In the Supreme Court of South Carolina

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

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 Election Commission .....Respondents

and

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

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BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AND PROFESSOR ROBERT F. WILLIAMS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Founded in 1995, the Brennan Center for Justice at New York University School of Law ("Brennan Center") is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.[1]

The Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as *amicus curiae*.

The Brennan Center also works to realize a fair and independent judicial system that protects fundamental rights, democratic values, and the rule of law under state constitutions as well as the U.S. Constitution. Recognizing that state courts and state constitutions are critical and distinct sources of protection of rights and democratic institutions, the Brennan Center regularly produces research and resources about state constitutional developments. The Brennan Center also regularly participates as *amicus* before the U.S. Supreme Court, federal circuit courts, and state appellate courts on these issues.

Professor Robert F. Williams is a Distinguished Professor of Law Emeritus at Rutgers University School of Law. He is an expert in state constitutional law and directed the Center for State Constitutional Studies at Rutgers. Professor Williams has authored extensive legal scholarship on state constitutional law, including *The Law of American State Constitutions* (2nd ed., 2023). He is also the co-author of *State Constitutional Law, Cases and Materials* (5th ed.,

[1] This brief does not purport to convey the position of New York University School of Law.

2015).

INTRODUCTION

State courts play an essential role in protecting our constitutional republic. Indeed, as Chief Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit has observed, state constitutions are the original sources of protections for many individual liberties, including those that are cornerstones of our republican form of government.[2] In fact, "most of the constitutional-rights litigation of the first 150 years after 1776 took place in the States."[3] This continues to the present day, with the U.S. Supreme Court holding that although challenges to partisan gerrymandered districts are non-justiciable under the federal constitution, this "conclusion [does not] condemn complaints about districting to echo into a void." *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019). Rather, "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id*. To this end, this Court has long made clear that, especially when the state constitution's text includes guarantees beyond those found in related federal provisions, "state courts can develop state law to provide their citizens with a second layer of constitutional rights." *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d 837 (2001).

Like many state constitutions, the South Carolina Constitution goes well beyond its federal counterpart to safeguard the right of its citizens to participate as equals in the political process by expressly mandating that elections be "free and open" and that qualified voters "have an equal right to elect officers." S.C. Const. art. I, § 5. Unlike the federal constitution,

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[2] *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 10-12 (2018) [hereinafter *51 Imperfect Solutions*]. ("Whether it's the individual liberty guarantees added in 1791 (the Bill of Rights), in 1865 (the Thirteenth Amendment), in 1868 (the Fourteenth Amendment), in 1870 (the Fifteenth Amendment), or in 1920 (the Nineteenth Amendment), all of the language underlying these guarantees originated in the States.").

[3] *Id.* at 13.

South Carolina's constitution also contains provisions guaranteeing that South Carolinians can use the franchise as a vital check on government power, *e.g.*, S.C. Const. art. IV, §§ 3, 5, 8; art. VI, § 7 (direct election of plural executives), and creating bulwarks against misuse of the legislative power, *e.g.*, S.C. Const. art. III, § 34 (prohibition on special legislation).

When, as here, an election takes place in a district that lawmakers intentionally manipulate far in excess of the changes needed to achieve population equality, transforming a once-competitive district into one where candidates of a favored political party always win by handy margins, there is nothing "free," "open," or "equal" about it. Voters in such a district may be able to cast ballots, but those ballots are deprived of force in a predetermined election. The heavy-handed rigging of results makes the election scarcely free, open, and equal in any meaningful sense of those words.

Indeed, this is an easy case. Unlike other cases involving difficult factual questions about whether the statewide share of seats won by each party is the product of objective redistricting or neutral reasons, this case concerns a single district redrawn by lawmakers with the stated goal of manipulating voting outcomes through partisan gerrymandering—motives that South Carolina lawmakers freely admitted repeatedly and at great length, including in their briefing before the U.S. Supreme Court. *See* Brief for Appellants at 2-4, 11-18, 25-28, 31-32, *Alexander v. S.C. State Conf. of the NAACP*, No. 22-807 (July 7, 2023) (acknowledging that the primary goal of redrawing at-issue congressional districts was to "pack[]" tens of thousands of "Democratic voters into District 6 'to make District 1 more electable'" and have "at least a 53.5% Republican vote share" (brackets removed)).

