courts must be careful to avoid substituting their own judgments for the judgments of the more politically responsive branches."); *State v. Denny*, 21 N.E. 252, 258 (Ind. 1889) (declaring void acts of the General Assembly that improperly sought to usurp authority not constitutionally conferred upon the

legislature). State judges' ability to invalidate state laws as unconstitutional is precisely what Indiana's Constitution contemplates: that Indiana's "executive, legislative, and judicial authority" are empowered "in so far only as the people deemed it wise and were willing to surrender or delegate power to agents," and that those "three separate and distinct departments" are "independent of each other *except to the extent that the action of one was made to constitute a restraint to keep the others within proper bounds*, and to prevent hasty and improvident action." *Ellingham*, 99 N.E. at 3 (emphasis added); *see also*, *e.g.*, *Holcomb v. Bray*, 187 N.E.3d 1268, 1275 (Ind. 2022) (recognizing that though Article 1, § 3 of the Indiana Constitution's "distribution-of-powers mandate generally prevents one branch of government from usurping the power constitutionally vested in another, some otherwise impermissible interference is authorized" and citing, as examples, *State v. Monfort*, 723 N.E.2d 407, 412 (Ind. 2000), and *Denny*, 21 N.E. at 254).

So while Indiana courts have unwaveringly acknowledged the General Assembly's constitutional legislative authority, they have with equal force held that the legislature's existence, and thus necessarily the outer bounds of its authority, derives from Indiana's Constitution and thus cannot exceed it. *State v. Noble*, 21 N.E. 244, 245-46, 251 (Ind. 1889). Stated differently, the Indiana Constitution created a legislative branch that is inherently checked by both an executive and judicial function. *See*, *e.g.*, *Rice*, 7 Ind. at 334 (explaining it is "[t]he right and duty of the Courts . . . to

compare legislative acts with the paramount law, and to bring them to its test[.]").

The "Legislature" in Indiana, as a matter of its very existence, is subject to judicial review. There simply does not exist in Indiana a freestanding, independent legislative department with the authority to pass legislation free from the checks and balances the Indiana Constitution requires.

Indiana has specifically recognized that these checks and balances go hand in glove with the legislature's authority even in the redistricting sphere. *See*, *e.g.*, *Denney v. State ex rel. Basler*, 42 N.E. 929, 931 (Ind. 1896) ("It need hardly be said . . . that, in so far as the constitution itself has made the apportionment of the state discretionary with the legislature, that discretion . . . will be scrupulously respected by the courts. . . . Where, however, the constitution has spoken, and the voice of the legislature [even as to legislative apportionment] is heard in conflict with the voice of the constitution, there the courts will interfere, and will sustain the paramount law of the land as against its violation by the legislature. . . ."); *Brooks v. State*, 70 N.E. 980, 982 (Ind. 1904) ("The General Assembly has much discretion in the disposition of the fractions of the unit of representation, but that discretion must be exercised within the limitations of the Constitution. If it is abused, and the validity of an apportionment act is brought into dispute, the question becomes a judicial one, and the courts have the right to determine whether that discretion has been exercised according to the restrictions put upon it by the Constitution.").

B. Petitioners' interpretation of the Elections Clause would upend Indiana's democratic framework.

Petitioners promote an interpretation of the Elections Clause hostile to these foundational tenets of Indiana law. Pet'rs' Br. at 17-18; *see also*, *e.g.*, Pet'rs' Br. at 23-24 (arguing that state legislatures' exercise of their authority under the Elections Clause "cannot be controlled by the constitution and laws of the respective states" (quotations and citation omitted)).

Petitioners hypothesize a state legislative body that exists independent of the state constitution that created it and is endowed, through the Elections Clause, with power exceeding and contrary to the checked power that its citizens bestowed upon it in conceiving it. *See*, *e.g.*, Pet'rs' Br. at 22-24 (arguing that only the federal constitution can limit state legislatures' regulation of congressional elections). Petitioners interpret the Elections Clause to upend each State's constitutional framework, simultaneously unmooring those legislatures from their state constitutional formulations and stripping each State's judiciary, though oddly not its executive, of its constitutional province. *See* Pet'rs' Br. at 2; *but see* Pet'rs' Br. at 24 (conceding that a state's constitution may govern certain aspects of the legislature's act of regulating federal elections, including through gubernatorial veto).

