No. 413PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; *et al.*,

Plaintiffs-Appellants,

v.

REPRESENTATIVE DESTIN HALL; *et al.*,

Defendants-Appellees.

From Wake County
No. 21 CVS 015426

REBECCA HARPER; *et al.*,

Plaintiffs-Appellants,

v.

REPRESENTATIVE DESTIN HALL; *et al.*,

Defendants-Appellees.

From Wake County
No. 21 CVS 500085

****

AMICUS CURIAE BRIEF OF PROFESSOR CHARLES FRIED IN SUPPORT OF PLAINTIFFS-APPELLANTS

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AMICUS CURIAE BRIEF OF PROFESSOR CHARLES FRIED IN SUPPORT OF PLAINTIFFS-APPELLANTS[1]

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[1] No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. See N.C. R. App. P. 28(i)(2).

INTRODUCTION

Gerrymandering politicians have honed their craft. As technology has advanced and voter behavior has become easier to predict, mapmakers can more precisely carve up states to insulate themselves from popular will.

Against this backdrop, even as the U.S. Supreme Court held that federal courts lack jurisdiction to review partisan gerrymanders, it was quick "not [to] condone excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead, it invited those harmed to seek redress at state courthouse doors. *Id.* This Court, too, has recognized the harms of increasingly gerrymandered districts. *See Stephenson v. Bartlett*, 355 N.C. 354, 375, 562 S.E.2d 377, 392 (2002).

Plaintiffs in this case have heeded these calls. North Carolina's Constitution gives plaintiffs ample basis for their effort. This Court should remedy their harms.

ARGUMENT

I. State constitutions contain protections of individual rights beyond the federal Constitution.

A. State supreme courts have an independent duty to guarantee the full protections of their constitutions.

As the U.S. Supreme Court closed the door to partisan gerrymandering claims under the federal Constitution, it emphasized that nothing prevents state courts from taking a different tack. *Rucho*, 139 S. Ct. at 2507. That

should come as no surprise. State constitutions contain myriad protections absent from the federal Constitution.

"State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). State supreme courts are the final arbiters of the meaning of their constitutions and they "may experiment all they want with their own constitutions, and often do in the wake of [the Supreme] Court's decisions." *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (Scalia, J.). As part of this long tradition of state constitutions exceeding the federal constitutional floor, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution." Brennan, 90 HARV. L. REV. at 491. They must go further, considering the text, structure, and history of their own constitutions to determine whether they provide stronger bulwarks against government encroachment.

B. The independent duty of state supreme courts is a critical feature of our federal system.

This two-tiered system is the defining feature of American governance. State constitutions' independent protection of individual rights reflects the best of our federalist traditions: people of a state can organize and restrain

their government beyond what the federal Constitution requires. "Our system of dual sovereigns comes with dual protections." *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 2 (2018).

State constitutions are the "ancestor[s], not the offspring, of the federal Constitution." *League of Women Voters v. Commonwealth* ("*LWV*"), 178 A.3d 737, 741 (Pa. 2018). The Revolutionary period was the "most creative and significant period of constitutionalism in modern Western history" due to "state constitutions that preceded the [federal] Constitution by more than a decade." Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993). The individual liberties guaranteed in the federal Constitution—including the Bill of Rights, the Reconstruction Amendments, and women's suffrage—were all innovated in the states prior to inclusion in our federal founding document. *See* SUTTON, IMPERFECT SOLUTIONS at 8. And "the state and federal founders saw federalism and divided government as the first bulwark in rights protection and assumed that the States and state courts would play a significant role, even if not an exclusive role, in that effort." Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 795 (2018).

