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 FOR *AMICUS CURIAE* FAIRDISTRICTS NOW IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus FairDistricts Now is a nonpartisan, nonprofit organization that works to ensure that Florida's electoral districts are drawn according to the law, and to educate the public about the importance of fairness and transparency in redistricting. *Amicus* was formed to ensure the implementation of Florida's Fair Districts Amendment ("FFDA"), a 2010 initiative amendment to the state constitution prohibiting incumbent favoritism or partisan bias in drawing district lines. Today, *amicus* continues to advocate for transparency and fairness in redistricting, including as a plaintiff in pending federal litigation challenging Florida's 2022 congressional map.[2]

Amicus files this brief in support of Respondents to urge this Court to reject the atextual and ahistoric Independent State Legislature Theory ("ISLT"), and to uphold state-level efforts to combat partisan gerrymandering, like the FFDA and the North Carolina provisions at issue here.

SUMMARY OF ARGUMENT

In 2019, this Court held that federal courts may not hear partisan gerrymandering claims. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). At the same time,

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[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Common Cause Florida et al. v. DeSantis*, 4:22-cv-109-AW-MAF (N.D. Fla. 2022).

this Court assured the country that it was not "condemn[ing] complaints about districting to echo into a void," because "*state* constitutions can provide standards and guidance for *state* courts to apply" in partisan gerrymandering cases. *Id.* at 2507–08 (emphasis added). As an example of such a permissible state constitutional provision, the Court explicitly singled out the FFDA, which "prohibit[s] partisan favoritism in redistricting." *Id.* Chief Justice Roberts' opinion for the Court was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. All agreed with the Court's sensible discussion of the important role of state courts and state constitutions in limiting partisan gerrymandering. No member of the Court disagreed.

Three years later, Petitioners and their *amici* ask this Court to go back on its word and hold that state courts are indeed powerless to address partisan gerrymandering—or any other aspect of federal elections—through "[p]rovisions in ... state constitutions." *Id.* The Court should reject this argument. "There is literally no support in the Constitution, the pre-ratification debates, or the history from the time of our nation's founding or the Constitution's framing" for Petitioners' radical and dangerous position. J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, THE ATLANTIC, (Oct. 3, 2022), https://tinyurl.com/3u8p3rp2.

In Part I below, *amicus* describes the background of the FFDA and shows that the *Rucho* Court was correct to praise it as an exemplar of state-level efforts to address partisan gerrymandering. In 2010, a supermajority of Florida voters endorsed the FFDA in a bipartisan push to end decades of partisan gerrymandering.

In so doing, those voters lawfully exercised the initiative power enshrined in Florida's constitution. As federal and state courts have held, this was a permissible check on the Florida Legislature's redistricting authority under the Elections Clause. Consistent with the *Rucho* Court's observation, constitutional text, legislative history, historical practice, and this Court's precedent uniformly support this conclusion.

In Part II below, *amicus* explains why, given the constitutionality of the FFDA, Petitioner's Elections Clause challenge to the North Carolina decision under review must fail. Like Florida, North Carolina has adopted state constitutional provisions that can be violated by "partisan favoritism in redistricting." *Rucho*, 139 S. Ct. at 2507. And North Carolina's "state courts" can "apply" those provisions to "str[ike] down" gerrymandered congressional maps, just as Florida's can. *Id.* In fact, the state constitutional provisions at issue here were expressly endorsed by North Carolina's General Assembly as well as its voters—and the General Assembly also explicitly invited the North Carolina courts to review its redistricting plans for constitutionality. All of this was a permissible exercise of the legislative power to regulate federal elections under the Elections Clause. And, while the North Carolina constitutional provisions at issue are worded more generally than the FFDA, Petitioners' "open-ended" vs. "specific" test has no constitutional basis; ignores the General Assembly's express invitation to the North Carolina courts to apply the relevant constitutional language in reviewing its redistricting plans; ignores the rich history of North Carolina's Free Elections Clause; and is utterly unworkable in practice.

ARGUMENT

I. AS THE *RUCHO* COURT RECOGNIZED, THE FFDA IS A PROPER LIMITATION ON THE FLORIDA LEGISLATURE'S REDISTRICTING AUTHORITY WHICH FLORIDA'S STATE COURTS MAY CONSTITUTIONALLY ENFORCE.