Petitioners' interpretation is exactly backwards. In allocating state government authority, state

constitutions are not imposing limits on the federal Constitution. *Contra* Pet'rs' Br. at 12. Under principles of federalism, state constitutions bring into existence the branches of state government which, once created, can then act, including to carry out the federal Constitution's directives. *See*, *e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (describing "[a] state, in the ordinary sense of the constitution, . . . [as] a political community of free citizens, . . . organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed," and observing that the state's "legislative power is the supreme authority, except as limited by the constitution of the state. . . ." (citations and quotations omitted)); *Ellingham*, 99 N.E. at 4 (observing that Hoosiers granted to the General Assembly "only such legislative power as may be necessary or appropriate to the declared purpose of the . . . Constitution and . . . for the sole purpose of carrying into effect [that] declared purpose" (citations and quotations omitted)). That includes a state legislative branch checked and balanced by the executive and judiciary. *See*, *e.g.*, *Rice*, 7 Ind. at 335 (confirming Indiana state courts' constitutional obligation to ensure that the legislature acts constitutionally).

In other words, the federal Constitution is not crafting some new "Legislature" but must take the branches of state government as it finds them.

Were it otherwise, Indiana's legislature could, under the guise of the Elections Clause, act with impunity in ways that would undermine the very

foundation of Indiana's governance. For example, what would preclude the General Assembly from concluding that it was empowered to establish the time, place, and manner of federal congressional elections through a unilateral amendment to Indiana's Constitution, without regard to the amendment process Indiana's Constitution establishes? Under Petitioners' reading of the Elections Clause, no provision of Indiana's Constitution would restrict the General Assembly from doing so. Lest the Court believe this possibility too far-fetched to be taken seriously, it was just over one hundred years ago that Indiana's General Assembly attempted unilaterally to amend the state constitution, arguing that it was within its state legislative authority to do so. *See Ellingham*, 99 N.E. at 1.

The Indiana Supreme Court rejected that General Assembly's approach as inimical to the canons of Indiana's and the nation's democratic framework. It observed that, since "the beginning of the judicial history of the state to the present," "an unbroken line of decisions" has confirmed that "the General Assembly is supreme and sovereign in the exercise of the lawmaking power thus conferred upon it, *subject only to such limitations as are imposed, expressly or by clear implication, by the state Constitution* and the restraints of the federal Constitution and the laws and treaties passed and made pursuant to it[.]" *Id.* at 3 (emphasis added).

This Court's decisions confirm that a state legislature's exercise of its authority under the Elections Clause "must be in accordance with the method which the state has prescribed for legislative enactments"

because "the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states." *Smiley v. Holm*, 285 U.S. 355, 367-69 (1932) (finding "no suggestion in the federal constitutional provision 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"); *see also*, *e.g.*, *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 570 (1916) (upholding state constitutional amendment vesting a portion of state's legislative power in its people through referendum on acts passed by state legislature against challenge amendment violated Article I, § 4 of federal Constitution and state constitutional provisions).

This precedent is, unsurprisingly, consistent with the Framers' own writings, which rebut any notion that they intended by the use of the word "legislature" in the Elections Clause to strip away the organic limitations of States' legislative assemblies. Instead, they contemplated checks and balances at both state and federal levels as the solution to the problem James Madison famously put so succinctly: "If men were angels, no government would be necessary."[4] THE

[4] The Federalist Papers shed light on the meaning of words in the Constitution regardless of whether one looks to the Framers' intent, the intent of the ratifying legislatures, or the original objective meaning of the constitutional text. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802, 818-24, n.117, n.122, n.123 (2007) (citing at n.117, n.122 and

FEDERALIST 51 (James Madison); *see also*, *e.g.*, THE FEDERALIST 10 (James Madison) (observing that "[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people"). For example, when writing about the state power granted by the Elections Clause, Alexander Hamilton repeatedly used the word "legislature" interchangeably with broader terms like "government[s]" and "administrations." *See* THE FEDERALIST 59 (Alexander Hamilton). Petitioners' cherry-picked reference to Hamilton's use of the term "legislature" in Federalist 59 thus is not dispositive of the meaning Hamilton ascribed to the word; rather, it only begs the ultimate question here. Pet'rs' Br. at 20.