Prior to incorporation of the protections of the Bill of Rights, state constitutions were the only constitutional safeguards of individual rights

against any actors other than the federal government. *See* Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities*, 69 TEMP. L. REV. 1247, 1249 (1996). Incorporation did not then deprive people of the rights already secured to them but provided an additional and independent set of protections. While focus shifted to the federal Constitution, the existing rights under state constitutions did not wane. Indeed, in the later twentieth century, that focus began to return to state constitutions, with state courts again relying on state guarantees to provide "greater protection than was available under the federal Constitution" in hundreds of cases. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS, 165–66 (2018).

That state constitutions provide guarantees beyond the federal floor reflects states' role as laboratories of democracies. "Just as American citizens benefit from laboratories of policymaking experimentation by state legislatures, they can benefit from laboratories of *interpretation* by state courts." Sutton, 70 RUTGERS U. L. REV. at 797. Indeed, if state courts guarded only those rights preserved by the federal Constitution, the bulk of state constitutions would be rendered surplusage. This does not reflect the purpose of our federal structure or the rights secured to the people. Instead, when, as here, the U.S. Supreme Court declined to enforce the rights violated by partisan gerrymanders, "state courts [became] the *only* forum . . . for

enforcing the right under their own constitutions, making it imperative to see whether, and if so, how the States fill the gaps left by the U.S. Supreme Court." SUTTON, IMPERFECT SOLUTIONS at 2.

C. Many states recognize that their state constitutions guarantee greater protection than the federal Constitution.

Reflecting this aspect of American federalism, many state courts interpret constitutional provisions more broadly than comparable federal protections. State supreme courts throughout the country recognize their independent duties under their own constitutions to protect their citizenry. *See, e.g.*, *State v. Guillaume*, 975 P.2d 312, 316 (Mont. 1999) ("In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart."); *State v. Hernandez*, 410 So.2d 1381, 1385 (La. 1982) (holding "we cannot and should not allow [federal constitutional] decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana").

This judicial independence extends to many relatively broad provisions that state courts have understood to protect rights central to individual liberty. For example, forty-eight states interpret the equal protection clause of their state constitutions to provide greater protections than the federal

Clause. GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 1.7 (Nov. 2021). Recently, for instance, the Minnesota Supreme Court reaffirmed that the state constitution's equal protection guarantee "hold[s] lawmakers to a higher standard of evidence when a statutory classification demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently." *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020) (citing *State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991)); *contra Washington v. Davis*, 426 U.S. 229, 239–48 (1976) (collecting cases and holding that the federal Equal Protection Clause requires discriminatory purpose).

These distinct safeguards reach numerous rights. Beginning with speech, numerous state constitutions confer greater protection than the federal Constitution. *See, e.g.*, *Trusz v. UBS Realty Invs., LLC*, 123 A.3d 1212, 1222 (Conn. 2015) (holding Connecticut Constitution provides broader protections for workplace speech than *Garcetti v. Ceballos*, 547 U.S. 410 (2006)); *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 46 A.3d 507, 513 (N.J. 2012) (holding "affirmative guarantee" of New Jersey Constitution "offers greater protection than the First Amendment"); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002) (Pennsylvania's Constitution "affords greater protection for speech and conduct than does the First Amendment");

State v. Henry, 732 P.2d 9, 17 (Ore. 1987) (holding Oregon Constitution provides broader protection from obscenity charges than *Roth v. United States*, 354 U.S. 476 (1957)).

State constitutions often provide greater protection to criminal defendants than the federal Constitution. For example, the exclusionary rule is more protective under multiple state constitutional decisions. *See generally* SUTTON, IMPERFECT SOLUTIONS at 42–83. In *United States v. Leon*, 468 U.S. 897, 900 (1984), the U.S. Supreme Court established a good-faith exception to the exclusionary rule, allowing the admission of evidence gathered in violation of the Fourth Amendment. Numerous state courts, interpreting their own protections against illegal search and seizure, rejected a similar exception. *See, e.g.*, *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988); *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992); *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991); *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 373 (2011) (at least twenty states have rejected the good-faith exception post-*Leon*); *cf. State v. Sullivan*, 74 S.W.3d 215, 222 (Ark. 2002) (on remand from U.S. Supreme Court holding pretextual arrest constitutional, determining that arrest violated Arkansas Constitution).

