

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 HUMAN RIGHTS WATCH
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

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October 26, 2022

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INTEREST OF *AMICUS CURIAE*¹

Human Rights Watch (“HRW”) is a non-profit, non-partisan organization established in 1978 that investigates and reports on violations of fundamental human rights in over 100 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch has filed amicus briefs before various bodies, including the U.S. Supreme Court, U.S. courts of appeal, and the Inter-American Commission on Human Rights.

SUMMARY OF ARGUMENT

By approving the ratification of the International Covenant on Civil and Political Rights (“ICCPR”)² and the International Convention on the Elimination of All Forms of Racial Discrimination

¹ Pursuant to Supreme Court Rule 37.6, amicus affirms that no counsel for a party authored this brief in any part, and that no person or entity, other than amicus and their counsel, made a monetary contribution to fund the brief’s preparation and submission. All parties have consented to the filing of this brief.

² International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 3 [hereinafter ICCPR].

“ICERD”),³ Congress has guaranteed to all U.S. citizens the right to vote free from partisan gerrymandering and discrimination. It has also guaranteed an effective remedy for U.S. citizens against violations of that right. An effective remedy against partisan gerrymandering, as the ICCPR makes clear, means judicial review. The guarantee of the right to vote free from gerrymandering and to judicial review is the supreme law of the land.

In approving these treaties, Congress also explicitly recognized that guaranteeing these political rights serves important interests, including facilitating the ability of the United States to advocate effectively for the rule of law and democratic governance in other countries as a means of protecting against human rights abuses. HRW’s experience in monitoring and investigating human rights abuses worldwide confirms that infringements on political rights, including restrictions on the right to vote as a result of gerrymandering, directly threaten other fundamental human rights, particularly for people historically marginalized or discriminated against based on religion, race, or ethnicity.

The North Carolina Supreme Court’s decision in *Harper v. Hall*, 380 N.C. 317 (2022) vindicated not only Respondents’ rights under the North Carolina State Constitution, but also the rights that Congress has guaranteed under the ICCPR and the ICERD. Adopting the novel interpretation of the Elections

³ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195, 212 [hereinafter ICERD].

Clause urged by Petitioners in this case—the Independent State Legislature Theory (“ISLT”)—would deprive Respondents, as well as all U.S. citizens, of any effective remedy against partisan gerrymandering. Respondents have identified numerous grounds on which the Court should reject the ISLT. HRW submits this amicus brief because the adoption of the ISLT would also directly contravene the protections set forth in the ICCPR and the ICERD. As a result, its adoption would undermine the important national interests that animated Congress’s approval of those treaties, including the protection of human rights domestically and abroad.

ARGUMENT

I. **CONGRESS, THROUGH THE RATIFICATION OF THE ICCPR AND THE ICERD, HAS GUARANTEED THE RIGHT TO VOTE FREE FROM PARTISAN GERRYMANDERING AND DISCRIMINATION, AS WELL AS AN EFFECTIVE REMEDY TO VINDICATE THAT RIGHT**

As this Court has long made clear, once a treaty has been ratified, it “is a law of the land as an act of congress is.” *Edye v. Robertson*, 112 U.S. 580, 598 (1884). The United States cannot ratify a treaty without the approval of the U.S. Senate by a two-thirds supermajority vote. U.S. Const. art. II, § 2, cl. 2. Once it has ratified a treaty, the United States, together with all other nations that have ratified that treaty, is “legally obligated to uphold the principles embodied in that treaty.” *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) (citing *Haver v. Yaker*, 76 U.S. 32, 35 (1869)). As a result of

Congress's approval of the ICCPR and the ICERD, which guarantee and require effective remedies to protect the right to vote free from partisan gerrymandering and discrimination, these protections are the "supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2.

A. The Right To Vote Free From Partisan Gerrymandering

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008). Article 25 of the ICCPR states that "[e]very citizen shall have the right and the opportunity . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." ⁴ By guaranteeing "equal suffrage," "genuine . . . elections," and the "free expression of the will of the electors," article 25 prohibits partisan gerrymandering. Partisan gerrymandering—"the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength" ⁵—necessarily infringes on the "free expression of the will of the electors," deprives citizens of "equal suffrage" on the basis of their political opinions or party affiliation, and calls into question whether an election is in fact "genuine."

⁴ ICCPR, *supra* note 2, at art. 25.

⁵ *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019).

To the extent that the plain text of article 25 of the ICCPR permits any ambiguity, the prohibition on partisan gerrymandering is set forth even more explicitly in the guidance issued by the U.N. Human Rights Committee (“HR Committee”), which, by the ICCPR’s own terms, is the body charged with providing authoritative interpretations of the treaty, as well as with monitoring its implementation.⁶ *See United States v. Duarte-Acero*, 208 F.3d 1282, 1287–88 (11th Cir. 2000) (holding that the HR Committee’s General Comments “are recognized as a major source for interpretation of the ICCPR”). First, General Comment 25, issued by the HR Committee, states that the right to vote entails that “[n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of . . . *political or other opinion*.”⁷ Second, it states that the “[t]he drawing of electoral boundaries and the method of allocating votes *should not distort the distribution of voters* or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their

⁶ ICCPR, *supra* note 2, at art. 40(4) (authorizing the HR Committee to prepare general comments and transmit them to the state parties as appropriate); arts. 40–41 (tasking the HR Committee with monitoring State Parties’ progress in implementing and complying with the ICCPR provisions); art. 28 (establishing the HR Committee).

