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THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

JULY 28, 2022

Printed for the use of the Committee on House Administration

BOOK 1 OF 2



Available on the Internet:
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THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY

THURSDAY, JULY 28, 2022

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 12:55 p.m., in Room 1310, Longworth House Office Building, Hon. Zoe Lofgren [Chairperson of the Committee] presiding.

Present: Representatives Lofgren, Raskin, Butterfield, Aguilar, Scanlon, Leger Fernandez, Davis, Loudermilk, and Steil.

Staff Present: Jamie Fleet, Democratic Staff Director; Khalil Abboud, Deputy Democratic Staff Director; Dan Taylor, Senior Counsel; Sean Wright, Senior Elections Counsel; Giancarlo Pellegrini, Elections Counsel; Peter Whippy, Communications Director; Sean Jones, Professional Staff Member; Andrew Garcia, Staff Assistant; Lauren Doney, Deputy Chief of Staff for Mr. Raskin; Kyle Parker, Chief of Staff for Mr. Butterfield; Alyssa Innis, Legislative Assistant for Mr. Aguilar; Keanu Rivera, Legislative Assistant for Ms. Scanlon; Tim Monahan, Minority Staff Director; Caleb Hays, Minority General Counsel and Deputy Staff Director; Nick Crocker, Minority Deputy Staff Director; Gineen Bresso, Minority Special Counsel; Will Nietzel, Legislative Assistant for Mr. Steil; and Ashleigh Padgett, Legislative Assistant for Mr. Loudermilk.

Opening Statement of Hon. Zoe Lofgren, Chairperson, a U.S. Representative from California

The CHAIRPERSON. I understand the Ranking Member is on his way, but we will begin this hearing of the Committee on House Administration.

First let me offer our apologies to our witnesses. We had intended to start this hearing an hour ago, but we were interrupted by votes on the Floor. So apologies for that.

I want to note, we are holding this hearing both in person and remotely and in compliance with the regulations for Remote Committee Proceedings pursuant to House Resolution 8.

Generally we ask witnesses who are joining us remotely to keep their microphones muted when not speaking to limit background noise, and witnesses will need to unmute themselves when recognized for their five minutes or when answering a question.

If you are joining remotely, please keep your camera on at all times, even if you need to step away for a moment. Please do not leave the meeting or turn your camera off.

At this time, I ask unanimous consent that the Chair be authorized to declare a recess of the Committee at any point and that all Members have five legislative days in which to revise and extend their remarks and have any written statements be made part of the record.

And, without objection, that is so ordered.

The independent State legislature theory holds that each State's legislature has the exclusive authority to regulate Federal elections under the United States Constitution.

The theory is not grounded in history, precedent, or logic, but it has gained an increasing following in some sectors of America over the past twenty years, and its adherents may include some current Supreme Court Justices.

In this upcoming term, the Supreme Court will hear the case of *Moore* v. *Harper*, in which the North Carolina Supreme Court struck down the State legislature's gerrymandering of the State's congressional districts. The State Supreme Court, of which my colleague from North Carolina was once an esteemed member, relied on various provisions of the State's constitution as the basis for its decision. The United States Supreme Court will decide whether those provisions of the North Carolina Constitution apply to Federal elections at all.

We are here today to examine this legal theory; to discuss the historical evidence, or lack thereof, supporting it; and, perhaps more importantly, to explore the dramatic and disruptive consequences to American democracy that would ensue if the Court endorses it.

This topic may seem dry at times, but consider this, all 50 States have election administrators. Some are elected and some are appointed. Some are single individuals; some are boards but none are the State's actual legislature. This makes sense. Professional, nonpartisan election administration is a cornerstone of the modern American right to vote.

Depending on how the Court resolves this upcoming case, that entire apparatus could vanish overnight, at least for Federal elections, which I would say is fairly important, and State politicians would suddenly find themselves in charge of Federal elections.

That is exactly what the Framers sought to avoid. The Constitution is in many ways a reflection of what came before it and the failed experiment of the Articles of Confederation, which illustrated the perils of leaving the Federal Government at the mercy of individual States.

As the Supreme Court has explained and our witnesses today can confirm, the animating purpose of the Constitution's Elections Clause was to avoid repeating that mistake. The independent State legislature theory would turn that goal on its head and give State legislatures power over Federal elections.

There are, admittedly, nuances to the theory. One version, which focuses on non-delegation theory, would essentially dissolve all 50 State election administration offices. Another version, which focuses on State constitutional provisions that lack specific stand-

ards, would have a narrower, although still disruptive, impact. We look forward to our witnesses guiding us through those nuances today.

But make no mistake: For many supporters, the independent State legislature theory is part of a broader plan to seize control of elections.

In that sense, the theory is linked to the Big Lie, former President Trump's scheme to violate the Electoral Count Act and to send the election back to the State legislatures, and to the election subversion bills we see around the country that shift power away from professional election administrators towards politicians.

That makes the theory dangerous and disruptive to American democracy, and we hope to explore that point in today's hearing.

I now would recognize the Ranking Member, Mr. Davis, for his opening statement.

