No. 21-1271

IN THE

Supreme Court of the United States

REPRESENTATIVE 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 THE ANTI-DEFAMATION LEAGUE, THE SIKH COALITION, THE UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, AND MEN OF REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, *Amici Curiae* Anti-Defamation League ("ADL"), The Sikh Coalition, The Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism, respectfully submit this brief in support of Respondents.

Founded in 1913, ADL is a civil rights and anti-hate organization whose timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment for all people. ADL was created at a time when fear and prejudice against Jews was so widespread that a Jewish man, Leo Frank, was convicted of murder after a trial marked by overt antisemitism and then dragged from his prison cell and lynched in 1915.[2] Through its 25 regional offices

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief.

[2] *See* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. Times, Mar. 8, 1982, https://www.nytimes.com/1982/03/08/us/after-69-years-of-silence-lynching-victim-is-cleared.html. After the lynching, armed mobs ran through the streets of Atlanta, forcing Jewish businesses to shutter their doors and about half of Georgia's Jewish population to flee. Sixty years later, Georgia posthumously pardoned Frank because the State failed to protect him while he was in its custody. *See* State Board of Pardons and Paroles, Pardon of Leo Frank (Mar. 11, 1986), http://www.gpb.org/files/georgiastories/nsouthfrank176.jpg; *see also* Leonard Dinnerstein, *Leo Frank Case*, New Georgia Encyclopedia (May 14, 2003), http://www.georgiaencyclopedia.org/articles/history-archaeology/leo-frank-case.

throughout the United States, ADL provides materials, programs and services to combat antisemitism and all forms of hate. ADL has long understood that representative democracy – built on free and fair elections, the rule of law, checks and balances guarding against over-concentration of power, and the robust protection of civil rights and liberties – is essential to a healthy, pluralistic society.

Because of its history fighting discrimination, including bias against marginalized and minority religious groups, ADL can provide unique and important insights for the Court in addressing the consequences of allowing a legislature to make decisions that affect the rights of marginalized groups without oversight or review from courts or other branches of government.

The Sikh Coalition is a nonprofit and nonpartisan organization dedicated to ensuring that members of the Sikh community in America are able to practice their faith. The Sikh Coalition defends the civil rights and civil liberties of Sikhs by providing direct legal services and advocating for legislative change, educating the public about Sikhs and diversity, promoting local community empowerment, and fostering civic engagement amongst Sikh Americans. The organization also educates community members about their legally recognized free exercise rights and works with public agencies and officials to implement policies that accommodate their deeply held beliefs. The Sikh Coalition owes its existence in large part to the effort to combat uninformed discrimination against Sikh Americans after September 11, 2001.

The Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism come to this issue out of a firm commitment to voting rights. As Reform Jews, we

believe democracy is strongest when the electorate reflects the population – and it suffers when citizens are shut out from the democratic process.

Amici are deeply concerned that this Court's acceptance of Appellants' efforts to evade state court review of the state legislature's partisan gerrymander of the state's congressional map could dramatically affect religious freedom in this country – a freedom that state and federal courts have been instrumental in protecting. The history of this nation shows that majority rule has often threatened the rights of marginalized and minority religious groups and imposed hardships on them. Had other branches of government been powerless to act, those dire consequences to freedom of religion would have been even greater. Recognition of Appellants' efforts to evade state court review would, in the view of *Amici,* deprive courts of the ability to oversee legislative actions that harm marginalized and minority communities.[3]

As set forth below, this brief first considers the historical underpinnings of the United States democratic system, including the necessity that the will of the majority be checked lest it trample the constitutional rights of unpopular or vulnerable minority and marginalized communities. (Point I). This brief then discusses the reality that the founders' concerns were warranted; throughout our history, marginalized and minority religious groups have been the subject of

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[3] *Amici* focus in this brief on the harm that marginalized and minority religious communities have faced and continue to face in this country. While historical and ongoing prejudice and discrimination exist with respect to other marginalized groups, we understand that these issues, including the longstanding racial implications of anti-voter legislation, will be addressed in other briefs.

discriminatory or prejudicial actions taken in the name of the majority's will. (Point II). Finally, this brief discusses the importance of judicial review of legislative actions in preserving the balance that is so critical to safeguarding the rights of marginalized groups, and urges the Court to recognize that legislative actions in North Carolina and elsewhere are subject to constitutional oversight by state and federal courts. (Point III).

