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* BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH AND PROFESSOR ATIBA R. ELLIS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Page

Page

Page

INTEREST OF THE *AMICI CURIAE*[1]

The Boston University Center for Antiracist Research

The Boston University Center for Antiracist Research (the "Center") is a nonpartisan, nonprofit university-based center that seeks to promote and facilitate antiracist progress by unifying research, policy, narrative, and advocacy efforts. The Center's animating goal is to eliminate racism through a rigorous, research-based, and integrative approach.

Professor Atiba R. Ellis

Professor Atiba R. Ellis ("Professor Ellis") is a professor of law at Marquette University and a nationally-recognized expert in voting rights, democracy, and race and the law. Professor Ellis' research, publications, and teaching focus on voting rights law with specific attention to how varying conceptions of the right to vote exclude voters on the margins.

Interests of Amici

The Center and Professor Ellis (collectively, the "*Amici*") have a keen interest in legislative and judicial actions that may impact racially subordinated populations. This case implicates important protections against

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1. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel, have made any monetary contribution intended to fund the preparation or submission of this brief. All parties provided written consent to the filing of this brief by blanket consent.

political actions that disenfranchise people of color, particularly, Black voters. Historically, state constitutions and the Voting Rights Act of 1965 ("VRA")[2] have provided separate, parallel protections against legislative action that negatively impact the ability of racial minority groups to select the political representatives they believe will most effectively pursue their interests. State constitutional protections against voter discrimination and suppression—and state courts' corresponding ability to enforce these protections—are often the last line of defense against discriminatory election laws and legislative redistricting plans. Petitioners, by advancing the independent state legislature theory ("ISLT"), seek to undermine this defense.

The Center and Professor Ellis submit this brief in support of Respondents to highlight the grave impact a ruling in favor of Petitioners would have, not just on Black voters in North Carolina, but on the voting rights of Black people and other people of color in many states across the United States.

SUMMARY OF ARGUMENT

Democracy in the United States is grounded upon the checks and balances provided by the federalist structure and three branches of government established by the U.S. Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Bayard v. Singleton*, 1 N.C. 5 (1787). These checks and balances have historically provided and continue to provide critical protections against

2. 52 U.S.C. §§ 10301-10314, 10501-10508.

racial exclusion and oppression.[3] These protections are especially important in the context of voting rights, as "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In the current legal landscape, without the preclearance provisions of the VRA and with *Rucho v. Common Causes*' mandate that federal courts cannot entertain challenges under the U.S. Constitution to partisan gerrymandering, state constitutions and the courts that enforce them—along with Section 2 of the VRA—provide the last line of defense against state legislative action that undermines the rights of Black people and other people of color. 139 S. Ct. 2484 (2019). The ISLT advanced by Petitioners, if endorsed by this Court, would remove this final check, in derogation of longstanding democratic principles and legal precedent.

The North Carolina state courts can and should review the actions of the North Carolina General Assembly with respect to state and federal election laws and legislative redistricting for conformance with the North Carolina Constitution.

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3. To say that such protections are critical is not to say that they have fully guaranteed an inclusive democracy. Indeed, their protections have been limited. *See Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 549 (2013) (noting that "[p]roblems [regarding race and voting] remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides"). Ongoing pervasive racialized subordination in voting rights in the United States demonstrates the need for more safeguards, not fewer.

I.

State judicial review provides a critical check on legislatures, and Petitioners' truncated history of voting rights in North Carolina obscures the extent to which endorsement of the ISLT could disenfranchise Black voters and other voters of color in North Carolina. The fulsome history of the unique struggles surrounding voting rights in North Carolina reveals how critical judicial review of General Assembly action truly is when it comes to election laws and why the General Assembly legislatively endorsed such judicial review.

II.

