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 AMICUS CURIAE LAWYERS DEFENDING AMERICAN DEMOCRACY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Lawyers Defending American Democracy (LDAD) is a 501(c)(3), non-partisan national organization of lawyers and their supporters dedicated to protecting and preserving American democracy. www.ldad.org. One of its founding principles is that adherence to the rule of law is essential to maintaining a vibrant democracy. LDAD submits this brief to offer an interpretive path for resolution of the critical issues presented by this case.

SUMMARY OF ARGUMENT

This case presents the Court with two interpretations of a constitutional provision. One interpretation presents the risk of significant harm to American democracy and the rule of law. It does so by eliminating the availability of judicial review to challenge government action that may violate state constitutions protecting the fundamental right to vote and have one's vote counted. The other interpretation threatens neither of these results. Even if it were assumed that the first interpretation is colorable – which it is not – an implicit, foundational principle of constitutional interpretation would compel adoption of the second interpretation, which does not threaten such harm.

The core issues in this case go beyond whether the Elections Clause permits state courts to remedy

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[1] All parties provided written consent to the filing of this brief by blanket consent. Amicus states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from Amicus, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

legislative violations of state constitutions under what Petitioners characterize as "vague state constitutional provisions[.]" Petition for Writ of Certiorari (Pet. Cert.), at i. The logic of Petitioners' argument and the structure of the Elections Clause reveal a more basic question – whether the Elections Clause should be interpreted as abolishing state court review of *any* state election laws enacted under the Clause.

Further, this case should not be resolved by reference only to the Elections Clause. Adoption of Petitioners' interpretation would create a significant risk of a destructive impact on rights protected by the 14th Amendment, namely citizens' fundamental right to vote and have their votes counted, *Reynolds* v. *Sims*, 377 U.S. 533, 554, 555 (1964), as well as by the 15th, 19th and 26th Amendments. State legislatures are enacting, and seeking to enact, state election laws that could readily be used to undermine the impartiality of elections to favor their own partisan candidates – even overturning elections. *See* States United Democracy Center, Protect Democracy, Law Forward, *A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration*, 4-6 (May 2022) (*A Democracy Crisis in the Making*). These laws create anew and potentially cataclysmic threat to American democracy. In evaluating the meaning of the Elections Clause, the Court should be aware of this real-world threat to our democracy and the rule of law and avoid interpreting the Clause in a way that promotes or enables this threat.

Petitioners assert that: "the power to regulate federal elections lies with state legislatures *exclusively*." (Emphasis in original) Brief for Petitioners, (Pet. Brief), at 11. If the Elections Clause gives the regula-

tory authority "exclusively" to the state legislatures (subject to the explicitly authorized potential override by Congress), by definition there cannot be any authority for state courts, regardless of the source or specificity of constitutional provisions they would be applying. Thus, Petitioners' "exclusivity" interpretation would effectively prohibit all state court review of citizens' claims that state laws providing for partisan gerrymandering or regulating the conduct of federal elections violate state constitutions.

Petitioners' interpretation essentially boils down to arguing that the Framers intended to immunize state legislatures from having to comply with their state constitutions. This flies in the face of the critical importance the Framers gave to the fact that written constitutions, by their nature, were superior to legislative acts and their recognition that laws contrary to an applicable constitution were void – as explained in *Marbury* v. *Madison*, 5 U.S. 137, 176-178 (1803).

Abolishing state court reviewability of such laws would make it impossible for "qualified citizens" to turn to state courts to protect against legislative violation of a "fundamental political right" – the right to vote and have their vote counted, *Reynolds*, 377 U.S., at 554, 555, 562, as defined and guarded in their state constitutions. Rather than preserving the rule of each sovereign State's constitution, Petitioners propose to override the authority of every sovereign State under the 10th Amendment and the doctrine of federalism to have its own state courts determine whether its own state legislature was complying with its own state constitution, and do so in the critical area of the right to vote.

Petitioners' interpretation would enable partisan state legislatures to negate their own superior state constitutions, even constitutional provisions specifically

protecting against excessive partisan gerrymandering and interference with impartial federal elections. Thus, Petitioners' interpretation would transform critical portions of each sovereign State's constitution and election laws from the "rule of law" to the "law of men."