Perhaps attempting to blunt these problems, Petitioners seek to pick and choose which of the state's constitutional provisions the Elections Clause embraces—proposing that at least *some* would continue to bind state legislatures engaged in congressional districting even under their interpretation of the Clause. *See*, *e.g.*, Pet'rs' Br. at 24 (agreeing that "each state's constitution may properly govern" certain aspects of legislature's exercise of its authority under Elections Clause, including "whether a bicameral vote is required to enact a law, whether legislation is subject to gubernatorial veto, . . . and, perhaps in the extreme case, whether some lawmaking entity other than the ordinary institutional legislature has authority to legislate on the

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n.123 reliance on the Papers for original objective meaning by Justices Thomas and Scalia and by the Court).

subject"). But nothing written in the Elections Clause supports Petitioners' view that these certain, select aspects of state government tacitly survive the Elections Clause while judicial review does not. A governor's veto, an executive branch action that renders a legislature's enactment null, is no more *procedural* in practice and no less *substantive* in effect than a court's nullifying the legislature's actions because they exceed the bounds of the power the people endowed in it. *Contra* Pet'rs' Br. at 24-25; *see also*, *e.g.*, *Tucker v. State*, 35 N.E.2d 270, 280 (Ind. 1941) (observing that the executive may at times be more representative of the people than the legislature). In sum and substance, both branches are carrying out their respective constitutional prerogatives, even if the result invalidates a legislative prescription under the Elections Clause.

While it may be that our tripartite system of government "designed the legislative branch to function as the grand depository of the democratic principle," never has Indiana's General Assembly served that function in a vacuum. Pet'rs' Br. at 19 (citation omitted). The judiciary has always been its equal, because *its* surest obligation has always been to "determine whether any given law is in conflict with the constitution or not." *Denney*, 42 N.E. at 930. As Petitioners seemingly acknowledge, checks and balances such as these are critical to the continuation of democracy as the Founders envisioned it; without them, as Indiana's General Assembly has shown, lawmakers will simply seek to "entrench their political power against future legislative change." Pet'rs' Br. at 30; *State ex rel. Mass*

Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd., 255 N.E.2d 833, 835 (Ind. 1970) ("The framers of our Constitution provided a system of checks and balances because they realized and appreciated the lesson of history that no man or group of men can be safely entrusted with unlimited power.").

II. Petitioners' interpretation of the Elections Clause would cement Indiana's highly partisan gerrymandered congressional districts.

Notwithstanding its recognition of the necessity of checks and balances to the preservation of democracy, the checks that Indiana's system of government provides are relatively weak. As a result, for decades, the General Assembly has gerrymandered both state and federal districts along highly partisan lines, depriving hundreds of thousands of Hoosiers of the representation in their governance that Indiana's Constitution guarantees them. Free from many meaningful checks on its authority, the General Assembly has fashioned itself into a body divorced from those it is intended to serve. If Petitioners' interpretation of the Elections Clause is adopted, Indiana, and states like it, stand to lose the courts as one of their only remaining lifelines to prevent gerrymandering and the harms it brings.[5]

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[5] Of course, if the Court interprets the Elections Clause to preclude *any* checks on state legislatures' redistricting process, including those Petitioners concede would remain viable under their interpretation of the constitutional provision, even voters in states with better-checked, less gerrymandered legislatures than

A. Indiana's General Assembly has long engaged in highly partisan gerrymandering to maintain political power at Hoosiers' expense.

1. Indiana's sordid history of highly partisan political gerrymandering.

The Indiana General Assembly draws Indiana's state legislative and federal congressional districts, subject to only the explicit requirement that they be contiguous. Ind. Const. art. 4, § 5; *see also*, *e.g.*, *Indiana*, PRINCETON GERRYMANDERING PROJECT (last visited Oct. 19, 2022) (reflecting Indiana's redrawn congressional districts).[6]

Indiana's Supreme Court has optimistically referred to redistricting as "the very technique by which the equality of the force of each vote [may be] maintained as shifts in the population occur." *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982); *see also*, *e.g.*, *Blue*, 188 N.E. at 589 (explaining that elections are "equal," as that term is used in Article 2, § 1 of the Indiana Constitution, "when each ballot is as effective as every other ballot"). Yet, throughout Indiana's political history, both Indiana Democrats and Republicans have used this authority to gerrymander partisan advantage in federal congressional elections for their respective parties—"cracking" opposing-party majorities across multiple districts or "packing" them

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Indiana's are likely to see their democratic institutions disintegrate.