Likewise, state supreme courts have interpreted their constitutions to provide more robust protections against double jeopardy than the federal Constitution. *See, e.g.*, *State v. Lynch*, 74 P.3d 73, 79 (N.M. 2003); *Guillaume*, 975 P.2d at 316. So too have state supreme courts found the death penalty to be unconstitutional under their state constitutions. *See, e.g.*, *State v. Gregory*, 427 P.3d 621, 626 (Wash. 2018); *see also People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004).

State supreme court interpretations of state constitutional provisions protecting personal rights have been precursors to protection being recognized under the federal Constitution. States found sodomy laws unconstitutional under state constitutions before *Lawrence v. Texas*, 539 U.S. 558 (2003). *See, e.g.*, *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 25–26 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997). So too for marriage rights of same-sex couples before *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 412 (Conn. 2008); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948–49 (Mass. 2003). In the same vein, state supreme courts, in states both with and without an explicit textual right of privacy, have found greater protection for privacy rights than the U.S. Supreme Court. *See, e.g.*, *State v.*

Brown, 156 S.W.3d 722, 729 (Ark. 2004); *State v. Perry*, 610 So.2d 746, 758 (La. 1992); *State v. Saunders*, 381 A.2d 333, 341 (N.J. 1977).

D. The North Carolina Constitution provides greater protection than the federal Constitution.

North Carolina is among the states with greater protections under its founding document than the federal Constitution:

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum v. Univ. of N.C. ex rel. Bd. of Gov'rs, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (internal citations omitted). More bluntly, "in construing and applying our laws and the Constitution of North Carolina, this Court is not bound by the decisions of federal courts, including the Supreme Court of the United States." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989).

Indeed, "[t]his Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedoms of association, speech, and voting." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 55, 707 S.E.2d 199, 208–09 (2011) (Newby, J., dissenting)

(internal citations omitted). For example, in *Blankenship v. Bartlett*, 363 N.C. 518, 523, 681 S.E.2d 759, 763 (2009), this Court held that the state "Equal Protection Clause requires a heightened level of scrutiny of judicial election districts," contrary to the assessment of the U.S. Supreme Court in *Chisom v. Roemer*, 501 U.S. 380 (1991).

II. North Carolina's Constitution precludes partisan gerrymandering.

North Carolina's Constitution is appropriately understood as exceeding federal constitutional protections and precluding partisan gerrymandering. Both the Free Elections Clause, N.C. CONST. art. 1, § 10, and the Equal Protection Clause, *id.* § 19, provide ample basis to strike down a highly biased map. And courts elsewhere have interpreted sister clauses to prohibit gerrymandering. *See LWV*, 178 A.3d at 817–21; *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987).

A. The Free Elections Clause provides distinct constitutional protections.

The state Declaration of Rights mandates that "[a]ll elections shall be free." N.C. CONST. art. 1, § 10. The Free Elections Clause, among others, makes the North Carolina "Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum*, 330 N.C. at 783. This Court's holdings demonstrate that the Clause is an

independent guarantee. *See, e.g.*, *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964).

This Court is hardly alone in that insight. Twenty-six state constitutions declare that elections shall be "free," "free and equal," or "free and open." *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103 & n.86 (2014). Courts have long recognized that these clauses create greater voter protections than the federal constitution. In *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006), for instance, the Missouri Supreme Court observed that while the federal Constitution only includes a right to vote by implication, that state's Free Election Clause and affirmative list of voter criteria ensure a positive right to vote. *Id.* at 211. The two clauses create "more expansive and concrete protections of the right to vote under the [state] Constitution," reflecting that "voting rights are an area where [the] state constitution provides greater protection than its federal counterpart." *Id.* at 212. As a result, the Missouri court struck down a voter ID law as imposing an unconstitutional burden on the state constitutional right.