In *Rucho*, this Court praised the FFDA as an example of permissible efforts by "[t]he States" to "address[] the issue" of "excessive partisan gerrymandering." 139 S. Ct. at 2507–08. By "prohibit[ing] partisan favoritism in redistricting," the Court explained, the FFDA "provide[d] ... guidance" that Florida's "state courts" could "apply" by "str[iking] down ... congressional districting plan[s] [that] violat[e]" the FFDA's command. *Id.* No Justice so much as suggested that the FFDA was constitutionally infirm—and for good reason. The Elections Clause's text, its legislative history, the states' historical practice, and this Court's precedents all establish that the *Rucho* Court was right.

A. For Decades, Gerrymandering by Both Democrats and Republicans Diluted Floridians' Votes.

Before the FFDA's enactment in 2010, Democratic and Republican majorities in Florida's Legislature drew district lines as they pleased, with the purpose of cementing their own political power and making themselves unaccountable to the voters.

Democrats held a majority in the Legislature during the 1970s and '80s, and frequently wielded their majority status to manipulate the redistricting

process.[3] The tide turned in the 1990s, as Republicans gained ground in both chambers.[4] The turbulent 1992 redistricting cycle saw both parties vie to strengthen their power through political gamesmanship. Republicans sought to pack minority voters into majority-minority districts to aid their party, and Democrats aimed to crack minority districts across the state to benefit their own.[5] Unable to reach agreement, the Legislature failed to pass a congressional map.[6] As a result, a federal court was forced to intervene and enact a remedial map.[7]

After taking control of both legislative chambers in 1996, Republicans used the 2000 redistricting cycle to solidify their control over Florida's electoral map. They ensured this result by packing and cracking Democratic districts, making it nearly impossible for Democrats to gain a majority in the state's congressional delegation or in either chamber of the Legislature.[8] Under the enacted 2002 map, 18 of 25 congressional districts (72%) leaned or were solidly Republican, despite a near-even partisan divide in the state.[9]

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[3] Matthew Isbell, *Florida Redistricting Preview #2: 1970s through 1980s – Democratic Gerrymandering*, MCI MAPS (Aug. 4, 2021), https://tinyurl.com/yxvh6j8f.

[4] Mathew Isbell, *Florida Redistricting Preview #4: 1990s Congressional Redistricting – Democrats vs the VRA*, MCI MAPS (Aug. 11, 2021) https://tinyurl.com/bpah43cj.

[5] *Id.*

[6] *Id.*

[7] *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1087–88 (N.D. Fla. 1992).

[8] Devon Ombres, *The Recent History of Gerrymandering in Florida: Revitalizing* Davis v. Bandemer *and Florida's Constitutional Requirements on Redistricting*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 297, 316-17 (2014).

[9] *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1324 (S.D. Fla. 2002).

To gain a majority in the congressional delegation, Democrats would have had to win all "their" districts, the only swing district, two Republican-leaning districts, and a safe Republican district—an all-but-impossible task in a closely divided state.[10]

In federal litigation challenging the 2002 congressional map, a three-judge panel determined that the Florida Legislature's "overriding goal with respect to congressional reapportionment was to … maximize the number of districts likely to perform for Republicans." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1300–01 (S.D. Fla. 2002). Although the court reluctantly upheld the congressional map, it lamented that "[t]his raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting." *Id.* at 1297. With the gerrymandered map in place, Democrats were marginalized and voters were denied their basic right to free and fair representation.

B. In a Vivid Example of Citizen Democracy, Floridians Enacted the FFDA.

Florida voters did not take this lying down. The state's constitution authorizes the citizen initiative process as "part of the state's lawmaking function," *Brown v. Sec'y of State*, 668 F. 3d 1271, 1279 (11th Cir. 2012), vesting voters with "[t]he power to propose the revision or amendment of any portion or portions of this constitution," Fla. Const. art. XI § 3. The state's constitution thereby authorizes Florida voters to "participate in the lawmaking process" just as its elected

[10] Ombres, *supra* note 8, at 317.

legislators do, including by "attach[ing] new conditions to the exercise of the legislature's various powers." *Diaz-Balart v. Browning*, 2011 WL 13175016, at *6 (S.D. Fla. Sept. 9, 2011), *aff'd*, 668 F.3d 1271 (11th Cir. 2012). This initiative process dates back to 1968, when the state Legislature proposed, and Florida voters approved, sweeping changes to the Florida constitution, including adding the ballot initiative power.[11] Thus, it bears emphasizing, the Legislature *itself* endorsed the initiative process by which the FFDA was subsequently enacted.