⁷ U.N. Human Rights Comm., General Comment No. 25 (1996) on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996), ¶ 3 (emphasis added). General Comment 25 also bars distinctions based on “race, colour, sex, language, religion, . . . national or social origin, property, birth or other status.” *Id.*

representatives freely.”⁸ Third, the HR Committee also expressly counsels against any electoral framework where one’s party membership could affect one’s right to vote.⁹

B. The Right To Vote Free From Discrimination

The ICERD, which the United States has also ratified and therefore carries the same legal force as an act of Congress, states that signatories must eliminate racial discrimination with regard to “[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage.”¹⁰ Under the ICERD, the intent of government officials is largely irrelevant, as the state is obligated to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists” without reference to the intent or aim of the state in instituting those laws or regulations.¹¹

United Nations committees charged with monitoring implementation of treaties—in particular, the UN Committee on the Elimination of Racial Discrimination (“CERD”)¹²—have expressed distinct

⁸ *Id.* ¶ 21 (emphasis added); *see also* ¶ 19.

⁹ *Id.* ¶ 10.

¹⁰ ICERD, *supra* note 3, at art. 5(c).

¹¹ *Id.* at art. 2, ¶ 1 (c).

¹² The CERD is the interpreting body of the ICERD. *See id.* at arts. 8–15.

concern over “the obstacles faced by individuals belonging to racial and ethnic minorities and indigenous peoples to effectively exercise their right to vote” in the United States.¹³ Additionally, a recent study commissioned by the European Parliament expressed concern regarding partisan gerrymandering functioning as a proxy for racial discrimination in the United States, noting substantial similarities between what U.S. courts found to be racially motivated gerrymandering and what they found to be lawful partisan gerrymandering.¹⁴ This study observed that partisan gerrymandering could cause the United States to fall short of its non-discrimination obligations under international law.¹⁵

These concerns are echoed in United States domestic law. Courts have noted political partisanship may serve as a “proxy” for membership in other racial, religious, or social groups. *See, e.g., N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016), *cert denied*, 137 S. Ct. 1399 (2017). Consequently, it is no surprise that international bodies have also found that the United States’

¹³ U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of The United States Of America, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014), ¶ 11.

¹⁴ ELIZABETH L. OSBORNE, THE PRINCIPLES OF EQUALITY AND NON DISCRIMINATION, A COMPARATIVE LAW PERSPECTIVE: UNITED STATES OF AMERICA 1, 67–68 (2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689375/EPRS_STU\(2021\)689375_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689375/EPRS_STU(2021)689375_EN.pdf).

¹⁵ *Id.* at 73.

boundary-drawing gamesmanship could result in discriminatory impacts across social groups. Partisan gerrymandering may therefore give rise to violations of non-discrimination provisions in both the ICCPR and the ICERD.¹⁶

¹⁶ The right to equality and freedom from discrimination is set forth in articles 2(1) and 26 of the ICCPR. According to article 2(1), each State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 of the ICCPR goes further to create an “autonomous right” of equality and “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.” *See* U.N. Human Rights Comm., General Comment No. 18 (1989) on Non-Discrimination, U.N. Doc. HRI/GEN/1/Rev.6 (Nov. 10, 1989), ¶ 12. It states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, *supra* note 2, at art. 26. The U.S. Senate made reservations with respect to its approval of the ratification of the non-discrimination provisions of the ICCPR, noting that discrimination was prohibited except where it was reasonably related to a legitimate government purpose. *See Resolution of Ratification: Senate Consideration of Treaty Document 95-20*, <https://www.congress.gov/treaty-document/95th-congress/20/resolution-text>. Tellingly, the U.S. Senate made no reservations with respect to article 25, which prohibits partisan gerrymandering.

C. The Right To An Effective Remedy When Voting Rights Are Violated

Congress also approved a guarantee to U.S. citizens of an effective remedy to vindicate the right to vote free from gerrymandering and discrimination. Article 2 of the ICCPR expressly requires all state parties not only “to respect,” but also to “ensure” the rights recognized by the ICCPR,¹⁷ including by “ensur[ing] that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”¹⁸ Furthermore, the HR Committee has explained in General Comment 31 that article 2 of the ICCPR mandates more than simply “effective protection of [ICCPR] rights.”¹⁹ State Parties “must ensure that individuals also have accessible and effective remedies to vindicate those rights” by “establishing appropriate *judicial and administrative mechanisms* for addressing claims of rights violations

¹⁷ ICCPR, *supra* note 2, at art. 2(2); U.N. Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

¹⁸ ICCPR, *supra* note 2, at art. 2(3)(a). Similarly, article 6 of the ICERD explicitly provides that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination.” ICERD, *supra* note 3, at art. 6.

