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 *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21, END CITIZENS UNITED//LET AMERICA VOTE ACTION FUND, NATIONAL COUNCIL OF JEWISH WOMEN, INC., ONEVIRGINIA2021, REPRESENTUS, REPUBLICAN WOMEN FOR PROGRESS, UNITARIAN UNIVERSALISTS FOR SOCIAL JUSTICE, AND VOTERS NOT POLITICIANS IN SUPPORT OF RESPONDENTS

Paul M. Smith
Counsel of Record
Adav Noti
Kevin P. Hancock
Aseem Mulji

CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 763-2200
psmith@campaignlegal.org
Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a diverse group of democracy reform, public policy, advocacy, and faith-based organizations whose missions include ensuring that the democratic process is free and fair for all voters: Campaign Legal Center, Democracy 21, End Citizens United//Let America Vote Action Fund, National Council of Jewish Women, Inc., OneVirginia2021, RepresentUs, Republican Women for Progress, Unitarian Universalists for Social Justice, and Voters Not Politicians. Each has an interest in ensuring that state courts and independent redistricting commissions continue to act as a check on partisan gerrymandering and the harms it inflicts upon American representative democracy.

SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that partisan gerrymandering is "'incompatible with democratic principles.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (quoting *Ariz. State Legis. v. Ariz. Redistricting Comm'n*, 567 U.S. 787, 791, 824 (2015) ("*AIRC*")). Although three years ago the Court held that partisan gerrymandering claims are nonjusticiable under the federal Constitution, the

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[1] Pursuant to this Court's Rule 37.6, counsel for *Amici Curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this *amici curiae* brief by written blanket consent.

Court assured the country that its ruling would not "condemn complaints about districting to echo into a void," due in part to the availability of state constitutions and independent redistricting commissions (IRCs) to check the problem of partisan gerrymandering. *Id.* at 2507.

The North Carolina Supreme Court in this case provided exactly the kind of check on gerrymandering that this Court promised would be available. After failing to remedy one decade's malapportioned congressional districts in federal court and facing another, voters sought relief in state court alleging that the North Carolina General Assembly's 2021 congressional plan violated the state constitution by severely disfavoring non-Republican voters. The North Carolina Supreme Court agreed, finding that the General Assembly's congressional map was indeed an "egregious and intentional partisan gerrymander, designed to . . . give greater voice to [some] voters than to any others," and in clear violation of a fundamental right to substantially equal voting power, as protected by four distinct provisions of the North Carolina Constitution. Pet. App. 10a-12a.

The Court should reject Petitioners' request to reverse the North Carolina Supreme Court's ruling under a radical and unprecedented reading of the Constitution's Elections Clause. *See* U.S. Const. art. I, § 4. Petitioners assert that the Elections Clause prevents state courts from invalidating state regulation of federal congressional elections that violates state constitutional protections. As Respondents have argued, Petitioners' assertion

should be rejected because it is inconsistent with the Constitution and this Court's precedents. But in addition, as *Amici* explain below, Petitioners' reading of the Elections Clause should be rejected because it would be disastrously harmful. It would eliminate or render ineffective some of the last available checks on partisan gerrymandering of congressional districts and betray the very purpose and promise of the U.S. Constitution itself: to provide for representative government.

Petitioners' reading of the Elections Clause would put an end to *any* judicial remedies for partisan gerrymandering and threaten the viability of IRCs. State courts and IRCs play a critical role in preventing and remedying partisan gerrymandering. Partisan gerrymandering benefits those in power, so there is little incentive for incumbent legislators to act contrary to their own partisan self-interest to end the practice. Partisan gerrymandering also undermines voters' ability to cure the problem by voting those same incumbents out of office. These dynamics exist at both the federal and state level, given that national interests increasingly dominate state politics and the redistricting process.

The costs to American representative democracy of allowing complaints about partisan gerrymandering to echo into a void would be enormous. By creating increasing numbers of "safe" congressional seats, partisan gerrymandering renders general elections uncompetitive. As a result, officeholders tailor their policy views to satisfy voters in the most extreme wing of their party, whose votes

they will need to win a competitive primary election. The result is a polarized Congress, where Members of each party are reluctant to work with the other party's Members out of fear of being defeated in a primary by a more liberal or more conservative challenger. Driven by these incentives, politicians continue to gerrymander their districts, feeding a vicious cycle of polarization, extremism, and dysfunction.

The Court should decline Petitioners' invitation to accelerate this trend and should respect the distinct constitutional role that state courts and IRCs play in preventing and remedying partisan gerrymandering.

ARGUMENT

I. Partisan Gerrymandering is Antidemocratic and Violates Fundamental Rights.

There is little debate that partisan gerrymanders, like North Carolina's congressional plan, "are incompatible with democratic principles," including the "core principle of republican government . . . that the voters should choose their representatives, not the other way around." *AIRC*, 567 U.S. at 791, 824 (internal citations and quotations omitted).

By drawing district lines to favor one political party, the party in control of redistricting can amplify its control over a congressional delegation, ensuring that more of its candidates are safely elected to Congress while artificially minimizing opportunities for voters of the disfavored party to elect their preferred candidates. The dilution and distortion that results from gerrymandered district maps is antithetical to the Founders' vision of Congress as "an

exact portrait of the people at large," a representative body where "equal interest among the people should have equal interest in it." John Adams, *Thoughts on Government* at 403 (1776), *reprinted in 1 American Political Writing During the Founding Era: 1760-1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983).