The General Assembly's enactment of 2003 N.C. Session Law 434 created a procedure for challenging redistricting plans through judicial review and granted the state courts power to impose interim redistricting plans to remedy any persisting defects in the General Assembly's plan. N.C. Gen. Stat. §§ 120-2.3, 120-2.4(a1). The General Assembly's passage of this legislation was in direct response to persistent racial and political gerrymandering, including in the redistricting plans that were the subject of the *Stephenson* cases (discussed below) before the North Carolina Supreme Court. Accordingly, the General Assembly has explicitly recognized the North Carolina Supreme Court's power to review, invalidate, and impose interim redistricting plans.

III.

It goes against the most fundamental premises of our governmental systems, as well as judicial precedent and

the text of the United States Constitution, to suggest, as the Petitioners do, that state legislatures, such as the General Assembly, are not bound by the provisions of their state constitutions protecting the right to vote.[4] North Carolina's solution to persistent, unconstitutional voter discrimination is consistent with the United States' federalist system of checks and balances and is in accord with this Court's decision in *Rucho*, which left open to state courts the ability to be the last option for judicial review of impermissible partisan gerrymandering; and, North Carolina's solution is a necessary check on discriminatory state legislative action when it comes to voting rights and elections.

ARGUMENT

I. A HEALTHY SYSTEM OF CHECKS AND BALANCES IS NECESSARY TO PROTECT AGAINST THE DISENFRANCHISEMENT OF BLACK VOTERS

a. State Judicial Review Provides Critical Protection Against Racialized Voter Suppression

United States democracy is built on the checks and balances provided by our three branches of government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Bayard v. Singleton*, 1 N.C. 5 (1787). This balance makes democracy possible and protects against any one or two

4. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022).

branches of government obtaining undue power or control. Fundamental to this balance is the role of the judiciary. State constitutions and the courts that enforce them provide critical protections that restrict individuals and governmental bodies–including state legislatures–from engaging in racial exclusion and oppression. These protections are especially important in the context of voting rights, because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It goes against the most fundamental premises of our governmental systems—not to mention the text of the United States Constitution and judicial precedent—to suggest that state legislatures are not bound by state constitutional provisions that protect the right to vote.[5]

When state legislatures have unchecked power to govern elections with impunity, history tells us that the voting rights of people of color will be undermined.[6] "A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the 'blight of racial discrimination in voting' continued to 'infec[t] the electoral process in parts of our country.'" *Shelby Cnty., Ala. v. Holder*, 570 U.S.

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5. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022).

6. Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1563, note 44 (2021) ("[T]he history of discrimination against racial minorities in voting and elections is one of 'democratic domination.'") (quoting DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 6.1, at 341 (6th ed. 2008)).

529, 560 (2013) (Ginsburg J., dissenting) (quoting *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966)). This included legislative actions to amend state constitutions by adding provisions to disenfranchise Black voters.[7] In *Giles v. Harris*, 189 U.S. 475 (1903), the Court upheld these racially discriminatory provisions on the ground that they posed "a quintessentially political problem requiring a political solution."[8] *Shelby Cnty., Ala.*, 570 U.S. at 561 (citing *Giles,* 189 U.S. at 488). In other words, despite the promise of the Fifteenth Amendment, the Court determined racialized voter suppression could continue unabated and the federal courts of that era would not intervene.

As discussed in greater detail *infra* Part I.b.i, the lack of a check on legislatures in the decades after Reconstruction resulted in profound racialized disenfranchisement. The number of Black voters in several southern states dropped from over 100,000 in the decade preceding *Giles* to fewer than 5,000 in the decade following *Giles*.[9] In North Carolina specifically, there was a "complete elimination of black voter turnout" between

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7. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295 (2000).

8. *See also* Ellis, *supra* note 6, at 1562–63 (discussing the irony of Justice Ginsburg quoting *Giles* in support of addressing racial discrimination in voting).

9. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 303-04 (2000) (noting that in Louisiana the number of Black voters dropped from 130,334 to 730, in Alabama, the number dropped from 181,471 to 3,000; and in Virginia, estimated Black voter turnout dropped to zero).

1896 and 1904,[10] and literacy tests survived until the passage of the VRA.[11] That Act led to "increased numbers of registered minority voters, minority voter turnout, and minority representation," but this Court's recent decisions have limited its scope. *Shelby Cnty., Ala.*, 570 U.S. at 562-63 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, § 2(b) (1), 120 Stat. 577); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (Kagan, J., dissenting).