¹⁹ Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

under domestic law.”²⁰ General Comment 31 places particular importance on the judiciary as a means of assuring effective remedies to violations of the ICCPR, noting “the enjoyment of the rights recognized under the [ICCPR] can be effectively assured by the judiciary in many different ways, including direct applicability of the [ICCPR], application of comparable constitutional or other provisions of law, or the interpretive effect of the [ICCPR] in the application of national law.”²¹

II. ADOPTION OF THE ISLT WOULD DEPRIVE VOTERS OF ANY EFFECTIVE REMEDY FOR PROHIBITED GERRYMANDERING IN CONTRAVENTION OF THE WILL OF CONGRESS AND THE NORTH CAROLINA STATE LEGISLATURE

In *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019), this Court held that “partisan gerrymandering claims present political questions beyond the reach of the federal courts,” but pointed to other judicial and administrative remedies available for such claims, including review by state courts and independent redistricting commissions. *Id.* at 2507–08; *see also Ariz. State Legislature v. Ariz. Indep.*

²⁰ *Id.* (emphasis added); *see also* G.A. Res. 60/147, annex, ¶¶ 3(c), (d), 11–12, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

²¹ Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

Redistricting Comm'n, 576 U.S. 787 (2015). Petitioners now urge the Court to adopt an interpretation of the Elections Clause that would foreclose those remedies and deprive U.S. citizens of any effective remedy to redress claims of partisan gerrymandering.²² Petitioners' arguments should be rejected because such a result would plainly contravene the United States' legal obligations under the ICCPR and the ICERD. By approving those treaties, Congress has not only prohibited partisan gerrymandering,²³ but it has also committed to providing judicial or similar review as a remedy for claims of gerrymandering.²⁴

As this Court has previously held, “[t]he Framers . . . gave Congress the power to do something about partisan gerrymandering in the Elections Clause.” *See Rucho*, 139 S. Ct. at 2508. Petitioners concede, as they must, that the power of a state legislature to regulate federal elections is subject to “a final check on abuse” by Congress.²⁵ But Petitioners ignore the fact that Congress *has already spoken* on this issue by approving the ICCPR and the ICERD in

²² *See* Petitioners' Br. at 39 (“[T]he power to regulate federal elections lies with State legislatures alone, and the [Elections] Clause does not allow the state courts, or any other organ of state government, to second-guess the legislature’s determinations.”) (emphasis omitted), 40 n. 9 (“To the extent the Court were to find that some portion of the *Arizona* opinion is contrary to Petitioners’ position in this case, and that the case is not distinguishable, the Court should overrule it.”).

²³ *See supra* Section I.A.

²⁴ *See supra* Section I.C.

²⁵ Petitioners' Br. at 30.

the manner that the Founders explicitly contemplated, i.e., with a super-majority vote of the U.S. Senate.²⁶ By duly approving a treaty that prohibits partisan gerrymandering and requires effective remedies for voters to protect their rights, Congress *has* placed a check on the authority of state legislatures to engage in independent district-drawing.²⁷ Article 25 of the ICCPR—which Congress approved without reservations—prohibits partisan gerrymandering.²⁸ To fulfill a State Party’s ICCPR article 2 obligation to provide “effective remedies,” the HR Committee points to “judicial and administrative mechanisms” as appropriate to address violations of the ICCPR.²⁹ Following the Court’s decision in *Rucho*, state court review of partisan gerrymandering is the only judicial review available to U.S. citizens that can satisfy this “effective remedy” obligation. *See Rucho*, 138 S. Ct. at 2507. In other words, Congress has exercised its constitutional authority by approving the ICCPR and has required judicial review to redress claims of partisan gerrymandering.

²⁶ *See* U.S. Const. art. II, § 2, cl. 2; THE FEDERALIST NO. 69, at 359 (Alexander Hamilton) (distinguishing the powers of the President from those the monarchy in Great Britain based on, among other things, the requirement that treaties be made only “with the concurrence of a branch of the legislature”).

²⁷ *See supra* Section I.

²⁸ *See supra* Section I.

²⁹ U.N. Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

In addition, the North Carolina State Legislature has also already spoken on this issue, and Petitioners' theory would eviscerate the legislation passed in North Carolina to provide an adequate judicial remedy for addressing gerrymandered districts. As Non-State Respondents explain, "the [North Carolina] legislature provided that 'action[s] challenging the validity of any act . . . that apportions or redistricts . . . congressional districts shall be filed in' a particular court and unambiguously directed that the action 'shall be heard and determined by a three-judge panel' of that court."³⁰ That legislation even "endorsed 'judgment[s] declaring unconstitutional . . . any act' that 'apportions or redistricts . . . congressional districts.'"³¹ Through that legislation, the North Carolina State Legislature has fulfilled obligations that the United States undertook under the ICCPR and the ICERD, consistent with the requirements of the Supremacy Clause. Because both Congress's approval of the ICCPR and the ICERD and duly enacted legislation by the North Carolina State Legislature bar the relief that Petitioners seek, the Court "[need] not pass upon [the] constitutional question" raised by Petitioners regarding the scope of the Elections Clause. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This

³⁰ Non-State Respondents' Br. at 59–60 (citing N.C. Gen. Stat. § 1-267.1(a)).

³¹ *Id.* (citing N.C. Gen. Stat. § 120-2).

rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”).

III. ADOPTION OF THE ISLT WOULD CONTRAVENE THE U.S. FOREIGN POLICY OBJECTIVES THAT ANIMATED CONGRESSIONAL APPROVAL OF THE ICCPR

When Congress approved the ratification of the ICCPR, it noted that our nation’s failure to do so in the past was “conspicuous, and in the view of many, hypocritical” in light of our nation’s historic commitment to universal suffrage and nondiscrimination, both domestically and abroad.³² Congress recognized that ratifying the ICCPR would “remove doubts about the seriousness of the U.S. commitment to human rights” and push back against efforts to delegitimize the United States as a global advocate for human rights, democratic self-governance, and the rule of law.³³ Foreign rivals have long cited the United States’ failures to safeguard the rights of people historically marginalized or discriminated against based on religion, race,

³² Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992).