Although partisan gerrymandering is not new, the rise of modern computing in recent decades has made it easier for politicians to draw gerrymanders so precise and extreme that even major shifts in voter preferences cannot shake loose the advantaged party's hold on power. *See* David Daley, *Ratf**ked: The True Story Behind the Secret Plan to Steal America's Democracy* 51-60 (2016). While voters in some states have managed to rein in partisan gerrymandering by mandating the use of IRCs by popular initiative, legislatures controlled by both parties in the last two decades have enacted extreme and durable partisan gerrymanders in states where they still run the redistricting process.[2] Such durable gerrymanders result in the entrenchment of one party's control over the state's congressional delegation, depriving disfavored parties' voters of fair congressional representation for an entire decade. Partisan gerrymandering also contributes to other phenomena ailing American democracy, including partisan polarization, extremism, and impaired

[2] *See* Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 867 (2015); Christopher Warshaw, et al., *Districts for a New Decade — Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle*, 52 Publius: J. Federalism 428, 447 (May 24, 2022).

democratic accountability leading to increased dysfunction—all of which will intensify absent meaningful checks on the practice.

Extreme partisan gerrymanders are not only unfair and destructive—they are also unconstitutional. Although this Court declined jurisdiction over partisan gerrymandering claims, *Rucho*, 139 S. Ct. at 2484, it has unanimously agreed—*twice*—that "severe partisan gerrymanders violate the [federal] Constitution," *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004); *see also id.* at 313 (recognizing consensus) (Kennedy, J., concurring in judgment). First, in *Vieth*, Justice Kennedy explained that extreme partisan gerrymanders inflict at least two constitutional harms on disfavored voters: they violate the right to fair and equal representation under the Fourteenth Amendment, *id.* at 313, and contravene the First Amendment's prohibition on "disfavored treatment by reason of [one's political] views," *id.* at 314. Then, in *Gill*, Chief Justice Roberts wrote for a unanimous Court that partisan gerrymandering can inflict the individual constitutional harm of vote dilution, by placing a voter in a "packed or cracked" district "caus[ing] his vote . . . to carry less weight than it would carry in another, hypothetical district." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

State courts have similarly found extreme partisan gerrymanders to violate multiple rights guaranteed by state constitutions. In some states, courts have applied new constitutional provisions specifically aimed at prohibiting partisan

gerrymandering.[3] In other states, like North Carolina, courts have engaged in their time-tested role of applying well-established constitutional principles to new factual contexts, and have found partisan gerrymanders to violate core state constitutional rights, including guarantees of free elections, equal protection of law, and free speech and association.[4]

In short, partisan gerrymandering of congressional districts inflicts constitutional harms on voters and serious damage on American democracy. It is a crisis in need of every available restraint.

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[3] *See, e.g.*, *Harkenrider v. Hochul*, No. 60, 2022 N.Y. Slip Op. 02833, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, and 2021-1210, 2022 WL 110261, at *24-28 (Ohio Jan. 12, 2022); *Neiman v. LaRose*, Nos. 2022-0298 and 2022-0303, 2022 WL 2812895, at *1 (Ohio July 19, 2022); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colorado Indep. Cong. Redistricting Comm'n*, 497 P.3d 493, 515 (Colo. 2021); Final Order Establishing Voting Districts for the Senate of Virginia, the House of Delegates of Virginia, and Virginia's Representatives to the United States House of Representatives at 1–2, *In Re: Decennial Redistricting Pursuant to The Constitution of Virginia, art. II, §§ 6 to 6-A, and Virginia Code § 30-399* (Va. Dec. 28, 2021), https://perma.cc/DNT2-THH8.

[4] *See, e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 820 (Pa. 2018); *Harper v. Hall*, 868 S.E.2d at 546; *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *1 (Md. Cir. Ct. Mar. 25, 2022); *Kennai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987).

II. Petitioners' Interpretation of the Elections Clause Would Leave Gerrymandering of Congressional Maps Effectively Unchecked and Thereby Injure American Representative Democracy.

Given that partisan politicians have little incentive to do anything about a practice that entrenches them in office, the constitutional rights of the victims of extreme partisan gerrymandering "demand[] judicial protection." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). In 2019, however, the Court held in *Rucho* that relief is not available in federal court. To be sure, *Rucho* emphasized that other judicial and political remedies remained. And indeed, in the years since, state constitutions and IRCs have played an important role in checking partisan gerrymandering. *See* Warshaw et al., *supra* note 2, at 432-33.

But Petitioners now ask this Court to remove two of the only remaining checks on partisan gerrymandering by adopting a strained interpretation of the Elections Clause that would preclude state court review of partisan gerrymanders and undermine IRCs. Petitioners argue that the Elections Clause grants state legislatures the power to regulate congressional elections—including the drawing of congressional districts—unconstrained by any substantive state constitutional or statutory law. Pet'rs' Br. at 11-12. Acceptance of that theory would undermine American representative democracy in fundamental ways.