There is also no question of whether a fairer alternative map is possible consistent with the state's traditional districting principles. Lawmakers' own map from 2012—the map they

replaced with the new gerrymander—is such a map. Under that map, the highly competitive First Congressional District needed only modest changes to bring the district into compliance with the federal constitution's "one-person, one-vote" requirement. But lawmakers stated that they chose instead to make sweeping changes for one purpose: to entrench a favored party in power for the balance of the decade.

This case, in short, presents an ideal fact pattern for the Court to establish that gerrymandering with the intent to manipulate the electoral process violates the South Carolina Constitution. The Court should accept the U.S. Supreme Court's invitation to address the problem of partisan gerrymandering at the state level, and it should follow in the footsteps of sister courts which have held that such practices run afoul of similar state constitutional guarantees.

ARGUMENT

I. South Carolina's Constitution and Courts Play a Distinct Role in Protecting the Democratic Process That Is Broader Than That of Their Federal Counterparts.

From the nation's founding, states have served as independent and important guardians of citizens' democratic rights and individual liberties. Prior to the adoption of the U.S. Constitution, state constitutions served as "the sole protection against governmental overreaching."[4] Notwithstanding the addition of the Bill of Rights, which "was taken from and actually mirrored corresponding state enactments," the framers of the federal charter contemplated "that the states would remain the principal protectors of individual rights."[5] Indeed, prior to the enactment of the Fourteenth Amendment and incorporation of the Bill of Rights against the states, state constitutions provided the sole source of protection against violations of individual rights by

[4] Judith S. Kaye, *Dual Constitutionalism in Practice and Principl*e, 61 St. John's L. Rev. 399, 400 (1987).
[5] *Id.* at 400-01.

state officials.[6] Post-incorporation, "the conceptual genius of federalism remains an integral component of our system of government."[7]

Unlike the federal constitution—and like many state constitutions—the South Carolina Constitution is replete with provisions that (1) protect the link between voters and their representatives more strongly than the federal constitution; (2) reflect a commitment to political equality as an essential feature of republican government; and (3) enlist voters in directly checking government power.[8] Intentional partisan gerrymandering undermines each of these principles by: (1) entrenching preferred elected officials in office and thus severing the link between voters and elected officials necessary for responsive government; (2) imposing state-sponsored political inequality by favoring certain voters more than others; and (3) removing, through deliberate state action, the ability of voters to engage in meaningful oversight of elected officials. Accordingly, this Court should join its sister state courts in recognizing that South Carolina's Free and Open Election Clause limits intentional manipulation of the electoral process to achieve a favored political outcome at the expense of diluting voters' "equal right to elect officers" and "be granted equal influence" over election. *See Graham v. Sec'y of State Michael Adams*, 684 S.W.3d 663, 682-83 (Ky. 2023) ("While the Kentucky Constitution does not categorically forbid any consideration of partisan interests in the apportionment process,

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[6] *See* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 773 (2021).

[7] Hon. Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 Me. L. Rev. 1, 11-12 (2023).

[8] *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 880 (Mar. 2021) ("[P]opular sovereignty is a defining principle of state constitutions. . . . [S]tate constitutions embrace majority rule as the best approximation of popular will. . . . [S]tate constitutions propose political equality as a necessary condition for majority rule."); Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 583 (Dec. 2023) ("[I]n the state tradition, a foundational reason for separating government power is to enhance popular accountability.").

partisanship may of course rise to an unconstitutional level. As with other constitutional challenges to apportionment plans, a claim that an apportionment plan is unconstitutionally partisan may be considered by the judiciary without violating the political question doctrine."); *Grisham v. Van Soelen*, 539 P.3d 272, 285 (N.M. 2023) ("[A] partisan gerrymander of an egregious degree violates the democratic principles expressed above in the New Mexico Constitution."); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 814, 817 (Pa. 2018) (finding that "partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power," and "a diluted vote is not an equal vote," so a redistricting plan violates Pennsylvania's Free and Equal Elections Clause where it subordinates neutral criteria to "extraneous considerations such as gerrymandering for unfair partisan political advantage").