The impact of *Giles* illustrates the fundamental paradox of leaving concerns of voting rights and elections to the will of the majority in a country where the majoritarian will has been to impose restrictions that suppress the voting rights of racial minorities.[12] And yet, the Petitioners' proposed theory would give legislators near-exclusive authority to regulate federal elections, unconstrained by state constitutions that provide critical protections against racialized voter suppression. Backstops like state constitutions are vital to the pursuit of an authentic democracy.

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10. Pildes, *supra* note 9, at 304.

11. Pildes, *Id.* at 315.

12. Ellis, *supra* note 6, at 1563, note 44 (describing how in the absence of a judicial check on the political process like that declined in *Giles*, a "voting rights paradox" may exist where "the majority may own the democracy on whatever terms it chooses—including discriminatory ones—and one must depend on the majority itself to change its mind about its antidemocratic choices").

b. Petitioners' Truncated History of Voting Rights in North Carolina Obscures the Extent to Which the Independent State Legislature Theory Will Disenfranchise Black Voters.

i. Courts Have Played a Key Role in Overseeing Legislative Districting in North Carolina.

The struggle for an inclusive and authentic democracy in North Carolina, dating back from the era of Reconstruction and continuing to the present, provides critical context to the importance of preserving the right of state citizens to challenge unconstitutional partisan gerrymandering. Petitioners' brief conveniently omits this critical history, instead focusing only on the first forty years "of practice under the Constitution" to make the flawed argument that "history confirms what is apparent from the text." *See* Pet'rs Br., at 3. In fact, the history of voting rights in North Carolina over the past century—and, critically, the past decade—illustrates that adoption of the Petitioners' theory would give way to extreme partisan gerrymandering, with racialized impacts.

In North Carolina, the adoption of the 1868 Constitution enfranchised Black men and spurred high rates of Black political participation, resulting in the election of dozens of Black lawmakers across the state House of Representatives, state Senate, and U.S. House of Representatives between 1877 and 1900. *See* Brief of NC NAACP *Amicus Curiae* Supporting Plaintiffs-Appellants North Carolina League of Conservation Voters, Inc. et al., Common Cause, and Rebecca Harper, *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (No. 413PA21) ("NAACP

Br.") at 6. But a violent coup d'etat in 1898[13] and the subsequent adoption of disenfranchisement amendments ended this period of multiracial democracy, resulting in what was essentially "a one-party state controlled by the Democratic party under the conspicuous banner of white supremacy."[14]

Between 1900 and the 1980s, North Carolina created multimember house and senate districts to submerge

13. On November 10, 1898, a mob of armed white men violently overthrew the city government, replacing Black aldermen with white segregationists, and publishing a "White Declaration of Independence." As many as 60 individuals may have been killed in connection with the coup. *See 1898 Wilmington Race Riot Report*, 1898 Wilmington Race Riot Commission, May 31, 2006, <https://www.ncdcr.gov/learn/history-and-archives-education/1898-wilmington-race-riot-commission>.

14. *See* Caitlin Swain, *Why the South Matters Now: The Voting Rights Act, North Carolina, and the Long Southern Strategy*, 12 Duke J. Const. Law & Pub. Pol'y 211, 225 (2017) (discussing the disenfranchisement amendments, including a statewide literacy test and poll tax, and the passage of the state's first Jim Crow law). *See also* Michael Kent Curtis, *Using the Voting Rights Act to Discriminate: North Carolina's Use of Racial Gerrymanders, Two Racial Quotas, Safe Harbors, Shields, and Inoculations to Undermine Multiracial Coalitions and Black Political Power*, 51 Wake Forest L. Rev. 421, 428 (2016) ("Election reforms, force, fraud, and a new white-only primary (which abandoned the veneer of racial neutrality) drove nails into the coffin of multiracial democracy."); Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. F. 58, 58–59 (2014) (discussing backlash against African American political success leading to violence in fraud in 1898 and subsequent efforts to disenfranchise through fraud, intimidation, violence, and racial animus).