A. Petitioners' Theory Would Eliminate Remedies for Partisan Gerrymandering Under State Constitutions.

As the Court noted in *Rucho*, state courts served as an important venue for addressing partisan gerrymandering even when federal courts were still able to hear such claims. For example, the Court described how, in 2015, the Florida Supreme Court invalidated the Florida Legislature's congressional districting plan as a partisan gerrymander that violated the state constitution's "Fair Districts Amendment." *Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015)). That Amendment, the Court explained, contains specific standards and guidance for judging the constitutionality of a partisan gerrymander that are absent in the U.S. Constitution. *See id.*; *Detzner*, 172 So.3d at 369 (describing how the Fair Districts Amendment "forbid[s] the Florida Legislature from drawing a redistricting plan or an individual district with the 'intent to favor or disfavor a political party or an incumbent'" (quoting Fla. Const. art. III, § 20(a))).[5]

In the years since *Rucho*, many state courts have adjudicated partisan gerrymandering claims. Courts of at least ten states are currently hearing or have heard claims alleging that partisan gerrymanders

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[5] Notably, in 2012, the Amendment was upheld by the Eleventh Circuit against an independent-state-legislature challenge like the one mounted here. *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012).

violated state constitutional provisions.[6] In many of those cases, state courts invalidated congressional maps for violating the state's constitution. *See, e.g.*, *Harkenrider v. Hochul*, No. 60, 2022 N.Y. Slip Op. 02833, 2022 WL 1236822, at *11 (N.Y. Apr. 27, 2022); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *1 (Md. Cir. Ct. Mar. 25, 2022); *Harper v. Hall*, 867 S.E.2d 554, 556 (mem) (N.C. 2022); *Neiman v. LaRose*, Nos. 2022-0298 and 2022-0303, 2022 WL 2812895, at *6 (Ohio July 19, 2022). And in at least one case, a state court relied on *Rucho* as authority for its ability to adjudicate a partisan gerrymandering claim under its state constitution. *Szeliga*, 2022 WL 2132194, at *1 ("Chief Justice Roberts, the author of *Rucho*, suggested, however, that 'provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.'").

But Petitioners in this case ask the Court to put an end to all state court review of gerrymandered congressional maps. Their extreme view allows no exception even for state constitutional provisions, like

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[6] *See Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct. Mar. 21, 2022), https://perma.cc/NB62-QD2Y; *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-CA-0006666 (Fla. 2d Cir. Ct. Apr. 22, 2022), https://perma.cc/438R-SP6V; *Rivera v. Schwab*, 512 P.3d 168, 177-78 (Kan. 2022); *Graham v. Adams*, No. 22-CI-0047 (Ky. Cir. Ct. Jan. 20, 2022), https://perma.cc/VB2D-AKLL; *Szeliga*, 2022 WL 2132194; *Republican Party of N.M. v. Oliver*, No. D-506-CV-202200041 (N.M. 5th Dist. Jan. 21, 2022), https://perma.cc/82JX-RKKZ; *Harkenrider*, 2022 WL 1236822; *Harper v. Hall*, 867 S.E.2d 554 (mem) (N.C. 2022); *Neiman*, 2022 WL 2812895; *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah 3d Jud. Cir. Ct. Mar. 17, 2022), https://perma.cc/2EFM-49PB.

the one in Florida, that *specifically* prohibit partisan gerrymandering. Although Petitioners claim that the question presented in this case involves only whether state courts may apply allegedly "vague state constitutional provisions," Pet'rs' Br. at i, their argument instead asserts that state legislatures are categorically "not subject to substantive state-law restrictions," *id.* at 25. Consistent with that claim, Petitioners contend that the North Carolina courts violated the Elections Clause simply by "striking down the General Assembly's original congressional map on state-law grounds," *id.* at 49, without regard to whether those state-law grounds were specific or vague.[7]

Petitioners' view of the Elections Clause also allows no room for state legislatures to decide for themselves whether their own state courts may review their congressional maps. Relying on *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)—a case premised on the separation of powers in the federal government—Petitioners claim that the federal non-delegation doctrine also bars *state legislatures* from granting any authority to state courts to review laws enacted pursuant to the Elections Clause. Pet'rs' Br. at 45; *see also id.* at 12 ("Any delegation of this legislative power would be

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[7] The breadth of Petitioners' argument undermines claims by their *amici* that a ruling in Petitioners' favor would allow state courts to continue to review state legislatures' congressional maps so long as those courts limit themselves only to "enforcing the express policy prescriptions of the legislature." Br. for Republican Nat'l Comm., NRCC & N.C. Republican Party as *Amici Curiae* Supporting Pet'rs at 21 ("RNC Br.").

itself unconstitutional[.]"). Even after conceding that the Court has permitted Congress to delegate "substantial implementing discretion" to other branches despite the non-delegation doctrine, Petitioners continue to claim that state legislatures cannot authorize state courts to apply election-related state constitutional provisions if they are too "open-ended." Pet'rs' Br. at 46.

Petitioners' position that state courts may not apply substantive state law to limit state legislatures' regulation of federal elections effectively asks this Court to eliminate *any* judicial remedies for partisan gerrymandering of congressional maps. In an attempt to make their radical position appear modest, Petitioners emphasize that the federal Constitution will continue to impose limits on state legislatures' authority to regulate federal elections, *see* Pet'rs' Br. at 23; but of course, this is not true for the partisan gerrymandering at issue in this case in the wake of *Rucho*. Such a result would eliminate judicial review precisely where it is needed the most—to correct legislative action that prevents the majoritarian political process from properly functioning. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [should be] subjected to more exacting judicial scrutiny."). And it would violate a fundamental tenet of our legal system: that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an

injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

B. Petitioners' Theory Would Threaten Independent Redistricting Commissions.

Petitioners' interpretation of the Elections Clause would threaten one of the most effective means to prevent partisan gerrymandering in the first place: IRCs, or lawmaking bodies separate from the state legislature that are vested with significant authority over redistricting. IRCs are typically created by voter-approved state constitutional amendments, often in response to public outrage over extreme gerrymanders enacted by state legislatures.