To assist in its determination of "what the law is," *Marbury*, 5 U.S., at 177, the Court has developed various principles of interpretation. Given the threat to American democracy and the rule of law presented by Petitioners' interpretation, Amicus respectfully suggests that the Court follow an implicit, foundational principle of constitutional interpretation: Where two interpretations of a constitutional provision are both colorable applying traditional tools, and one interpretation would threaten American democracy and the rule of law and the other would not, courts should adopt the interpretation that would not threaten those harms.

Contrary to this foundational principle, Petitioners' interpretation would nullify the bedrock "rule of law" protection of state court review to prevent state laws from violating citizens' state constitutional rights. It would thereby threaten American democracy, not only by undermining the state constitutional election provisions safeguarding the voting process, but also the fundamental federal right to vote, which those provisions implement and support. Even if Petitioners' interpretation were colorable (and Amicus believes it is not), because Respondents' interpretation would *not* threaten American democracy or the rule of law, Respondents' interpretation should be adopted.

ARGUMENT

This case presents a sharp conflict between two interpretations of a constitutional provision. One interpretation presents the risk of significant harm to American democracy and the rule of law. It does so by eliminating the availability of judicial review to challenge government action that may violate state constitutions protecting the fundamental right to vote and have one's vote counted. The other interpretation threatens neither of these effects. Even if it were assumed that the first interpretation is colorable, an implicit, foundational principle of constitutional interpretation would compel adoption of the second interpretation, which does not threaten such harms.

The underlying issues in this case go beyond whether the Elections Clause permits state courts to remedy legislative violations of state constitutions under what Petitioners characterize as "vague state constitutional provisions[.]" Pet. Cert., at i. First, the logic of Petitioners' argument and the structure of the Elections Clause reveal a more basic question – whether the Elections Clause should be interpreted as abolishing state court review of *any* state election laws enacted under that Clause. That is, does that Clause prohibit state courts from reviewing all citizens' claims that state laws providing for partisan gerrymandering or regulating the conduct of federal elections violate state constitutions?

Second, this case cannot be resolved by reference only to the Elections Clause. Adoption of Petitioners' interpretation would create a significant risk of a destructive impact on rights protected by the 14th Amendment, namely a citizen's fundamental right to vote and have one's vote counted, *Reynolds*, 377 U.S., at 554, 555, as well as by the 15th, 19th and 26th Amendments. State legislatures are enacting, and

seeking to enact, state election laws that could readily be used not only to undermine the impartiality of elections to favor their own partisan candidates – but even to overturn elections. See *A Democracy Crisis in the Making* at 4-6. These laws create a new and potentially catastrophic danger to the priceless American right to vote and the rule of law, rather than of men. In evaluating the meaning of the Elections Clause, the Court should be aware of this real-world threat to our democracy and the rule of law and avoid interpreting the Clause in a way that promotes or enables this threat.

I. PETITIONERS' INTERPRETATION WOULD PRECLUDE STATE COURT REVIEW OF ALL DISTRICTING AND FEDERAL ELECTION CONDUCT LAWS

Turning to the first issue, the necessary consequence of Petitioners' principal argument goes beyond prohibiting state courts from reviewing the relevant state election laws based on "vague state constitutional provisions". Pet. Cert., at i. It would prohibit state courts from reviewing such laws based on *any* state constitutional provisions, regardless of how precise.

Specifically, Petitioners assert that: "The text of the Constitution assigns to state legislatures alone the authority to regulate the times, places, and manner of congressional elections – including the authority to draw congressional districts . . . . [T]he power to regulate federal elections lies with state legislatures *exclusively*." (Emphasis in original) Pet. Brief, at 11. "[T]he power to regulate federal elections lies with the State legislatures alone, and the Clause *does not* allow the state courts, or any other organ of state

government, to second-guess the legislature's determinations." (Emphasis in original), *Id*., at 39.

If the Elections Clause gives the regulatory authority "exclusively" to the state legislatures (subject to the explicitly authorized potential override by Congress), by definition there cannot be any role for state courts, regardless of the source or specificity of constitutional provisions they would be applying. Thus, Petitioners' "exclusivity" interpretation would effectively prohibit all state court review of citizens' claims that state laws providing for partisan gerrymandering or regulating the conduct of federal elections violate state constitutions.

Prohibiting state constitutional review of state laws regulating the conduct of federal elections would prevent citizens from enforcing a broad range of state constitutional election requirements. "Core aspects of the electoral process regulated by state constitutions include voting by 'ballot' or 'secret ballot,' voter registration, absentee voting, vote counting, and victory thresholds." *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787, 823 (2015).

