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S.C. SUPREME COURT

IN THE

SUPREME COURT OF SOUTH CAROLINA

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2024-001227

League of Women Voters of South Carolina ..... Petitioner,

v.

Thomas Alexander, in his official capacity as President of the South Carolina Senate; **Murrell Smith**, in his official capacity as Speaker of the South Carolina House of Representatives; **Howard Knapp**, in his official capacity as Director of the South Carolina State Election Commission ..... Respondents,

and

Henry McMaster, in his official capacity as the Governor of South Carolina……Intervenor

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BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. CLC has litigated numerous partisan gerrymandering cases, including *Gill v. Whitford*, 585 U.S. 48 (2018), and *Rucho v. Common Cause*, 588 U.S. 684 (2019). CLC also has expertise in state constitutional partisan gerrymandering cases, serving as lead counsel in Utah and Kansas and filing amicus briefs in Kentucky, New Hampshire, New York, New Mexico, Pennsylvania, Maryland, Ohio, and North Carolina. *See LWV of Utah v. Utah Legislature*, 554 P.3d 872 (Utah 2024); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022). CLC draws on this expertise and perspective from across various states to discuss the application of South Carolina's Free Elections Clause in this case and the justiciability of partisan gerrymandering claims.

INTRODUCTION

Partisan gerrymandering is "incompatible with democratic principles" and the "core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (*AIRC*) (internal citations and quotations omitted). Whether done by Democrats, Republicans, or anyone else, manipulating district lines for partisan gain impedes the proper functioning of the electoral process. The extreme partisan gerrymander in South Carolina has been admitted by Respondents and confirmed by the U.S. Supreme Court, *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 21 (2024), and it is an affront to the State Constitution. The sweeping constitutional guarantee that "[a]ll elections shall be free and open," S.C. Const. art. I, § 5, is undermined when district lines are manipulated to virtually guarantee certain preferred partisan outcomes at the expense of South Carolina voters.

Courts are critical to correct this problem—one that is only getting worse. The combination of an increasingly polarized electorate and the sophisticated tools that propel today's mapmaking enables gerrymanderers to dilute the voting strength of a disfavored group of voters with precision, entrench favored incumbents, and often secure preferred electoral outcomes for a decade. The state judiciary, the only institution with both the constitutional authority to stop gerrymandering and the lack of political incentive to allow it, must not leave objections to such partisan manipulation to merely "echo into a void." *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019). Instead, because "state constitutions can provide standards and guidance for state courts to apply" against partisan gerrymandering, *id.*, the Court should hold that South Carolina Constitution's Free Elections Clause provides justiciable, substantive limits on extreme gerrymandering. Straightforward text, deep history, and compelling precedent all support that the Free Elections Clause prohibits extreme partisan gerrymandering in South Carolina.

ARGUMENT

I. Partisan gerrymandering violates the Free Elections Clause.

South Carolina's Free Elections Clause broadly requires that "[a]ll elections shall be free and open, and every inhabitant . . . shall have an equal right to elect officers." S.C. Const. art. I, § 5. This protection of South Carolina's electoral process extends beyond just eligibility or interference with casting a ballot, contrary to Respondents' misunderstanding. Text, history, precedent, and persuasive sister state caselaw all support the conclusion that the Free Elections Clause seeks to prevent the manipulation and subversion of the electoral process inherent in partisan gerrymandering.

A. The Free Elections Clause's text bars partisan gerrymandering.

The text of the Free Elections Clause prohibits partisan gerrymandering. The Free Elections Clause makes an affirmative and enforceable promise to the people of South Carolina: that "[a]ll elections shall be free and open, and every inhabitant . . . shall have an *equal right* to elect officers." S.C. Const. art. I, § 5 (emphasis added). An election is not "free and open" when its results are predetermined by manipulated district lines, nor are all inhabitants granted an "equal right to elect officers" when gerrymandering artificially diminishes the electoral strength of certain voters and amplifies the influence of others. The original public meaning of the Clause's text, as well as other relevant constitutional provisions, supports this conclusion.

This Court has repeatedly held that "[i]t is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question." *Smith v. Tiffany*, 419 S.C. 548, 555 (2017). "[T]he words found in the statute [must be given] their plain and ordinary meaning." *Id.* at 556 (internal quotations omitted). And when "[n]o categorical answer is to be found in the express language" then the Court should "look to its historical background." *Knight v. Hollings*, 242 S.C. 1, 4 (1963). Applying the plain meaning of the constitutional text at issue here, it is apparent that the key terms of the Free Elections Clause are incompatible with extreme partisan gerrymandering.

The Free Elections Clause's guarantee of "free and open" elections was added to the South Carolina Constitution in 1868. At that time, Webster's already-authoritative dictionary defined "free" as "exempt from the subjection to the will of others; not arbitrary or despotic; assuring liberty; defending individual rights against encroachment by any person or class." *Free*, Webster's International Dictionary of the English Language, Comprising the Issues of 1864, 1879, and 1884 (1898). "Open" was defined as "without reserve or false pretenses; not concealed or secret; not

hidden or disguised." *Open*, Webster's International Dictionary of the English Language, Comprising the Issues of 1864, 1879, and 1884 (1898).