A. South Carolina's Constitution Contains Multiple Provisions Safeguarding the Link Between Voters and Their Elected Representatives Not Found in the Federal Constitution

The federal constitution does not directly concentrate power in the people, but rather in their proxies (states, representatives, and electors). But in state constitutions, explicit textual commitments to popular sovereignty are common,[9] and have been interpreted by courts to "underscore the importance of the franchise to effectuat[e] the other rights guaranteed by [state constitutions]." *Grisham*, 539 P.3d at 282.

In the case of South Carolina, the very first section of the South Carolina Constitution declares that "[a]ll political power is vested in and derived from the people only" and reserves for the people "the right . . . to modify their form of government." S.C. Const. art. I, § 1. This Popular Sovereignty Clause is from the 1868 Constitution and it embodies the principle that

[9] Bulman-Pozen & Seifter, *supra* note 8, at 869 ("Every state constitution but New York's includes an express commitment to popular sovereignty. The most common formulation declares that 'all political power is inherent in the people.'").

government authority comes from the people and the people have a fundamental right to revise their government.[10] *See, e.g.*, *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 296 n.72, 882 S.E.2d 770 (2023), *reh'g denied* (Feb. 8, 2023) (Kittredge, J. dissenting) (noting that art. I, § 1 is an expression of the "bedrock principle" that "the will of the people is expressed in the policy judgments of their elected representatives."). But that bedrock principle assumes the elections for those representatives are free from manipulation and can accurately channel popular will. By intentionally manipulating maps to exclude disfavored voters from particular districts, partisan gerrymandering artificially entrenches the power of favored voters and breaks this assumed link between "the people" and the "judgments of their elected representatives."

Unlike the federal constitution, state constitutions also expressly endow their citizens with the right to vote.[11] State constitutions further protect the right to vote by guaranteeing that elections be "free," "free and equal," or "free and open," barring certain restrictions on the franchise, or protecting the act of voting itself.[12] South Carolina's constitution includes all of the above. It expressly guarantees citizens' "entitle[ment] to vote" and devotes an entire Article to the "right of suffrage." S.C. Const. art. II. Among other protections, the South Carolina Constitution provides that "[a]ll elections shall be free and open"; declares that "every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an *equal right* to elect officers and be elected to fill public office" (emphasis added); mandates that "[t]he right of suffrage . . . be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct"; prevents any

[10] Cole B. Graham, Jr., *The South Carolina State Constitution* 49 (Oxford University Press 2011).
[11] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 91 (Jan. 2014).
[12] *Id.* at 103; Bulman-Pozen & Seifter, *supra* note 8, at 871-72.

"power, civil or military," from "at any time interfer[ing] to prevent the free exercise of the right of suffrage in this State"; and even "privilege[s] from arrest" voters going to or returning from the polls. S.C. Const. art. I, § 5; art. II, §§ 1, 2, 11. *See Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390 (2020) ("The right to vote is a cornerstone of our constitutional republic."); *State v. Huntley*, 167 S.C. 476, 481-82, 166 S.E. 637 (1932) ("All persons who are citizens of the State possessing these qualifications, as prescribed by the Constitution, are entitled to an equal vote in the election of officers . . . ." (interpreting S.C. Const. art. I, § 5)). By contrast, the original U.S. Constitution did not guarantee the right to vote, and even the intervening amendments do not contain a positive guarantee of the right to vote, much less provide such comprehensive safeguards for it.[13] *See* U.S. Const. art. 1, § 2 (only reference to individual voting rights in original federal constitution delegates to states the "[q]ualifications" for voting); amend. XV (right to vote cannot be denied based on race); amend. XIX (right to vote cannot be denied based on sex); amend. XXVI (right to vote for those eighteen and up cannot be denied based on age).

B. South Carolina's Free and Open Elections Clause Contains an Equality Mandate That Demands Voters Have Equal Influence Over Elections and Protects Against Intentional Manipulation of the Electoral Process to Undermine That Equality.