Weinschenk is one of many cases in which state courts held that their free elections clauses protect voting rights more than the federal constitution. *See, e.g.*, *LWV*, 178 A.3d 737; *Finke v. State ex rel. McGrath*, 65 P.3d 576 (Mont. 2003) (applying strict scrutiny to regulation on voting); *Applewhite v.*

Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *18 (Pa. Commw. Ct. Jan. 17, 2014); *see also Martin v. Kohls*, 444 S.W.3d 844, 852 (Ark. 2014).

Not only does this Court's jurisprudence align with other courts' understanding of free elections clauses as expanding voter rights, but it would be on solid footing in applying that insight to partisan gerrymandering. In *LWV*, 178 A.3d 737, Pennsylvania's Supreme Court reaffirmed that the state's constitution better protects voters than its federal counterpart. And, it explained, the history and import of its Free Elections Clause means it "should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides . . . an equally effective power to select the representative of his or her choice, . . . bar[ring] the dilution of the people's power to do so." *Id.* at 814. "An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes," the court reasoned, violated this tenet, and functioned as the state "interfer[ing] to prevent the free exercise of the right of suffrage." *Id.* at 821 (quoting PA. CONST. art. 1, § 5).

The history of Pennsylvania's Free Elections Clause, which the Pennsylvania Supreme Court carefully examined and concluded prohibits partisan gerrymandering, *id.* at 803–09, is also the history of North Carolina's Clause. Notable among the states with free elections clauses are Virginia, Pennsylvania, Maryland, Massachusetts, and North Carolina—

those with the earliest constitutional frameworks. As an initial matter, this alone suggests that the Clause goes further than the federal Constitution: these states, including North Carolina, adopted their Free Elections Clauses before federal constitutional ratification, which indicates that they are not coextensive with federal protections. *See supra* Part I.B.

Drafters of early state constitutions drew free elections clauses from the English Declaration of Rights of 1689. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 45–46 (2d ed. 2013). The clauses' predecessor was included in the English Declaration following the "Glorious Revolution" to address the King's subversion of parliamentary democracy through manipulating the electorate in different areas. J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 148 (1972).

North Carolina's drafters "freely borrowed" from the constitutions of Virginia, Maryland, and Pennsylvania when drafting the state's Declaration of Rights, which represented a "reasoned statement of principles" at the core "of the Anglo-American tradition of political expression." ORTH & NEWBY at 45–46. The Declaration of Rights itself explains the purpose of free elections in its preceding section: the "redress of grievances" and the "amending and strengthening [of] the laws." N.C. CONST. art. I, § 9; *see also* ORTH & NEWBY at 55–57.

This purpose is instructive: "the theme of popular sovereignty is sounded" in Sections 9 and 10's requirements of frequent and free elections. ORTH & NEWBY at 56. That theme appears throughout the Declaration; the right to assemble, for example, reflects the need to "instruct their representatives" and seek "redress of grievances," N.C. CONST. art. I, § 12, a phrase also used in the frequent elections clause, *id.* § 9. Elections are the "principal means of translating [popular sovereignty] into reality" and, "[t]o be effective, elections must be frequent and free." ORTH & NEWBY at 56. This Court has recognized a similar principle: "[T]his is a government of the people, in which the will of the people,—the majority,—legally expressed, must govern." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897); *see also Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937) (noting that underpinning of Free Elections Clause is "consent of the governed").

North Carolina has only strengthened the text of the Clause over time. The current iteration of the Constitution has even stronger language than its predecessors. While originally, the Constitution noted that elections "ought to be free," *see* N.C. DECL. OF RIGHTS (1776) § IV, the current version mandates that they "shall be free," N.C. CONST. art. I, § 10. Through this change, the drafters of North Carolina's Constitution sought to "make clear" that the Free Elections Clause and the associated rights "are commands and

not mere admonitions" limiting government conduct. *N.C. State Bar v. DuMont*, 304 N.C. 627, 639; 286 S.E.2d 89, 97 (1982) (citation omitted).