In November of 2010, exercising that legislatively sanctioned initiative power, Florida's voters approved the FFDA.[12] That amendment was a forceful response by Florida's polity to the decades of brazen gerrymandering perpetrated by elected officials of both parties. Its aim was to "require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Advisory Op. to the Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 181 (Fla. 2009).

To accomplish that goal, the FFDA establishes two tiers of standards for the Legislature to follow. The

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[11] Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came To Be and What it Has Become*, 18 FLA. COASTAL L. REV. 5, 18–19 (2016); P.K. Jameson & Martha Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 423–24 (1995).

[12] A nearly identical amendment adopted at the same time regulated the drawing of state legislative districts. For the purposes of this brief, the "FFDA" refers to the amendment regulating congressional elections.

"Tier I" criteria require that "[n]o apportionment plan or individual district ... be drawn with the intent to favor or disfavor a political party or an incumbent"; that "districts ... not be drawn" to "deny[] or abridg[e]" the rights of "racial or language minorities"; and that districts "consist of contiguous territory." Fla. Const., art. III § 20(a). The "Tier II" criteria codify other traditional redistricting principles, including that districts be "as nearly equal in population as is practicable"; "compact"; and, "where feasible, utilize existing political and geographic boundaries." The Tier II criteria must be followed to the extent doing so does not conflict with the Tier I provisions. *Id.* § 20(b).

Enacting the FFDA took years of grassroots mobilization. A nonpartisan coalition, FairDistrictsFlorida.org, campaigned for the amendment for four years, emphasizing the restoration of political power to the people of Florida. Over time, the coalition's ranks grew to include the Florida League of Cities, the Florida Association of Counties, and the Florida School Board Association. It also included organizations of all political persuasions, from the ACLU to Tea Party groups. And it was supported by a bevy of public officials—Democratic, Republican, and independent.[13]

In 2009, the Florida Supreme Court approved the FFDA's ballot language, finding that the amendment would not enlarge or alter the function of the state judiciary. Rather, it found, the FFDA was "directed to the single unified purpose of establishing standards by which … congressional districts are to be drawn." *In re*

[13] Linda Honold and Adrien Schless-Meier, *Case Studies of State Redistricting Campaigns Volume 3: Florida FairDistrictsFlorida.Org* at 8 (Oct. 2015), https://tinyurl.com/2sxpf4wc.

Standards, 2 So. 3d at 183. The court continued: "under the [FFDA], the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The [FFDA] do[es] not shift in any way the authority of the Legislature to draw ... congressional districts to the judicial branch." *Id.* at 187. On January 22, 2010, the Florida Department of State certified the FFDA for placement on the 2010 general election ballot. Ultimately, it received 1.75 million signatures for ballot certification—almost 10% of the state's population.[14] By the time the amendment came up for a vote, it had the endorsement of every newspaper editorial board in the state.

In November 2010, Floridians approved the FFDA by a clear supermajority of 62.9% to 37.1%.[15] An extraordinary feat of popular lawmaking, the initiative drew support across party and racial lines, including from conservative suburbs and retiree communities across the state.[16] As the Florida Supreme Court later observed, "the citizens of the state of Florida, through the Florida Constitution, employed the essential concept of checks and balances, granting to the Legislature the ability to apportion the state in a manner prescribed by the citizens." *In re Senate Joint Resolution*

[14] This is an aggregate tally for both redistricting amendments, one regulating state legislative redistricting and the other regulating congressional redistricting.

[15] Florida Dep't of State, Div. of Elections, General Election – Constitutional Amendments (Nov. 2, 2010), https://tinyurl.com/3dvsb25f.

[16] Matthew Isbell, *Florida Redistricting Preview #6: The Fair Districts Campaign*, MCI MAPS (Sept. 2, 2021), https://tinyurl.com/3cu7je5a.

of Legislative Apportionment 1176, 83 So. 3d 597, 600 (Fla. 2012) ("Apportionment I").

C. Federal and State Courts Have Repeatedly Upheld the FFDA Against Elections Clause Challenges.

Although the FFDA enjoyed widespread bipartisan support from Floridians, one group in particular did *not* support it: members of the Florida Legislature, who viewed it as a threat to their own self-entrenchment. Mere hours after the FFDA was approved in the general election, members of Florida's congressional delegation took to the courts to challenge the new constitutional provisions, with the Florida House of Representatives later joining as an intervenor-plaintiff.