Although South Carolina's current constitution was ratified in 1895, its Free and Open Elections Clause derives from the 1868 Constitution, *see* S.C. Const. of 1868, art. I, § 31, enacted against the backdrop of Reconstruction. After the Civil War, the federal government required South Carolina to rewrite its constitution and change its election procedures "to make the electoral process more democratic."[14] Consistent with that mandate, the delegates to the 1868

[13] Douglas, *supra* note 11, at 95-97.
[14] Susan Bowler & Frank T. Petrusak, *The Constitution of South Carolina: Historical and Political Perspectives*, in *Government in the Palmetto State*, 27-28 (Luther F. Carter & David S. Mann eds., 1984).

Constitutional Convention sought to draft a constitution that would "secure to every man . . . an equal share of political rights"[15] and be "opposed to any general disfranchisement of the masses of the people."[16]

The resulting Constitution of 1868 was a milestone.[17] It was the first in the state's history to "secure to every man . . . an equal share of political rights,"[18] the first to be ratified by voters,[19] the first to require that elections be "free and open," and the first to guarantee that voters "shall have an equal right to elect officers and be elected." S.C. Const. of 1868, art. I, § 31. The 1868 Constitution also added special language to "protect[] . . . the right of suffrage," S.C. Const. of 1868, art. VIII, § 1, which is preserved in Article II of the present-day constitution.[20]

The South Carolina Constitution has not always lived up to its pronouncements of political equality—in particular, now-defunct portions of the later 1895 constitution had the effect of disenfranchising many Black South Carolinians—but subsequent drafters' preservation of an express constitutional provision guaranteeing an equal right to elect representatives across several constitutional iterations reinforces the central role of the franchise in South Carolina's

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[15] Opening Remarks of Convention President A.G. Mackey, *Proceedings of the Constitutional Convention of South Carolina*, 18 (Jan. 15, 1868) [hereinafter "*1868 Constitutional Convention*"], available at https://archive.org/details/proceedingsofcon00sout.
[16] *Id.* at 17; *see also id.* at 16 (noting that the convention was a response to the anti-democratic establishment of the state's prior constitutions, *i.e.*, "the five South Carolina Conventions which have preceded it, . . . [where] the noble doctrine that governments were constituted for the good of the whole, was substituted that anti-republican one, that they were intended only for the benefit of one class at the expense of another").
[17] *Id.* at 27-29; Cole B. Graham, Jr., *supra* note 10, at 31.
[18] Opening Remarks of Convention President A.G. Mackey, *1868 Constitutional Convention*, *supra* note 15 at 17.
[19] 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 (Summer 2006).
[20] Cole B. Graham, Jr., *supra* note 10, at 71.

constitutional order.[21] *C.f. Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 190, 906 S.E.2d 345 (2024) (finding that the 1895 constitution's "mandate that South Carolina's black and white children be educated in separate facilities" neither diluted nor abolished the state's "constitutional obligation to provide free public education," which derived from the 1868 constitution).

The plain text of the Free and Open Elections Clause unambiguously sets out its drafters' intent. The Clause demands that elections be "free and open" and endows all voters with "an equal right to elect officers," free from governmental interference or manipulation. S.C. Const. art. I, § 5. Indeed, this Court need look no further than its own precedents for the proposition that the essential values at the heart of the Clause require that "the vote of every elector be granted equal influence with that of every other elector," and that "every voter has the same right as any other voter." *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C,* 189 S.C. 85, 90, 200 S.E. 95 (1938). Peer courts have interpreted such mandates to bar intentional partisan gerrymandering. *E.g., League of Women Voters of Pa.*, 178 A.3d at 804 (finding, with respect to a Free and Open Elections Clause that also guarantees equality in elections, that "the plain and expansive sweep of the words 'free and equal,' . . . [is] indicative of the framers' intent . . . that all voters have an equal opportunity to translate their votes into representation").

Neither the text nor the history of the Free and Open Elections Clause—nor this Court's precedents—can be squared with legislators' intentional manipulation of the electoral process for the sole and expressly stated purpose of ensuring that one favored political party can suppress competition and no longer face a serious electoral challenge. This Court should vindicate the

[21] *Id.*

mandate in South Carolina's Free and Open Election Clause and hold that such intentional silencing of disfavored voters, clearly evidenced in the record, is unconstitutional.