Eleven states currently use IRCs for congressional redistricting, with significant variation among them as to the commission's degree of independence from partisan politics.[8] Three allow elected officials to serve as commissioners,[9] while eight maintain greater independence by prohibiting

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[8] These states are Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, and Washington. *See* Doug Spencer, *All About Redistricting*, https://perma.cc/WUY9-3JJX; Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1813-19 (2012).

[9] IRCs in these states—Hawaii, New Jersey, and Virginia—are sometimes called "politician commissions" as they are not strictly independent from the state legislature. Virginia's commission must include both partisan legislators and non-elected citizens, so it is perhaps best considered a hybrid. *See* Haw. Const. art. IV, § 2; N.J. Const. art. II, § 2; Va. Const. art. II, § 6a.

direct participation by politicians.[10] Some permit partisan legislative leaders to appoint commissioners,[11] while others limit the role of politicians in the appointment process.[12] Some allow partisan legislatures a role in approving or modifying IRC-approved districts,[13] while others regard the IRC's decision as final. Many require commissions to operate transparently and to provide meaningful opportunities for public participation.[14] And all IRCs must abide by specified neutral criteria when drawing district lines—including, often, an explicit prohibition on partisan gerrymandering.[15]

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[10] IRCs in these states—Arizona, California, Colorado, Idaho, Michigan, Montana, New York, and Washington—are often categorized as "independent commissions." *See* Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, § 2; Colo. Const. art. V, §§ 44-44.5; Idaho Const. art. III, § 2(2); Mich. Const. art. IV, § 6; Mont. Const. art. V, § 14; N.Y. Const. art. III, § 5-b; Wash. Const. art. II, § 43.

[11] *See* Ariz. Const. art. IV, pt. 2, § 1(3); Idaho Const. art. III, § 2(2); Mont. Const. art. V, § 14(2); N.Y. Const. art. III, § 5-b(a); Wash. Const. art. II, § 43(2).

[12] IRCs in these states—California, Colorado, and Michigan—are widely regarded to meet the highest standard of independence from partisan political influence. *See* Cal. Const. art. XXI, § 2; Colo. Const. art. V, § 44.1; Mich. Const. art. IV, § 6(1).

[13] *See* Wash. Const. art. II, § 43(7)-(8); N.Y. Const. art. III, § 4(b); Va. Const. art. II, § 6a(d)-(g).

[14] *See, e.g.*, Colo. Const. art. V, § 44.4; Mich. Const. art. IV, § 6(8)-(10), (14)(b).

[15] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(14)-(15); Cal. Const.

Although the design of IRCs varies from state to state, their core purpose is to limit the role of self-interested politicians and thereby make the redistricting process less susceptible to extreme partisan manipulation. By and large, IRCs have been successful in this endeavor, producing fairer district maps than states without independent commissions. *See* Warshaw et al., *supra* note 2, at 447.[16]

This Court's adoption of Petitioners' Elections Clause theory could halt this forward progress and threaten states' carefully designed IRCs in at least two ways. The first threat comes from those who seek to redefine the term "Legislature" in the Elections Clause to exclude IRCs altogether.[17] This theory, of course, contradicts settled precedent. In *AIRC*, the Court upheld Arizona's use of an IRC to draw its congressional districts, holding in no uncertain terms that "the Elections Clause permits the people . . . to provide for redistricting by independent commission." 576 U.S. at 813. The Court explained that "redistricting is a legislative function, which may be

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art. XXI, § 2(e); Colo. Const. art. V, § 44.3; Mont. Const. art. V, § 14(1); Mont. Code Ann. § 5-1-115; Wash. Const. art. II, § 43(5); N.Y. Const. art. III, § 4(c).

[16] These scholars note that the effectiveness of commissions depends on their design: commissions with greater independence from partisan political bodies and enforceable standards of partisan fairness tend to produce fairer maps, whereas advisory and politician commissions can easily fall prey to partisan gamesmanship. *See* Warshaw et al., *supra* note 2, at 447.

[17] *See* Br. for Claremont Inst. Ctr. for Const. Juris. as *Amicus Curiae* Supporting Pet'rs at 23; Br. for APA Watch as *Amicus Curiae* Supporting Pet'rs at 13.

performed in accordance with the State's prescriptions for lawmaking," including IRCs established by popular initiative. *Id.* at 808-09. And, more recently in *Rucho*, this Court recognized that IRCs are one of the remaining means to "restrict[] partisan considerations in districting," including commissions that are "responsible in whole or in part for creating and approving . . . congressional . . . districts." 139 S. Ct. at 2507.

Petitioners do not call in the first instance for overruling *AIRC*. They concede that the power to redistrict under the Elections Clause may be assigned to a "lawmaking entity other than the ordinary institutional legislature," such as IRCs, focusing their challenge not on the roles of different lawmaking bodies in the redistricting process but on the role of state courts. Pet'rs' Br. at 24-25. *AIRC*'s affirmance of IRCs, they note, is "not relevant here." *Id.* at 40. At the same time, however, Petitioners argue that state legislatures themselves cannot delegate redistricting authority to other institutions (or at least not to courts), *id.* at 44-46, and they invite this Court to overrule *AIRC* if necessary, *id.* at 40 n.9.

The consequences of such a ruling, or any that casts doubt on the constitutionality of IRCs, would be enormous. It would call into question the method of legislating under the Elections Clause now used by eleven states to draw and approve congressional districts, as well as six additional states that use advisory and backup commissions. Such a ruling would invite substantial litigation against IRCs and call into question the validity of the ten congressional

maps drawn and approved by IRCs during the last redistricting cycle.[18] These maps are currently being used to elect 121 Members of the 118th Congress, more than a quarter of the House of Representatives.[19] This Court should decline any invitation by Petitioners or their *amici* to relitigate *AIRC* and sow such chaos. Instead, the Court should unambiguously reaffirm the constitutionality of IRCs under the Elections Clause.

