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 Governor of the State of South Carolina .....Intervenor

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The "primary goal" of S.865 was to rig congressional elections to favor Republican candidates in the First Congressional District (CD1). To accomplish that goal, lawmakers disregarded neutral redistricting criteria and surgically reapportioned precincts based on partisan voting history—all to reduce the electoral influence of Democratic voters in CD1. As a result, members of Petitioner League of Women Voters of South Carolina (LWVSC) no longer enjoy participation in "free and open" elections and are denied an "equal right to elect" congressional representatives, the "equal protection of law," the right to be free from viewpoint discrimination, and the right to vote with the rest of their counties.

Respondents'[1] briefs show that they are remorseless. They ask for total immunity, insisting that the South Carolina Constitution prohibits this Court from enforcing any check on their redistricting power. But at every turn, Respondents ignore plain meaning, contort the historical record, and disregard precedent. *Rucho* was right: partisan gerrymandering is "incompatible with democratic principles." *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019) (citation omitted). Because the text of the South Carolina Constitution prohibits the intentional subversion of democracy embodied in S.865, the Court must not "condemn [Petitioner's] complaints about districting to echo into a void." *Id.*

ARGUMENT

I. Petitioner's claims are justiciable.

Respondents argue that *even if* S.865 is a grotesque partisan gerrymander that violates the South Carolina Constitution, this Court is powerless to grant relief. Fortunately for South Carolina voters, Respondents are wrong.

[1] References to "Respondents" refer to the House, the Senate, and the Governor, as an intervenor, collectively. They do not refer to the State Election Commission "SEC," as the SEC raises only one substantive argument, addressed in Section V.

A. The South Carolina Constitution does not foreclose judicial review of congressional redistricting plans.

Respondents' chief argument is that redistricting laws are categorically beyond the judiciary's reach because they are textually committed to the General Assembly. That ignores both settled first principles and this Court's decisions that say otherwise.

For over a century, the law has been that "the powers of the General Assembly are plenary as to all matters of legislation *unless* prohibited by some provision of the Constitution." *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625, 631 (1936) [hereinafter *Coleman*] (emphasis added); *Fripp v. Coburn*, 101 S.C. 312, 85 S.E. 774, 775 (1915) ("[T]he Legislature may enact any law not prohibited by the Constitution."). This is unremarkable: the Constitution always constrains legislative acts, whether passed under an explicit grant of power or under the General Assembly's plenary lawmaking authority. In every case, the judiciary's constitutional role is to resolve the challenge.

Retail Services & Systems, Inc. v. S.C. Department of Revenue sheds helpful light. 419 S.C. 469, 799 S.E.2d 665 (2017). That decision assessed a challenge to a law that "limit[s] a liquor-selling entity to three retail liquor licenses." *Id.* at 471, 799 S.E.2d at 666. Regulation of liquor sales is unquestionably left to the General Assembly under Article VIII-A of the South Carolina Constitution. *See id.* at 472, 799 S.E.2d at 666 ("[T]he South Carolina Constitution contains a broad mandate to the General Assembly with respect to regulating the sale and retail of alcohol."); *see also id.* at 478, 799 S.E.2d at 669 (Kittredge, J., dissenting). But this Court didn't flinch from its duty to resolve the challenge. The majority and dissent split on whether the law was constitutional, but no justice questioned whether the claim was justiciable. *See, e.g.*, *id.* at 475; 799 S.E.2d at 668 ("This is an example of market regulation that exceeds constitutional bounds."); *id.* at 483, 799 S.E.2d at 672 (Kittredge, J., dissenting) (explaining why Statutes are "a legitimate exercise of the State's police power," and do not violate the Equal Protection or Due Process Clauses).

Still, the Governor argues that Article II, Section 10's command that the General Assembly "regulate the time, place and manner of elections" grants the legislature exclusive and unreviewable authority over those matters, including redistricting. Gov'r Br. 8–12.[2] But as the Governor concedes elsewhere, that just isn't so. *See* Gov'r Br. 14 ("[E]ven a cursory review of the South Carolina Reports makes clear [that the Court can review laws related to voting and elections]."). Voter-registration deadlines are enacted under the same constitutional authority, yet South Carolina courts routinely grant relief when they infringe on the fundamental right to vote. *See, e.g.*, *S.C. Democratic Party v. Knapp*, No. 2024-CP-40-05967 (Richland Cnty. Ct. of Common Pleas Oct. 4, 2024) (extending voter registration deadline "to protect [the right to vote] in the wake of a major hurricane"). Likewise, in *State ex rel. Edwards v. Abrams*, the Court struck down a law that allowed "a husband and wife [to] enter a voting booth together for the purpose of voting." 270 S.C. 87, 89, 240 S.E.2d 643, 644 (1978). Despite clearly regulating the "manner of elections," the Court ruled that the law violated the right to vote by secret ballot. *Id.* at 92–93, 240 S.E.2d at 645–46; *see also* S.C. Const. art. II, § 1 ("All elections by the people shall be by secret ballot."). Courts have long exercised judicial review over statutes enacted pursuant to Article II, Section 10, and Respondents cannot convincingly argue that the same clause exempts redistricting from judicial review.

The Senate makes a slightly different argument, relying instead on the General Assembly's authority to "arrange the various Counties . . . into Congressional Districts . . . *as it*

[2] The Governor argues at length that Section 10 "include[s] the power to draw maps." Gov'r Br. 8–11. That is an unremarkable proposition, and a non-sequitur. The issue is whether such maps are, unlike all other legislation, exempt from compliance with the state and federal constitution. The Governor concedes (as he must), that they are not. *See* Gov'r Br. 12 n.2 (agreeing that redistricting plans cannot have the effect of denying or abridging the right to vote "on account of race"); *see also Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring, under the Equal Protection Clause, that all congressional districts be approximately equal in population).

may deem wise and proper." Sen. Br. 19 (citing S.C. Const. art. VII, § 13).[3] That "wise and proper" language, they argue, "grants [] plenary authority to consider politics when conducting [] redistricting"—or, to put it in less delicate terms, to use reapportionment to cheat in favor of one political faction. Sen. Br. 21–22.