C. South Carolina's Constitution Empowers Popular Majorities to Act as a Vital Check on Government Power

Like many nineteenth century constitutions, several portions of the South Carolina Constitution recognize the risk of abuse of power by elected officials and empower popular majorities as critical safeguards.[22] By dividing the electorate along partisan lines, partisan gerrymandering impedes the ability of popular majorities to check government power.

Although portions of South Carolina's subsequent 1895 constitution at one time added barriers inhibiting Black and poorer white South Carolinians from using the franchise to check government power, it never abandoned—and to this day retains—populist constitutional innovations common to the Jacksonian and Progressive eras empowering voters to act as vital checks against governmental power.[23] For example, South Carolinian's constitution provides for a plural executive branch with voters directly electing each office. S.C. Const. art. IV, §§ 3, 5, 8; art. VI, § 7 (direct election of governor, lieutenant governor, Secretary of State, Attorney General, Treasurer, Superintendent of Education, Comptroller General, and Commissioner of

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[22] *See generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. Legis. 39, 44-45 (2014) ("The primary issue facing constitution-makers in the nineteenth century was how best to secure a republican form of government in light of emerging concentrations of political power . . . . As a result, popular rule emerged as a common issue, resulting in broader distributions of voting rights, enhanced political responsiveness through elections of most state officeholders, and the recognition that 'there was a good common to society as a whole, which government was obligated to pursue.'" (quoting 100 G. Alan Tarr, *Understanding State Constitutions* 98 (1998)); Marshfield, *supra* note 8, at 583 ("State constitutions have a long history of viewing government officials as a dangerous elite who will eventually coalesce in a common interest against the people. . . . [A] foundational reason for separating government power is to enhance popular accountability.").

[23] *See generally* Marshfield, *supra* note 8, at 566 ("[A]n extension of the idea that power should correspond with direct pathways of popular accountability, states began to proliferate the number of popularly elected executive officials during the Jacksonian era.").

Agriculture). That stands in contrast to the federal Electoral College, which "construct[s] a barrier to majority rule at the national level," as well as the broader structure of the federal constitution, which does not empower voters to directly elect any member of the executive branch.[24]

While these provision underscore South Carolina's concern with executive power unchecked by voters, other provisions in South Carolina's constitution evince the framers' specific concern with misuse of legislative power for private ends—a common concern for constitutional drafters during the 19th century.[25] Unlike the federal constitution, South Carolina's includes a prohibition on "special laws." S.C. Const. art. III, § 34; *see Home Ins. Co. v. New York*, 134 U.S. 594, 606 (1890) (holding even Fourteenth Amendment does not prohibit special legislation federally). Restrictions on special legislation were populist innovations that reflected both "a 'belief that legislatures are by nature utterly careless of the public welfare'" and a "common concern for the special treatment of powerful interests."[26]

This Court has found that legislative efforts to privilege certain South Carolinians over others in political process can amount to a violation of South Carolina's prohibition on special legislation. For example, in *Kearse v. Lancaster*, this Court found that a statute incorporating a new school district violated South Carolina's prohibition on special legislation in part because "[s]pecial rights [were] given to the electors residing in the territory proposed to be incorporated as a school district here, when such rights are not given to electors of other school districts of the

[24] Bulman-Pozen & Seifter, *supra* note 8, at 900.
[25] *See generally id.* at 885 ("By the early nineteenth century, concerns that legislatures were not faithful representatives of the people had grown acute, and state reformers adopted a new round of constitutional provisions that sought to check the legislature in the service of greater popular accountability.").
[26] Schutz, *supra* note 22 at 45, 46 (quoting Charles Binney, *Restrictions upon Local and Special Legislation in State Constitutions* 9 (1894)).

state." 172 S.C. 59, 63, 172 S.E. 767 (1934). The ratifiers' choice to include "a limitation upon the power of the Legislature" to remedy "the great and growing evil of special and local legislation" should lead this Court to view legislation engaging in political favoritism toward particular South Carolinians with suspicion. *Thomas v. Macklen*, 186 S.C. 290, 297-98, 195 S.E. 539 (1938) (emphasis omitted).