³³ *Id.* at 3; Kenneth Roth, *Introduction*, in HUMAN RIGHTS WATCH, WORLD REPORT 2006 1, 6 (2006), <https://www.hrw.org/legacy/wr2k6/introduction/introduction.pdf>

ethnicity, or other status in an effort to prevent the American system from being held up as a global exemplar. The Soviet Union, for example, has frequently tried to deflect criticism of its human rights abuses and call into question the purported virtues of democracy by pointing to the deeply entrenched racism against Black people in the United States.³⁴

In response to these obstacles to the exercise of American influence abroad, members of Congress from both parties determined that it was in the national interest to ratify the ICCPR: “By ratifying the [ICCPR] at this time, the United States can enhance its ability to promote democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also in those countries in Africa and Asia which are beginning to move toward democratization.”³⁵ The “anti-hypocrisy” concerns which animated the ratification of the ICCPR remain relevant today. Foreign rivals continue to use allegations of hypocrisy to undermine the ability of the United States to advocate abroad for human rights, including democratic self-governance and the rule of law.

³⁴ Emily Couch, *Why We Should Stop Portraying African Americans as Victims in the Soviet Propaganda Game*, WILSON CTR. (Feb. 18, 2020), <https://www.wilsoncenter.org/blog-post/why-we-should-stop-portraying-african-americans-victims-soviet-propaganda-game>; Julia Ioffe, *The History of Russian Involvement in America’s Race Wars*, ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/international/archive/2017/10/russia-facebook-race/542796/>.

³⁵ S. Rep. No. 102-23, at 3 (1992).

A substantial amount of criticism from authoritarian governments is aimed at asserting that American elections do not express the free will of the electorate. For instance, in the past year, the policy director of the Central Committee of the Chinese Communist Party held a press conference stating that “[t]he electoral [democracies] of Western countries are actually [democracies] ruled by the capital, and they are a game of the rich, not real democracy.”³⁶ Congress’s goal in approving ratification of the ICCPR remains critical in positioning the United States to more effectively call attention to the fact that China has not ratified the ICCPR, that it largely precludes its citizens from participating in government decision-making, and that its political leadership routinely denies its citizens’ rights without accountability.³⁷

In approving the ratification of the ICCPR, Congress was motivated by the idea that the United States could participate in the United Nation’s work to bring other nations into compliance with their

³⁶ See Evelyn Cheng, *China Slams U.S. Democracy as a ‘Game of the Rich’ at an Event Promoting Xi’s Growing Power*, CNBC (Nov. 15, 2014), <https://www.cnbc.com/2014/11/12/china-criticizes-us-democracy-while-promoting-xis-growing-power.html>.

³⁷ See S. Rep. No. 102-23, at 3 (1992) (“By ratifying the [ICCPR] at this time, the United States can enhance its ability to promote democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also in those countries in Africa and Asia which are beginning to move toward democratization.”); *China: Third Term for Xi Threatens Rights*, HUMAN RIGHTS WATCH (Oct. 10, 2022), <https://www.hrw.org/news/2022/10/10/china-third-term-xi-threatens-rights>.

obligations to safeguard their citizens' human rights.³⁸ The United States cannot fulfill Congress's stated intent to uphold its standing as an exemplar of democratic rights and freedoms, nor can it participate in the enforcement and compliance work of the HR Committee, unless it fulfills its obligations domestically. A ruling adopting Petitioners' interpretation of the Elections Clause would prevent the United States from fulfilling its these obligations. As a result, it would undermine the important interests that Congress expressly recognized in approving the ICCPR and hamper the United States' ability to promote its interests and protect fundamental human rights across the world.

Critically, if this Court were to adopt the ISLT as Petitioners urge, the resulting failure of the United States to uphold its obligations under the ICCPR would not go unnoticed. The HR Committee and the United States continue to monitor compliance with, and implementation of, obligations under the ICCPR through the submission of periodic reports.³⁹ These reports provide the United States with a mechanism to describe its progress in implementing and fulfilling its obligations under the ICCPR. In anticipation of the United States' most recent report, the HR Committee expressly included partisan gerrymandering in its "list of issues," asking the United States to "comment on the compatibility of practices of drawing electoral boundaries with a view to influencing election

³⁸ See S. Rep. No. 102-23, at 3 (1992).

³⁹ See ICCPR, *supra* note 2, at art. 40 (outlining the requirements for States Parties and Committees to engage in periodic reports).

outcomes with article 25.”⁴⁰ In its fifth periodic report, the United States responded that “[t]he drawing of electoral boundaries in U.S. states can be challenged in litigation filed under the U.S. Constitution or state constitutions or under the federal Voting Rights Act or state statutory law.”⁴¹ The United States specifically pointed to this Court’s decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* and a 2015 Florida Supreme Court case that “struck down that state’s congressional districting plan as a violation of the Fair District amendments to the Florida constitution.”⁴² But under the theory advanced by Petitioners, these remedies would no longer exist. *See supra* Section II.