Setting aside whether the antidemocratic manipulation of electoral outcomes can *be* "wise and proper," the argument holds no water. Article VII's "wise and proper" language is not unique. Instructively, it is no different than Article VIII-A's command to regulate liquor sales as the General Assembly "considers proper." S.C. Const. art. VIII-A, § 1. Here, as in *Retail Services*—indeed, as always—the General Assembly cannot enact laws that violate the Constitution, even where it legislates pursuant to an explicit grant of authority. *See Retail Servs. & Sys., Inc.*, 419 S.C. at 475, 799 S.E.2d at 668; *see also, e.g.*, *Coleman*, 181 S.C. 10, 186 S.E. at 630 (even the House's authority "to determine its rules and proceedings," *see* S.C. Const. art. III, § 12, cannot "ignore constitutional restraints or violate fundamental rights").

In sum: there is no redistricting exception to judicial review. This Court's cases are clear that the constitutional assignment of authority doesn't confer unchecked power. As with any other statute, the Court must fulfill its constitutional duty and determine whether S.865 violates any of the constitutional rights asserted.

[3] For support, the Senate cites *Beaufort County v. S.C. State Election Commission*, 395 S.C. 366, 718 S.E.2d 432 (2011), and *Bailey v. S.C. State Election Commission*, 430 S.C. 268, 844 S.E.2d 390 (2020). Sen. Br. 20. But *Beaufort County* wasn't a constitutional challenge, had nothing to do with redistricting, and its political question analysis spans a single, inapposite sentence. 395 S.C. at 376–77, 718 S.E.2d at 438. *Bailey* also lacked a constitutional claim—a fact the Court emphasized. *See* 430 S.C. at 271 n.1, 844 S.E.2d at 391 n.1. Neither suggest that legislation enacted under Article VII, Section 13 need not comply with the rest of the South Carolina Constitution.

B. *Rucho* invites, instead of rejects, this Court's review.

Contrary to Respondents' view, *Rucho* doesn't constrain this Court. Its justiciability ruling does not inform—let alone govern—this dispute. And even if the Court finds *Rucho* persuasive, its reasoning confirms that Petitioner's claims are justiciable.

Rucho didn't decide that partisan gerrymandering lies beyond the judiciary's reach, or that there are no judicially manageable standards to adjudicate such claims. Far from it. The majority decried the practice as "incompatible with democratic principles," and took care to explain that state interventions remain in place to curtail it. 588 U.S. at 718 (citation omitted); *see id.* at 719 ("Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void."). *Rucho* concluded that *federal* courts cannot adjudicate partisan gerrymandering claims because the *federal* Constitution does not provide "judicially manageable standards for deciding such claims." *Id.* at 691. Without a clearer textual mandate in the federal Constitution, the Court felt left to make an "unmoored determination" about what is "fair" in the context of redistricting. *Id.* at 707.

Every post-*Rucho* state supreme court case affirms this view. When litigants have brought claims under state constitutional provisions identical to those asserted in *Rucho*, as in New Hampshire and Kansas, high courts have dismissed those claims where judicially manageable standards are not evident.[4] *See Rivera v. Schwab*, 512 P.3d 168, 179–80 (Kan. 2022) (claims nonjusticiable where "the sole mechanism relied on . . . is the constitutional guarantee of equal protection"); *Brown v. State*, 313 A.3d 760, 774 (N.H. 2023) (applying *Rucho*'s reasoning where "plaintiffs acknowledge that their . . . claims under the State Constitution resemble at face value those made under parallel provisions of the federal document in *Rucho*"). In North Carolina, one claim rested on an independent constitutional provision, but the court held it was not implicated

[4] The Senate complains that Petitioner "fail[ed] to address" partisan gerrymandering cases out of North Carolina, New Hampshire, and Kansas. Sen. Br. 17, 25. That is incorrect. Petitioner explained at length why those cases are inapposite. *See* Pet. for Original Jurisdiction 8–9, 40–41; *see also id.* at 39, n.34 (distinguishing *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023)).

by partisan gerrymandering, *Harper v. Hall*, 886 S.E.2d 393, 439 (N.C. 2023), and tethered its justiciability analysis to North Carolina's laws that "expressly insulate the redistricting power from intrusion by the executive and judicial branches," *id.* at 419; *see* N.C. Const. art. II, § 22(5) (exempting redistricting legislation from a gubernatorial veto). But where litigants invoke independent protections that implicate partisan gerrymandering—like the right to "free and open" or "free and equal" elections—courts have found claims justiciable. *See Grisham v. Van Solen*, 539 P.3d 272, 282 (N.M. 2023); *Graham v. Adams*, 684 S.W.3d 663, 684 (Ky. 2023); *see also League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 820–21 (Pa. 2018) (deciding, before *Rucho*, that partisan gerrymandering is justiciable under its free and equal clause).

Unlike in New Hampshire and Kansas, Petitioner's claims are not federal constitutional claims repackaged with state constitutional citations. Petitioner's claims rest on provisions unique to South Carolina that have no federal counterpart, and whose texts far outstrip the generic command that everyone receive equal protection of the law. *See infra* Part II. *Rucho*'s reasoning—even if followed—does not compel dismissal.

C. Petitioner's claims can be judicially identified, determined, and molded.

Respondents claim it is impossible to identify judicially manageable standards for Petitioner's claims. But examples from at least five sister states prove otherwise. This Court is not helpless to redress a constitutional violation just because it is presented in the first instance here. *See, e.g.*, *Singleton v. State*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993) (holding for the first time that forced ingestion of medication to facilitate execution violates Article I, Section 10's protection of the right to privacy).

Respondents evoke various doomsday scenarios, urging this Court to circumvent judicial review of partisan gerrymanders and their attendant political mess. *See* Sen. Br. 5, 22, 25; Gov'r Br. 12–14; House Br. 5–7. The Senate's brief is particularly evocative, claiming that judicial review here would involve courts in the "political morass" of gerrymandering and "drag the judiciary into superintending the inherently political redistricting process at every level of

government." Sen. Br. 5. Petitioner agrees that the Enacted Map is a political morass—and an antidemocratic, unconstitutional one at that. As sister courts have shown, however, there are judicially manageable standards this Court may adopt that will not involve South Carolina courts in unending redistricting litigation, but simply put an end to unconstitutional gerrymanders.