In the Southern District of Florida, two Florida Representatives and the Florida House argued that the FFDA violated the federal Constitution's Elections Clause because it was "enacted completely outside of the legislative process," citing the clause's "prescription that the 'Times, Places and Manner of holding Elections… be prescribed in each State by the 'Legislatures thereof." *Diaz-Balart*, 2011 WL 13175016, at *2, *6. Coalition partners intervened to defend the FFDA. The court held that the FFDA was entirely consistent with Supreme Court precedent and the Framers' original understanding of the Elections Clause. *Id.* at *7. The Eleventh Circuit unanimously affirmed, emphasizing that "Florida's citizen initiative is every bit a part of the state's lawmaking function." *Brown*, 668 F.3d at 1279.

State legislators' efforts to thwart the FFDA did not cease there. In 2012, the Legislature made a "mockery"

of the required transparent and fair redistricting process by passing a blatantly gerrymandered map. *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 377 (Fla. 2015) ("Apportionment VI"). In a "shadow" redistricting process marked by subterfuge, lawmakers colluded in back-room meetings with party operatives to draw extreme gerrymanders favoring Republicans. *Id.* at 377–80.[17] The resulting map allowed Republicans to carry 63% of the state's congressional seats, while winning just 51% of the statewide vote.[18] Although not a formal party, *amicus* helped lead the subsequent court challenge to the lawmakers' unconstitutional map. An expert witness at trial called the map the most extreme gerrymander he had ever seen.[19] Finding that the redistricting process was infected with "improper partisan intent," the trial court invalidated Districts 5 and 10 under the FFDA.[20]

In 2015, the Florida Supreme Court agreed, but held that the trial court had not gone far enough.

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[17] Discovery and trial exposed the breadth of lawmakers' scheme to evade their constitutional obligations. Consultants used proxies and aliases throughout the redistricting process, including in public forums and when submitting maps, to avoid suspicion. Apportionment VI, 172 So. 3d at 380–81. Tellingly, lawmakers and political operatives systematically deleted nearly all of their emails and documentation relating to the redistricting. *Id*. at 385.

[18] Andrew Prokop, *The Florida Supreme Court Just Made a Huge New Anti-Gerrymandering Ruling*, VOX (July 9, 2015), https://tinyurl.com/u7b3c2e3.

[19] *See* Paula Dockery, *Fair District Amendments Make Impact*, FLORIDA TODAY (June 19, 2014), https://tinyurl.com/yc59cjk3.

[20] *Romo v. Detzner*, 2014 WL 3797315 at *11, *20 (Fla. Cir. Ct. July 10, 2014), *aff'd sub nom. League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

Apportionment VI, 172 So. 3d at 363. It ordered the Legislature to redraw eight congressional districts to comply with the FFDA's requirements. *Id.* at 363. The court's decision emphasized that, in enacting the FFDA, "[t]he voters sought fair districts." *Id.* at 415. It was the responsibility of the judiciary, the court held, to give effect to that intent. *Id.* The court further explained that "the Elections Clause ... [does not] prohibit[] the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn." *Id.* at 370 n.2. This Court would go on to cite this decision of the Florida Supreme Court as proof that the justiciability holding in *Rucho* did not "condemn complaints about districting to echo into a void." 139 S. Ct. at 2507.

Despite getting a second bite at the apple, Florida's Legislature again failed to propose a congressional map that complied with the FFDA. *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258, 96–97 (Fla. 2018) ("Apportionment VIII"). The trial court subsequently adopted a remedial map. Acknowledging its "solemn obligation to ensure compliance with the Florida Constitution in this unique context," the Florida Supreme Court upheld the trial court's remedial plan. *Id.* at 297. In the first election following the remedial plan's enactment, the state saw a swift uptick in electoral competitiveness: congressional races were much closer than they had been in years, and five seats changed hands from one party to the other.

D. The FFDA Is Constitutional Under The Elections Clause.

The FFDA is constitutional. That is the unexceptional premise that was necessary to, and the

intellectual basis for, *Rucho*'s favorable discussion of the FFDA as an example of what "[t]he States" may do. Indeed, whether as a matter of plain text, legislative history, historical practice, or judicial precedent, the FFDA satisfies Elections Clause scrutiny.