large Black populations into districts with a surrounding larger White population, as a means of racialized political subordination. NAACP Br. at 7–8.[15] This practice succeeded in diluting the collective voting power of Black people and controlling election outcomes across North Carolina at the local and state level. NAACP Br. at 7–8. It was not until 1986, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the judiciary intervened to declare that such multimember districting schemes were unconstitutional and violated the VRA's prohibition against racial vote dilution. *See* NAACP Br. at 8. In that landmark case, this Court affirmed the district court's finding that the General Assembly "had officially discriminated against its [B]lack citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing, at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting and designated seat plans for multimember districts." *Id.* at 38-39.

Though the dismantling of multimember districts following *Thornburg v. Gingles* spurred a period of Black voter participation and political success, racialized voter discrimination and suppression have continued to plague North Carolina's electoral systems in the decades since. NAACP Br. at 8–9. Of particular relevance here, over the most recent decade, the North Carolina General Assembly has repeatedly engaged in unconstitutional tactics to disenfranchise Black voters, reined in only by the courts.

Courts have repeatedly struck down the General Assembly's election regulations since 2010. NAACP

15. *See also* Expert Report of James L. Leloudis II (Dec. 23, 2021) ("Leloudis Rep.") at 50.

Br. at 10. In *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd sub nom. North Carolina v. Covington*, 137 S. Ct. 2211 (2017), a federal court struck down twenty-eight North Carolina General Assembly districts as unconstitutional racial gerrymanders. The court rejected defendants' claims that "race was not the primary factor used in the redistricting, and that even if it was, their use of race was reasonably necessary to serve a compelling state interest – namely, compliance with Section 2 and Section 5 of the Voting Rights Act." *Id.* at 124.

The same year, this Court held in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), that the General Assembly had engaged in racial gerrymandering in the construction of its U.S. House of Representative Districts 1 and 12. The fate of Districts 1 and 12 would return quite often to this Court. There, the General Assembly was accused of concentrating Black voters into two districts to prevent their participation in several other "crossover" or coalitional districts. *See* NAACP Br. at 12–13. This Court affirmed the district court's finding that the General Assembly engaged in unconstitutional racial gerrymandering. *Cooper*, 137 S. Ct. at 1466.

In 2019, a three-judge panel of the Wake County Superior Court found North Carolina's 2017 state legislative plan to be an unconstitutional partisan gerrymander in *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56 (N.C. Super. Ct. Sept. 3, 2019). There, the state court struck down 28 legislative districts as unconstitutional partisan gerrymanders under North Carolina's constitution, concluding that Republican mapmakers designed the 2017 plans to intentionally maximize their own political power

and protect Republican majorities, to the detriment of individual voters, by packing Democrats into districts to diminish their voting strength elsewhere. *Id.* at 347. There, the legislature's remedy was also deemed to be "infected with racial discrimination," prompting the court itself to construct a remedial plan through the appointment of a special master. NAACP Br. at 14.

One district court opinion highlighted the persistence of the General Assembly's racially discriminatory tactics. In that case, plaintiffs asked the district court to truncate the terms of legislators serving in districts that were to be redrawn under *Covington* and order a special election to fill those seats with representatives elected under constitutional districting plans. *Covington v. North Carolina*, 270 F. Supp. 3d 881 (M.D.N.C. 2017) (*Covington II*). Though the *Covington II* court ultimately declined to grant this request, citing practical concerns for holding such a special election, it reasoned that "the widespread, serious, and longstanding nature of the constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—counsels in favor of granting Plaintiffs' request." *Id.* at 884. As that court commented, "[b]eyond the immediate harms inflicted on Plaintiffs and other voters who were unjustifiably placed within and without districts based on the color of their skin, Plaintiffs—along with millions of North Carolinians of all races—have lived and continue to live under laws adopted by a state legislature elected from unconstitutionally drawn districts." *Id.* at 894. Moreover, that court also noted that the legislative defendants took no action to remedy the constitutional violation "for many weeks after affirmance of this Court's order," and have "otherwise acted in ways that indicate they are more interested in delay than they are in correcting

this serious constitutional violation." *Covington II*, 270 F. Supp. 3d at 884.