In 1895, South Carolina revised its constitution, but no substantive changes were made to the Free Elections Clause, underscoring the definitional consistency. Webster was still using these same definitions of "free" and "open," and other dictionary definitions from that era centered around the same concepts. Black's Law Dictionary defined "free" as "unconstrained; having power to follow the dictates of his own will; not subject to the dominion of another; enjoying full civic rights." *Free*, Black's Law Dictionary (1st ed. 1891). The Oxford English Dictionary defined "free" as "not bound or subject; enjoying civil liberty; existing under a government which is not arbitrary or despotic and does not encroach upon individual rights; unimpeded, unrestrained, unrestricted, unhampered." *Free*, Oxford English Dictionary, Volume 4, F to G (1900). Oxford defined "open" as "easy to understand; performed or carried on without concealment; may be used, shared, or competed for without restriction." *Open*, Oxford English Dictionary, Volume 7, O to P (1909).

In the early 1970s, when the South Carolina Constitution was again revised, the Free Elections Clause remained unchanged. Though Webster had updated its definitions of "free" and "open" by this time, the crux of those definitions remained the same. "Free" was defined as "enjoying civil and political liberty; not determined by anything beyond its own nature or being; not obstructed or impeded; not hampered or restricted []; allowed to be executed without interference from the opposing side; not subject to the rule or control of another." *Free*, Webster's Seventh New Collegiate Dictionary (1963). "Open" was defined as "not repressed by legal controls; free from checking or hampering restraints; exposed to general knowledge." *Open*, Webster's Seventh New Collegiate Dictionary (1963).

All of these definitions focus on the same concepts we associate with these words today and exhibit a striking continuity. "Free" signifies exemption from subjugation to another's will and the unhampered enjoyment of individual civil rights. "Open" means candor, the absence of concealment and dishonesty, and unrestricted.[1]

Partisan gerrymandering is, by its very nature, a violation of everything these words denote. By manipulating district lines for the purpose of ensuring favorable partisan outcomes, Respondents have turned the Clause's fundamental constitutional mandates on their head—they have subjected the rights and will of the voters to the despotic will of their supposed representatives. When the outcome of an election is all but certain before any voter enters the booth, that election is not conducted with candor and frankness, but instead subjects voters to the dictates of the line-drawers' whims. Elections conducted under such conditions are simply not "free and open" as those terms were understood in 1868—or as they are understood today.

Beyond "free and open" elections, the Free Elections Clause guarantees that the citizens of South Carolina "shall have an equal right to elect officers." S.C. Const. art. I, § 5. Webster's definition of "equal" from the time of both the 1868 and 1895 Constitutions is unambiguous: "having the . . . same value; neither inferior nor superior, greater or less; evenly balanced, not unduly inclining to either side; characterized by fairness; unbiased; impartial; equitable; just." *Equal*, Webster's, Issues of 1864, 1879, and 1884 (1898).

At the time of the 1895 constitutional convention, Black's Law Dictionary defined "equal" as "the condition of possessing the same rights, privileges, and immunities, and being liable to the

[1] Nor are these definitions "just picked," as the Governor suggests. *See* Gov. Br. at 24 n.4. Rather, they are from multiple dictionaries from the time the relevant language was added to the constitution, which provides a persuasive account of what the term meant when it was first included in the constitution. *See id.* at 24 (citing *Owens v. Stirling*, 443 S.C. 246, 269-70, 904 S.E.2d 580, 592 (2024)).

same duties," while Oxford defined the same as "neither less nor greater []; identical in . . . value; having the same rights or privileges; affecting all objects in the same manner and degree, uniform in effect or operation; fair, equitable, just, impartial." *Equal*, Black's Law Dictionary (1st ed. 1891); *Equal*, Oxford English Dictionary, Volume 3, D to E (1897). Webster's definition at the time of the 1970s revisions includes much of the same, defining "equal" as "identical in mathematical value; like in quality, nature, or status; regarding or affecting all objects in the same way; free from extremes." *Equal*, Webster's Seventh New Collegiate Dictionary (1963). As with "free" and "open," these straightforward definitions of "equal," are incompatible with gerrymandering, which divides districts "in a way that gives one political party an *unfair advantage* in elections." *Gerrymandering*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/gerrymandering (last visited Jan. 21, 2025) (emphasis added). Here, Respondents intentionally and systematically packed and cracked voters in the pursuit of creating an additional safe Republican congressional district, favoring Republican voters while disfavoring non-Republican voters. This manipulation of the electoral system for the voters of Charleston is anathema to the text of the Free Elections Clause, and deprives them of what "the words expressly state," that elections "must be maintained absolutely free, and the vote of every elector must be granted *equal influence* with that of every other elector." *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95, 97 (1938).