ARGUMENT

I. The Founders Recognized the Perils of an Unchecked Majority

Since the founding of the republic, the role of state legislatures has been to promulgate laws affecting the general welfare of the people within their states. That power has never been unilateral or absolute. It has been shared with state executive and judicial branches and expressly limited by the federal and state Constitutions.

The founders of this country, many of whom were legislators, recognized the potential tyranny even of elected legislatures. As a Christian, James Madison understood that Christianity had flourished "not only without the support of human laws, but in spite of every opposition from them." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). He added: "We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority." *Id.*

In March 1788, John Adams defended the fledgling Constitution's rejection of a single, unicameral decision-making body, arguing that three interlocking branches, including the check of judicial review, were needed to combat the potential for a "tyranny of the majority." John Adams, *A Defence of the Constitutions of Government of the United States of America*, Vol. 3, 290-291 (1788).

The 1786 Virginia Act for Establishing Religious Freedom, similarly recognized the threat to religious groups; as Thomas Jefferson wrote, the law was "meant to comprehend, within the mantle of its protection, the Jew, the Gentile, the Christian and the Mahometan, the Hindoo and Infidel of every denomination." Thomas Jefferson, *Autobiography*, in Founders' Constitution, Vol. 5, Document 45. Jefferson, like the other founders, understood that, without such a law, religious freedom could be impaired and minority and marginalized religions imperiled by an intolerant public.

Additionally, in Federalist No. 9, Alexander Hamilton recognized the dangers of factionalism arising from partisan appeals to a majority. He wrote that the power of an elected legislature had to run hand-in-hand with judicial review:

> The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election . . . are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.

The Federalist No. 9 (Alexander Hamilton).

And, in his letter to the Jewish community, George Washington expressed the hope that religious minorities would "continue to merit and enjoy the good will of the other inhabitants, while everyone shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid." *Letter From George Washington to the Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0135. Underlying this aspiration was Washington's recognition that the situation of marginalized groups was precarious and subject to the preferences and prejudices of "the other inhabitants." *Id.*

II. The Founders' Concerns Have Been Justified Throughout U.S. History

The founders were right to worry about the risks to marginalized and minority religious groups from an unchecked popular will. Our history is replete with examples of the majority seeking to discriminate against or even extinguish marginalized and minority religious groups. *Amici* recount some of this history below.

A. Discrimination Against Quakers and Catholics

Discrimination against Quakers and Catholics was prevalent at the founding of the country. In colonial times and even after 1776, many states enacted laws disfavoring non-Protestants. As early as 1656, Massachusetts sought to ban Quakers as "a cursed sect of heretics" and imposed various tortures and even death upon them for disobedience. *See* Mass. Gen. Court Act of October 14, 1656. In 1659, two Quakers who defied the ban were executed. Beginning in 1659, Virginia enacted similar laws. *See* Edward

Rawson, *Declaration of the General Court on the Quaker Problem of November 18, 1659*. As Jefferson observed a century later: "If no capital execution took place here, as it did in New England, it was not owing to the moderation of the church, or the spirit of the legislature." Thomas Jefferson, *Notes on the State of Virginia*, (Univ. of N. Carolina Press for the Inst. of Early Am. History and Culture ed. 1954).