In at least five other states, state courts have adopted judicially manageable standards to assess partisan gerrymandering claims. *See League of Women Voters of Pa.*, 178 A.3d at 820–21 (Pa. 2018); *Szeliga v. Lamone*, No. C-02-CV-21-001816, at *45–46, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734, at *12–26 (Utah Dist. Ct. Nov. 22, 2022), *rev'd in part on other grounds*, 554 P.3d 872 (Utah 2024); *Grisham*, 539 P.3d at 281, 286–92; *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 92–93 (Alaska 2023); *see also* Campaign Legal Center Amicus Br. 21–22. These standards are drawn from broad constitutional provisions like South Carolina's. The courts of Alaska, Maryland, New Mexico, Pennsylvania, and Utah offer persuasive guidance for this Court and flatly disprove Respondents' postulations that our Constitution lacks sufficiently manageable standards to adjudicate partisan gerrymanders. Identifying workable tests to ensure the broad protections of the South Carolina Constitution defend its citizens' rights from government encroachment is at the core of this Court's power and abilities. *See, e.g.*, *Brabham v. City of Sumter*, 275 S.C. 597, 598, 274 S.E.2d 297, 297 (1981) (establishing the test for violations of a compensable taking under Article I, Section 13); *State v. Rowell*, 444 S.C. 109, 115–16, 906 S.E.2d 554, 557 (2024) (establishing the test to determine whether a new trial is required when Article I, Section 14 is violated). This Court is well equipped to do that here, too. And that sister courts have already trod this path illustrates the readiness and aptitude for state courts to do just that.

South Carolina's Constitution guarantees not just free and open elections and the equal protection of laws, but also the "equal right to elect officers." S.C. Const. art. I, § 5; *see infra* Part II.A.1. Petitioner's claims are grounded in South Carolina's specific constitutional guarantees. This Court's decisions interpreting those guarantees affirm that there are judicially manageable

standards to adjudicate unconstitutional partisan gerrymanders. *See* Pet'r Br. 47–49. This Court has the power and obligation to construe those words according to their plain meaning. It is a feature, not a bug of our federalist system that this Court is tasked with defining the application of our Constitution for the first time, and that it is independently empowered to do so without recourse to the federal courts' interpretation of Article III requirements.

II. Petitioner's constitutional claims are on solid ground.

A. Free and Open Elections

Under this Court's text-based approach to constitutional interpretation, South Carolina's Free and Open Elections Clause proscribes partisan gerrymandering. Respondents would limit Section 5 to the right to cast a ballot, but that misinterprets the Clause's plain text and ignores the Constitution's separate protections for the right of suffrage. Petitioner's interpretation of Section 5 is faithful to the text, more consistent with this Court's interpretive methodology, and (unlike Respondents') in accord with all other courts that have addressed the question.

1. The text of Article I, Section 5 proscribes partisan gerrymandering

"Constitutional interpretation begins with the text itself," and ends there "when the meaning of the text is plain." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 182, 906 S.E.2d 345, 353 (2024) (citing Antonin Scalia, A MATTER OF INTERPRETATION 16 (1997)). If "the text is plain and the context makes the meaning clear," the Court lacks "license to alter or shade the plain meaning . . . to stretch or shrink the scope of the Constitution." *Id.* at 182, 906 S.E.2d at 353.

South Carolina's Free and Open Elections Clause provides: "All elections shall be free and open, and 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." S.C. Const. art. I, § 5. The question, then, is whether an election held on a partisan gerrymandered map like S.865 is "free and open" and guarantees every voter "an equal right to elect officers." *Id.* An analysis of the plain text of Article I, Section 5 reveals that it does not.

As defined in the late 19th Century when the Clause was ratified, "free" and "open" were explicitly linked to fair and transparent government.[5] The contemporaneous definition of "free" in Webster's International Dictionary was "exempt from subjugation to the will of others"; "not under an arbitrary or despotic government; subject only to fixed laws regularly and fairly administered"; "enjoying political 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, p. 594 (1898). Black's Law Dictionary's definition was similar: "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, 518–19 (1st ed. 1891).

The same Webster's dictionary defined "open" as "accessible"; "without reserve or false pretenses"; "not concealed or secret; not hidden or disguised." *Open*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1004. (The 1891 Black's Law Dictionary defined only the verb "open," *see Open*, BLACK'S LAW DICTIONARY, 850.) Taken together, these definitions show that "free" and "open" mean much more than Respondents want them to. They protect the exercise of political rights without outside control or deceit—a right plainly injured by a system of voting that creates "preferred" outcomes by diluting certain voters' electoral influence. The remainder of Article I, Section 5 confirms this understanding.

By guaranteeing that all electors be afforded an "*equal right to elect officers*," Section 5 goes further even than the "free and open" and "free and equal" clauses held to prohibit partisan gerrymandering in New Mexico and Kentucky. Under definitions common to the clause's drafters in the late 1800s, a "right" is a "legal power" or "privilege . . . granted by authority." *Right*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1242. When the right at issue is a "*political* right," the meaning is modified to especially refer to "the power to participate,

[5] The Free and Open Elections Clause was adopted in Article I, Section 31 of the Constitutional Convention of 1868. *See* Pet'r Br. 25–26; S.C. Const. of 1868, art. I, § 31. The Clause has remained substantively unchanged. *See* Amicus Br. of Campaign Legal Center 9–11.

directly or indirectly, in the establishment or administration of government." *Right*, BLACK'S LAW DICTIONARY, 1045. A right is *equal* when it is extended in an "unbiased" manner and is "not unduly inclining to either side." *Equal*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 504.

Contrary to Respondents' arguments, Section 5's guarantee of an equal right "to elect" cannot merely mean the right to cast a ballot. *See, e.g.*, House Br. 8–10. Section 5's "equal right *to elect*" sets it apart from the right "of suffrage" protected in Article II of the Constitution. *See infra* Part II.A.2; *see also Suffrage*, BLACK'S LAW DICTIONARY, 1184 ("A vote; the act of voting; the right or privilege of casting a vote at public elections."). At the time, Webster's defined "elect" as "[t]o select or take for an office; to select by vote." *Elect*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 476. That is important here because, in a partisan gerrymander, voters' relative rights *to elect*—their right to translate a vote into representation—is "unduly inclin[ed] to either side," even while the right of *suffrage*—"the right . . . of casting a vote"—is afforded equally. Modern usage agrees: One can *vote* for a losing candidate, but one cannot *elect* a losing candidate. Individuals in CD1 may be equally free to vote for Republicans and Democrats, but S.865 ensures that their corresponding rights *to elect* officers are decidedly unequal. That violates Section 5.