Start with the Elections Clause's text. Petitioners' argument in support of the ISLT hinges on the phrase "the Legislature thereof." Even setting aside the use of the term "Legislature" as a reference to the State's law-making function, Petitioners' focus on the *institutional* legislature does not advance their argument. "[T]he Founding generation understood that 'legislatures'" were bodies that acted "subject to substantive state constitutional restrictions." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L. J. 455, 447–48 (2022); *see* 2 Records of the Federal Convention of 1787, at 88 (George Mason) (Max Farrand ed., 1937) (state legislatures are "mere creatures of the State Constitutions, and cannot be greater than their creators"). The Framers also understood that when those bodies "act[ed] contrary to the[ir] state constitution," they were not acting as "legislatures" at all. *The Meaning of "Legislature" in the Federal Constitution*, 24 HARV. L. REV. 220, 220–21 (1911); *see Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787) (if the legislature attempted to "repeal or alter the constitution," that act would "destroy their own existence as a Legislature"); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (Paterson, J.) (because legislatures are "[c]reatures of the Constitution," "all their acts must be conformable to it, or else they will be void"). Thus, the Elections Clause's use of the word "Legislature"—even if meant "in the ordinary sense" of an "official

[lawmaking] body," rather than in an "enlarged sense"—does not "render[] inapplicable the conditions which attach to the making of state laws." *Smiley v. Holm*, 285 U.S. 355, 364–66 (1932). State legislatures are still subject to, and constrained by, state constitutions.

Next, consider legislative history. As this Court has noted, "[t]here is no intimation, either in the debates in the Federal Convention or in contemporaneous exposition, of a purpose to exclude ... restriction[s] imposed by state Constitutions upon state Legislatures when exercising [their] lawmaking power" under the Elections Clause. *Smiley*, 285 U.S. at 369; *see also Diaz-Balart*, 2011 WL 13175016, at *4–5. In fact, the Convention debates were replete with expressions of "distrust [for] state legislatures"—the same sentiment that led to the FFDA's enactment—making it "hard to imagine" that the Framers intended *sub silentio* to "eliminate" the "important check on state legislatures" provided by state constitutions and state-court judicial review. Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 1, 32–33 (forthcoming 2023); *see also* Luttig, *supra* (noting the Framers' "deep suspicions of the natural partisan tendencies of the state legislatures").

Historical practice, too, validates the FFDA. Under the Articles of Confederation, state constitutions "expressly regulated the way in which 'legislatures' could exercise their power to direct the manner of appointing delegates to Congress, and those regulations were subsequently followed." Smith, *supra*, at 463, 476. States continued to adopt such restrictions under the Constitution, both in the founding generation and thereafter,

without notable resistance or criticism. These included substantive prescriptions and limitations on how congressional maps may be drawn. *See, e.g.*, *id.* at 493, 506–07, 518, 525–28; Amar & Amar, *supra*, at 22; Weingartner, *supra*, at 38.

For example, in 1830, Virginia amended its constitution to specify that the state's congressional districts would be "apportioned as nearly as may be amongst the several counties, cities, boroughs, and towns ... according to their respective numbers." *See* Smith, *supra*, at 506 (quoting Va. Const. of 1830 art. III § 6). It did so over the sole objection of Lewis Summers, who—alone among the delegates to the constitutional convention—expressed concern that this provision might "regulate by the State Constitution ... powers or duties devolved on the Legislature by the Constitution of the United States." *Id.* at 485–86. This early (and isolated) invocation of what is now known as the ISLT did not sway Summers' fellow delegates, who included father of the Constitution James Madison, Chief Justice John Marshall, and future president John Tyler—all of whom voted, along with a supermajority of their colleagues, to adopt the provision. *Id.*

Finally, this Court's own precedent holds that the Elections Clause takes state legislatures as it finds them, subject to state constitutional provisions like the FFDA that constrain their discretion. *See Smiley*, 285 U.S. at 367–68 ("We find no suggestion in the [Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."). For example, in *Ohio ex rel. Davis v. Hildebrant*, the Court

considered a congressional redistricting act passed by Ohio's General Assembly but then rejected by the state's voters through a referendum process endorsed by the Ohio Constitution. 241 U.S. 565, 566 (1916). This Court dismissed the relators' complaint that this process violated the Elections Clause as "plainly without substance." *Id.* at 569. As the Court later explained, "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state constitution of Ohio, in its application to congressional elections, was sustained." *Smiley*, 285 U.S. at 372.

In sum, the FFDA is plainly constitutional. Text, legislative history, historical practice, and precedent uniformly support that conclusion. The *Rucho* Court was thus correct to cite the FFDA as a prime example of what voters may validly do to prevent their "complaints about districting [from] echo[ing] into a void." 139 S. Ct. at 2507.