As to partisan districting, "[a]t least 12 state constitutions have provisions that *substantively* restrict the drawing of congressional districts by requiring that congressional districts be contiguous and compact; preserving political subdivisions or communities of interest; or precluding partisan considerations or efforts to protect incumbents." (Emphasis in original) Brief for Harper Respondents in Opposition, at 31. As *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019), noted, "[s]ome [States] have outright prohibited partisan favoritism in redistricting." These include: "Fla. Const., Art. III, Sect. 20(a) ("No apportionment plan or individual district shall be drawn with the intent to

favor or disfavor a political party or an incumbent.'); Mo. Const., Art. III, Sec. 3 ('Districts should be designed in a manner that achieves both partisan fairness and secondarily, competitiveness. 'Partisan fairness' means that parties should be able to translate their popular support into legislative representation with approximately equal efficiency' [.]" *Id.*

In *Rucho*, the Court stated that: "[t]he districting plans at issue here are highly partisan by any measure." 139 S. Ct., at 2491. More generally, the Court observed that" "[e]xcessive partisanship in districting leads to results that reasonably seem unjust." *Id*., at 2506. Indeed, the Court acknowledged it was a "fact that such [excessive] gerrymandering is 'incompatible with democratic principles,' *Arizona State Legislature*, 576 U.S. at 791 [.]" *Rucho*, 139 S. Ct., at 2506.

Rucho recognized that one of the ways "[t]he States are actively addressing the issue [of excessive partisan gerrymandering]," *id*., at 2507, is by providing for state court review of state districting legislation. Specifically, the Court noted approvingly that: "[i]n 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015)." 139 S. Ct., at 2507.

The Court was concerned that, having precluded review of partisan districting claims in federal courts, reviewability continue to be available in state courts. It noted: "[n]or does our conclusion condemn complaints about districting to echo in a void . . . . Provisions in state statutes and state constitutions can provide standards of guidance for state courts to apply." 139 S. Ct., at 2507. Petitioners' interpretation is flatly inconsistent with this recent recognition by the Court.

II. THIS CASE CANNOT BE RESOLVED BASED SOLELY ON ELECTION CLAUSE. INTERPRETATION LIKEWISE NEEDS TO AVOID HARM TO THE FUNDAMENTAL 14TH AMENDMENT RIGHT TO VOTE AND HAVE VOTE COUNTED

Eliminating state court reviewability of state election laws would make it impossible for "qualified citizens" to turn to state courts to protect against legislative violation of a "fundamental political right" – the right to vote, *Reynolds*, 377 U.S., at 554, 555, as defined and guarded in their state constitutions. The right to vote includes not only the right of qualified citizens to submit a ballot, but also the right to have the ballot counted. "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a State to cast their ballots and have them counted [.]" *Reynolds*, 377 U.S., at 555 (quoting *United States* v. *Classic*, 313 U.S. 299, 315 (1941)).

As *Reynolds* recognized, "'the political franchise of voting [is] a fundamental political right, because [it is] preservative of all other rights.'" 377 U.S., at 562 (quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)). These "other rights" include the rights, through being able to vote for congressional candidates, to influence what federal laws and policies will be adopted in sensitive and important areas of social and economic policy. "The right to vote freely for the candidates of one's choice is of the essence of democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S., at 556. These principles apply equally to the voting franchise in each State.

Yet today, certain state legislatures have passed, or are seeking to pass, laws that politicize and interfere with the impartial election process. This includes bills that "would give legislators direct or indirect control over election outcomes, allowing lawmakers to reject the choice of the voters… [,] require all ballots to be counted by hand, practically guaranteeing delays, higher rates of counting error, and increasing risk of tampering by bad actors… [and] create[] criminal liability for steps that election officials routinely take to help voters cast ballots." *A Democracy Crisis in the Making*, at 6.

Indeed, nine state laws have already been enacted that "permit partisan actors to interfere with election operations or overturn election results [.]" Brennan Center for Justice, *Voting Laws Roundup: May 2022*, 1-2 (May 26, 2022). Some of these state laws, or bills that could become law, would violate their States' constitutions. For example, see Maggie Astor, *Court Lifts Voting Restrictions in Montana*, N.Y. Times, 19 (Oct. 9, 2022) (Montana state court found three state laws that restricted voting violated the Montana Constitution).