The second threat to IRCs is the theory that Petitioners *do* advance in this case. They concede that *procedural* provisions of state constitutions relating to gerrymandering are enforceable and that assignment of responsibility for congressional redistricting to an IRC might be viewed as permissibly procedural. Pet'rs' Br. at 24. But they then assert that no "substantive" state constitutional rules could govern an IRC's exercise of this power. *Id.* As an initial matter, *AIRC* also forecloses this theory. *See* 576 U.S at 808 (holding that redistricting must "be performed in accordance with the State's prescriptions for lawmaking"); *see also id.* at 817-18 ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding

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[18] Of the eleven states that provided for congressional redistricting by IRCs in 2021, all but one will use a commission-drawn plan in the upcoming midterm elections; New York is using a court-drawn plan. *See* Warshaw et al., *supra* note 2, at 437.

[19] *See What Redistricting Looks Like in Every State*, FiveThirtyEight (Jul. 19, 2022), https://perma.cc/QF7P-E4FX.

federal elections in defiance of provisions of the State's constitution.").

More fundamentally, Petitioners' theory makes no sense in the context of IRCs. IRCs are, like state houses and senates, creatures of state constitutions. And because all IRCs are established by voters via initiative or referendum, their governing standards and procedures tend to be codified in extensive detail in state constitutional provisions. For example, the Michigan Constitution details not only the appointment structure and duties of its IRC but also various particulars of its map-drawing process, including extensive rules for public participation; mandatory criteria the commission must "abide by . . . in proposing and adopting each plan," including a prohibition on conferring "disproportionate advantage to any political party"; voting thresholds for adopting the plan; and backup voting rules if no single plan satisfies the necessary threshold for approval. *See* Mich. Const. art. IV, § 6. Other state constitutions regulate IRCs with similar detail.[20] And, as in nearly all IRC states,[21] the state supreme court has

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[20] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(3)-(23); Cal. Const. art. XXI, § 2; Colo. Const. art. V, §§ 44-44.5; N.J. Const. art. II, § 2; N.Y. Const. art. III, §§ 4, 5-a; Va. Const. art. II, § 6a; Wash. Const. art. II, § 43.

[21] *See* Cal. Const. art. XXI, § 3(b); Colo. Const. art. V, § 44.5; Haw. Const. art. IV, § 10; Idaho Const. art. III, § 2(5); N.J. Const. art. II, § 2, ¶ 7; N.Y. Const. art. III, § 5; Va. Code Ann. § 30-400; Wash. Const. art. II, § 43(10); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009).

jurisdiction to enforce these provisions and to review plans adopted by the commission. *Id.* § 6(19).

These state constitutional provisions characterize what an IRC is in essence: a set of procedures and standards for redistricting finely tuned by voters to promote certain desired outcomes like transparency, participation, impartiality, and partisan fairness. Without any way to enforce these provisions in court, commissioners and interested politicians could ignore them without consequence, rendering IRCs unable to fulfill their essential purpose. No one, thereafter, would be likely to advocate for creation of an IRC given the legislature's monopoly control of congressional redistricting subject to no judicial oversight.

Petitioners do suggest that the Elections Clause may allow state courts to review redistricting plans for compliance with certain procedural but not substantive constitutional provisions. Pet'rs' Br. at 24-25. But, as some *amici* have ably explained, substance and procedure are notoriously difficult to disentangle, making it all but impossible for state courts and redistricting entities to identify which state constitutional provisions would be enforceable and which would not. *See, e.g.*, Br. for Conf. of Chief Justices as *Amicus Curiae* Supporting Neither Party at 23-27. This is especially true in the context of IRCs, which are governed by a web of substantive and procedural rules (and rules that fall somewhere in between), all working in tandem to promote fair, non-partisan-gerrymandered maps. For example, are prohibitions on the use or consideration of party

registration and election results procedural or substantive? *See* Ariz. Const. art. IV, pt. 2, § 1(15); Mont. Code Ann. 5-1-115. What about provisions that require commissioners to "favor" competitive districts, Ariz. Const. art. IV, pt. 2, § 1(14)(F), or "abide by" certain criteria in "proposing and adopting each plan," Mich. Const. art. IV, § 6(13)? IRCs cannot realistically function unless all involved parties, including courts, can discern which of these provisions are enforceable and which are not—an unlikely scenario under Petitioners' proposal.

Even if it were possible to identify which IRC regulations are substantive, the inability to enforce these regulations would severely undermine IRCs. Almost every IRC includes an explicit role for state courts to check its work and ensure compliance with mandatory standards and procedures.[22] Without such judicial review, IRCs become purely symbolic measures, unable to remedy the harms arising from unconstitutional partisan gerrymanders.

In sum, IRCs are a promising reform—one that this Court has endorsed—to curb partisan gerrymandering and restore trust in the redistricting process. Any embrace of Petitioners' ill-founded interpretation of the Elections Clause threatens to render them unconstitutional or a nullity in practice.

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[22] *See supra* note 21.

C. Voters Cannot Depend on State Legislatures and Congress Alone to Check Partisan Gerrymandering.

Any ruling in this case that leaves IRCs and state courts unable to prevent or remedy congressional partisan gerrymandering would allow this antidemocratic practice to go effectively unchecked. Although this Court in *Rucho* described federal legislation as an "avenue for reform" that "remains open," 139 S. Ct. at 2508, history, precedent, and common sense show that politicians are unlikely to act against their own self-interest to limit partisan gerrymandering.