[6] *Available at*: https://gerrymander.princeton.edu/reforms/IN.

into a few districts with an overwhelming stronghold. *See generally* Christopher Warshaw, *An Evaluation of the Partisan Bias in Indiana's 2011 Congressional and State Legislative Districting Plan* 22 (May 2021)[7] ("Warshaw Report").[8]

In the early 2000s, Democrats used their majority in the state House to draw congressional districts that were gerrymandered to maximize the Democratic Party's advantage, "pitt[ing] [incumbent] Republicans against each other" and "fortif[ying] Democratic strongholds." Richard L. Berke, *Democrats' New Map of Indiana Divides G.O.P.*, N.Y. TIMES (June 2, 2001); *see also* Warshaw Rpt. at 16-17. They made no effort to hide their partisan motivations in doing so. *See* Berke, *supra* (quoting Ed Mahern, the lead map drawer, admitting that "it was not [his] objective to have a Democrat come out on the short end"). And their efforts paid off. Democrats were successful in gerrymandering Indiana's districts in their favor from 2002 to 2010. Warshaw Rpt. at 16. However, that gerrymander had run its course by 2010, when Republicans gained control of Indiana's General Assembly. *See*, *e.g.*, *Indiana 2010 legislative election results*, BALLOTPEDIA (last visited Oct. 3, 2022).[9]

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[7] *Available at*: https://www.women4changeindiana.org/s/W4C-Redistricting-Indiana-Warshaw-Report-51421.pdf.

[8] Women4Change commissioned Dr. Christopher Warshaw, a national expert on gerrymandering, to prepare this report on gerrymandering in Indiana.

[9] *Available at*: https://ballotpedia.org/Indiana_2010_legislative_election_results.

Republicans wasted no time acting in kind, gerrymandering congressional districts with even more extreme partisan leans favoring their party's candidates. Warshaw Rpt. at 16-17. In 2012, Republicans won just over half of the statewide two-party congressional vote but won seven of the nine congressional seats—a discrepancy extreme by national and Indiana's historical standards. *Id.* at 17. Between 2012 and 2020, Republicans held, on average, a twelve percent advantage in maximizing Republican voters' effects on election outcomes—a larger and more persistent advantage than Indiana had seen in the prior forty years. *Id.* at 16-17. Put another way, during the 2010 decade, Republican votes were twelve percent less likely to go unheard than Democratic votes. And Republicans' maps gave their party a safety net in another way, too: under them, the statewide vote could have swung five percentage points, and Republican voters still would have maintained an advantage in having their votes (and thus voices) count. *Id.* at 21. Under the 2010 maps, even if Democrats had won 50 percent of the statewide vote, they would have won only three of Indiana's nine congressional seats. *Id.* at 12.

The Indiana Republican Party's gerrymandering achieved the durability that had eluded the state's Democrats. Republicans have retained their seven congressional seats since 2012. *See* Jeff Trandahl, *Statistics of the Congressional Election of November 5, 2002* (2003) at 15; Lorraine C. Miller, *Statistics of the Congressional Election of November 7, 2006* (2007) at

15; Karen L. Haas, *Statistics of the Congressional Election of November 2, 2010* (2011) at 18.

Indiana's 2020 election proved no different than those earlier in the cycle. As a result of that election cycle, Republicans maintained their seven-two advantage in Indiana's congressional delegation, expanded their control of the General Assembly and retained the governor's office. *See United States House of Representatives elections in Indiana, 2020*, BALLOTPEDIA (last visited Oct. 19, 2022);[10] *Indiana House of Representatives elections, 2020*, BALLOTPEDIA (last visited Oct. 19, 2022);[11] *Indiana gubernatorial and lieutenant gubernatorial election, 2020*, BALLOTPEDIA (last visited Oct. 19 2022).[12]

That heavily gerrymandered Republican General Assembly proceeded to enact congressional districts that are even more aggressively gerrymandered than those in the 2010 maps. Christopher Warshaw, *An Initial Evaluation of the Partisan Bias in Indiana's Proposed Districting Plan for Congress and the State*

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[10] *Available at*: https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Indiana,_2020.

[11] *Available at*: https://ballotpedia.org/Indiana_House_of_Representatives_elections,_2020.