These developments show that, at this time in American history, our democracy is facing threats to the impartiality and integrity of our elections of a kind and magnitude that it has never faced before. A recent national poll reported that 67% of "Americans … think the nation's democracy is in danger of collapse." Quinnipiac University Poll, August 31, 2022. At a time of such intense public scrutiny and loss of confidence in the future of democracy, it is essential that state courts retain the authority to review challenges to state laws involving partisan districting and the conduct of federal elections to enable citizens to

protect their fundamental right to vote and have their votes counted.

Instead of preserving the supremacy of each sovereign State's constitution, Petitioners propose to override the authority of every sovereign State under the 10th Amendment and the doctrine of federalism to have a state court determine whether its legislature complied with its own state constitution. Such a shift would have a particularly pernicious effect on the right to vote. "Through the structure of its government … a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). "This Court … repeatedly has held that state courts are the ultimate expositors of state law (citations omitted) [.]" *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).

III. PETITIONERS' INTERPRETATION DISREGARDS FRAMERS' DEEP COMMITMENT TO WRITTEN CONSTITUTIONS AS SUPERIOR TO LEGISLATURES' ENACTMENTS

At root, Petitioners' argument is that the Framers intended to empower state legislators to enact relevant laws that could violate their States' constitutions with impunity by preventing state courts from performing their fundamental function of reviewing legislative acts for unconstitutionality. In effect, Petitioners are arguing that, by choosing to assign responsibility for preparing "time, place and manner of election" laws to state legislatures, rather than a different entity, the Framers intended to make the acts of state legislatures superior to their States' constitutions.

That argument ignores the very nature and purpose of a written constitution as understood by the

Framers. Rather, the Framers viewed a constitution as the supreme law with which all other laws must comply. As *Marbury*, 5 U.S., at 177, recognized:

> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society.

Marbury also foresaw and repudiated what would be the practical consequences of disregarding the constitution "as a paramount law . . . . It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits." *Id*., at 178.

As a legal and practical matter, since federal courts lack non-diversity jurisdiction over state law claims, if state courts were barred from reviewing citizens' claims of state unconstitutionality, state legislatures' Elections Clause laws would be immune from judicial review of violations of state law. Nor could Congress, as a legislative body, provide judicial review of citizens' claims that state laws violated their state constitutional rights. Thus, interpreting the Constitution to immunize state laws from state court review would give state legislatures the very "practical and real omnipotence", and legislative enactments the superiority to constitutions, that Chief Justice Marshall abhorred.

IV. HARMS FROM PETITIONERS' INTERPRETATION

Petitioners' interpretation would enable partisan state legislatures to negate their own superior state constitutions, even constitutional provisions specifically protecting against excessive partisan gerrymandering and interference with impartial federal elections. Thus, Petitioners' interpretation would transform critical portions of each sovereign State's constitution and election laws from the "rule of law" to the "law of men."

The harms to American democracy that could result would be incalculable. These include: depriving untold millions of American citizens of their sacred right to vote and have their votes counted for their legislators in Congress, improperly denying election to Congress of candidates who had lawfully won their elections, installing candidates who lost, and undermining citizens' trust in the legitimacy of American democracy.

CONCLUSION

In determining "what the law is," *Marbury*, 5 U.S., at 177, the Court has developed various principles of interpretation to assist it. Given the threat to American democracy and the rule of law presented by Petitioners' interpretation, Amicus respectfully suggests that the Court apply an implicit, foundational principle of constitutional interpretation:

Where two interpretations of a constitutional provision are colorable using traditional tools, and one interpretation would threaten American democracy and the rule of law and the other would not, courts should adopt the interpretation that would not threaten those harms.

Amicus does not believe that Petitioners' interpretation of the Elections Clause is colorable based on the traditional tools of construction. In any case, Petitioners' interpretation would undermine the rule of law by preventing state courts from protecting citizens' state constitutional election rights against attack by state laws designed to undermine impartial elections. It would threaten American democracy by exposing potentially millions of Americans to loss of state constitutional voting rights that are critical to implementing and safeguarding their fundamental federal right to vote and have their vote counted. Since Respondents' interpretation is colorable and would *not* threaten American democracy and the rule of law, it should be adopted.

Respectfully submitted,

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