Taken together, these provisions clarify a fundamental difference between the federal constitution and South Carolina's constitution that should inform this Court's analysis: while the federal constitution largely distances voters from acting as a direct check against misuse of government power, South Carolina's constitution envisions voters playing a central role in doing so. Legislators' intentional manipulation of the electoral process to entrench the candidates of favored political parties or, conversely, to target and lock out disfavored candidates, parties, and voters—whether through partisan gerrymandering or other means—prevents voters from acting as a check on government power and thus shuns the populist principles animating South Carolina's constitution.

II. Federal Jurisprudence Is Not Determinative as to Whether the South Carolina Constitution Protects Against Electoral Manipulation Via Partisan Gerrymandering.

A. State Constitutions Are Independent Sources of Authority That Can and Do Establish More Robust Protections Than Their Federal Counterpart.

It is well-established that states possess the "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also State v. German*, 439 S.C. 449, 471, 887 S.E.2d 912 (2023) ("State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." (citation omitted)). In practice, too, "[o]n issues encompassing free speech, religious liberty, private property rights, due process, privacy, capital punishment, education,

victims' rights, and the rights of criminal defendants, state courts have frequently identified greater constitutional protections than their federal counterparts."[27] Thus, as this Court has long recognized, "the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *German*, 439 S.C. at 471 (citation omitted). Or, put differently, state constitutions "properly serve[] as a one-way ratchet in the protection of individual rights."[28]

B. State Courts Have an Obligation to Independently Interpret Their Constitutions.

As the preeminent authority on the South Carolina Constitution, this Court should decline to interpret its state constitutional guarantees in lockstep with federal jurisprudence by finding either that South Carolina's Constitution does not protect voters from partisan gerrymandering or that such claims are not justiciable. As explained above, the constitutions' respective texts and contexts are fundamentally different. And state constitutions like South Carolina's laid the foundation for the federal one—not the other way around.[29]

Lockstepping state constitutional jurisprudence with federal constitutional interpretation devalues state constitutions as an independent source of law and detracts from the nation's federalist structure.[30] After all, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way."[31] To the contrary, the federalist structure contemplates a "redundancy in interpretive authority" with "state courts and federal courts

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[27] Bolick, *supra* note 6, at 771.
[28] *Id.*, at 773.
[29] *51 Imperfect Solution*, *supra* note 2, at 10-11.
[30] *See generally* Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353 (2019).
[31] *51 Imperfect Solutions*, *supra* note 2, at 174.

independently constru[ing] the guarantees that their respective constitutions have in common" as "one important way that our system of government channels disagreement in our diverse democracy."[32] Indeed, one state supreme court justice has called it a "settled matter that state courts ought to independently interpret their state constitutions even when those constitutions contain provisions that parallel those in the Federal Constitution."[33] To interpret the state constitution in lockstep with the federal one is to deem it a second-tier authority, rather than a coequal source of rights.

State court constitutional innovation not only fulfills those foundational texts' independent meaning, but also advances the development of federal constitutional law, which "profit[s] from the contest of ideas" among state jurists.[34] A state-centric approach is likewise consistent with the broader constitutional order as "a nation whose constitution invests limited and defined powers in the national government, with the residuum of legitimate government powers remaining in the states."[35]

Lockstepping also overlooks that federal courts often underenforce constitutional rights for prudential reasons. As jurists have observed, it is a natural consequence of our federalist system that federal courts sometimes decline to enforce federal constitutional rights to the same extent as analogous state constitutional rights.[36] This tendency toward underenforcement generally derives from federalism concerns, rooted in a desire not to unduly interfere with local

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[32] Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1312 (Nov. 2017).
[33] Justice R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986929.
[34] *51 Imperfect Solutions*, *supra* note 2, at 20.
[35] Bolick, *supra* note 6, at 776-77.
[36] *51 Imperfect Solutions*, *supra* note 2, at 175; *see generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (Apr. 1978).

governance or to apply monolithic judicial solutions to every person in every jurisdiction across the country.[37] Such concerns undergirded the U.S. Supreme Court's decision to find partisan gerrymandering claims non-justiciable in *Rucho*. 588 U.S. at 718, 719 (declining to find partisan gerrymandering claims justiciable in federal court in part because the expansion of federal judicial authority would have been "unlimited in scope and duration—it would recur over and over again around the country").