2. Respondents' blinkered interpretation of Section 5 fails to consider the Constitution "as a whole."

Respondents each advance cramped interpretations of Article I, Section 5 that ignore our constitutional design. *See* Sen. Br. 35–40; House Br. 8–10; Gov'r Br. 27–29. Because each argument treats Article I, Section 5 as coextensive with the rights of suffrage that Article II articulates, they must be rejected.

The 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); *see also* Antonin Scalia & Bryan Garner, READING LAW 174–76 (2012). Indeed, the notion that independent clauses must be given independent meaning was firmly rooted at the time of drafting. *See Washington Mkt. Co. v.*

Hoffman, 101 U.S. 112, 115–16 (1879) ("[I]f it can be prevented, no clause, sentence, or word shall be [interpreted to be] superfluous, void, or insignificant.").

The Court's reasoning in *Eidson* is instructive:

> [W]e must always consider the words in light of the company they keep—their context. Especially when interpreting our Constitution, context is often the key to unlocking the meaning of the words used, and the context extends not only to the sentence or section the words inhabit, but to the entire design and structure of the Constitution of which they are a part.

Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 182; 906 S.E.2d 345, 353 (2024), *reh'g denied* (Oct. 3, 2024).

That command applies here. Article II sets out the Right of Suffrage and protects, *inter alia*, the general right to vote without undue influence; the right to secret ballot; the right to be an elector; the right to appeal a denial of one's voting rights; and against arrest during the voting process. S.C. Const. art. II, §§ 1–3, 8, 9, 11, 12. It also imposes specific qualifications on the right to vote, including age and mental competency requirements, and bars those in penal institutions from the franchise. *Id.* §§ 4–8. These provisions unquestionably prohibit the formal vote-denial hypotheticals raised by Respondents' briefs. Given that Article II separately protects the right "to vote, free from any unconstitutional legal or physical restrictions," Gov'r Br. 28, the rule against surplusage (and the command to construe Section 5 in context of the whole constitution) precludes interpreting Article I, Section 5 as providing only those same protections. Because Respondents' interpretation of Article I, Section 5, renders it "superfluous, void, [and] insignificant," it must be rejected. *Washington Mkt. Co.*, 101 U.S. at 115.

Reliance on *Harper v. Hall* unravels for similar reasons. *See* House Br. 11–12; Sen. Br. 34, 36–38. To start, the textual predicate in *Harper* only promised "free" elections, making it less robust than the "free *and open*" and "free *and equal*" clauses held to prohibit partisan gerrymandering in New Mexico and Kentucky, and a far cry from Section 5's additional guarantee of an "equal right to elect officers." *See Harper v. Hall*, 886 S.E.2d 393, 432–39 (N.C. 2023); N.C. Const. art. I, § 10 ("All elections shall be free."). Beyond that, the rule against

surplusage did not foreclose the North Carolina Supreme Court's conclusion in *Harper* as it does here. Unlike Article II of the South Carolina Constitution, North Carolina's charter lacks a broad grant of suffrage. Although its Article VI is similarly titled "Suffrage and Eligibility to Office," those provisions only set the bounds of who may participate in the elective franchise, rather than providing a broad grant of suffrage. *Compare* N.C. Const. art. VI, § 1 ("*Only* a citizen of the United States who is 18 years of age and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.") (emphasis added), *with* S.C. Const. art. II, § 1 ("The *right of suffrage*, as regulated in this Constitution, *shall be protected* by laws regulating elections and prohibiting . . . *all undue influence* from power, bribery, tumult, or improper conduct.") (emphasis added), § 2 ("No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State.").

Since North Carolina's Constitution lacks a broad grant of suffrage, it is no answer to the breadth of South Carolina's Constitution that the *Harper* court construed the promise of "free" elections to guarantee only the right to cast a vote unimpeded. *See Harper*, 886 S.E.2d at 438. Interpreting South Carolina's Constitution in the same way as North Carolina's would treat Section 5 as superfluous and would fail to consider Section 5 within "the entire design and structure of the Constitution of which [it] [is] a part." *Eidson*, 444 S.C. at 182; 906 S.E.2d at 353.

3. Other states' interpretations of their free and open elections clauses support Petitioner's argument.

Every state supreme court to analyze a "free and open" or "free and equal" clause challenge to partisan gerrymandering has ruled that the practice is prohibited. Pet'r Br. 23–24. Unable to dispute that fact, the Governor tries to soften its impact with two weak sleights of hand.

First, the Governor lists seven states with "free and open" or "free and equal" clauses and claims "none . . . forbids partisan gerrymandering." Gov'r Br. 33. Petitioner's argument under Section 5 is "implausible," he argues, because it demands the conclusion "that all these States have misunderstood their clauses." *Id.* The Governor's careful drafting deliberately obscures the

truth: *none* of those seven states have addressed the question here. In that regard, Arizona, Indiana, Missouri, Oklahoma, South Dakota, Tennessee, and Wyoming are no different than Pennsylvania until 2018 and New Mexico and Kentucky until 2023—states where state constitutional protections against partisan gerrymandering sat dormant until litigants brought claims. To assume that those states have implicitly rejected such claims relies on flawed logic, belied by the fact that every state to address the question has ruled in Petitioner's favor.

Second, he argues that "free and open" or "free and equal" elections clauses cannot prohibit partisan gerrymandering because *some* states with such clauses have enacted statutory prohibitions on partisan gerrymandering. Gov'r Br. 32. The rule of superfluity would make these additional safeguards redundant, he says, if "free and open" elections clauses are understood to prohibit partisan gerrymandering. *Id.* The Governor cites no authority for this unusual application of the rule of superfluity. In each of his cites, the rule is employed to ensure each part of a text is given meaning, *see, e.g.*, *Parker v. Delaware*, 201 A.2d 1181, 1186 (Del. 2019), not to argue that a statute's existence proves that no constitutional protection exists.