Finally, intratextual analysis further shows that the Free Elections Clause's promise is not limited to the casting of ballots. Beyond the fact that the words of the Clause itself are deliberately broad and encompassing, the very next article in the South Carolina Constitution devotes twelve entire sections explicitly to the right of suffrage. S.C. Const. art. II, §§ 1-12. To interpret Article I, Section 5 as limited to suffrage and duplicative of the rights secured in Article II, *see, e.g.*, Sen.

Pres. Br. at 36, would render this important clause surplusage that was not corrected over the course of nearly two centuries (during which time South Carolina's Constitution was thoroughly and significantly revised two separate times). This Court is "not at liberty to treat any portion of the Constitution as surplusage." *Ravenel v. Dekle*, 265 S.C. 364, 377, 218 S.E.2d 521, 527 (1975).

The more likely and more logical explanation is that South Carolina's Framers intended for the Free Elections Clause to cover not just the right to vote, but the entirety of the electoral process. And that is precisely how this Court has interpreted the Clause in prior cases. *See State v. Williams*, 20 S.C. 12, 17 (1883) (holding that under the Free Elections Clause the legislature cannot prohibit an otherwise constitutionally qualified elector from holding office); *State v. Huntley*, 167 S.C. 476, 166 S.E. 637, 639-640 (1932) (holding that requiring voters in a school board primary to be on the club rolls of a political party was unconstitutional under the Free Elections Clause).

The Free Elections Clause creates an affirmative and enforceable promise that "[a]ll elections shall be free and open, and every inhabitant . . . shall have an *equal right* to elect officers." S.C. Const. art. I, § 5 (emphasis added). The fact that the second part of Article I, Section 5 addresses the "equal right to elect officers" further underscores the point that the separately guaranteed right to "free and open" elections *must* therefore address something about the election system more broadly. The Free Elections Clause's text requires that the will of the voters be "exempt from the subjection of the will of others," and that the entire electoral process be conducted "without false pretenses" to reach "unbiased, equitable," and "just" results that are "not despotic," and that "defend[] individual rights." Partisan gerrymandering is the antithesis of these guarantees.

B. History bolsters applying the Free Elections Clause against partisan gerrymandering.

The history of Free Elections Clauses in general—and South Carolina's in particular—confirms that the provision restrains partisan gerrymandering.

First, the context in which the original Free Elections Clause arose in seventeenth-century England informs its enduring meaning. At that time, parliamentary elections were corrupted to serve the Crown through the creation of "rotten boroughs," where politicians distorted electoral districts and their compositions to predetermine results. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 256, 269 (2021); J.R. Jones, *The Revolution of 1688 in England* 35-36 (1972). In addition to using coercion and patronage to boost favored candidates, rotten boroughs were skewed to contain only voters guaranteed to support the King's party patrons, and often were devised with dramatically varying populations. Ross, *supra*, at 269; *Wesberry v. Sanders*, 376 U.S. 1, 14-15 (1964).

Predetermining elections through these practices was "striking proof of the decay in the representative system" at the time. William Carpenter, *The People's Book: Comprising their Chartered Rights and Practical Wrongs* 407 (1831). During the Glorious Revolution, Englishmen sought to improve the system by enshrining, in familiar language, the guarantee that "Election of Members of Parliament ought to be free." Bill of Rights 1688, 1 W. & M. 2 c. 2 (Eng.), tinyurl.com/yckkayw6. This provision was seen as a solution to stop the King's effort to "manipulate the law" in his "campaign to pack Parliament" by ensuring an impartial electoral process. Jones, *supra*, at 318; *accord* Ross, *supra*, at 221-22, 284, 289.

England's Free Elections Clause failed to be fully enforced at the time given ongoing local corruption and the Crown's continued broad, unilateral governmental authority. Jones, *supra*, at

326-31. But its core principles endured and regained prominence in early American history. Ross, *supra*, at 289. For example, Alexander Hamilton explicitly decried "the destruction of the right of free election" in England that was the result of parliamentary elections "stigmatized with the appellation of rotten boroughs" as "the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 264 (J. Elliott ed., 1876), ("*Debates*").

Drawing on that history, in 1790, Pennsylvania was the first state to include a clause in its constitution guaranteeing that all elections would be "free and equal." In the decades that followed, well over a dozen other states would follow Pennsylvania's example and prevent electoral manipulation in their own states by adopting a version of the Free Elections Clause in their own state constitutions. Brett Graham, *"Free and Equal": James Wilson's Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 Alb. L. Rev. 799, 813 (2022).