Finally, “[t]he application of international law domestically not only serves to hold the government accountable to its people but, more importantly . . . allows foreign nations to observe that the United States will live up to its international obligations, thus making other nations more willing to engage in a cooperative relationship with the United States.”⁴³ This Court has previously looked to international legal

⁴⁰ U.N. Human Rights Comm., List of Issues Prior to Submission of the Fifth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/QPR/5, ¶ 27 (Apr. 2, 2019).

⁴¹ U.N. Human Rights Comm., Fifth Periodic Report Submitted by the United States of America Under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Due in 2020, U.N. Doc. CCPR/C/USA/5, ¶ 113 (Jan. 15, 2021).

⁴² *Id.*

⁴³ Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. 197, 219 (2011).

standards, including ratified treaties, as an interpretive guide in reading the United States Constitution. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 102–103 (1958) (stating that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for crime” in support of the Court’s holding that the Eighth Amendment bars a punishment of statelessness); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (interpreting the rights of prisoners of war in light of the United States’ obligations under its ratified treaties on the law of war).⁴⁴ And the usage of international law in Supreme Court jurisprudence has not been the province of justices of any purported partisan affiliation.⁴⁵ “The overseas trade in the American Bill of Rights is an important means of

⁴⁴ Examples of the Court citing to ratified treaties and international norms as powerful authorities in its constitutional jurisprudence abound. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (looking to international standards in abolishing the juvenile death penalty); *Graham v. Florida*, 560 U.S. 48, 81–82 (2010) (looking to the Convention on the Rights of the Child to conclude that the contemporary understanding of the Eighth Amendment did not allow sentences of life without parole for crimes committed before age 18); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing the European Court of Human Rights to refute the claim in *Bowers v. Hardwick* that same-sex sexual conduct was universally condemned).

⁴⁵ Ryan C. Black & Ryan J. Owens, *We Are the World: The U.S. Supreme Court’s Use of Foreign Sources of Law*, 46 BRITISH J. POL. SCI. 891, 902 (2016).

strengthening international human rights,”⁴⁶ and has been since it was authored.

IV. ADOPTION OF THE ISLT WOULD UNDERMINE PROTECTIONS AGAINST PARTISAN GERRYMANDERING THAT ARE A BULWARK AGAINST OTHER HUMAN RIGHTS VIOLATIONS

When groups cannot exercise the right to vote free from gerrymandering—a right guaranteed by Congress through its approval of the ratification of the ICCPR and ICERD—those groups are particularly vulnerable to deprivations of other fundamental human rights. As procedural safeguards are cast aside, autocratic governments or leaders with such tendencies are empowered to disenfranchise marginalized communities, both in the United States and abroad. Disenfranchisement is often a precursor to additional discriminatory policies directed at groups based on race, ethnicity, religion, or other status. As a group’s electoral power diminishes, so does its ability to remedy human rights violations through participation in the democratic process. For example, in Hungary, widespread gerrymandering has occurred alongside the severe mistreatment of migrants and refugees, discriminatory policies targeting women and lesbian, gay, bisexual, and transgender people, and the near-complete destruction of independent media.⁴⁷

⁴⁶ Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988).

⁴⁷ See Lydia Gall, *Hungary’s Authoritarian Leader is No Gift to U.S. Conservatives*, THE HILL (Aug. 4, 2022),

To provide the Court with necessary context on the potentially far-reaching negative effects that partisan gerrymandering and similar restrictions on the exercise of political rights can have on a wide array of human rights, particularly for groups experiencing discrimination based on race, ethnicity, religion, or other status, HRW provides below a detailed discussion of two additional recent examples, in Sri Lanka and Iran.

A. In Sri Lanka, District Gerrymandering Has Led To The Disenfranchisement Of Religious Minorities

The institutional changes primarily led by now-ousted Gotabaya Rajapaksa in Sri Lanka provide one example of an erosion of democratic safeguards which has had the effect of further disenfranchising religious minorities in the majority Buddhist country.⁴⁸ The

<https://thehill.com/opinion/campaign/3585522-hungarys-authoritarian-leader-is-no-gift-to-us-conservatives/>; Farbod Faraji & Lee Drutman, *Hungary's Viktor Orbán Can Thank the U.S. for Facilitating His Rise to Power*, CHICAGO TRIBUNE (Aug. 3, 2022), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-viktor-orban-turkey-authoritarian-power-us-electoral-system-20220803-erhu6pjljgafcxj3wk5um32te-story.html> (noting that district gerrymandering in Hungary, which models that of the United States, has helped keep Orbán in power and created an “anti-democratic feedback loop”); HUMAN RIGHTS WATCH, *Hungary: Events of 2021*, <https://www.hrw.org/world-report/2022/country-chapters/hungary> (last visited Oct. 23, 2022).

⁴⁸ Shaahidah Riza, *Delimitation and Its Effect on Minorities*, SRI LANKA BRIEF (Mar. 19, 2015), <https://srilankabrief.org/delimitation-and-its-effects-on-minorities/>; U.S. DEPT OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: SRI LANKA (Jun. 2, 2022),

drawing of electoral maps, known as delimitation in Sri Lanka,⁴⁹ is a fraught issue.⁵⁰ While there have been efforts at electoral reform aimed at proportional representation,⁵¹ delimitation has been seen by many in the political and ethnic majority as a way to consolidate power.⁵² Prominent nationalists have long called for the abolishment of provincial councils,

<https://www.state.gov/reports/2021-report-on-international-religious-freedom/sri-lanka/>; Sujata Gamage, *Electoral Reform: NMSJ Proposes Mixed Member System Within Overall PR*, COLOMBO TELEGRAPH (Dec. 20, 2021), <https://www.colombotelegraph.com/index.php/electoral-reform-nmsj-proposes-mixed-member-system-within-overall-pr/>.