II. LIKE THE FLORIDA COURTS, NORTH CAROLINA'S COURTS MAY LAWFULLY REVIEW CONGRESSIONAL MAPS FOR COMPLIANCE WITH STATE CONSTITUTIONAL PROVISIONS.

If Florida's polity may use Florida's state constitution to constrain the Florida Legislature's redistricting authority—as the *Rucho* Court said it could—there is no reason why North Carolina's polity cannot do the same. Likewise, if Florida's state courts can enforce such constitutional provisions through judicial review—as the *Rucho* court said it could—there is no reason why North Carolina's state courts cannot do the same. No valid basis exists to distinguish this case.

A. The North Carolina Supreme Court's Actions At Issue Were Authorized By The State's Voters And Its Legislature.

Petitioners characterize the decision below as an illegitimate and undemocratic exercise of judicial fiat. Nothing could be further from the truth.

For starters, the provisions of the North Carolina Constitution that the North Carolina Supreme Court enforced below are part of North Carolina's duly ratified state constitution, just as the FFDA is a part of Florida's. The most notable difference is that, unlike in Florida—where the voters alone ratified the FFDA (albeit through an initiative process authorized by the Legislature)—the North Carolina General Assembly played a direct role in adopting the substantive provisions at issue here. In 1969, the General Assembly proposed revising North Carolina's 1868 Constitution. *N.C. Bd. of Educ. v. State*, 805 S.E.2d 518, 523 (N.C. Ct. App. 2017), *aff'd*, 371 N.C. 149 (2018). A committee of experts drafted the proposed language, which the General Assembly approved and sent to the voters for ratification. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1790 (1992); *Bd. of Educ.*, 805 S.E.2d at 524. Through this process, *both* North Carolina's legislature *and* its electorate gave their imprimatur to the constitutional provisions that the state's Supreme Court applied below.

But that is not all. Unlike in Florida, "the [North Carolina] state legislature itself has [also] legislated a comprehensive scheme for state judicial statutory and constitutional review of the legislature's redistricting decisions"—and the decision before this Court was the

product of that legislatively enacted scheme. Luttig, *supra*. Specifically, the General Assembly authorized the state's courts to review "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts ... congressional districts," N.C. Gen. Stat. § 1-267.1(a), and it authorized state courts to declare maps unconstitutional and "impose an interim districting plan" to remedy any violation. *Id.* §§ 120-2.3; 120-2.4(a)(1).[21]

To put it simply, the General Assembly, using its authority under the Elections Clause to "prescribe[]" the "Times, Places and Manner of holding Elections," has expressly and voluntarily conditioned its redistricting legislation on the determination by the North Carolina courts that said legislation complies with the North Carolina constitution. If the Florida Supreme Court could strike down congressional districts under the FFDA *without* the Legislature's express authorization—as the *Rucho* Court agreed it could—then surely, the North Carolina Supreme Court can strike down congressional districts at the express invitation of the General Assembly. This alone should suffice to affirm the decision below.

[21] Petitioners' argument that this action by the General Assembly violated some "non-delegation" rule lacks any textual, precedential, or historical basis. *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulations of Federal Elections*, 108 VA. L. REV. 1091, 1136 (2022) (observing that, given "[t]he ubiquity of delegation in the first decades of the republic," a reading of the Elections Clause that disfavored delegation would "lead to the absurd conclusion that the first several elections to Congress were basically illegal in most states").

B. Petitioners' Argument That The Provisions At Issue Are Too "Open-Ended" Lacks Any Basis And Is Unworkable.

Petitioners and their *amici* seek to distinguish the North Carolina constitutional provisions at issue here from provisions like the FFDA on the ground that the North Carolina provisions' language is too "open-ended" for state courts to permissibly enforce. Petitioners' Brief at 46. As Petitioners concede, when a state court employs highly specific language in a state's constitution to strike down a congressional map, it is acting legitimately as a court—but, in their view, when it employs more generally worded provisions to do so, it engages in illegitimate "policymaking." *Id.* at n.11; *see also, e.g.*, Brief of *Amici Curiae* Group of New York Voters at 3, *Moore et al. v. Harper et al.*, No. 21-1271 (U.S. Sept. 6, 2022) (arguing for a "clear statement" rule). This argument fails.