The Governor's argument is folly. If simple legislation controlled constitutional interpretation, "then the Legislature may alter the Constitution by an ordinary Act." *Davenport v. Caldwell*, 10 S.C. 317, 327 (1878) (quoting *Marbury v. Madison*, 5 U.S. 137, 138 (1803)). The General Assembly cannot negate or preempt constitutional guarantees by simple statute, and codification of a right in statute does not foreclose its existence in a constitution. Courts separately analyze whether a particular harm is prohibited by the constitution, statute, or both. *See, e.g.*, *Hamm v. City of Rock Hill*, 379 U.S. 306, 316 (1964). Legislatures are well within their authority to pass statutes that protect "no more than what [the U.S.] Constitution [already] guarantees." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978). The rule against superfluity does not change the self-evident reality that statutes can and often do safeguard rights in ways that overlap with existing constitutional protections.

The only other state supreme courts *to consider* whether a partisan gerrymandering claim is justiciable under their "free and equal" or "free and open" elections clauses—Kentucky, New

Mexico, and Pennsylvania—found that it is. *See Graham*, 684 S.W.3d at 682–83; (Ky. 2023); *Grisham*, 539 P.3d at 289; (N.M. 2023); *League of Women Voters of Pa.* 178 A.3d at 818. (2018). Our sister states' reasoning buttresses Section 5's strong textual commitment to "free and open" elections and an equal right to *elect* officers, a reality elided by Respondents' superficial examination "free and open" clauses beyond South Carolina's.

4. Respondents' discredited approach to constitutional interpretation does not align with this Court's precedent.

The argument that Article I, Section 5 doesn't prohibit partisan gerrymandering because its drafters didn't aim to end partisan gerrymandering in 1868 lacks merit for several reasons. *See* Sen. Br. 36–37; House Br. 10–11; Gov'r Br. 15, 23–26, 28–29.

First, Respondents have not—and cannot—prove their historical predicate. That Section 5 perfectly mirrors language used to police rotten boroughs in England is good evidence that the drafters of Section 5 likely *did* intend to root out rigged electoral systems (like partisan gerrymanders) along with the other, less sophisticated forms of antidemocratic manipulation. *See* Campaign Legal Center Amicus Br. 8–11 (tracing historical lineage of "free and open" and "free and equal" elections); *see also id.* at 10 (noting that the English "rotten boroughs system is the historical cognate for modern-day partisan gerrymandering").

Respondents aver that political gerrymandering is a longstanding "political reality" in South Carolina. Gov'r Br. 25. But the fact that a constitutional violation goes years, decades, or centuries without judicial redress hardly absolves it. Courts often vindicate constitutional rights after yearslong, continuous violation of those rights. *See, e.g.*, *Wesberry*, 376 U.S. at 7 (holding more than 30 years after the fact that Georgia's 1931 reapportionment "grossly discriminates against voters" under the one person, one vote principle). For example, in the first 130 years following the Bill of Rights' ratification, the U.S. Supreme Court never once struck down a law or governmental action under the First Amendment. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931). And the Fourteenth Amendment was ratified in 1868, but courts countenanced *de jure* segregation for decades after. *See Plessy v. Ferguson*, 163 U.S. 537 (1896); *but see Brown v. Bd.*

of Educ., 347 U.S. 483 (1954). If political gerrymandering has existed in South Carolina for as long as Respondents say it has, that makes the constitutional violation worse, not nonexistent. The fact that no one has yet argued that Section 5 prohibits partisan gerrymandering cannot end the issue.

Second, Respondents' rigid originalism is intellectually dishonest unless its application is driven by evidence that the drafters intended that their work be constrained by their own contemporary conception of what state actions violate the right to "free and open" elections.[6] Respondents bring no such evidence, and the pro-democratic and rights-expansive language that permeated the Constitutional Convention of 1868 points conclusively the other way. *See, e.g.*, Proceedings of the Constitutional Convention of South Carolina, 16–18 (Jan. 15, 1868) (available at: https://archive.org/details/proceedingsofcon00sout). If the drafters of the Free and Open Elections Clause intended pass an expansive, rights-protective constitutional provision, it would be an affront to the very spirit of originalism for the Court to adopt the narrow (and otherwise flawed) approach advocated by Respondents.

Third, Respondents' approach lacks support in this Court's precedent. As discussed *supra*, Part II.A.1., this Court employs a text-first approach to constitutional interpretation, not the disfavored "old originalism," Smith, *Originalism and Level of Generality* at 491–92, that treats a law as "trapped in amber," *United States v. Rahimi*, 602 U.S. 680, 691–92 (2024) (explaining the Second Amendment extends to arms "not yet in existence" at the founding and "permits more than just those regulations identical to ones that could be found in 1791" (cleaned up)). For example, "not even ardent originalists promote the view that the 'cruel and unusual' punishment

[6] Without evidence that a clause's drafters intended that it be construed narrowly with their conception of the specific evils they meant to proscribe, a rigidly originalist approach is prone to *violate* the drafters' intent in contemporary settings. *See, e.g.*, Peter J. Smith, *Originalism and Level of Generality*, 51 Ga. L. Rev. 485, 492 (2017) ("Because many of the most contested provisions of the Constitution . . . are framed in broad, abstract terms, this approach inevitably should lead the originalist to seek the original meaning of those provisions at a high level of generality."); *see also Owens v. Stirling*, 443 S.C. 246, 309, 904 S.E.2d 580, 614 (2024) (Beatty, C.J., concurring in part and dissenting in part).

clause must be decided by 18th century standards." *Owens*, 443 S.C. at 302, 904 S.E.2d at 610 (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861 (1989)) (Hill, J., concurring in result); *see also id.* at 330, 904 S.E.2d at 625 ("While the framers' views, when ascertainable, are certainly relevant on legislative matters, their past understanding of the constitutionality of a particular provision is not conclusive.") (Beatty, C.J., concurring in part and dissenting in part); *id.* at 354–59, 904 S.E.2d at 637–40 (using historical evidence to discern what "unusual" meant in 1868 but applying that definition to whether the firing squad meets that definition *now*) (Kittredge, J., concurring in part and dissenting in part).