⁴⁹ Riza, *supra* note 48.

⁵⁰ Varun Nambiar, *Sri Lanka Supreme Court Rules Against Provincial Council Elections Before Delimitation of Electoral Districts*, JURIST (Sep. 3, 2019), <https://www.jurist.org/news/2019/09/sri-lanka-supreme-court-rules-against-provincial-council-elections-before-delimitation-of-electoral-districts/> (“Delimitation has been a controversial political issue in Sri Lanka.”).

⁵¹ See, e.g., *Three Political Parties Suggest an Electoral System Based on Proportional Representation for the Country*, COLOMBO PAGE (Oct. 8, 2021), http://colombopage.com/archive_21B/Oct08_1633705044CH.php.

⁵² See, e.g., *Provincial Councils’ Delimitation Report in the House for Debate*, SUNDAY TIMES (Mar. 4, 2018), <https://www.sundaytimes.lk/180304/news/provincial-councils-delimitation-report-in-the-house-for-debate-284427.html> (noting concerns raised by members of the Delimitation Committee over Muslim representation and “unusual ethnic distribution” as a result of the electoral redistricting).

which they view as hindering their consolidation of power.⁵³

The election of Gotabaya Rajapaksa accelerated attempts to chip away at electoral safeguards.⁵⁴ Citing COVID-19, Rajapaksa repeatedly postponed provincial council elections in 2020,⁵⁵ amid disputes over the delimitation of voting districts.⁵⁶ Rajapaksa also operated for five months without legislative

⁵³ See, e.g., Saman Indrajith, *Gevindu Insists on Abolishing Provincial Councils Under New Constitution*, ISLAND ONLINE (Sep. 26, 2020) <https://island.lk/gevindu-insists-on-abolishing-provincial-councils-under-new-constitution/>; *Sri Lanka Moves Closer Towards Abolishing Provincial Councils*, EARLY TIMES (May 16, 2013), <http://www.earlytimes.in/newsdet.aspx?q=107523>.

⁵⁴ Alan Keenan, *Sri Lanka: Landslide Win for the Rajapaksa Puts Democracy and Pluralism at Risk*, CRISIS GROUP (Aug. 12, 2020), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-landslide-win-rajapaksa-puts-democracy-and-pluralism-risk>.

⁵⁵ *Sri Lanka Decides to Postpone Provincial Elections*, SOUTH ASIAN MONITOR (Dec. 30, 2020), <https://www.southasianmonitor.org/sri-lanka/sri-lanka-decides-postpone-provincial-elections>.

⁵⁶ Freedom House, *Sri Lanka*, FREEDOM IN THE WORLD 2021, <https://freedomhouse.org/country/sri-lanka/freedom-world/2021> (last visited Oct. 22, 2022) (“Provincial council elections were repeatedly postponed due to disputes over the delimitation of voting districts.”). In 2019, the Sri Lanka Supreme Court held that the president could not unilaterally declare electoral district boundaries in the absence of the report of a delimitations review committee chaired by the prime minister. Nambiar, *supra* note 50; see also *Provincial Council Elections Cannot Be Held Under Previous System: Supreme Court*, NEWS FIRST (Sep. 3, 2019), <https://www.newsfirst.lk/2019/09/03/provincial-council-elections-cannot-be-held-under-previous-system-supreme-court/>.

oversight, exceeding the constitutional three-month maximum for a parliamentary recess.⁵⁷ During this period, the Rajapaksa administration created several task forces composed almost entirely of Sinhalese military and police officials⁵⁸ and adopted a series of policies and practices with a discriminatory impact on Sri Lanka's Muslim and Tamil minorities in particular.⁵⁹ In October of 2020, the Sri Lanka Podujana Peramuna government passed the 20th Amendment, which reintroduced expansive

⁵⁷ Gulbin Sultana, *Sri Lanka Headed for Elections: Democracy in Distress?*, MANOHAR PARRIKAR INST. FOR DEF. STUDIES & ANALYSES (Jul. 17, 2020), <https://idsa.in/issuebrief/sri-lanka-headed-for-elections-gsultana-170720>; *Sri Lanka to Hold Coronavirus-Delayed Election on August 5*, AL JAZEERA (Jun. 11, 2020), <https://www.aljazeera.com/news/2020/6/11/sri-lanka-to-hold-coronavirus-delayed-election-on-august-5>.

⁵⁸ See, e.g., Gazette Extraordinary No. 2178/18 of June 2, 2020 (Sri Lanka).