Gerrymandering represents "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 456 (2006) (Stevens, J., concurring in part) (internal quotations omitted). Polls show that nine in ten voters oppose partisan gerrymandering,[23] and yet lawmakers have done little to check the practice. Why would they? When partisan gerrymandering benefits those in power, there is little incentive for incumbent legislators and map-drawers to act contrary to their own self-interest. Because of these incentives, neither Congress nor state legislatures provide a reliable means of protecting voters against the clear constitutional injuries that partisan gerrymandering

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[23] John Kruzel, *American Voters Largely United Against Partisan Gerrymandering*, The Hill (Aug. 4, 2021), https://perma.cc/CRH3-NEBZ.

inflicts. State legislatures that increasingly reflect national partisan divisions will enact rather than prevent partisan gerrymanders, and members of Congress—the beneficiaries of this partisan gerrymandering—are unlikely to curtail it.

Despite strong opposition to partisan gerrymandering by voters, state legislatures are too intertwined with their state congressional delegations to check partisan gerrymandering. This is because state elections and policymaking—and the legislative candidates who sail on those winds—have become increasingly driven by national interests. *See* Joshua Zingher & Jesse Richman, *Polarization and the Nationalization of State Legislative Elections,* 47 Am. Pol. Rsch. 1036, 1047 (2019); Daniel Hopkins, *The Increasingly United States* 13 (2018). This trend has resulted in state legislatures that are "not sufficiently independent of their national counterparts" and state-level politics that is "overawe[d]" by national politics. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & Pol. 1, 1 (2013). The politicization of issues at every level of government has been largely one directional: the "convergence of state and national political agendas and positions [has been] characterized primarily by state adoption of national political agendas and positions rather than the other way around." *Id.* at 19. And because adherence to national political agendas affects access to campaign dollars and the likelihood of reelection, state legislators have strong incentives to work on behalf of national party interests, including by enacting partisan gerrymandered

congressional districts. Jake Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics* 128-29 (2022).

Because state legislators generally have less time and fewer policymaking resources than their federal counterparts, they often turn to concentrated, resource- and information-rich national partisan interests to take on complex policymaking tasks. *Id.* at 130-31. Redistricting is especially vulnerable to this national party control because it is highly technical and resource intensive, occurs in a very short period of time, and has clear national implications. *See* Alex Garlick, *National Policies, Agendas, and Polarization in American State Legislatures: 2011 to 2014*, 45 Am. Pol. Rsch., 941, 942 (2017). National party interests need only be involved for a short while to lock in congressional maps that make it harder for their political opponents to win for an entire decade. This dynamic has borne out in recent redistricting cycles. National partisan interests have not been shy about using state legislatures as chess pieces to control congressional composition, in some cases taking the pen themselves to draw state congressional district lines. *See* Robert Draper, *The League of Dangerous Mapmakers*, The Atlantic (Oct. 2012), https://perma.cc/G3XT-QP5K; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002).

Indeed, well-funded national political organizations have come to serve as clearinghouses for their party's national partisan redistricting strategy. *See* National Democratic Redistricting

Committee, "Our Work," https://perma.cc/HDK3-TVRY ("a centralized hub to fight for fair maps"); National Republican Redistricting Trust, "About Us," https://perma.cc/F5K6-WZL8 ("coordinating "nationwide redistricting strategy" for the Republican Party). Partisan actors with more explicit ties to Congress and national partisan offices also participate actively in the congressional redistricting process. For example, the committee responsible for drawing Maryland's "highly partisan" congressional districts in 2011 was advised by Maryland Congressman Steny Hoyer, the majority leader and second-highest ranking Democrat in the House. *See Rucho*, 139 S. Ct. at 2493. In 2021, former Congressman and current Florida Governor Ron DeSantis led that state's hyper-partisan gerrymander. Nathaniel Rakich & Tony Chow, *Ron DeSantis Drew Florida An Extreme Gerrymander*, FiveThirtyEight (Jul. 14, 2022), https://perma.cc/6KF6-7SFT. And in Illinois, the Democratic-controlled legislature created a highly gerrymandered map that included a new long, skinny, and safely Democratic district in which a former aide to President Joe Biden and Illinois's Democratic governor is running. Sara Burnett, *Illinois Dems Embrace Gerrymandering in Fight for US House*, Associated Press (Oct. 28, 2021), https://perma.cc/5H8S-WET9. When national parties and actors are the authors and the beneficiaries of

gerrymandered maps, the odds of state legislative action to limit the practice are long.[24]

Whether driven directly by national parties or by state legislators' increasing alignment with national parties, the behavior of state legislatures in recent redistricting cycles undercuts any notion that they are likely to curb congressional gerrymandering on their own. State legislatures have consistently enacted partisan gerrymanders, regardless of party. *See supra* p. 10 (citing state court decisions invalidating 2020-cycle partisan gerrymanders). Where state legislatures can gerrymander, recent history has shown that they will. State laws preventing or limiting partisan gerrymandering, including those establishing IRCs, have largely been enacted not by state legislatures but via ballot initiative. And state legislatures have routinely resisted those reforms. *See e.g.*, Utah S.B. 200, 2020 Gen. Sess. (Utah 2020) (repealing citizen-enacted independent redistricting commission); *AIRC*, 576 U.S. at 297 n.5 (describing the state legislature's "interference" with commission "operations" and attempts to remove the commission's independent chair).