[12] *Available at*: https://ballotpedia.org/Indiana_gubernatorial_and_lieutenant_gubernatorial_election,_2020).

House (Sept. 2021),[13] ("Warshaw September Report").[14] Under the 2021 maps, Indiana will reach nearly state-historic levels of gerrymandering and will become one of the most gerrymandered states in the country, with maps "more pro-Republican than 97% of the [nation-wide] congressional plans over the past 50 years." Warshaw Sept. Rpt. at 2. For example, while under the prior maps Indiana's fifth congressional district was a competitive district that leaned Republican, the new maps render it a solid Republican district. Warshaw Sept. Rpt. at 6. In fact, Princeton University's Gerry-mandering Project deemed Indiana to have *zero* competitive congressional districts. *See Indiana's Re-districting Report Card*, PRINCETON GERRYMANDERING PROJECT (last visited Oct. 19, 2022).[15]

2. Indiana's congressional delegation does not fairly represent Hoosiers.

The Indiana General Assembly's extreme partisanship comes at great cost to Hoosiers' constitutional rights. It should come as no surprise that highly partisan gerrymandering, like that of Indiana's General Assembly, deprives voters of "an equal voice, as nearly as possible, in the selection of those who should make

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[13] *Available at*: https://static1.squarespace.com/static/5855cbd2ff7c50433c31de7b/t/614d274086a2136eff286c27/1632446273191/W4C_Warshaw_Analysis_210921.pdf.

[14] Women4Change also commissioned Dr. Warshaw to prepare this report.

[15] *Available at*: https://gerrymander.princeton.edu/redistricting-report-card?planId=rec44fRjfjGbS94vx.

the laws by which they [a]re to be governed," at both the state and federal levels. *Brooks*, 70 N.E. at 982. As Warshaw documents, about forty-four percent of Hoosiers vote for Democratic candidates. For that, the gerrymandered map yields them two of nine, or twenty-two percent, of their congressional delegation.

Particularly meaningful to *amicus* is this gross deprivation's negative effects on women voters and candidates. Women are "more likely to be registered to vote and more likely to turn out to vote than men." *Women Voters*, POLITICAL PARITY (last visited Oct. 19, 2022);[16] *see also*, *e.g.*, *Gender Differences in Voter Turnout*, THE CENTER FOR AMERICAN WOMEN AND POLITICS (CAWP) (last visited Oct. 19, 2022)[17] (showing "[w]omen have registered and voted at higher rates than men in every presidential election since 1980, with the turnout gap between women and men growing slightly larger with each successive presidential election").

Women also are more likely to identify as Democrats and "to express opinions that align with the policy positions of the Democratic Party" than men. *See Women Voters*, POLITICAL PARITY (last visited Oct. 19, 2022) (observing "persistent pattern" of "women [being] more likely than men to support Democratic

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[16] *Available at*: https://www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Voters.pdf.

[17] *Available at*: https://cawp.rutgers.edu/facts/voters/gender-differences-voter-turnout.

presidential candidates");[18] Richa Chaturvedi, *A closer look at the gender gap in presidential voting*, PEW RESEARCH CENTER (July 28, 2016) ("[D]ating to 1992, women have been consistently more likely than men to identify as a Democrat or lean toward the Democratic Party.");[19] *Gender Gap Public Opinion*, CAWP (last visited Oct. 19, 2022)[20] (showing, for example, "[w]omen tend to be more supportive of gun control, reproductive rights, welfare, and equal rights policies than men" and "less supportive of the death penalty, defense spending, and military intervention").

Yet despite women's consistently voting in higher numbers than men and systematically favoring policies associated with the Democratic Party, the congressional delegations in highly partisan gerrymandered states, like Indiana, do not reflect these voting patterns. *Compare, e.g.*, *Number of Voters as a Share of the Voter Population, by Sex*, KAISER FAMILY FOUNDATION (KFF) (last visited Oct. 19, 2022)[21] (showing nearly 1.6 million Hoosier women voted in 2020 compared to approximately 1.4 million men), *with, e.g.*, *Partisan Lean Scores for Congressional Districts in 2020*, FIVETHIRTYEIGHT (last visited Oct. 1, 2022) (showing massive

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[18] *Available at*: https://www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Voters.pdf.