⁵⁹ Phillip Baumgart, *Sri Lanka's Parliamentary Elections Will Shape Its Political Future—Likely for the Worse*, NEW ATLANTICIST (Jul. 30, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/sri-lankas-parliamentary-elections-will-shape-its-political-future-likely-for-the-worse/> (“[O]ne task force is vaguely charged with creating a “virtuous society” and eradicating “anti-social behavior,” while another justifies the expropriation of Hindu and Muslim land in Sri Lanka’s Eastern Province under the pretext of Buddhist archaeological preservation.”). See C.V. Wigneswaran, *Why the Presidential Task Force on Archaeology in the Eastern Province and the Future of the Tamils*, COLOMBO TELEGRAPH (Apr. 23, 2021), <https://www.colombotelegraph.com/index.php/why-the-presidential-task-force-on-archaeology-in-the-eastern-province-the-future-of-the-tamils/>, on context into Rajapaksa’s political objectives in creating the Buddhist archaeological preservation task force and its discriminatory impact on Tamils populations.

presidential powers, including allowing the president sole power to appoint commissioners to the Election Commission as well as the power to unilaterally dissolve parliament after two years and six months of the Legislature being elected.⁶⁰

These actions coincided with widespread instances of electoral violence. During the November 2019 presidential election, observers reported violence and intimidation, mostly directed at Muslim voters.⁶¹

⁶⁰ A BRIEF GUIDE TO THE 20TH AMENDMENT TO THE CONSTITUTION, CTR. FOR POLICY ALTERNATIVES (2021), https://www.cpalanka.org/wp-content/uploads/2021/07/A-brief-guide-to-the-20th-Amendment-to-the-Constitution-English-CPA-compressed_compressed-1.pdf; SUMMARY OF CHANGES UNDER THE PROPOSED 20TH AMENDMENT, CTR. FOR POLICY ALTERNATIVES, at 3, 6 (2020), <https://www.cpalanka.org/wp-content/uploads/2020/09/Final-doc-Summary-of-Changes-Under-the-Proposed-20th-Amendment.pdf>; see also *Sri Lanka: Newly Adopted 20th Amendment to the Constitution is Blow to the Rule of Law*, INT'L COMM'N JURISTS (Oct. 27, 2020), <https://www.icj.org/sri-lanka-newly-adopted-20th-amendment-to-the-constitution-is-blow-to-the-rule-of-law/>.

⁶¹ Aanya Wipulasena, *Sri Lanka Election: Observers Report Poll Day Violations*, AL JAZEERA (Nov. 16, 2019), <https://www.aljazeera.com/news/2019/11/16/sri-lanka-election-observers-report-poll-day-violations>; 2019 SRI LANKAN PRESIDENTIAL ELECTION, ELECTION OBSERVATION REPORT, CTR. FOR MONITORING ELECTION VIOLENCE (2020), <https://anfrel.org/wp-content/uploads/2020/06/cmev-presidential-election-2019-final-report-english-3.pdf>; DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA EUR. UNION ELECTION OBSERVATION MISSION, FINAL REPORT: PRESIDENTIAL ELECTION, 16 NOVEMBER 2019 (2020), https://www.europarl.europa.eu/cmsdata/212448/Sri-Lanka_presidential_election_16_November_2019_EU_EOM_report.pdf.

Similarly, in the 2020 parliamentary elections, reports indicated intimidation and harassment of women, Muslim, and Tamil voters.⁶²

This electoral misconduct has been coupled with other policies that prevent the free exercise of religion by religious minorities in Sri Lanka. For example, in 2020, the government imposed a requirement to cremate anyone who died with COVID-19.⁶³ Cremation is contrary to Muslim belief and the policy caused immense distress to a vulnerable minority. The government refused to lift this requirement for a year, despite World Health Organization guidelines that burial is safe, and opposition from United Nations experts, medical professionals in Sri Lanka, and religious leaders of all major faiths in the country.⁶⁴ When the “forced cremation” policy was eventually dropped, it was replaced by a restriction of burials to a single remote

⁶² Freedom House, *Sri Lanka*, FREEDOM IN THE WORLD 2021, <https://freedomhouse.org/country/sri-lanka/freedom-world/2021> (last visited Oct. 22, 2022); DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA EUR. UNION ELECTION OBSERVATION MISSION, FINAL REPORT: PRESIDENTIAL ELECTION, 16 NOVEMBER 2019 (2020), https://www.europarl.europa.eu/cmsdata/212448/Sri-Lanka_presidential_election_16_November_2019_EU_EOM_report.pdf.

⁶³ *Sri Lanka: Covid-19 Forced Cremation of Muslims Discriminatory*, HUMAN RIGHTS WATCH (Jan. 18, 2021), <https://www.hrw.org/news/2021/01/18/sri-lanka-covid-19-forced-cremation-muslims-discriminatory>.

⁶⁴ *Id.*

site where grieving families were allegedly mistreated by security personnel.⁶⁵

Similarly, local nongovernmental organizations have reported widespread impunity surrounding incidents of religiously-motivated discrimination and violence against minority religious groups.⁶⁶ In ten out of at least eleven cases of intimidation or attacks by Buddhist groups on Christian churches in 2021, police said the pastors were to blame for holding worship services; in three additional cases, police accused pastors of breaching the peace.⁶⁷ Religious rights groups reported instances in which police continued to prohibit, impede, and attempt to close Christian and Muslim places of worship, citing sham or pretextual governmental regulations.⁶⁸

B. Iran's Political System Demonstrates That Without Effective Voting Remedies, Citizens Cannot Exercise Fundamental Rights

Recent events in Iran similarly demonstrate that autocratic governments without legitimate democratic institutions often extensively violate their citizens' human rights. Over the past several weeks, Iran has seen widespread anti-government protests

⁶⁵ *Id.*

⁶⁶ U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: SRI LANKA 1 (2022), <https://www.state.gov/reports/2021-report-on-international-religious-freedom/sri-lanka/>.