While some of these cases involved partisan gerrymandering and not racial gerrymandering, the two are closely related. Indeed, scholars have noted that partisan gerrymanders and racial gerrymanders are two sides of the same coin.[16] Gerrymandering, whether under the guise of being "partisan" or "racial," is a powerful tool in the "anticoalition tool kit."[17] As stated by one of Respondents' experts below, in North Carolina, politics and race overlap "to the extent that partisan gerrymandering many times acts as a cover for racial discrimination in redistricting."[18] Accordingly, North Carolina's recent history of unconstitutional partisan and racial gerrymandering exemplifies the critical need for judicial oversight of legislatures, and the devastating impact on the rights of Black voters in the state in the absence thereof.

In sum, without judicial oversight, the "will of the map drawer" perpetuates itself at the expense of the will of

16. Joshua S. Sellers, *Election Law and White Identity Politics*, 87 Fordham L. Rev. 1515, 1544 (2019) (discussing the difficulty of disaggregating "racial from political justifications"); Atiba R. Ellis, *When Political Domination Becomes Racial Discrimination:* NAACP v. McCrory *and the Inextricable Problem of Race in Politics*, 68 S.C. L. Rev. 517, 533 (2017) (discussing "the unavoidable racial components of voting practices"); Curtis, *supra* note 14, at 425 ("In North Carolina's history, when a multiracial political party has faced a one-race party (or a mostly one-race party), disrupting the multiracial coalition has been a key goal of the anticoalition party.").

17. *Id.*

18. Leloudis Rep. at 4.

the people. *See Common Cause*, 2019 N.C. Super. LEXIS 56, at *13-14.

ii. Judicial Oversight Has Also Been Necessary in Countering Other Racialized Voter Suppression Tactics.

Other racially discriminatory voting restrictions passed by the North Carolina General Assembly underscore the need for judicial oversight of state legislative determinations regarding elections. For example, the General Assembly has repeatedly enacted voter identification laws, which research has shown disproportionately disenfranchise Black and other racial minority voters.[19] In 2016, the U.S. Court of Appeals for the Fourth Circuit held that the General Assembly's strict photo voter identification law, H.B. 589, which also included four other voting restrictions, was enacted with a racially discriminatory intent in violation of the Equal Protection Clause and the Voting Rights Act. *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). Indeed, that law—which, for example, eliminated specific identification options more likely to be possessed by African Americans and modes of voting disproportionately used by African Americans—was enacted following a period of uniquely high African-American voter turnout from 2000 to 2012.[20] As the Fourth Circuit observed, the law was "the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965," and

19. *See*, *e.g.*, John Kuk, Zoltan Hajnal and Nazita Lajevardi, *A disproportionate burden: strict voter identification laws and minority turnout*, Politics, Groups and Identities 2022, Vol. 10, No. 1, June 4, 2020, at 126-134.

20. Swain, *supra* note 14, at 214, 216.

"target[ed] African Americans with almost surgical precision" for exclusion from the political process. *Id.* at 227, 214.

Nonetheless, in 2018, the General Assembly passed a new photo voter identification law, which was immediately challenged as racially discriminatory in both state and federal court. In *NC NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019), a federal court determined that the passage of the law was "likely motivated by racially discriminatory intent in violation of the Voting Rights Act and the U.S. Constitution." NAACP Br. at 16–17. In *Holmes v. Moore*, a state court found that the law was enacted in violation of the Equal Protection Clause of the North Carolina Constitution. *See* Final Judgment and Order, No. 18-cvs-15292 (N.C. Super. Sept. 17, 2021). The state court noted that the events leading to the enactment of the law departed from the normal legislative procedure. Final Judgment and Order at 18-19. Specifically, the legislature ratified an amendment to the North Carolina Constitution to require photo identification as a condition to vote *the day after the Supreme Court's ruling in Covington*, which struck down 28 General Assembly districts as unconstitutional racial gerrymanders. *Id.* at 19 (emphasis added). As the court explained, ratifying the amendment "in the immediate aftermath of the *Covington* decision shows an effort and intent by the legislature to alter the State's Constitution, thereby allowing their racially gerrymandered supermajority to implement their legislative goals." *Id.*