Original meaning has a role in the interpretative exercise, but not in the way Respondents think. As Justice Hill wrote in his *Owens* concurrence, "[h]istory, custom, and tradition can be essential to understanding many of the vague and open-ended terms used in our constitutions." *Owens*, 443 S.C. at 302, 904 S.E.2d at 610 (Hill, J., concurring). But constitutional interpretation isn't a hunt for historical analogues. The application of constitutional provisions isn't constrained by the drafters' imaginations. And even "ardent originalists" recognize that a constitutional provision's text must play a preeminent and even decisive role in its interpretation. *Id*. In *United States v. Jones*, for example, Justice Scalia wrote that the attachment of a GPS tracking device to a vehicle was a "search" within the meaning of the Fourth Amendment. 565 U.S. 400, 404 (2012). That was so even though the drafters of the Fourth Amendment had neither GPS trackers nor even motor vehicles on their mind in 1789. *See id.* at 406, n.3 ("[I]t is quite irrelevant whether there was an 18th-century analog.").

The text of South Carolina's Free and Open Elections Clause prohibits partisan gerrymanders. *See supra* Part II.A.1; *see also* Pet'r Br. 26–29. The Clause guarantees "free and open" elections; requires that the qualifications "to elect" and "be elected" are coextensive; and extends the "equal right to elect officers" to all qualified voters. S.C. Const. art. I, § 5. Taken together, the text and this Court's decisions require the adjudication of partisan gerrymandering claims under the Free and Open Elections Clause. Whether partisan gerrymandering was the specific evil targeted by Section 5—versus a broad concern over anti-democratic manipulations—

simply does not control the analysis. *See* Smith, *Originalism and Level of Generality* at 492 ("Because many of the most contested provisions in the Constitution . . . are framed in broad, abstract terms, the [new originalist] approach inevitably should lead the originalist to seek the original meaning of those provisions at a high level of generality.").

B. Equal Protection Clause

Respondents' Equal Protection arguments fail because they mistakenly treat the South Carolina Equal Protection Clause "as a single isolated provision," rather than construing it "in light of its relationship to the entire Constitution." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 351, 287 S.E.2d 476, 479 (1982). Article I, Section 3's guarantee of "equal protection of the laws" doesn't exist in a vacuum. By its own terms, the Clause's scope depends on what *other* affirmative protections and guarantees "the laws" afford. Because "equal protection" is a contingent right, and our Constitution's pro-democratic protections extend further than the U.S. Constitution, it would be flawed exegesis to conclude that Section 3 extends no further than the Fourteenth Amendment.

Respondents' reliance on *Harper*, *Brown*, and *Rivera* fails for the same reason. *See also supra* Part I.B. Because North Carolina, New Hampshire, and Kansas (like the U.S. Constitution) lack South Carolina's textual guarantees of "free and open elections," an "equal right to elect officers," and protections from "undue influence from power," they offer poor comparators for whether South Carolina's Equal Protection Clause protects voters from extreme partisan gerrymandering. *See* S.C. Const. art. I, § 5, art. II, § 1. *Grisham*, however, which Respondents concede arose under a "meaningfully similar" set of "issue[s] and facts," House Br. 14, offers a good benchmark. Contrary to Respondents' uncited claim that New Mexico's protections are "more expansive," *id.*, the two constitutions share important features.

Here, as in *Grisham*, the Equal Protection Clause must be read "together with" the constitution's surrounding protections of voting, elections, and democracy. *See* 539 P.3d at 283 ("The right to vote *is* the essential democratic mechanism . . . that links the people to their

guaranteed power and rights. We therefore read [New Mexico's Equal Protection Clause] together with [surrounding pro-democracy protections] to evaluate an individual's right to vote[.]"). Given that South Carolina's Constitution goes beyond New Mexico's—additionally guaranteeing an "equal right to elect" and enshrining a "protection of right of suffrage" at Article II, Section 1—the *Grisham* Court's conclusion that partisan gerrymandering violates New Mexico's Equal Protection Clause carries even greater weight here.

Read in context of "the entire design and structure of the Constitution," *Eidson*, 444 S.C. at 182; 906 S.E.2d at 353, Respondents' view that the Equal Protection Clause only protects voters at the time they cast a ballot, *see* Sen. Br. 40; Gov'r Br. 34, cannot be right.[7] Take a hypothetical practice whereby a given polling location systematically discounts every tenth voted ballot that favors a Republican candidate at the close of Election Day. Of course, *most* Republican voters who cast a ballot at that location will have "vote[d] for the same number of representatives as voters in other districts." Sen. Br. 40. They'll have also "vote[d] as part of a constituency . . . similar in size to that of the other districts." *Id.* But it would strain reason to conclude that South Carolina's guarantee to equal protection under law is so toothless as to tolerate this clearly dilutive and "improper conduct." Such a practice would surely be a "restriction[] on the right to vote," even if it happens well after a voter has cast their ballot or was in place long before. *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009). And because it would be based "on grounds other than residence, age, [or] citizenship," it would doubtlessly "violate the Equal Protection Clause" under this Court's precedent. *Id.*

Now, take a less extreme—but equally dangerous—example. In Respondents' view, the Equal Protection Clause would have nothing to say about a map that maximized *all* of South

[7] The *Grisham* petitioners unsuccessfully argued the same. *See* Pet'r Br., *Grisham v. Van Soelen*, 2022 WL 22844601, at *17 (Nov. 3, 2022) (arguing New Mexico's Equal Protection provisions not implicated where plaintiffs "are not prevented from participating in the political process or casting their individual vote"); *but see Grisham*, 539 P.3d at 284 ("[W]e would be derelict in our responsibility to vindicate . . . the equal protection guarantee, were we to deny a judicial remedy to individuals directly affected by such a degree of vote dilution.").

Carolina's congressional delegation to favor one specific party (*i.e.*, a 'seven-seat' map)—regardless of how many traditional redistricting principles it transgressed, or how many non-favored party voters' "complaints" it consigned "into a void." *Rucho*, 588 U.S. at 719. "In such a scenario, the will of the people would come second to the will of the entrenched party, and the fundamental right to vote in a free and open election . . . would be transformed into a meaningless exercise." *Grisham*, 539 P.3d at 284. Respondents' interpretation of South Carolina's Equal Protection Clause all but invites this scenario. But this Court has rejected the contention that this guarantee is so feckless in the face of "debasement or dilution of the weight of a citizen's vote." *See Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 451, 633 S.E.2d 482, 486 (2006). It should do so again here.

C. Free Speech and Assembly

Respondents urge this Court, without reason, to read Article I, Section 2 of the South Carolina Constitution in lockstep with the First Amendment. This Court should instead interpret the plain meaning of the text of Article I, Section 2, which bars partisan gerrymandering.