Following the Civil War, South Carolina adopted a new constitution in 1868, and included a Free Elections Clause in the state constitution for the first time. The new constitution was a "well balanced copy of the ordinary American state constitution of the period," David Duncan Wallace, *The South Carolina Constitution of 1895*, Bulletin of Univ. of S.C. No. 197, 21 (1927), an "amalgam" that borrowed extensively from existing constitutions, including those containing Free Elections Clauses. 2 James L. Underwood, *The Constitution of South Carolina* 47 (1986). By "transplant[ing]" the Free Elections Clause into the South Carolina Constitution, the Framers intended to "bring[] the old soil with it" by retaining the provision's long-understood historical meaning. *Stokeling v. United States*, 586 U.S. 73, 80 (2019); *accord Lindsay v. E. Bay St. Comm'rs*, 2 S.C.L. 38, 59 (S.C. Const. App. 1796) (finding South Carolinians' rights "not less valuable than

those of the people of England," and the state constitution further protective against the power of the legislature).

While some states use the "free and equal" formulation, and others utilize "free and open," these phrasings are "substantially the same." *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. 1951) (discounting any meaningful difference in Missouri's change from "free and equal" to "free and fair"). When South Carolina included the "free and open" clause in the new 1868 constitution, it drew upon a rich history of protection against the manipulation and distortion of elections going back to the Pennsylvania Constitution and before that the English Bill of Rights. The democratic dysfunction of the rotten boroughs system is the historical cognate for modern-day partisan gerrymandering, and the historical purpose of the Free Elections Clause to ensure an impartial electoral process reinforces its application to prevent gerrymandered maps today.

Second, the historical context in which the Free Elections Clause was added to the South Carolina Constitution also informs its meaning. As this Court has stated, "the state of the public mind at the time of the adoption of the Constitution of 1868 renders us legitimate assistance in the construction and interpretation of its provisions." *State v. Shaw*, 9 S.C. 94, 106 (1878). The new 1868 constitution, enacted during Reconstruction, "embodied many principles of democratic government," including apportionment based on population rather than wealth, as it had been previously. Cole Blease Graham, Jr., *The Evolving South Carolina Constitution*, 24 J. Pol. Science 11, 19 (1996). The particular Reconstruction context in which the new constitution was ratified had a special focus on protecting South Carolina voters—including for the first time Black voters—from intimidation, undermining, weakening, or manipulation of their right to vote. *See* W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. Rev. 859, 863 (2006).

Before and after the adoption of the new rights-protective constitution, Black voters faced innumerable horrors and "aggressive tactics" meant to deter or undermine their voting strength. *Id.* at 864. In response to Republican electoral wins, Democrats resorted to violence and intimidation against likely Republican voters, as well as nefarious schemes to prevent Republican victories such as the all-white primary. *Id.* at 867-69. Against this background, it would make little sense to interpret the South Carolina Constitution as banning some of these anti-democratic schemes designed to preference one party over the other, while allowing extreme partisan gerrymandering with the same goal. The Governor supplies historical examples of gerrymanders in the state's history as though the fact that the new constitution did not in practice prevent every corruption or manipulation of the election system somehow means that the constitution permits these actions. But such a conclusion of course does not follow.

C. Precedent supports broadly applying the Free Elections Clause.

This Court's precedent also supports that the Free Elections Clause guards against distortions of the state's electoral process. For well over a century, this Court has held that the language of the Free Elections Clause is "affirmative," and that its broad protections may not be "abridged by any mere legislative provision." *State v. Williams*, 20 S.C. 12, 16 (1883). The sweep of the Free Elections Clause encompasses more than the simple act of casting a ballot, protecting against subversion of the right to vote including through indirect means. The clause limits the legislature's power to establish an electoral environment unduly favorable or unfavorable to a particular candidate or party, and guarantees that every South Carolinian's vote "must be granted equal influence." *Cothran*, 200 S.E. at 97; *Joint Legislative Comm. for Jud. Screening Through McConnell v. Huff*, 320 S.C. 241, 244, 464 S.E.2d 324, 326 (1995). These protections enshrined in the Free Elections Clause are incompatible with partisan gerrymandering.

In *Joint Legislative Committee*, this Court held that the Free Elections Clause "limit[ed] the legislature's power" to enact laws creating the electoral environment in which candidates would compete. 464 S.E.2d at 326. That case concerned the legislature's creation of new judgeships and the eligibility of certain legislators to fill them. By finding Article I, Section 5 "clearly applicable," this Court reinforced the notion that the Clause applies to the election system as a whole and guards against actions by the legislature that might undermine it.

In *Cothran*, this Court spoke even more clearly: the state's Free Elections Clause mandates that "the vote of every elector must be granted *equal influence* with that of every other elector," elections must be "open to all qualified electors *alike*," and "no constitutional right of [a] qualified elector [may be] subverted." 200 S.E. at 97 (emphasis added).

Respondents would find the Free Elections Clause satisfied so long as no voter is prevented from casting a ballot. But being unencumbered while casting a ballot in an election with artificially predetermined results is hardly free or open, and precedent supports this view. *See State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932) (challenged law did "not in express terms deprive any voter of the right to vote" but had the effect of depriving those citizens "who do not have their names upon the club roll of some political party" of participation). This Court's precedents also reinforce that "the right to vote is a cornerstone of our constitutional republic," and any potential infringement of that right should be evaluated in light of that fundamental precept. *See Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020) (citing art. I, § 5). The Free Elections Clause does not guarantee preferred electoral outcomes, *contra* Sen. Pres. Br. at 37, but it does guarantee an election that is not a farcically pre-decided charade.