For starters, nothing in the Constitution's text or this Court's precedent distinguishes between closed-ended and open-ended constitutional provisions or suggests that courts cease to act as courts when they interpret and enforce provisions of the latter type. As Chief Justice John Marshall famously opined, in words equally applicable to the North Carolina Constitution: "we must never forget that it is a *Constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original). It is hardly a criticism of North Carolina that its constitution employs layman's language dating from the 17th century (*e.g.*, "free" elections) rather than the technical redistricting terminology of the 20th (*e.g.,* "compactness").

Moreover, this Court routinely discerns the meaning of general constitutional language—such as "unreasonable searches," "due process of law," "cruel and unusual punishments," and "equal protection of the laws." To do so, it applies traditional judicial tools, such as precedent, drafting history, original public meaning, and historical practice. And, based on those constructions, this Court sometimes strikes down laws as unconstitutional. Those decisions are no less legitimate—and no less "judicial"—because the constitutional provisions at issue are worded generally. The North Carolina Supreme Court is entitled to employ the same judicial tools to discern the meaning of its own constitution's "open-ended" provisions. *See* Brief of *Amicus Curiae* Conference of Chief Justices at 17, *Moore et al. v. Harper et al.*, No. 21-1271 (U.S. Sept. 6, 2022) [hereinafter "Brief of Conference of Chief Justices"] ("Courts do not cease to act judicially when they interpret and apply constitutional provisions such as "'free' or 'fair' elections" or "equal protection.").

Notably, even constitutional provisions that appear "open-ended" on their faces may have readily discernable meanings when one looks to their context.[22] *Cf. Rucho*, 139 S. Ct. at 2505–06. Take North Carolina's "Free Elections Clause," which has no analogue in the federal Constitution, and which this Court has no experience interpreting. It provides that "[a]ll elections

[22] And, conversely, even constitutional provisions that appear highly specific can require judicial interpretation. For example, the FFDA's prohibition on drawing districts "with the intent to favor or disfavor a political party or an incumbent" may require judicial construction to determine, *e.g.*, whose intent matters, what degree of intent is required (*e.g.*, *sole* intent, *predominant* intent, or *any* intent), and how such intent is to be proven.

shall be free." N.C. Const., art. I, § 10. This clause has existed in North Carolina's constitutions in substantially the same form since 1776, and is "derived from a [similar] clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688." *Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (citing Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. HIST. REV. 215, 221 (1929)); *see also* Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 78 ALA. L. REV. 221, 227–28, 289 (2021) (describing the origins of colonial-era "free elections" clauses in the English Bill of Rights of 1689).

England's "free elections" clause was adopted "in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage[.]'" *Harper*, 868 S.E.2d at 540 (citing J.R. Jones, The Revolution of 1688 in England 148 (1972); Gary S. De Krey, Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution 241, 247–48, 250 (2007)). For example, the Crown annulled or modified the charters of English boroughs (the rough equivalent of legislative districts) to "control the appointment of new borough members" and thereby ensure election of the Crown's "partisan allies." Ross, *supra*, at 256–57, 267, 279–80. The Crown further "influence[d] the composition of Parliament by expanding the body through the grant of [new] charters" to "rotten boroughs," in which "nonresident lords, barons, and other nobles allied with the King could control parliamentary selection." *Id.* at 269. Through efforts like these, the Crown was able to ensure a Parliament that was "amenable to the Crown's policy preferences."

Id. at 257, 267. Opponents objected to these maneuvers as an illegitimate "influence upon ... free Elections." *Id.* at 257 (quoting J.H. Sacret, *The Restoration Government and Municipal Corporations*, 45 ENG. HIST. REV. 232, 250 (1930)).

"Avoiding the manipulation of districts that diluted votes for electoral gain was [thus] a key principle of the reforms following the Glorious Revolution"—the English Bill of Rights' "free elections" clause among them. *Harper*, 868 S.E.2d at 540; Ross, *supra*, at 288. As the North Carolina Free Elections Clause's textual similarity to the English clause and the statements of the North Carolina clause's framers make clear, this anti-manipulation principle was carried forward in the North Carolina clause. *Harper*, 868 S.E.2d at 540–42 & n.13 (discussing the frequent references of the North Carolina framers to the reforms of the Glorious Revolution); *see also* Brief of *Amici Curiae* Historians in Support of Appellees at 12, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (No. 16-1161), (noting that "Free Elections" provisions like North Carolina's were a "response" to "concerns" about "'unfair, partial, and corrupt'" elections in England (quoting John Adams, Thoughts on Government (1776))).