These same federalism concerns do not apply when state courts give full effect to their own constitutions. Because they are better situated to tailor solutions to local conditions and local traditions, state courts have no "reason to apply a 'federalism discount' to [their] decisions," and thus should not rely on federal courts for guidance when interpreting state constitutions.[38] Similarly, many state courts have approached partisan gerrymandering cases not by applying the federal political question doctrine, but rather by "carefully balanc[ing] competing considerations" and avoiding "wander[ing] unnecessarily beyond the bounds of the proper judicial function into the political thicket," while "also remain[ing] fastidiously faithful to our most solemn duty of guaranteeing that the people remain free of the tyranny that lies in a government unconstrained by constitutional limitations." *Graham*, 684 S.W.3d at 679.

Historically, when for prudential reasons the U.S. Supreme Court declines to enforce specific federal constitutional rights, it is common for state courts to continue to protect state constitutional analogues to those rights.[39] For instance, following the U.S. Supreme Court's decision to no longer protect economic liberties rooted in substantive due process, state courts

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[37] *Id.*
[38] *51 Imperfect Solutions*, *supra* note 2, at 175.
[39] *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976).

continued to do so for decades,[40] including South Carolina. *E.g.*, *Stone v. Salley*, 244 S.C. 531, 539, 137 S.E.2d 788 (1964) (holding that fixing the retail price of milk violated South Carolina's constitution because "such governmental intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise"), *overruled in part by R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) . The same has proven true with respect to takings claims, as well as cases concerning impairment of contract, licensing, and economic liberties.[41] Such practice is consistent with the U.S. Supreme Court's observation in *Rucho* that states are "actively addressing the [partisan gerrymandering] issue on a number of fronts." 588 U.S. at 719.

Another contributing factor in the underenforcement of federal constitutional rights is a concern about the dangers of creating rules that are, in effect, permanent because of the difficulty of changing the federal constitution. As noted by Judge Sutton, however, "the political accountability risks facing the federal courts when it comes to the development of new rights does not apply in the states. The state constitutions are more readily amendable."[42] Indeed, the South Carolina Constitution has been amended over 400 times since its adoption.[43]

Finally, as Arizona Supreme Court Justice Clint Bolick observed, perhaps "the most compelling reason for state judges to take responsibility for independently interpreting their state

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[40] *Id*.
[41] *See* Jeffrey S. Sutton, *21st Century Federalism: A View from the States*, 46 Harv. J.L. & Pub. Pol'y 31, 34-36 (2023).
[42] Jeffrey S. Sutton, *What Should Be National and What Should Be Local in American Judicial Review*, 2022 Sup. Ct. Rev. 191, 213 (2022); *see also 51 Imperfect Solutions*, *supra* note 2, at 16-19.
[43] *South Carolina Constitution*, Ballotpedia, https://ballotpedia.org/South_Carolina_Constitution (last visited Feb. 6, 2025).

constitutions" is that "[U.S.] Supreme Court justices do not take an oath to uphold the [State] Constitution. But we do."[44]

C. Federal Jurisprudence Is Particularly Inapposite in the Context of This Case.

The argument against a lockstep analysis is particularly strong where, as here, the South Carolina Constitution contains a constitutional provision with no federal analogue (the Free and Open Elections Clause) that specifically protects voters from the harm which partisan gerrymandering inflicts upon them: inequality in the right to elect officers. *E.g.*, *Graham*, 684 S.W.3d at 684 (equality mandate in Kentucky's Free and Open Elections Clause is violated when a voter's vote is not afforded "the same influence as that of any other voter"). Indeed, the U.S. Constitution has little to say about voting—much less a comparable guarantee to the South Carolina Constitution's requirement that elections be "free," "open," and "equal," *see* S.C. Const. art. I, § 5. Thus, federal gerrymandering jurisprudence cannot answer the questions before this Court.