Partisan gerrymandering subverts voters' rights by manipulating district lines precisely for the purpose of ensuring that not all voters have equal influence. A district where the lines are drawn

to virtually guarantee the success or failure of a particular party or candidate is not open to all qualified electors in a like manner, but instead favors some voters over others. While the legislature has the power to enact districting plans under Article II, Section 10, that power must be exercised subject to the requirement of Article I, Section 5, which guarantees that the entire election—not just the act of casting a ballot—must be free and open.

D. Persuasive sister state decisions apply equivalent Free Elections Clauses to bar partisan gerrymandering.

Sister state caselaw supports applying the Free Elections Clauses to prohibit extreme partisan gerrymandering. Thirty different states have some form of constitutional requirement that elections be "free," but courts have rarely been asked to interpret the full breadth of these provisions in the context of partisan gerrymandering. But simply because courts have not been asked to apply Free Elections Clauses in this context does not mean they are not applicable. And at any rate, the current caselaw provides persuasive support for Petitioners.

Pennsylvania's Constitution, in nearly identical language to that of South Carolina, guarantees to its citizens that "[e]lections shall be free and equal," with the addition that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. Notably, both constitutions also contain provisions explicitly directing map-drawers to respect county boundaries. S.C. Const. art. VII, §§ 9, 13; Pa. Const. art. II, § 16.

In *League of Women Voters v. Commonwealth*, 645 Pa. 1 (2018) (*LWVPA*), the presence of that county-specific language helped lead Pennsylvania's highest court to the conclusion that the state's Free Elections Clause should be given "the broadest interpretation, one which governs all aspects of the electoral process" to guarantee that voters have "equally effective power to select the representative of his or her choice." 645 Pa. at 117. The *LWVPA* court thus reached the intuitive conclusion that an "election corrupted by extensive, sophisticated gerrymandering and partisan

dilution of votes is not 'free and equal.'" *Id.* at 128. In 2022, the Court reinforced this analysis and holding in *Carter v. Chapman*, 270 A.3d 444, 462, 470 (Pa. 2022). These decisions provide strong support that South Carolina's Free Elections Clause—with the similar constitutional context—also restrains partisan gerrymandering.

State court decisions in Maryland, Utah, and Kentucky have similarly found that their own states' Free Elections Clauses prohibit extreme partisan gerrymandering. *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734, at *27 (Utah Dist. Ct. Nov. 22, 2022) (*LWVUT*)[2]; *Graham v. Adams*, 684 S.W.3d 663, 682-83 (Ky. 2023). While in *Graham* the Kentucky Supreme Court ultimately found no constitutional violation, the Court stated plainly that "[w]hile the Kentucky Constitution does not categorically forbid any consideration of partisan interests in the apportionment process, partisanship may of course rise to an unconstitutional level." *Id.* at 682.

Further, the outcome in *Graham* is distinct from this case in two significant ways. First, the *Graham* ruling was based on specific precedent unique to Kentucky. *Id.* at 685. Second, the *Graham* court's holding was based on the factual finding that "there *may* have been *some* partisanship in [the General Assembly's] crafting [of the apportionment plan]." *Id.* (emphasis added). Here, there is no question that the map at issue is definitively a partisan gerrymander. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 19-21 (2024).

[2] Following the decision by the district court, the Utah Supreme Court ruled for Plaintiffs on other grounds and declined to review the district court's analysis of the partisan gerrymandering claims, but retained jurisdiction over them. *LWV of Utah*, 554 P.3d at 921.

An additional point regarding the rulings in Pennsylvania, Utah, and Maryland is worth noting. In all three states' constitutions, the Free Elections Clause explicitly refers to the right of suffrage. Pa. Const. art. I, § 5; Utah Const. art. I, § 17; Md. Dec. of R. art. 7. Yet despite this fact, all three courts found that the Clause applied to more than the simple act of casting a ballot. As the *LWVUT* Court noted,

> One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

2022 WL 21745734, at *27 (internal citations omitted). A finding that South Carolina's own Free Elections Clause, which makes no mention of suffrage, applies exclusively to that act would lead to exactly the "arbitrary and unjust results" warned of by the *LWVUT* court.

Two rulings on this issue bear mention for the purpose of highlighting why this Court should decline to follow their example. First is that of *Harper v. Hall*, 384 N.C. 292 (2023) (*Harper III*). There, the Court found that partisan gerrymandering was a non-justiciable political question because "both our constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches." *Id.* at 331. This finding was based on the North Carolina Constitution's explicit exemption of redistricting legislation from the governor's veto power, N.C. Const. art. II, § 22(5)(b)-(d), as well as statutory language that provides for only a limited role for the courts in reviewing redistricting plans, N.C.G.S. §§ 120-2.3 to -2.4. Neither South Carolina's Constitution nor its statutory code contain any such provisions or limitations.