Again, this Court begins and often ends constitutional interpretation with the plain meaning of the text. *See supra* Part II.A.1.; *Eidson*, 444 S.C. at 182, 906 S.E.2d at 353; *Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002). But Respondents would have the Court adopt the reasoning of the U.S. Supreme Court or other courts interpreting different constitutional provisions. *See* Sen. Br. 43; Gov'r Br. 37, 39. These arguments disregard the "the key to unlocking the meaning" of state constitutional provisions: "the context," which extends "to the entire design and structure of the Constitution of which they are a part." *Eidson*, 444 S.C. at 182, 906 S.E.2d at 353; *see Riley v. Charleston Union Station Co.*, 71 S.C. 457, 51 S.E. 485, 488 (1905) ("a Constitution must be considered as a whole").

As set out in Petitioner's Opening Brief and *supra*, the South Carolina Constitution commits to "free and open" elections protected "from all undue influence" where citizens have "equal influence" over elections. These commitments require a different analysis than those

followed in cases involving the U.S. Constitution, which lacks these protections. It is a hallmark of our federalist structure that this Court can interpret a similar free-speech protection independently of the U.S. Supreme Court or any other state supreme court.[8] *See, e.g.*, *Planned Parenthood*, 438 S.C. at 232, 882 S.E.2d at 794 ("State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." (quoting *Easler*, 327 S.C. at 131 n.13, 489 S.E.2d at 625 n.13); *see also* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 707–08 (2011). Respondents err by relying on interpretations of different provisions from other constitutions to direct this Court's analysis of Article I, Section 2.

Respondents rely heavily on *Rucho*, urging this Court to hold that S.865 places "no restrictions on speech, association or any other First Amendment activities." Sen. Br. 43 (quoting *Rucho*, 588 U.S. at 713); *see* Gov'r Br. 38. But *Rucho* was decided on other grounds and, rather than setting standards for state supreme courts to follow, specifically contemplated that "[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply" to the claims before this Court. *Rucho*, 588 U.S. at 719.

On the history, the Governor reprises his argument that the popular understanding or intent of the drafters of South Carolina's constitutional provisions should control the Court's analysis. *See* Gov'r Br. 37–38. He posits "no one . . . thought that they had anything to do with partisan gerrymandering." *Id.* at 37. But even if we could glean insight into the drafters' minds, that should not inform the Court's analysis of the text of Article I, Section 2. As explained at length, *see*

[8] Respondents cite a 1992 footnote in which this Court said without discussion that Article I, Section 2's protections are coextensive with the First Amendment. *See* Sen. Br. 43 (citing *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 151 n.7, 317 S.E.2d 544, 548 n.7 (1992)); Gov'r Br. 38 (citing the same). But more recent decisions explain that the Constitution's protections in this ambit can and often do extend further than those of its federal counterpart. *See State v. Easler*, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 622 n.13 (1997); *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840–41 (2001); *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 232, 882 S.E.2d 770, 794 (2023), *reh'g denied* (Feb. 8, 2023).

supra Part II.A.4, Respondents' gloss on originalism is squarely at odds with this Court's textualist practice.

D. Preservation of Counties

Respondents advance ill-founded defenses to Petitioner's claim that S.865 violates our constitutional commitment to preserving county boundaries.[9] Tellingly, they fail to articulate any positive account of what sections 9 and 13 of Article VII *should* mean. The parties present two competing interpretations of sections 9 and 13: one relies on text and precedent to argue that the provisions manifest a commitment to keeping counties whole; another renders them mere footnotes to the General Assembly's unchecked power to redistrict however they "deem wise and proper." Respectfully, this Court should adopt the former.

On Respondents' view, the phrase "as it may deem wise and proper" means the General Assembly may disregard the constitutional commitment to maintaining county boundaries under Article VII, Section 13. *See* Sen. Br. 44, 47; *see also* Gov'r Br. 3. That would nullify Section 13 entirely. For the same reasons it does not foreclose judicial review, this phrase cannot mean the General Assembly is empowered to manipulate the redistricting process unconstrained by the Constitution's text. *See supra* Part I.A.

The Governor similarly contends that events after (and even before) the adoption of sections 9 and 13 render them toothless. He first references redistricting with split counties from *before* adoption of Sections 9 and 13. Gov'r Br. 39–40. He concedes, however, that "counties were kept whole" following adoption of sections 9 and 13 until the 1980s, when federal law required some county splitting. *Id.* at 40. Curiously, the Governor references how the West Committee "recommended deleting both provisions." Gov'r Br. 40. But the General Assembly

[9] The Senate erroneously claims that this argument wasn't pled. Sen. Br. 45. But Petitioner's Section 9 argument was incorporated as part of its Section 13 cause of action. *See* Compl. ¶ 204. And the cases the Senate cites do not preclude this Court from considering an argument foregrounded in Petitioner's Complaint and developed further in its Opening Brief.

declined to follow that recommendation, which only reaffirms the General Assembly's mandate to take these provisions seriously. *See id.*

Respondents rely on equally unavailing precedent. They argue that decisions upholding the one-person, one-vote principle render sections 9 and 13 unenforceable.[10] *See* Gov'r Br. 40–41; Sen. Br. 47; House Br. 16–17. But these decisions do not require the Court to read sections 9 and 13 out of the Constitution. Pet'r Br. 40–41; *see Legis. Redistricting Cases*, 629 A.2d 646, 667 (Md. 1993). More still, the Senate claims Article VII, Section 9 does not apply to congressional districts. Sen. Br. 45. It cites this Court's decision in *McLure v. McElroy*, which explained that "original provisions of the Constitution of 1895 create of each county an Election District." 211 S.C. 106, 112, 44 S.E.2d 101, 105 (1947). To be sure, *McLure* explained that "combinations of counties" can form "Congressional Districts." *Id.* But it did not suggest that constitutional constraints on election districts are inapplicable to congressional districts. *See id.*

Nor should the Court credit Respondents' urging to give them the benefit of the doubt because the General Assembly "did its best." House Br. 17; *see also* Sen. Br. 46–47. There are no participation trophies when judging constitutional compliance. And as Petitioner's expert analysis shows, out of 84,907 simulated plans that complied with federal law and the state's neutral redistricting criteria, 78,868 plans (approximately 93%) split fewer counties than S.865. *See* Pet'r Br. 40–41. If the mandate to preserve counties means anything, it cannot indulge a congressional redistricting plan that blatantly sacrifices county integrity to manufacture artificial political advantage. Whether or not the Enacted Plan was the General Assembly's "best," it is constitutionally deficient.