Moreover, South Carolina requires that "[a]ll sections of the Constitution must be considered together," *Gaud v. Walker*, 214 S.C. 451, 476, 53 S.E.2d 316 (1949), meaning that South Carolina's Equal Protection and Free Speech Clauses must be construed in tandem with its Free and Open Elections Clause. Political equality is thus quadruply guaranteed by the South Carolina Constitution, which: (i) declares that elections must be "free and open," (ii) demands that all voters "have an equal right to elect officers," (iii) guarantees all people "the equal protection of the laws," and (iv) safeguards the freedom of speech and association. *See* S.C. Const. art. I, §§ 2, 3, 5. The federal constitution, by contrast "is wary of unmediated popular sovereignty, majority rule, and political equality" and thus "bears a very different relationship to

[44] Bolick, *supra* note 2, at 777 (quoting *State v. Mixton*, 478 P.3d 1227, 1249 (Ariz. 2021) (Bolick, J., dissenting)).

democracy than do state constitutions."[45] In light of these textual and structural differences, it makes little sense to conclude that South Carolina's Equal Protection and Free Speech Clauses perfectly mirror their federal counterparts.

When multiple state constitutional provisions protect the same underlying right, it is common for state courts to read the provisions jointly in a manner that enhances the underlying protection.[46] For example, state supreme courts have found that their state constitutional commitments to providing for a public school system must be read harmoniously with—and thus are enhanced by—state equal protection clauses. *See*, *e.g.*, *Sheff v. O'Neil*, 678 A.2d 1267 (Conn. 1996); *Bd. of Educ. of Kanawha v. W. Va. Bd. of Educ*., 639 S.E.2d 893, 899 (W. Va. 2006). Other state courts have interpreted search and seizure protections in a similar manner, finding them to be enhanced by state constitutional privacy guarantees. *Quigg v. Slaughter*, 154 P.3d 1217, 1223 (Mont. 2007). And in a recent case concerning partisan gerrymandering, the New Mexico Supreme Court determined that the state's Popular Sovereignty Clause and Right of Self-Government Clause required the court to construe its Equal Protection Clause "in *par[i] materia* or through the 'prism' of [these] other Bill of Rights provisions that also speak directly to the right to fair electoral representation." *Grisham*, 539 P.3d at 282. This Court has long recognized that political equality among voters is jointly protected by multiple provisions, including South Carolina's Free and Open Elections Clause and its Equal Protection Clause. *E.g.*, *Bailey*, 430 S.C. at 271-72; *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182 (2009). Accordingly, this Court should recognize that these parallel guarantees of political equality enhance one another.

[45] Bulman-Pozen & Seifter, *supra* note 8, at 895.
[46] *See* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provision Together*, Wis. L. Rev. 1001 (2021).

Finally, Petitioner's construction of the South Carolina Constitution is fully consistent with federal precedent on partisan gerrymandering. In *Rucho*, the U.S. Supreme Court invited state courts to curb partisan gerrymandering through their own constitutions. *Rucho,* 588 U.S. at 719-20. Though it held that the federal constitution lacked judicially manageable standards to adjudicate partisan gerrymandering claims, the U.S. Supreme Court emphasized that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 719. It further held that it was neither "condon[ing] excessive partisan gerrymandering" nor "condemn[ing] complaints about districting to echo into a void," because federal justiciability is not interchangeable with justiciability under the separate law of the states. *Id.* at 719. In other words, the "solution" to partisan gerrymandering does not "lie[] with the federal judiciary"—it lies with state courts and state law. *Id.* at 718.[47]

CONCLUSION

For the forgoing reasons, the Brennan Center and Professor Williams respectfully request that the Court grant Petitioner's request for relief as set forth in its Complaint.

[47] Given that state constitutions are "more likely to share historical and linguistic roots" with each other than with the federal document, to the extent that this Court should look beyond South Carolina for guidance, the jurisprudence "of a sister state should have the most to say about the point." *51 Imperfect Solutions*, *supra* note 2, at 175.

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