Further, North Carolina's Free Elections Clause states only that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This, combined with North Carolina's unique history and precedent, led the Court to conclude that the state's Free Elections Clause's application was limited to the

freedom to exercise the franchise. *Harper III*, 384 N.C. at 363. In contrast, the promise of South Carolina's Free Elections Clause is far broader, promising "free *and* open" elections and an "an equal right to elect officers" to all its citizens. S.C. Const. art. I, § 5 (emphasis added). South Carolina's inclusion of this additional language indicates something more than just a protection on the physical act of casting a ballot.

Brown v. Sec'y of State, 176 N.H. 319 (2023), is likewise not persuasive. There, the Court found that partisan gerrymandering presented a non-justiciable political question based on the puzzling reasoning that New Hampshire's Free Elections Clause did not "expressly address partisan gerrymandering" or articulate manageable standards for adjudicating partisan gerrymandering claims. *Id.* at 333. But these assertions do not pass muster when it comes to common sense and legal precedent. The First Amendment to the United States Constitution does not contain the word "censorship," but censorship is an obvious tool which can be wielded to frustrate its promise of free speech. In the same way, while the Free Elections Clause of South Carolina and New Hampshire may not contain the words "partisan gerrymandering," it is an obvious tool which can be wielded to frustrate the amendments' promises of "free" elections and an "equal right" to vote or elect officers. Discernable standards for adjudicating partisan gerrymandering exist, as demonstrated by Pennsylvania and other states, *LWVPA*, 645 Pa. at 120, and the *Brown* court failed to satisfactorily explain why those standards were unworkable.

Overall, current sister state caselaw supports the conclusion that South Carolina's Free Elections Clause, like those in several other states, prohibits extreme partisan gerrymandering.

II. Partisan gerrymandering claims are justiciable and Court intervention is necessary to correct dysfunction in the democratic process.

Partisan gerrymandering claims are justiciable and courts across the country provide examples this Court can follow. It is the proper role of the Court to ensure acts of the legislature

abide by all constitutional requirements, and the judiciary must not shirk from its urgent role of protecting the rights of citizens and ensuring the proper functioning of South Carolina's democratic process.

A. Precedent establishes this Court's jurisdiction.

It is fundamental that this Court has a duty "to declare what the law is in the case before" it. *Aultman & Taylor Co. v. Rush*, 26 S.C. 517, 2 S.E. 402, 407 (1887). While Article II, Section 10 of the South Carolina Constitution provides that redistricting is a legislative prerogative in the first instance, that does not obviate this Court's judicial review or obligation to uphold voters' rights by serving as the "final arbiter of the meaning of the State Constitution." *Berry v. Milliken*, 234 S.C. 518, 523, 109 S.E.2d 354, 356 (1959). Though the initial line-drawing is committed to a particular legislative body, this textual commitment does not exempt a redistricting plan from judicial review, and this Court has performed this duty when required. *E.g.*, *Elliott v. Richland Cnty.*, 322 S.C. 423, 427, 472 S.E.2d 256, 259 (1996) (declaring redistricting plan invalid); *Growe v. Emison*, 507 U.S. 25, 33 (1993) ("[S]tate courts have a significant role in redistricting."); *Scott v. Germano*, 381 U.S. 407 (1965). The Governor concedes (at 14), that this Court can—and must—review redistricting plans when necessary, but then tries to exempt compliance with constitutional mandates from this review. But this Court must ensure that every constitutional provision—including Article I, Section 5—is satisfied.

Neither does the political question doctrine bar review. The political question doctrine is only applicable where the constitution specifically vests the legislature with sole authority over the action at issue, and no other constitutional provisions apply. *See Gantt v. Selph*, 423 S.C. 333, 339, 814 S.E.2d 523, 526 (2018). But that is not the case here where on the one hand Article II, Section 10 empowers the legislature to redistrict, but on the other hand Article I, Section 5 requires that all

elections be free and open.[3] Where legislative actions taken pursuant to one clause may implicate rights protected in another, this Court has the duty to review this potential conflict. Indeed, that is the quintessential judicial action.

B. Persuasive authority favors exercising jurisdiction over partisan gerrymandering claims.

Federal courts have rerouted partisan gerrymandering cases to state courts to be litigated under state constitutions, which multiple courts have applied to prevent the manipulation of the electoral process. Although the U.S. Supreme Court in *Rucho* acknowledged that "[partisan] gerrymandering is 'incompatible with democratic principles,'" it ruled that federal Article III "case or controversy" constraints made the issue "beyond the reach of the federal courts." 588 U.S. at 718 (quoting *AIRC*, 576 U.S. at 791) (emphasis added). But that decision interpreting Article III does not dictate this Court's justiciability determinations. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020). Federal justiciability doctrines do not apply "even when [state courts] address issues of federal law"—much less when this Court addresses South Carolina's own Constitution. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *accord Sweezy v. Wyman*, 354 U.S. 234, 255 (1957) (same for separation-of-powers doctrines). Indeed, the *Rucho* Court itself reassured that the unavailability of federal review "does not condone excessive partisan gerrymandering" or "condemn complaints about districting to echo into a void" because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." 588 U.S. at 719. And the Court reinforced in a partisan gerrymandering case that "state legislature[s] may not create congressional

[3] Contrary to Respondents' contentions, nothing in Article II, Section 10 gives the legislature *sole* power over redistricting. *See* S.C. Const. art. II, § 10.

districts independently of requirements imposed by the state constitution" and enforced through state judicial review. *Moore v. Harper*, 600 U.S. 1, 26 (2023) (quotations omitted).