This long history of blatant legislative efforts to engage in racialized voter suppression provides important context for this Court's consideration of Petitioners'

proposed theory.[21] Indeed, the absence of such history from Petitioners' brief, and Petitioners' suggestion that this appeal can be resolved based on a narrow textual consideration of the Elections Clause, Article I, Section 4 of the United States Constitution coupled with a limited survey of the practices of the states prior to the Civil War, constitutes an effort to erase from consideration the history of voter suppression that provides actual, far more authentic context for the role of the North Carolina Constitution and judiciary in the present case. Without the rights and protections afforded under state constitutions and the enforcement of those rights by the state judiciary, as Petitioners would have it, voters would have no judicial remedy against extreme partisan gerrymandering, which, as noted above, often operates as a proxy for racial gerrymandering. As the state's legislative and judicial history on this issue has proven, absent any checks or balances from state courts, disenfranchisement of Black voters, and the demise of participatory democracy, is certain.

21. Ellis, *supra* note 16, at 519 ("North Carolina's efforts to transform voting regulations must be read against the history of the state regarding race and politics.").

II. THE NORTH CAROLINA GENERAL ASSEMBLY CHECKS ITS OWN POWER TO ENACT REDISTRICTING PLANS WITH JUDICIAL REVIEW

a. North Carolina Has Historically Used Judicial Review to Ensure the Constitutionality and Validity of its Redistricting Plans

Judicial review provides an essential check on state legislatures and this power has long been used to protect the voting rights of Black people and other people of color. North Carolina's redistricting history demonstrates the necessity of judicial review: since the passage of the Voting Rights Act, redistricting plans by North Carolina's General Assembly have been subject to some form of judicial review during every redistricting cycle. *See, e.g.*, *Drum v. Seawell*, 271 F.Supp. 193, 193 (M.D.N.C. 1967); *Dunston v. Scott,* 336 F.Supp. 206, 208 (E.D.N.C. 1972); *Thornburg v. Gingles,* 478 U.S. 30, 30 (1986); *Shaw v. Reno*, 509 U.S. 630, 633 (1993); *Hunt v. Cromartie,* 526 U.S. 541, 543 (1999); *Stephenson v. Bartlett,* 582 S.E.2d 247, 248 (N.C. 2002); *Rucho v. Common Cause,* 139 S. Ct. 2484, 2491 (2019). Indeed, the state's congressional districts have been the subject of "more racial gerrymandering litigation at the Supreme Court level than any other districts in the country."[22]

North Carolina relies on judicial review to ensure that redistricting plans comply with the state's constitution. In the case of *Stephenson v. Bartlett* ("*Stephenson I*"),

22. Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 UC Irvine L. Rev. 229 (2018).

the North Carolina Supreme Court found the General Assembly's redistricting plans unconstitutional under the North Carolina Constitution's whole county provision.[23] Recognizing that Section 5 of the Voting Rights Act prevented forty of North Carolina's one hundred counties from adopting reapportionment plans that diluted the vote of legally protected racial minority groups, the court harmonized the state and federal provisions. In doing so, the court emphasized that "within the context of state redistricting and reapportionment disputes, it is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan.'" *Stephenson I* at 384 (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

After *Stephenson I,* the General Assembly enacted new redistricting plans, which were again invalidated by the North Carolina Supreme Court. In *Stephenson II*, that court found the plans violated Section 2 of the Voting Rights Act, the state constitution's contiguity and whole county provisions, and the court's prior direction in *Stephenson I* that "communities of interest should be considered in the formation of compact and contiguous districts." *Stephenson v. Bartlett (Stephenson II)*, 582 S.E.2d 247, 307 (N.C. 2003) (citing *Stephenson I*).