[19] *Available at*: https://www.pewresearch.org/fact-tank/2016/07/28/a-closer-look-at-the-gender-gap-in-presidential-voting/.

[20] *Available at*: https://cawp.rutgers.edu/gender-gap-public-opinion.

[21] *Available at*: https://www.kff.org/other/state-indicator/number-of-individuals-who-voted-in-thousands-and-individuals-who-voted-as-a-share-of-the-voter-population-by-sex/.

Republican lean scores in seven of Indiana's nine congressional districts).[22] This is so whether you consider the partisan composition, or the gender make-up, of these states' delegations. *See also*, *e.g.*, *Women Voters*, POLITICAL PARITY (last visited Oct. 19, 2022) (explaining women place more value on "increasing the presence of women in office than men [do]");[23] *Women Candidates and Political Parties*, POLITICAL PARITY (last visited Oct. 19, 2022)[24] (discussing "disproportionate barriers facing Republican women" in running for elected office such that districts gerrymandered in favor of Republicans are less likely to elect women candidates).

Moreover, across the country, gerrymandering consistently undermines women candidates' electoral opportunities.[25] For example, 2020 redistricting efforts significantly affected incumbent women congressional representatives' chances of winning reelection in 2022, rendering sixteen of those representatives' reelection chances "less safe," compared to ten whose chances

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[22] *Available at*: https://github.com/fivethirtyeight/data/blob/master/partisan-lean/2020/fivethirtyeight_partisan_lean_DISTRICTS.csv.

[23] *Available at*: https://www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Voters.pdf.

[24] *Available at*: https://www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Parties.pdf.

[25] For its part, in the over two hundred years it has been a state, Indiana has elected only eight women to serve as congressional representatives. *Indiana*, REPRESENT WOMEN (last visited Oct. 1, 2022), *available at*: https://representwomen.app.box.com/s/ree9nuam99h2hm2hc5oew25f0za8cuhw.

became "more safe." *Redistricting Effects Women Congressional Incumbents*, CAWP (last visited Oct. 19, 2022).[26] Past examples of redistricting targeting women incumbents confirm that states' "gendermandering" in their 2020 redistricting is not the exception, it is the rule. *See*, *e.g.*, *A Case of Gender Gerrymandering*, WASHINGTON POST (Apr. 26, 2001);[27] *Voter Suppression Targets Women, Students and People of Color (Issue Advisory, Part Two)*, NAT'L ORG. FOR WOMEN (Sept. 2014) ("[S]cholars have noted that district lines are drawn in a way that disfavors female candidates.").[28]

Thus, Indiana's entrenched partisan gerrymandering breeds congressional delegations that simply do not represent the voices of the state's electorate, including, for example, those of the majority of voters—women.

B. The few state-law protections Petitioners concede the Elections Clause accommodates are unavailable to Hoosiers.

Unfortunately, Hoosiers have few practical means to correct this lack of representation in their

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[26] *Available at*: https://cawp.rutgers.edu/redistricting-effects-women-congressional-incumbents.

[27] *Available at*: https://www.washingtonpost.com/archive/local/2001/04/26/a-case-of-gender-gerrymandering/025e2fb3-6d87-4564-a9b3-5511d2a65876/.

[28] *Available at*: https://now.org/resource/voter-suppression-targets-women-students-and-people-of-color-issue-advisory-part-two/.

congressional delegations. And, even accepting Petitioners' assertion that the Elections Clause contemplates operation of *some* state constitutional provisions but not others in federal redistricting, none of the "procedural" checks Petitioners suggest—gubernatorial vetoes, lawmaking by voter initiative, and express state constitutional provisions—meaningfully aids Hoosiers in protecting their constitutional right to an equal voice.

First, Indiana's gubernatorial veto is unusually weak. Unlike in most states, the General Assembly can override the governor's veto with a simple majority; no supermajority is necessary. Ind. Const. art. 5, § 14. And since legislation requires only a simple majority to pass, any bill that reaches the governor's desk will have at least simple majority support, and therefore the votes necessary to override any veto. *See*, *e.g.*, Ind. Const. art. 1, § 25; Leon H. Wallace, *Legislative Apportionment in Indiana: A Case History*, 42 IND. L. J. 6 (1966) (noting that the few times Indiana governors have vetoed congressional redistricting maps, the General Assembly has overruled the veto).