Accordingly, numerous state courts have applied state constitutional provisions to derive judicially manageable partisan gerrymandering standards. In some states, courts have applied new citizen-initiated constitutional provisions to limit gerrymandering.[4] In other states, courts have barred gerrymandering by engaging in their time-tested role of applying broader constitutional mandates to specific contexts. *See, e.g.*, *LWVPA*, 645 Pa. at 126-27.[5] Also, around the time of South Carolina's constitutional drafting, state courts in Wisconsin, Michigan, and Indiana exercised jurisdiction over redistricting disputes to prevent the legislature from drawing districts of unequal size and with boundaries designed for partisan ends because "[i]f the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *State ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724, 729-30 (Wis. 1892); *id.* at 735- 37 (Pinney, J., concurring).[6]

Again, the North Carolina Supreme Court's reversal in *Harper III* is a distinguishable outlier. North Carolina has a distinct redistricting history that does not match up with South Carolina's, and where this Court has upheld South Carolinians' rights against unlawful redistricting. *Cf. Harper III*, 384 N.C. at 329. Unlike South Carolina, North Carolina's Constitution also exempts redistricting from the regular lawmaking process by explicitly barring gubernatorial

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[4] *See Harkenrider v. Hochul*, 197 N.E.3d 437, 453-54 (N.Y. 2022); *LWV of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d 255, 288-93 (Ohio 2022); *Adams v. DeWine*, 167 Ohio St. 3d 499, 510-20 (Ohio 2022); *LWV of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colo. Indep. Legislative Redistricting Comm'n*, 513 P.3d 352, 355 (Colo. 2021).

[5] *See Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 21, 539 P.3d 272, 281; *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 92-94 (Alaska 2023); *LWV of Utah*, 2022 WL 21745734, at *10-20; *Szeliga*, 2022 WL 2132194, at *45-46.

[6] *See Giddings v. Blacker*, 52 N.W. 944, 946-47 (Mich. 1892) (requiring "honest and fair" redistricting); *id.* at 947-48 (Morse, C.J., concurring) (decrying "unequal and politically vicious" districts); *Parker v. State ex rel. Powell*, 32 N.E. 836, 842 (Ind. 1892) (denouncing "evils" of "gerrymander[ing]"); *id.* at 846 (Elliot, J., concurring) (similar).

veto. *Id.* And, unlike here, North Carolina statutes purport to limit judicial review. *Id.* at 331-332. Regardless, the *Harper III* dissent is more persuasive in establishing the propriety of exercising judicial review over redistricting disputes. *Id.* at 401-406, 416-421 (Earls, J., dissenting).

Respondents fret that if this Court adjudicates this case, it will open the floodgates to nonstop redistricting litigation in the state. *See, e.g.*, Sen. Pres. Br. at 5. But this fear is unfounded. A review of the states where courts have found such claims justiciable does not show such a deluge. Rather, the clearly enumerated standards provide guidance to legislatures and litigants alike, which reduces, not increases, the volume of redistricting litigation.

C. Judicial review is key to safeguarding the democratic process.

Judicial review in this area is critical. Extreme partisan gerrymandering, as Respondents have engaged in here, affronts the basic premise of American government: that democratic "power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794) (Madison). But unlike other issues that may be dealt with through traditional democratic accountability, "gerrymander[ing] benefit[s] those who control the political branches," and "enables politicians to entrench themselves in power against the people's will;" as such, it is uniquely resistant to democratic solutions. *Whitford*, 585 U.S. at 74 (Kagan, J., concurring). If voters' representatives can at will shunt them into districts in which their vote is essentially worthless and the representative's re-election is virtually guaranteed, those voters will be left with no recourse despite the obvious violation of their constitutional rights. In such a situation, it is often "only the courts [who] can do anything to remedy the problem." *Id.* "Unblocking stoppages in the democratic process is what judicial review ought preeminently to be about," and the denial of the most fundamental of democratic right, that of an effective vote, "seems the quintessential stoppage." John Hart Ely, *Democracy and Distrust* 116-36 (1980).

Partisan gerrymandering undermines democracy in three principal ways: it creates extreme asymmetry in the ability to translate votes to seats; it reduces competitiveness and increases partisan polarity; and it impairs democratic accountability.