In November of 2003, the General Assembly convened an extra session to enact new redistricting plans and consider North Carolina's system for judicial review of the redistricting process.[24]

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23. N.C. Const. art. II § 3, 5, "No county shall be divided in the formation of a senate district" and "No county shall be divided in formation of a representative district."

24. North Carolina Bill Summary, 2003 Ex. Sess. H.B. 3.

b. The *Stephenson* Cases Prompted the General Assembly to Enact Legislation Codifying Judicial Review of Redistricting Plans

Following *Stephenson II*, the General Assembly enacted its 2003 redistricting plans and, on the same day, enacted 2003 N.C. Session Law 434, which was ultimately codified as §§ 120-2.3 and 120-2.4(a1). *See Stephenson v. Bartlett*, 595 S.E.2d 112, 115 (N.C. 2004). This legislation created a procedure for challenging redistricting plans and granted the court power to impose an interim districting plan that remedies any defects in the General Assembly's plan. The General Assembly's actions in passing §§ 120-2.3 and 120-2.4(a1) are a direct response to North Carolina's history of racial and political gerrymandering. The North Carolina Supreme Court, in reviewing 2003 N.C. Session Law 434, noted that:

> In the context of redistricting, the potential for the branches of government to collide with each other is great, and the consequences of such a collision are grave. In passing these statutes, the General Assembly has recognized the unique nature of these infrequent but potentially divisive cases and has set out a workable framework for judicial review that reduces the appearance of improprieties.

Id. at 120.

The Elections Clause grants state legislatures the power to enact laws governing elections. Here, the General Assembly enacted a law affirming that the North Carolina Supreme Court has the power to find redistricting

plans "unconstitutional or otherwise invalid, in whole or in part and *for any reason*."[25] The legislature thus recognized the court's authority to declare redistricting plans unconstitutional or invalid based on racial gerrymandering, partisan gerrymandering, or some other basis. North Carolina's storied history with respect to voting rights juxtaposed with the *Stephenson* decisions and subsequent legislative action reflect recognition of the State's unique situation and illustrates that judicial review of the General Assembly is the best available option for reducing the effect of racial discrimination and partisan politics on the redistricting process.[26]

The General Assembly's enactment of §§ 120-2.3 and 120-2.4(a1) recognized that whatever form unconstitutional or invalid gerrymandering takes, the North Carolina judiciary has the power to protect the rights of its citizens and ensure that race is not used in the redistricting process for partisan gain. To strip North Carolina's judiciary from having this critical oversight function will simply enable overt forms of racial discrimination in redistricting to go unchecked.

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25. N.C. Gen. Stat. § 120-2.3 (emphasis added).

26. *See* Seth Warren Whitaker, *State Redistricting Law:* Stephenson v. Bartlett *and the Judicial Promotion of Electoral Competition*, 91 Va. L. Rev. 203, 247 (2005).

III. NORTH CAROLINA'S METHOD FOR ADDRESSING GERRYMANDERING IS CONSISTENT WITH *RUCHO* AND PRINCIPLES OF FEDERALISM

a. North Carolina's Method for Addressing Partisan Gerrymandering is Consistent with this Court's Decision in *Rucho*

The North Carolina Supreme Court's review and ultimate ruling on the General Assembly's redistricting plans is precisely the type of check on state legislative action contemplated and endorsed by this Court's decision in *Rucho*.

Rucho involved a challenge to North Carolina's (and Maryland's) congressional districting maps as being the product of unconstitutional partisan gerrymandering. Plaintiffs alleged that the gerrymandered districts violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, Section 2 of the U.S. Constitution. Relevant here, in the case of North Carolina, the Republican-controlled General Assembly in 2016 had "instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. Following a four-day trial, the District Court unanimously held that the 2016 Plan violated the Equal Protection Clause and Article 1, Section II of the U.S. Constitution.

This Court reversed, holding that claims that partisan gerrymandering violated the U.S. Constitution were not justiciable in federal court. *Rucho*, 139 S. Ct. at 2508.