Congress is also unlikely to provide an enduring remedy for partisan gerrymandering. To be sure, the Elections Clause grants Congress broad authority to regulate the drawing of congressional lines. It could

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[24] The national influence over state map-drawing also demonstrates why it takes no "grand logical leap" to be concerned about conflicts of interest in congressional redistricting even though incumbent members of Congress do not literally draw their own districts under state law. *Contra* RNC Br. at 8 n.3.

take the pen and draw a state's district lines itself or prohibit partisan gerrymandering of congressional districts, *AIRC*, 576 U.S. at 812—but only if it wanted to. To this point, Congress has failed to do so, and there is little reason to believe that will change.

A Congress full of legislators entrenched in power by the extreme partisan gerrymanders of the last two decades has all the wrong incentives to undo the system keeping them in power. *See Rucho*, 139 S. Ct. at 2523-24 (Kagan, J., dissenting). Legislators' instinct for self-preservation, coupled with increased fidelity to national party, tend to override any efforts to respond to constituents' anti-gerrymandering preferences. Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 Am. J. Pol. Sci. 136, 136 (2001). ("[W]hen candidates . . . balance the broad policy views of the local district and the national party, the national party dominates."). In other words, relying on Congress to guard against partisan gerrymandering is leaving to the foxes the responsibility of repairing the gaping hole in the side of the henhouse.

History proves the point. Congress has rarely used its Elections Clause authority to enact substantive standards for congressional redistricting. While the Apportionment Act of 1842 and its updates have sought to end the unfairness inherent in at-large congressional elections by mandating single-member districts, *see Vieth*, 541 U.S. at 276 (plurality opinion), the durable partisan gerrymandering enabled by single-member districts continues to plague voters to the present. No recent congressional proposal to curb

the practice has ever passed both chambers, let alone with bipartisan support. Indeed, the latest proposal failed in the Senate after a version of it passed the House of Representatives in 2021 with unified Republican opposition. *See* S.B. 2747, 117th Cong. (2021-22); H.R. 1, 117th Cong. (2021-22). The bill currently has no prospects of becoming law. *See* Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate*, N.Y. Times (Jan. 19, 2022), https://perma.cc/YCC4-MT8U.

Even if one Congress were able to address partisan gerrymandering head on, the self-serving interests and incentives would remain, and any protections could be undone by future Congresses. In any event, the mere possibility of congressional action is no reason to eliminate or undermine valid checks on partisan gerrymandering from state courts and IRCs. Whether turning to state legislatures or to Congress, the political process is unlikely to provide a durable remedy for the ongoing ills of partisan gerrymandering.

III. Unchecked Partisan Gerrymandering Would Exacerbate Polarization, Extremism, and Dysfunction.

By removing checks on partisan gerrymandering, as well as other antidemocratic state legislative action, Petitioners' interpretation of the Elections Clause would accelerate the vicious cycle of polarization, extremism, and dysfunction already imperiling the health of American democracy.

Partisan gerrymandering increases polarization by rendering general elections uncompetitive, shifting

electoral competition to primary elections. Using the recent technological developments noted above, partisan map drawers can not only maximize their statewide partisan advantage, but also secure as many "safe" seats as possible. Ashlyn Still, Harry Steven & Kevin Uhrmacher, *Competitive House Districts Are Getting Wiped Off the Map,* Wash. Post (Nov. 23, 2021), https://perma.cc/3QG7-SRMZ. The Cook Political Report estimates that fewer than seven percent of House districts will be competitive this November,[25] and six of those have already been "drawn out of existence" in the current redistricting cycle.[26]

As competitive districts disappear and safe seats abound, a fundamental premise at the heart of representative government is lost: that changes in electoral support lead to changes in who holds power. As Representatives Mike Gallagher (R-WI) and Ro Khanna (D-CA) have explained, "[t]he less competitive a district becomes, the more general elections become formalities."[27] To win election, candidates in safe districts must redirect their attention to the contest determinative of the electoral outcome: the primary. There, turnout is more limited and voters skew toward the ideological poles. Andrew

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[25] 2022 House Race Ratings, Cook Pol. Rep. (Oct. 11, 2022), https://perma.cc/U8HN-M4NF (categorizing only 31 of 435 House races as "toss-ups").

[26] *What Redistricting Looks Like in Every State*, *supra* note 19.

[27] Mike Gallagher & Ro Khanna, *Two Congressmen Offer a Bipartisan Plan to 'Drain the Swamp'*, USA Today (June 1, 2017), https://perma.cc/HD2M-LNTX.

B. Hall, *What Happens When Extremists Win Primaries?*, 109 Am. Pol. Sci Rev. 18, 18 (2015). As a result, the victors of these contests are often candidates far more ideologically extreme than their voters at large. Clifton B. Parker, *Politicians More Polarized Than Voters, Stanford Political Scientist Finds*, Stanford News Serv. (Dec. 20, 2017), https://perma.cc/EF2J-5G9P.

Thus, once in office, candidates elected to safe gerrymandered districts are beholden not to the average voter but rather to a small, vocal minority, representing the most extreme wings of their party.[28] As "single-minded seekers of reelection," Members of Congress behave in ways they believe will satisfy the factions necessary to keep them in office. David Mayhew, *Congress: The Electoral Connection* 5-6 (1974). For the growing number of representatives from partisan gerrymandered districts, those constituencies are their primary voters, and the party itself, when it holds the unchecked power in the state legislature to draw district lines.