In other words, the General Assembly's heavy-handed gerrymandering ensures that its partisan supermajority in the state legislature has been and likely will remain veto-proof. Thus, it is no surprise that, while on average between 2010 and 2020 state legislatures overrode approximately five percent of vetoed legislation in their respective states, Indiana's General Assembly overrode more than three times as many vetoed acts. *See Veto overrides in state legislatures,*

Statewide Comparison, BALLOTPEDIA (last visited Sept. 30, 2022).[29] And one need look no further than last legislative session to find the General Assembly's exercise of this veto-proof majority to override a veto of acts Indiana's courts ultimately struck down as unconstitutional. *See Holcomb*, 187 N.E. at 1274 (holding act General Assembly passed over Governor's veto unconstitutional).

Second, Hoosiers are foreclosed from engaging in "lawmaking by initiative." Pet'rs' Cert. Reply at 11. While nine states have used ballot initiatives to establish independent redistricting commissions, Indiana and twenty-three other states do not allow ballot initiatives or voter-initiated referenda. *See States without initiative or referendum*, BALLOTPEDIA (last visited Oct. 19, 2022);[30] *see also Ballot initiative*, BALLOTPEDIA (last visited Oct. 19, 2022).[31] Thus, Hoosiers have no means of establishing a districting body independent of the legislature via a ballot initiative process.

Third, even if a state constitutional amendment limiting the state legislature's authority to district with partisan intent would survive Petitioners' interpretation of the Elections Clause, a suggestion nigh impossible to square with Petitioners' other arguments, that recourse remains potentially unavailable

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[29] *Available at*: https://ballotpedia.org/Veto_overrides_in_state_legislatures.

[30] *Available at*: https://ballotpedia.org/States_without_initiative_or_referendum.

[31] *Available at*: https://ballotpedia.org/Ballot_initiative.

to Hoosiers, too. *See* Pet'rs' Cert. Br. at 36 (allowing that a state court may "enforce specific and judicially manageable standards, such as contiguousness and compactness requirements," even as to districts drawn under the Elections Clause). Unlike some states, Indiana's Constitution contains no express process for voters to place constitutional amendments on the ballot. Hoosiers have no reason to hope that both chambers of their entrenched, highly partisan legislature will pass such an amendment in the successive sessions required for it to be presented to the State's citizens for a vote. *See* Ind. Const. art. 16, § 1; *see also*, *e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (describing Florida's "Fair Districts Amendment," Fla. Const. art. 3, § 21, as providing sufficient "standards and guidance for state courts to apply").

In sum, no state-law protection Petitioners suggest the Elections Clause embraces—gubernatorial vetoes, ballot initiatives, or state constitutional provisions—is a recourse realistically available to Hoosiers. Instead, Indiana voters have limited means to change the composition of their gerrymander-manufactured congressional delegation. *See*, *e.g.*, Kaitlin Lange, *Indiana's congressional, state maps substantially favor republicans study says*, INDIANAPOLIS STAR (June 22, 2021).[32]

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[32] *Available at*: https://www.indystar.com/story/news/politics/2021/06/22/indianas-current-district-maps-strongly-favor-republicans-study-says/7770089002/.

C. State-court enforcement of state constitutional guarantees is critical to ensuring democracy in Indiana.

Against this backdrop, Indiana's judiciary stands as the last bastion between Hoosiers' constitutional guarantee of fair representation and a political party determined to preserve its power.[33] *See*, *e.g.*, *Brooks*, 70 N.E. at 982 ("While it is true that exact equality among the voters of the state cannot be secured, it can be approximated, and the Constitution requires that it shall be approximated in every instance as nearly as practicable."); *Indiana Revenue Bd.*, 255 N.E. at 834 ("[T]he court is guardian of the Constitution.").

Like the citizens of North Carolina, Hoosiers have available to them state constitutional guarantees of free and equal elections, equal privileges and immunities under the law, freedoms of speech and association, and meaningful access to their courts that only those courts can aid them in protecting. *See*, *e.g.*, Ind. Const. art. 1, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or

[33] Perhaps an optimistic observer would argue that Hoosiers' actual last resort is electing new state legislators to draw fairer and more competitive congressional districts. But, in practice, "[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight." *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting). Partisan gerrymandering in Indiana has gotten worse, not better. "Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard." *Id.* at 2525.

reputation, shall have remedy by due course of law."); *id.*, art. 1, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."); *id.*, art. 1, § 31 ("No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances."); *id.*, art. 2, § 1 ("All elections shall be free and equal.").