While the Court recognized that the redistricting plans were "highly partisan, by any measure," that was not enough to strike them down as unconstitutional because "the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." *See id.* at 2491, 2501. In short, according to the Court, the Constitution does not answer the question "How much [partisan gerrymandering] is too much?" *See id.* at 2499-501, 2505.

This Court's decision in *Rucho*, however, did not give legislatures *carte blanche* to engage in partisan gerrymandering, but rather made clear that state courts were better positioned to review such matters. The *Rucho* decision explicitly "does not condone excessive partisan gerrymandering . . . [n]or does [it] condemn complaints about districting to echo into a void." *Id.* at 2507. Indeed, the Court listed examples of how states have addressed partisan gerrymandering through provisions in state constitutions. *Id.* The Court cited states that have "outright prohibited partisan favoritism in redistricting" in their constitutions. *See id.* at 2507-08 (citing Fla. Const., Art. III, § 20(a); Mo. Const., Art. III, § 3). The Court also cited states that have approved constitutional amendments creating commissions or state demographers to create and approve district maps for congressional and state legislative districts. *See id.* at 2507 (citing Colo. Const., Art. V, §§ 44, 46; Mich. Const., Art. IV, § 6; Mo. Const., Art. III, § 3).

North Carolina's approach to addressing partisan gerrymandering adheres to this Court's jurisprudence, providing a mechanism for state judicial review in lieu of review by the federal courts. In a state like North Carolina, with its troublesome history with respect to voting rights,

judicially-imposed oversight of the legislature provide a vital mechanism for reducing the effect of partisan and, by proxy, racial politics on the redistricting processes.[27]

b. A Holding that the ISLT Bars North Carolina's Response to Partisan Gerrymandering Would Be Highly Disruptive to the Federalist System of Government

A holding consistent with Petitioners' position that North Carolina's response to partisan gerrymandering is barred by the ISLT would be highly disruptive of our federalist system of government. One of the inherent benefits of that governmental balance is that states are empowered to experiment with different solutions and adapt to their own unique problems that arise from their unique history, culture, and environment – they can create their own unique checks and balances. This is precisely what the General Assembly did when it codified judicial oversight over legislative districting plans. North Carolina knows all too well that discriminatory election laws are a persistent problem and the best tool to address this problem is judicial review.

Inherent within the empowerment of state government bodies permitted and, indeed, encouraged by our federalist system is the recognition that "[s]tate courts' understanding of and immersion in their states' legal culture, precedent, and constitution" puts them in the best position to interpret their own laws.[28] Application of the ISLT, which, in practice,

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27. *See* Whitaker, *supra* note 26, at 247.

28. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. at 54 (forthcoming in 2023).

operates as a restriction on state courts' construction of state election laws, would undermine this federalist deference to the state courts and essentially federalize the interpretation and application of state election law.[29] Under this framework, while parties could not seek redress for partisan gerrymandering in either state or federal court, parties could be incentivized to go directly to federal courts to challenge other state election laws, thereby circumventing state courts and creating a scenario where the federal courts are interpreting state law before the state courts do.[30] Parties could also, for instance, seek injunctions from federal courts to preclude the application of state court rulings that impact federal elections.[31] Undermining state courts' primacy when it comes to interpreting state election laws in this manner could create pressure on state courts to interpret state election laws consistent with the federal courts, which could, in turn, affect the interpretation of state law beyond the election law provision that was subject to interpretation by the federal courts.[32] Consistent with federalist principles, the North Carolina state courts are best suited to interpret and apply the state's constitution and laws – and they should be permitted to do so without undue influence from the threat of federal judicial review.

29. *Id.*

30. *Id.* at 54-55.

31. *Id.* at 54.

32. *Id.* at 55.

CONCLUSION

The Center and Professor Ellis respectfully submit that this Court should, consistent with its holding in *Rucho* and principles of federalism, reject the Independent State Legislature Theory promoted by Petitioners and uphold North Carolina's chosen method of ensuring that its election laws are fair and do not undermine the rights of Black voters and other voters of color.

Respectfully submitted,

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