As a result, Members of Congress from both sides of the aisle describe an increasingly polarized environment where representatives have little incentive "to talk and cooperate, much less compromise" lest they face a primary challenger from their party's outer flank. Earl Blumenauer & Jim

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[28] *See* Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (Apr. 2005); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Political Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 307 (1991).

Leach, Opinion, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003), https://perma.cc/7BTU-AQ7R; s*ee also* Richard C. Barton, *Congress is Polarized. Fear of Being 'Primaried' Is One Reason.*, Wash. Post (June 10, 2022), https://perma.cc/76NG-U8RX. Polarization in state legislatures has likewise "increased substantially in recent decades," as more extreme candidates face less general election competition and fare better in primaries. Cassandra Handan-Nader, Andrew C. W. Myers & Andrew B. Hall, *Polarization and State Legislative Elections* (Stan. Inst. For Econ. Pol'y Rsch., Working Paper No. 22-05, 2022).

Due to the polarization caused by these artificially safe districts and the attendant fear of angering extreme wings of each party, compromise in gerrymandered legislative bodies is often nonexistent. Rather, the two parties "form themselves in action that is reaction"—when one wins, their opponents lose—and in this zero-sum environment "do battle every day in every way." Harvey C. Mansfield, *Our Polarized Politics Dimly Seen*, Nat'l Affs. (Winter 2020), https://perma.cc/K857-KEF2.

This intractable party conflict has created gridlock so impenetrable that it hinders the functioning of government institutions and heightens the risk of political violence. Indeed, as the partisan polarization of its members has increased, Congress has increasingly been unable to perform basic responsibilities, including budgeting and appropriations. Francis Lee, *How Party Polarization Affects Governance*, 18 Ann. Rev. Pol. Sci. 261, 270

(2015). Partisan warfare has also resulted in "repeated spectacles of high-stakes brinksmanship over the debt limit and other policies" including a downgrade of U.S. Treasury debt and four federal government shutdowns since 2010. *Id*. at 276. And most disturbingly, the deleterious effects of polarization may not be limited to gridlock: Recent political science research has found that "more . . . polarized democracies are more likely to experience greater levels of political violence" as trust and cooperation between parties break down. James A. Piazza, *Political Polarization and Political Violence* (July 20, 2022) (Working Paper), https://perma.cc/D3UK-FBH6.

With compromise off the table, members of gerrymandered legislatures also increasingly seek to limit the democratic prospects of their opponents by, for example, drawing them unwinnable districts. *See* Mansfield, *supra* p. 30 ("Party contention is mainly *about* the rules and not merely *within* the rules as of a game."). Indeed, as the parties grow more and more polarized, they have more incentives to change the rules of the game to "ensure that they win and their opponents lose." Jacob M. Grumbach, *Laboratories of Democratic Backsliding* 180 (Apr. 20, 2022) (Working Paper), https://perma.cc/AM5U-U6S5. "[L]egislators under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *125 (N.C. Super. Ct. Sept. 3, 2019). In doing so, they guarantee their own partisan

success and restart the cycle of polarization, extremism, and dysfunction.

Although *Amici*'s primary focus here is on partisan gerrymandering, it is important to acknowledge that Petitioners' theory would also remove essential checks on the other important areas of election regulation that keep the cycle from spiraling out of control. Absent oversight from state courts, polarized state legislatures would also be able to ensure their own partisan advantage by enacting voting rules that disproportionately restrict the registration and voting opportunities of disfavored voters. The theory would also potentially remove the people's check on antidemocratic state legislative action in many states by threatening to invalidate pro-voter policies enacted through the initiative process.[29] *See, e.g., AIRC*, 576 U.S. 787.

Removing checks on antidemocratic action in these areas stands to reduce participation and erode trust in the democratic process, just as partisan

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[29] Among the myriad voter-enacted policies threatened by Petitioners' theory are, for example, independent redistricting commissions, *see supra*; congressional redistricting standards, Fla. Const. art. III, § 20(a); restoration of voting rights for people with felony convictions, Fla. Const. art. VI, § 4; automatic voter registration, Nev. Rev. Stat. §§ 293.5727-293.5767; primary reform, Colo. Prop. 108, Unaffiliated Elector Initiative (2016) (approved); ranked-choice voting, Alaska Ballot Measure 2, Alaska's Better Elections Initiative (2018) (approved); same-day voter registration, Me. Question 1, Same-Day Registration Veto Referendum (2011) (approved); and no excuse or universal voting by mail, Mich. Const. art. II, § 4; Or. Measure 60, Or. Vote by Mail for Biennial Elections Act (1998) (approved).

gerrymandering has done. *See* Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 Ann. Rev. Pol. Sci. 563, 582 (2008); Larry Hogan, Opinion, *Partisan Gerrymandering Has No Place in Our Democracy*, Wash. Post (Mar. 27, 2018), https://perma.cc/4TWE-B5VL. It will likewise contribute to partisan polarization, creating the incentive and opportunity for further antidemocratic action. Thus, Petitioners' theory of unchecked state legislative action in congressional redistricting and other areas of election would intensify the polarization spiral already threatening to grind American democracy to a halt.

CONCLUSION

The Court should respect the role and power of state courts in our constitutional system, honor the checks on partisan gerrymandering this Court promised would remain, and avoid exacerbating the harm that polarization is already doing to American representative democracy.

October 25, 2022

Respectfully submitted,

Paul M. Smith
Counsel of Record
Adav Noti
Kevin P. Hancock
Aseem Mulji
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 763-2200
psmith@campaignlegal.org

Counsel for Amici Curiae