Thus, despite its terse wording, the Free Elections Clause is not a *tabula rasa*. And in construing that clause to bar partisan gerrymandering, the North Carolina Supreme Court was not engaged in "unfettered policymaking," as Petitioners assert. Petitioners' Brief at 46. Rather, that court did what *this* Court routinely does: it employed "the interpretive and decision making tools traditionally used by judicial officers," such as history and context, to discern that clause's

meaning and intent. Brief of Conference of Chief Justices at 19, 20–21. Perhaps this Court, reading the same historical sources *de novo*, would come to a different conclusion about the meaning of the Free Elections Clause—or perhaps not. Regardless, such disagreement has never been a basis for federal courts to impugn a state court's interpretations of its own constitution. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").[23]

[23] The same goes for the North Carolina Supreme Court's interpretation of its constitution's Equal Protection Clause, Free Speech Clause, and Freedom of Assembly Clause to prohibit partisan gerrymandering. Although those clauses—unlike the Free Elections Clause—*do* have analogues in the federal Constitution, it is well-settled that state courts may depart from this Court's construction of constitutional language when interpreting their own constitutions, even when the relevant provisions are worded identically. *See, e.g.*, *State v. Ochoa*, 792 N.W.2d 260, 264–67 & nn. 1–3 (Iowa 2010); Jeffrey S. Sutton et al., *51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation*, 103 JUDICATURE 33, 45 (2019). Here, moreover, usurping the North Carolina Supreme Court's role as the ultimate authority on the meaning of these state constitutional provisions would be particularly inappropriate, as ample state-court precedent supported—even required—the conclusions reached below. *See, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002) (holding that North Carolina's Equal Protection Clause mandates that redistricting plans afford "substantially equal voting power and substantially equal legislative representation"); *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 223, 225–26 (1875) (voiding an act of the General Assembly districting Wilmington into three wards with markedly different populations for "plain[ly] violati[ng the] fundamental principle[of] apportionment of representation"); *Harper v. Lewis*, 2019 N.C. Super. LEXIS 122, at *9–11 (N.C. Super. Ct. Oct. 28, 2019) (unanimously

Finally, Petitioners' proposed dichotomy of "open-ended" and "specific" constitutional provisions is utterly unworkable. *See* Brief of Conference of Chief Justices at 23–27. How is this Court (or a lower federal court) to decide when a state constitutional provision crosses the proposed line? Must the determination be made on the basis of the provision's text alone, as if it were a contract with an integration clause—or may courts consider history, legislative intent, and judicial precedent when determining if a state constitutional provision is too vague? If the provision's text must be considered *in vacuo*, why does the Elections Clause impose such a rule, when federal courts seldom—if ever—interpret the federal constitution in that manner? If contextual factors may save a constitutional provision from being pronounced "too vague," how are those factors to be weighted? And what special expertise does this Court have in the diverse histories and interpretive jurisprudence of the 50 state constitutions?

In reality, "[t]here are no legal standards discernable in the Constitution for making ... judgments" about when state constitutional language becomes too "open-ended" to satisfy Elections Clause scrutiny—let alone "limited and precise standards that are clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2500. Absent such standards, the public would inevitably attribute the Court's decisions in this area to the desired political outcome of those Justices voting in the majority. If the perceived lack of clear and neutral standards bars federal courts from hearing partisan gerrymandering claims, notwithstanding that

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holding that extreme partisan gerrymanders violate the state's Free Elections and Equal Protection clauses).

practice's acknowledged "incompatib[ility] with democratic principles," *Rucho*, 139 S. Ct. at 2506, then *a fortiori*, the lack of such standards counsels strongly against plunging into this new "political thicket."

CONCLUSION

As this Court observed just three years ago, in considering gerrymandering challenges to congressional redistricting plans, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. And, applying those standards, state courts can "str[ike] down ... congressional districting plans as a violation" of their state constitutions. *Id.* We trust the Court meant what it said. And that is all that happened here. North Carolina's legislature expressly invited the North Carolina courts to review its handiwork for compliance with the state's constitution. The North Carolina courts proceeded to do as the legislature had asked, discerning the meaning of North Carolina's constitution using the same interpretive techniques this Court routinely employs. The federal Elections Clause gives this Court no license to second-guess this state-law process, or the state-law decision that resulted.

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted.

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