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 10.

following the death of 22-year-old Mahsa (Jina) Amini after Iran’s religious morality police arrested her for allegedly violating hijab rules.⁶⁹ “Women and girls have been conspicuous on the front lines of the protests,”⁷⁰ where—joined by men and boys—they have been calling for “liberty, equality, no hijab, no oppression.”⁷¹ Authorities have responded to these protests with excessive and lethal force.⁷²

The ability of victims to obtain recourse in the face of such state violence is hindered in Iran, as religious minorities and women have long been denied

⁶⁹ See Farnaz Fassihi, *In Iran, Woman’s Death After Arrest by the Morality Police Triggers Outrage*, N.Y. TIMES (Sept. 16, 2022), <https://www.nytimes.com/2022/09/16/world/middleeast/iran-death-woman-protests.html>.

⁷⁰ Farnaz Fassihi, *How Two Teenagers Became the New Faces of Iran’s Protests*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/world/middleeast/iran-protests-killed-teens.html>.

⁷¹ Khosro Kalbasi Isfahani (@KhosroKalbasi), TWITTER (Oct. 3, 2022, 9:59 AM), <https://twitter.com/KhosroKalbasi/status/1576935015492960256>; see also Bill Van Esveld & Elaheh Sajadi, *In Iran, Schoolgirls Leading Protests for Freedom: Government Repression Extends to Children*, HUMAN RIGHTS WATCH (Oct. 12, 2022), <https://www.hrw.org/news/2022/10/12/iran-schoolgirls-leading-protests-freedom>.

⁷² *Iran: Security Forces Fire On, Kill Protesters*, HUMAN RIGHTS WATCH (Oct. 5, 2022), <https://www.hrw.org/news/2022/10/05/iran-security-forces-fire-kill-protesters>.

equal political participation based on purported religious justifications.⁷³

With the exception of a select number of designated seats for religious minorities, parliamentary candidates in Iran must have “belief in and practical obligation to Islam and the holy system of the Islamic Republic of Iran.”⁷⁴ The Guardian Council, a powerful organization that has the power to veto parliamentary legislation, supervise elections, and approve or disqualify candidates, frequently discriminates against religious minorities and women who attempt to seek election to public positions.⁷⁵ For example, residents of Yazd, a city in central Iran, reelected Sepanta Niknam, who is Zoroastrian, to the city council in May 2017.⁷⁶ Although nothing in the election laws pertaining to city councils barred a member of a religious minority from representing Muslim-majority cities, the Guardian Council requested Niknam’s immediate dismissal, and the Court of Administrative Justice suspended him in

⁷³ U.N. Human Rights Comm., Concluding Observations: Iran, ¶ 5, U.N. Doc. CCPR/C/IRN/CO/3 (Nov. 29, 2011), <https://digitallibrary.un.org/record/719297?ln=en>.

⁷⁴ Law for the Elections of the Islamic Consultative Parliament [Majles] of 1995, art. 28 (Iran).

⁷⁵ HUMAN RIGHTS WATCH, ACCESS DENIED: IRAN’S EXCLUSIONARY ELECTIONS 3, 11–13 (2005), https://www.hrw.org/sites/default/files/media_2021/08/202108mena_iraq_exclusionaryelection.pdf.

⁷⁶ Tara Sepehri Far, *Iran’s Guardian Council Trounces Religious Freedom*, HUMAN RIGHTS WATCH (Oct. 28, 2017), <https://www.hrw.org/news/2017/10/28/irans-guardian-council-trounces-religious-freedom>.

October 2017 over the objections of the Yazd city council chairperson and the speaker of Iran's parliament.⁷⁷ The Guardian Council has also disqualified all women from standing as candidates for president.⁷⁸

In sum, the Guardian Council, along with other unchecked powers in Iran's political system, operates under relatively few limits, and Iran's citizens lack effective remedies to protect their political rights.⁷⁹ The restrictions on voting rights and political participation for religious minorities and women in Iran have contributed to systemic patterns of discrimination against a majority of Iran's population.

* * *

These examples highlight that the risks to human rights that stem from infringements on right to vote free from gerrymandering and discrimination are particularly severe for ethnic, racial and religious minorities and for women and girls.

⁷⁷ *Id.*

⁷⁸ HUMAN RIGHTS WATCH, ACCESS DENIED: IRAN'S EXCLUSIONARY ELECTIONS 3, 11–13 (2005), https://www.hrw.org/sites/default/files/media_2021/08/202108mena_iraq_exclusionaryelection.pdf; see U.S. DEP'T OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAN 50 (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/iran>.

⁷⁹ Freedom House, *Iran*, FREEDOM IN THE WORLD 2021, <https://freedomhouse.org/country/iran/freedom-world/2022> (last visited Oct. 24, 2022).

CONCLUSION

The Petitioners' reading of the Elections Clause would deprive U.S. citizens whose right to vote is restricted through gerrymandering of their last effective remedy—judicial review by the state courts. Adopting the ISLT would therefore cause the United States to violate its obligations under the ICCPR and the ICERD, would contravene Congress's objectives in approving those treaties, and would hamper the United States' ability to promote its interests and protect fundamental human rights across the world.

Respectfully submitted,

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October 26, 2022