[10] The Governor posits changes in the legal landscape meant "[t]he framers and People must [] have understood during the constitutional amendments in the 1970s that these provisions would play a diminished role moving forward." Gov'r Br. 41. This troubling, continued reliance on the purported intent of legislative drafters—indeed, the *People*'s—is conjecture. That the framers of the 1970s constitutional amendments retained sections 9 and 13 is evidence only of those sections' continued importance in our Constitution.

III. Factual disputes have no bearing on the Court's legal analysis.

A. If the Court agrees that partisan gerrymandering *can* violate the constitution, the Court can appoint a tryer of fact.

If factfinding is needed to adjudicate Petitioner's claims (or to adjudicate any remedial map drawing process), the Court has well-established mechanisms to retain jurisdiction while resolving lingering factual disputes. *See Pascoe v. Wilson*, 416 S.C. 628, 649 n.21, 788 S.E.2d 686, 697 n.21 (2016) (Few, J., dissenting) ("We have authority to find facts in our original jurisdiction.") (collecting cases). Under S.C. Code Ann. § 14-3-340, the Court may certify questions of fact to the "circuit court of the county in which the cause of action shall have arisen," or it may appoint a referee "to take testimony and report thereon, under such instructions as my be prescribed by the court, in any cases arising in the Supreme Court wherein issues of fact shall arise." *See, e.g.*, *In re Lexington Cnty. Transfer Ct.*, 334 S.C. 47, 48, 512 S.E.2d 791, 791 (1999) (accepting original jurisdiction and appointing fact finder); *Cleveland v. City of Spartanburg*, 185 S.C. 373, 194 S.E. 128, 134–35 (1937) (same).

B. Judicial estoppel precludes Respondents' predicate factual argument.

The equitable doctrine of judicial estoppel forecloses Respondents from arguing that the Enacted Plan was not, in fact, a partisan gerrymander. Judicial estoppel "ensure[s] the integrity of the judicial process" by "prevent[ing] a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). As this Court has explained, "[w]hen a party has formally asserted a version of facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997).

Without question, Respondents' victory in the U.S. Supreme Court relied heavily on their insistence that S.865 was drawn with the "primary goal" of "maintain[ing] a 6-1 partisan

composition in the congressional delegation."[11] *See Alexander v. S.C. State Conf. of NAACP*, 602 U.S. 1, 20–21 (2024) (criticizing the district court for "inferring bad faith based on the racial effects of a political gerrymander"). Having escaped federal liability by arguing that S.865 (and specifically, CD1) is a partisan gerrymander, Respondents cannot now defend this case by denying that very contention.

IV. As the U.S. Supreme Court ruled in *Moore v. Harper*, the federal Constitution does not strip this Court of its duty to interpret and apply South Carolina law.

From the Senate's telling, one would never know the holding of *Moore v. Harper* is that the "Elections Clause does *not* insulate state legislatures from the ordinary exercise of state judicial review." 600 U.S. 1, 24 (2023) (emphasis added). Indeed, the U.S. Supreme Court made clear that state legislatures remain constrained by state constitutions when they exercise authority under the Elections Clause of the Federal Constitution. *Id.* at 27; *see also Rucho*, 588 U.S. at 719 (recognizing that state constitutions can proscribe partisan gerrymandering). This is unsurprising, as the South Carolina Legislature only exists as "the mere creature[]" of the South Carolina Constitution. *Moore*, 600 U.S. at 27 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 88 (Farrand ed. 1911)).

Moore reaffirmed that state law cannot be used to end-run federal law, but that is no different than the relationship between the two in other contexts. *Moore*, 600 U.S. at 34–35 (discussing the relationship in property law). The Court left a narrow exception: "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. The Court didn't do

[11] *See, e.g.*, Pet'r. Br. Ex. 1, *S.C. State Conf. of NAACP v. Alexander*, No. 3:21-03302, Trial Tr. 1862:17–18 (D.S.C. Oct. 13, 2022) (Senator Campsen's "primary goal was to draw a Republican district" in Congressional District 1); Jurisdictional Statement at 4, *Alexander v. S.C. NAACP*, No. 22-807, 2023 WL 2265678 (U.S. 2023)("the Enacted Plan follows partisan patterns to move heavily Democratic areas of Charleston County out of District 1"); *id.* at 27 ("the Enacted Plan is the only plan that keeps District 1 majority-Republican and maintains the 6-1 partisan composition in the congressional delegation").

what the Senate claims it did: instruct that independent state constitutions cannot reach the question of partisan gerrymandering. The application of this Court's regular tools of construction and the text, history, and context of the South Carolina Constitution are the *sine qua non* of judicial review. And that is all Petitioner asks the Court to do.

V. Petitioner's claims are not barred by laches.

Finally, the SEC (but no other party) urges the Court to dismiss this action under a theory of laches. *See* SEC Br. 8–14. Because the SEC did not (and cannot) show that Petitioner unreasonably delayed in filing this action or that the case materially prejudiced any party, this Court should not dismiss. *See Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988) (laches requires a showing of "(1) delay, (2), unreasonable delay, [and] (3) prejudice").

Petitioner did not delay in bringing this action, much less unreasonably so. This action was filed immediately following federal litigation against the same redistricting plan, where much of Petitioner's evidence was revealed by the testimony of lawmakers. Moreover, given that the outcome of that federal action could have implicated Petitioner's position or resulted in changes to South Carolina's congressional map, it is not unreasonable for Petitioner to have waited until the federal litigation concluded to file this action. SEC also cannot show "material prejudice." *Grossman v. Grossman*, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963). The SEC—like all Respondents—agreed that the Court should take original jurisdiction because of "the public interest involved," SEC Resp. to Pet. for Original Jurisdiction at 1, and represented it would "take no position on the merits of the litigation," *id.* at 1–2, n.2. Given that all parties want the Court to answer whether the Constitution prohibits partisan gerrymandering, it makes little sense to now dismiss under laches.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's Opening Brief, Petitioner is entitled to relief.

Respectfully submitted,

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