Until 1806, New York banned Catholics from holding political office. N.Y. Const. of 1777, art. XXXIX. Similar prohibitions lasted until 1821 in Massachusetts and until 1876 in New Hampshire. Mia Brett, *The Universal Application of Laws is Never Equal: Antisemitism in U.S. Law*, Canopy Forum (Aug. 18, 2022), https://canopyforum.org/2022/08/18/the-universal-application-of-laws-is-never-equal-antisemitism-in-us-law/. "Maryland, Rhode Island, North Carolina and New Hampshire did not allow non-Christian voting until well into the 19th century …" *Id.*

In the 19th century, anti-Catholic bias was widespread. In 1834, for example, a convent near Bunker Hill was burned to the ground by an anti-Catholic mob. Wilfred J. Bisson, *Countdown to Violence: The Charlestown Convent Riot 1834* (1989). In 1844, Philadelphia suffered the Bible Riots, in which two churches were destroyed and no fewer than 20 people killed. Michael Feldberg, *The Philadelphia Riots of 1844: A Study in Ethnic Conflict* (1975).

In the 1920s, a United States Senator from Maine (Hersey) opposed immigration by both Catholics and Jews, publicly describing immigrants from Asia and southern Europe as having "strange and pagan rites" and speaking a "babble of tongues." Joshua Zeitz, *When America Hated Catholics*, Politico (Sept. 23, 2015), https://www.politico.com/magazine/story/20

15/09/when-america-hated-catholics-213177/. This sentiment was reflected in anti-immigrant policies passed overwhelmingly in the 1920s by the United States Congress. For example, the Immigration Act of 1924 drastically curtailed the number of immigrants from Southern and Eastern Europe, corresponding directly to the regions from which Catholics and Jews primarily immigrated. Maldwyn Allen Jones, *American Immigration* 237 (Univ. of Chicago Press 2d ed. 1992).

B. Discrimination Against Latter-Day Saints

Followers of the Church of Jesus Christ of Latter-Day Saints have also been subject to state-sanctioned discrimination. In the 1830s and 40s, for example, the followers of Joseph Smith were victims of widespread discrimination and violence. In 1838, the Governor of Missouri ordered all Mormons expelled from his state, stating: "The Mormons must be treated as enemies, and must be exterminated or driven from the state." Mo. Exec. Order 44 (1838); *see also* Colin Branham, *The Saints Were Sinners: The Mormon Question and the Survival of Idaho*, https://www.boisestate.edu/presidents-writing-awards/the-saints-were-sinnersthe-mormon-question-and-the-survival-of-idaho/. In 1844, a mob murdered Joseph Smith and his brother Hyrum while they were jailed in Carthage, Illinois. Brigham Young University, *Joseph Smith: The Prophet, The Man*, 301-315 (1993).

As late as the mid-1880s, Idaho's legislature passed laws banning Mormons from holding office and preventing practicing Mormons from voting or serving on juries. *See generally* Merle W. Wells, *The Idaho Anti-Mormon Test Oath, 1884-1892*, 24 Pac. Historical Rev. 235 (1955).

C. Discrimination Against Jews

State discrimination against Jews has been widespread and well-documented. As noted above, states including South Carolina, Georgia and New Hampshire limited the right to hold office only to men "professing a belief in the faith of any Protestant sect." *Religious Test and Oaths in State Constitutions*, Univ. of Madison-Wisconsin Center for the Study of the Am. Const., https://csac.history.wisc.edu/document-collections/religion-and-the-ratification/religious-test-clause/religious-tests-and-oaths-in-state-constitutions-1776-1784/ (last visited Oct. 23, 2022). In 1818, the so-called "Jew Bill" was introduced in the Maryland House of Delegates that would have allowed Jews to hold office, serve as jurors, and work as lawyers. Edward Eitches, *Maryland's "Jew Bill"*, 60 Am. Jewish Historical Q. 258, 258 (1971). The legislation was debated for eight years before it finally became law in 1826 under the name, "An Act to extend to the sect of people professing the Jewish Religion, the same rights and privileges enjoyed by Christians." *Id.* Even then, for the next 40 years an officeholder had to profess the belief in a "future state of rewards and punishments." *See Thomas Kennedy: Maryland Legislator Who Made a Difference* (1918), https://msa.maryland.gov/msa/stagser/s1259/121/3343/html/tkbio.html.