First, partisan gerrymandering's effectiveness and insulating effect stems from its ability to create extreme asymmetry in the ability to translate votes to seats. It enables the line-drawing party to secure far more seats in the legislative body than would be expected based on statewide vote share. *See* Nicholas Stephanopoulos & Eric McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1506 (2018).

This does not mean, as Respondent's repeatedly claim, that the remedy to partisan gerrymandering must be some form of proportional representation. Rather, protection against partisan gerrymandering means establishing a minimum baseline of democratic symmetry such that the will of the voters is not stymied to the point of total ineffectuality.

This is in lockstep with what the Framers envisioned for the American system of representative government. John Adams argued that to prevent "the unfair, partial, and corrupt elections" that marked the English electoral system, the "equal interest[] among the people should have equal interest[]" in the American system of representation. John Adams, *Thoughts on Government* 403 (1776), *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805* (Hyneman & Lutz eds., 1983). Hamilton shared a similar sentiment: "the true principle of a republic is, that the people should choose whom they please to govern them." *Debates*, *supra*, at 257. Thus, as Madison urged, "it is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that" elected representatives "should have an immediate dependence on, and an intimate sympathy with, the people." Federalist No. 52, at 295 (Clinton Rossiter ed., 1961); *accord id.* Nos. 37, 39, 56.

Put simply, when an asymmetry is created such that the interests of the people's representatives are no longer aligned with the interests of the people, *and those representatives are no longer accountable to the people*, those representatives cease to be representatives at all. Such a government cedes all credibility to claims of upholding the rights of the individual as a core principle.

Second, partisan gerrymandering eliminates political competition to maximize safe seats. Stephanopoulos, *supra*, at 1506. Recent election cycles, such as that of 2022, have stood out for their near-complete elimination of competitive congressional elections. Reid Epstein & Nick Corasaniti, *'Taking the Voters Out of the Equation': How the Parties Are Killing Competition*, N.Y. Times (Feb. 6, 2022).

Competition tempers the desire of political parties to run ideologically extreme candidates because it creates a need to win over moderate voters, which drives representatives to better represent the political "community as a whole." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). Without it, the primary election becomes determinative. This often benefits more extreme candidates who attract more ideological rather than more moderate voters. *Whitford*, 585 U.S. at 83 (Kagan, J., concurring). This reduces the incentive of those politicians to compromise or moderate their views, with the result being that pragmatic, bipartisan solutions (which many voters favor) are sacrificed at the altar of ideological purity.

These hyper-polarized conditions are precisely what the Framers feared from a two-party system: the "mischiefs of faction" and the "instability, injustice and confusion [it] introduced," which are the "mortal diseases under which popular governments have everywhere perished." Federalist No. 10, at 77 (Madison). Gerrymandering is the epitome of faction run amok: a classic

case of "the public good [being] disregarded" by parties operating in a designed echo chamber of anti-competition. *Id.* It leaves policy to be dictated "not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority," *id.*, and "enable[s] the representatives of the people to substitute their will," Federalist No. 78, at 467 (Hamilton).

Third, as noted above, partisan gerrymandering reduces popular accountability by insulating representatives from their voters. It enables politicians, exactly as Respondents did here, to use highly accurate partisan heuristics to select voters they think will most reflexively re-elect their favored candidates, and then divide or overconcentrate the remaining voters. Stephanopoulos, *supra*, at 1506. Where politicians can effectively choose their voters, gerrymandering "[a]t its most extreme . . . amounts to 'rigging elections.'" *Whitford*, 585 U.S. at 84 (Kagan, J., concurring) (citation omitted). Such a lack of accountability and responsiveness runs afoul of South Carolina's foundational tenet and the first article of its constitution that "All political power is vested in and derived *from the people only*." S.C. Const. art. I, § 1 (emphasis added).

Modern technology has made these negative effects of partisan gerrymandering much worse. While map-drawers previously used manual processes relying on imperfect and incomplete data, today's lines are drawn using complex algorithms, sophisticated artificial intelligence programs, and super-computing capabilities, combined with granular data of voters' mostly static partisan preferences. *See* Sarah M.L. Bender, *Algorithmic Elections*, 121 Mich. L. Rev. 489, 511-13 (2022). Partisan gerrymandering is of course not new, but "gerrymanders [are] far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides." *Rucho*, 588 U.S. at 729 (Kagan, J., dissenting). Plainly stated: "These are not your grandfather's—let alone the Framers'—gerrymanders." *Id.*

Using these modern methods, the precision and extent to which Respondents have utilized partisan gerrymandering is repugnant to traditional democratic principles. The extreme asymmetry, reduced competition and increased partisan polarity, and impaired democratic accountability inherent to partisan gerrymandering make it uniquely resistant to traditional democratic solutions. While the South Carolina Constitution does not countenance such acts as the Respondents have taken, it is only a tool; to be effective, someone must pick it up and use it—as Petitioners have done here.

CONCLUSION

For the reasons above, and those in Petitioner's brief, Petitioner is entitled to relief.

Respectfully submitted,
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