As the Pennsylvania Supreme Court observed, the centrality of these clauses to the popular-sovereignty underpinnings of the constitution demands they be given the broadest of interpretation and apply to all aspects of elections, including districting. *LWV*, 178 A.3d at 803–14. In this context, those principles mean the Court should find for plaintiffs. They have ably explained that the General Assembly has diluted votes based on partisan affiliation. The effect is to frustrate popular sovereignty and insulate certain politicians from democratic accountability. That is inconsistent with a free election and the fundamental principles of North Carolina's Declaration of Rights. If the purpose of free elections is to ensure popular sovereignty, the Constitution cannot be read to tolerate district maps that dilute certain votes to undermine popular will; and if their purpose is to ensure "redress of grievances," this Court cannot tolerate maps that insulate politicians from the people they are to represent. *See also* N.C. CONST. art. I, § 35; ANTONIN SCALIA & BRYAN GARDNER, READING LAW 167 (2012) (underscoring importance of reading document as a whole); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 910–16 (2021).

B. The Equal Protection Clause provides heightened protections of voting rights.

North Carolina's Equal Protection Clause provides another, related, basis for precluding partisan gerrymandering. Because of its Free Elections Clause, the North Carolina Constitution's Equal Protection Clause is best understood as prohibiting partisan gerrymandering. As this Court has observed, constitutional provisions must be read to harmonize with one another. In *Blankenship*, for example, this Court explained that, once the state chose to give its citizens the right to vote for judges in its constitution, "that provision must be construed in conjunction with the Equal Protection Clause to prevent internal conflict." 363 N.C. at 525. This Court therefore departed from federal jurisprudence in holding that the state Equal Protection Clause demands heightened scrutiny in assessing districts for judicial elections.

That reasoning aligns with other courts' jurisprudence. When the Missouri Supreme Court struck down the voter ID law in *Weinschenk*, it did so under the state's Equal Protection Clause as informed by its Free Elections and Qualifications of Voters Clauses. Governed by all three, the Missouri court applied strict scrutiny, leading to the finding of unconstitutionality under equal protection analysis. 203 S.W.3d at 215 & n.24.

This reasoning also illustrates why North Carolina's Equal Protection Clause, consistent with *Blankenship*, is best understood as precluding partisan gerrymandering. Through its inclusion of the Free Elections Clause—a "command[] not mere admonition[]," *DuMont*, 304 N.C. at 639—the Constitution creates a high bar to justify partisan vote dilution. Contrary to the lower court's suggestion that the North Carolina Constitution does not reach gerrymandering because gerrymandering does not "impinge on the right to vote," slip op. ¶ 123, "[i]t is well settled in this State that 'the right to vote *on equal terms* is a fundamental right,' " with the Equal Protection Clause protecting "the fundamental right of each North Carolinian to *substantially equal* voting power," *Stephenson*, 355 N.C. at 377–81 & n.6 (emphases added). Just as this Court imposed heightened scrutiny to judicial districting, even when the federal Constitution did not, it should apply the wariest of eyes to partisan gerrymandering.

The Alaska Supreme Court took a similar approach when assessing districting in *Kenai Peninsula Borough*, 743 P.2d at 1371. There, the Court held that a districting plan violated Alaska's Equal Protection Clause because "a voter's right to an equally geographically effective or powerful vote . . . represent[ed] a significant constitutional interest." *Id.* at 1372. The Alaska court reached this conclusion despite finding that the districts complied with the federal Equal Protection Clause. *Id.* at 1370. North

Carolina's Constitution provides a strong basis for this Court to reach a similar conclusion.

CONCLUSION

This Court should exercise its independent authority under the North Carolina Constitution to redress plaintiffs' injuries.

Respectfully submitted, this the 21st day of January, 2022.

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