In 1862, then-General Ulysses S. Grant, outraged over perceived smuggling and cotton speculation, issued General Order 11 expelling all Jews from the territory under his command (including Mississippi, Kentucky and Tennessee). The Order applied to all Jews as a "class violating every regulation of trade established by the Treasury Department and also department orders," and gave them 24 hours to leave. Although President Lincoln rescinded the order, it reflected

widespread distrust of Jews during the Civil War. *See Ulysses S. Grant and General Orders 11*, National Park Service, https://www.nps.gov/articles/000/ulysses-s-grant-and-general-orders-no-11.htm (last updated Jan. 14, 2021).

For decades, including through most of the 20th century, legislatures passed so-called "Sunday laws" precluding merchants from selling goods on Sundays, preferring the dominant religion without regard for the harm to marginalized and minority religious groups that did not observe their Sabbath on that day. Many Jews were actually arrested for doing business on Sundays in violation of those laws. Mia Brett, *The Dark History of American Antisemitism*, AlterNet (Oct. 29, 2021), https://www.alternet.org/2021/10/american-antisemitism/.

D. Discrimination Against Muslims

Muslims have faced a history of state-sanctioned discrimination in the United States and they continue to face such discrimination today. Elsadig Elsheikh et al., *Legalizing Othering: The United States of Islamophobia*, Univ. Cal. Berkeley Haas Institute for a Fair and Inclusive Society (Sept. 2017). Researchers have documented that more than 230 anti-Muslim bills have been introduced or enacted in state legislatures by elected officials since 2010 alone. Univ. Cal. Berkeley's Othering & Belonging Institute, Anti-Muslim Legislation, https://belonging.berkeley.edu/islamophobia/anti-muslim-legislation-interactive-map?emci=3ce75a06-df3d-ed11-a27c-281878b83d8a&emdi=79e36342-4c3f-ed11-b495-00224832e4ca&ceid=12100679. This legislation misconstrues Islamic principles to imply a universally-defined legal code that does not exist: "Many representatives, in their introduction of anti-'Sharia law' bills, mention the 'invasion' of 'sharia

law' and the urgent need to stop it from entering American courts." Swathi Shanmugasundaram, Anti-Sharia Law Bills in the United States, Southern Poverty Law Center (Feb. 5, 2018), https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-billsunited-states. Rather than consisting of statutes, regulations, or judicial precedent, however, Sharia is a "divine and philosophical" array of Quran-based guidance to help Muslims live an Islamic life. Asifa Quraishi-Landes, Five Myths About Sharia, The Washington Post (June 24, 2016). https://www.washingtonpost.com/opinions/five-myths-about-sharia/2016/06/24/7e3efb7a-31ef-11e6-8758-d58e76e11b12_story.html?utm_term=.d07365e39557

Since 2010, state legislatures have enacted a wave of thinly-veiled, anti-Muslim legislation targeting contracts that rely on "foreign law." Swathi, *supra*. Yet, in 2012, for example, the Kansas state legislature enacted anti-Sharia Senate Bill 79, declaring contracts that incorporate Sharia law to be against public policy. Kan. Stat. Ann. §§ 60-5101 to -5108 (Supp. 2012). The following year, the North Carolina legislature passed a law that effectively barred state courts from considering Sharia law — even when Islamic principles were contemplated by the parties to the contract — in cases of divorce, child custody, child support, alimony or other family law proceedings. N.C. Gen. Assem., House Bill No. 522. These laws are part of a national trend of anti-Sharia laws passed by state legislatures; in 2017, 14 states introduced an anti-Sharia law bill and Texas and Arkansas enacted the legislation. Swathi, *supra*; Anti-Defamation League, *ADL Disappointed Over North Carolina's Passing of House Bill 522, After Urging Governor to Veto Legislation* (Sept. 11, 2013), https://dc.adl.org/news/adl-disappointed-over-north-carolinas-passing-of-house-bill-522-after-

urging-governor-to-veto-legislation/; Elsheikh et al., *supra*.