Most specifically, Indiana has long guaranteed that "the vote of every elector is [to be] equal in its influence upon the result to the vote of every other elector" under the free-and-equal clause, Article 2, section 1 of its constitution. *Oviatt v. Behme*, 147 N.E.2d 897, 901 (Ind. 1958) (quotations and citation omitted). And the Indiana Supreme Court has recognized that redistricting, subject to the Indiana Constitution's provisions, including Article 2, section 1, "is the very technique by which the equality of the force of each vote is maintained as shifts in the population occur." *Bartolomei*, 434 N.E.2d at 78.

The lack of other meaningful checks on Indiana's districting process available to Hoosiers renders Article 2, section 1 and these other state constitutional provisions, and the Indiana courts enforcing them, the only means of ensuring "each [Hoosier voter's] ballot is as effective as every other ballot." *Blue*, 188 N.E. at 589. Indeed, as the Indiana Supreme Court observed fifty years ago, "[w]hat check is there on the acts of

the General Assembly if redress by the courts of grievances growing out of those acts is unavailable[?]" *Indiana Revenue Bd.*, 255 N.E. at 835.

At the very least, lawmakers unthreatened by the state's executive or its populace remain cognizant that its judiciary may nonetheless hold them to account, and they tailor their conduct accordingly. One Indiana state Senator contrasted North Carolina's redistricting, which he observed "really push[ed] it" and engendered litigation, with Indiana's, which, he noted, did not. *See*, *e.g.*, Leslie Bonilla Muñiz, *Will Pro-Legislature Elections Theory in SCOTUS Case Come to Indiana?*, IND. CAP. CHRON. (Aug. 8, 2022)[34] (quoting Indiana state Senator Jon Ford, chair of the Senate Elections Committee). State legislators are cognizant of that constitutional tipping point in their gerrymandering efforts, and they know that "when you get real cute, you end up in a lawsuit—and you lose it. And then the courts redraw the lines[.]" Ally Mutnick, *Republicans weigh "cracking" cities to doom Democrats*, POLITICO (July 6, 2021) (quoting Rep. James Comer (R-Ky.));[35] *see also*, *e.g.*, Tom Davies, *Indiana redistricting plan secures suburban district for GOP*, ASSOCIATED PRESS (Sept. 14, 2021)[36] (quoting Marjorie Hershey, a

[34] *Available at*: https://indianacapitalchronicle.com/2022/08/08/will-pro-legislature-elections-theory-in-scotus-case-come-to-indiana/.

[35] *Available at*: https://www.politico.com/news/2021/07/06/republicans-redistricting-doom-democrats-498232.

[36] *Available at*: https://apnews.com/article/elections-indiana-indianapolis-redistricting-andre-carson-b861df2578f816bbf2c7d45d5ec7aec1.

political scientist at Indiana University, advising, "There's a point at which if you go after too much, you start raising court challenges that are going to at least risk the possibility that the whole map goes down.").

By eliminating this last democratic safeguard for Hoosiers, Petitioners' interpretation of the Elections Clause would place seemingly unlimited congressional redistricting authority in the General Assembly's hands alone—all but ensuring the end to Indiana's democratic system of governance. *See*, *e.g.*, THE FEDERALIST 47 (James Madison) (observing that the "accumulation of all [congressional redistricting] powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny").

CONCLUSION

Indiana's Constitution creates a General Assembly limited by state constitutional guardrails, enforced by a supreme court. Those limitations are hardly extrinsic to or severable from the Assembly. They are instead organic parts of our General Assembly's existence, critical to proper functioning of Indiana's state government—all the more so in a state in which the voters are up against a durable and extreme partisan gerrymander, unlikely to be able to effect change through the ballot box.

Petitioners make the extreme claim that by the use of a single word and with no explanation the Founders deprived the states of the intrinsic benefit of

one of state government's checks and balances in the administration of federal elections. Indiana voters need state courts available as a tool to balance the General Assembly's extreme partisan gerrymandering of Indiana's congressional delegation. Women4Change respectfully requests the Court reject Petitioners' efforts to further erode the means we need to make our democracy work.

Respectfully submitted,

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