III. The Fundamental Importance of Review of Legislative Decisions by Other Branches to Protect Minorities Within the Democratic Process

As noted above, the history of the United States is replete with instances of violence and legal discrimination against minority and marginalized groups. This history makes it clear that a democratic system with checks and balances is necessary for the protection of marginalized and minority groups against abuses by one branch of government. It has been – and will remain – a critical challenge for our democracy to balance majoritarian views with the rights of minorities.

Allowing the North Carolina legislature to make determinations involving fundamental rights such as the right to vote, shielded from judicial or executive oversight, undermines the democratic principles that underlie our system and risks trampling individuals' fundamental rights.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), Justice Robert Jackson provided an eloquent summary of the need for judicial review of legislative actions to protect marginalized and minority religious groups. In *Barnette*, the Supreme Court struck down statutes forcing public school students to salute the American flag and pledge allegiance even when their religious beliefs (as in the case of Jehovah's Witnesses) precluded such a salute:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them

> beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. Justice Jackson recognized that a majority of Americans frowned on such perceived "anti-patriotic" actions and, if called upon to vote, would condemn them.[4] That was why a check on the power of an elected legislature was essential. As Justice O'Connor noted in her separate opinion in *Employment Division v. Smith,* 494 U.S. 872, 902 (1990), the rights of minorities cannot be sufficiently protected by the political process, stating: "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."

This view of the role of the courts is rooted in the founding-era concern that legislation must be subject

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[4] In fact, Jehovah's Witnesses were subject to a wave of physical violence and arbitrary imprisonment following the Supreme Court's decision sanctioning compelled flag salutes. *See* Jeffrey Sutton, *Barnette, Frankfurter, and Judicial Review,* 96 Marquette L. Rev. 133, 136 (Feb. 28, 2012) ("The Witnesses' resistance to the flag salute and to the wartime draft, combined with the Supreme Court's stamp of constitutionality on compelled flag salutes in *Gobitis*, unleashed a wave of persecution with few rivals in American history. . . . In the first three weeks after the decision, there were hundreds of attacks against Witnesses across the country. Between May and October 1940, the American Civil Liberties Union reported to the Justice Department, vigilantes attacked 1,488 Witnesses in 335 communities, covering all but four states in the country.").

to appropriate review. As Hamilton wrote in Federalist No. 78: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."

This Court has recognized that excessive concentration of powers in a single branch jeopardizes the integrity of our system of government. In *I.N.S. v. Chadha,* 462 U.S. 919, 960–62 (1983), Chief Justice Burger quoted Madison in Federalist No. 47 stating that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *Chadha* explained that the Framers vested the executive, legislative, and judicial powers in separate branches to reflect their concern "that trial by a legislature lacks the safeguards necessary to prevent the abuse of power." *Id.*

State courts are a critical safeguard. "At the same time that they exercise their authority in requiring compliance with federal law," they also "ensure compliance with their own state's constitution." George Bundy Smith, *State Courts and Democracy: The Role of State Courts in the Battle for Inclusive Participation in the Electoral Process*, 74 N.Y.U. L. Rev. 937, 947 (1999). "The role of the state courts in these instances," like the role of federal courts, "is to ensure a level playing field for the participants in the electoral process." *Id.*

That democracy hinges on judicial review of legislative decisions has been recognized for centuries, including in de Tocqueville's *Democracy in America*,

published in 1835. Discussing the power given to judges, de Tocqueville described it as an essential element of the system of checks and balances: "Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies." Alexis de Tocqueville, *Democracy in America*, 101 (Colonial Press 1948); *see also* John Hart Ely, *Democracy and Distrust*, 105 (Harvard University Press 1980) ("Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech, publication, and political association. . . [R]ights like these, whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process.").

CONCLUSION

Amici believe fervently in the need for a pluralistic democracy that checks the power of any one branch of government. To provide unchecked power over fundamental rights to a state legislature risks serious harm to all vulnerable marginalized and minority populations that have – throughout history – relied on the balance of powers to protect them from the potential tyranny of the majority. This Court should reaffirm that the Constitution recognizes the power of North Carolina courts and its executive branch to review the laws enacted by the North Carolina legislature.

Respectfully submitted,

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