[The statement of the Chairperson follows:]

ZOE LOFGREN, CALIFORNIA
CHAIRPERSON

JAMIE RASKIN, MARYLAND
G.K. BUTTERFIELD, NORTH CAROLINA
PETE AGUILAR, CALIFORNIA
MARY GAY SCANLON, PENNSYLVANIA
VICE CHAIRPERSON
TERESA LEGER FERNANDEZ, NEW MEXICO

JAMIE FLEET
STAFF DIRECTOR

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RODNEY DAVIS, ILLINOIS
RANKING MINORITY MEMBER

BARRY LOUDERMILK, GEORGIA
BRYAN STEIL, WISCONSIN

TIM MONAHAN
MINORITY STAFF DIRECTOR

Chairperson Zoe Lofgren
The Independent State Legislature Theory and its Potential to Disrupt our Democracy
Thursday, July 28, 2022
Opening Statement

The Independent State legislature theory holds that each State's legislature has the exclusive authority to regulate Federal elections under the United States Constitution. The theory is not grounded in history, precedent, or logic, but it has gained an increasing following in some sectors of America over the past 20 years, and its adherents may include some current Supreme Court justices.

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Confederation, which illustrated the perils of leaving the Federal Government at the mercy of individual States.

As the Supreme Court has explained and our witnesses today can confirm, the animating purpose of the Constitution's Elections Clause was to avoid repeating that mistake. The independent State legislature theory would turn that goal on its head and give State legislatures power over Federal elections. There are admittedly nuances to the theory. One version, which focuses on non-delegation theory, would essentially dissolve all 50 State election administration offices. Another version, which focuses on State constitutional provisions that lack specific standards, would have a narrower, although still disruptive, impact.

We look forward to our witnesses guiding us through those nuances today. But make no mistake: For many supporters, the independent State legislature theory is part of a broader plan to seize control of elections.

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That makes the theory dangerous and disruptive to American democracy, and we hope to explore that point in today's hearing.

Opening Statement of Hon. Rodney Davis, Ranking Member, a U.S. Representative from Illinois

Representative DAVIS. Thank you, Madam Chairperson.

Today's hearing topic is one that many Americans are unfamiliar with, mostly because it is a complicated legal theory that is hard to define. You see, if you ask Democrats what "independent State legislature theory" means, you will get one answer; if you ask Republicans, you will get something different.

This theory focuses on the Constitution's use of the word "legislature" and what that means—specifically, how much authority is given to a State's legislature to determine election law.

So, as a Committee, we should be using this as an opportunity to gather the facts, not make any accusations or insinuations.

I say that because I know that some on the Left, including sanctioned Democrat lawyer Marc Elias, are already setting the stage ahead of 2024, suggesting this theory is all a grand plan by Republicans to steal the election, which is not only ludicrous but completely untrue and unfounded.

In fact, we are even seeing some on the Left use this theory as a, quote, "doomsday"-type scenario to fundraise and an excuse to cover their favorite topic, President Trump and the 2020 Presidential election, all to support the January 6th Committee's investigation.

But no matter how the Left tries to spin it, Republicans believe that the Constitution is clear. Article I, Section 4 states, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time, by law, make or alter such regulations."

Further, the Presidential Electors Clause states, "Each State appoint in such manner as the legislature thereof may direct a number of electors."

So, this shouldn't be controversial. Republicans and Democrats should both agree that States have the primary authority to establish election law and administer Federal elections and that Congress plays a secondary role.

This is why, yesterday, I introduced the American Confidence in Elections Act—it is the ACE Act—a comprehensive bill focusing on the importance of strong election-integrity reforms that meet the moment by bolstering voter confidence in our elections while respecting the Constitution, federalism, and conservative principles.

The ACE Act ensures States maintain primary authority over elections while providing them with the tools they can quickly implement to restore voter confidence and election integrity. And it also removes outdated Federal policies standing in their way.

The Constitution divides authority between Congress and the States. That is why the bill is coupled with model State legislation for State legislatures to consider as we work to improve election integrity—the same election legislation we Republicans will implement in the District of Columbia to ensure that, after years of election crises in the District, residents can trust that their votes will be counted fairly and accurately.

Our driving principle is that every eligible American should have the opportunity to vote and that their ballot should be counted ac-

cording to law. Unlike the partisan H.R. 1 that was crafted behind closed doors, my bill has been drafted publicly over the course of two years and is the product of feedback and ideas from a large and diverse set of Members of Congress, stakeholders, Secretaries of State, State legislators, and local election administrators across eighteen States and territories, both Republicans like me and Democrats like my colleagues. In fact, we have been working on this bill since before the last Presidential election.

I invite any of my colleagues across the aisle to join me in supporting this bill that empowers States to run free, fair, and secure elections, elections that promote voters' confidence and drive strong turnout.

House Administration Republicans will continue to champion policies that respect the primary role of States over elections and ensure that it gets Congress out of the way.

And thank you again, Madam Chairperson. I yield back.

[The statement of Representative Davis follows:]

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I say that because I know that some on the Left, including sanctioned Democrat lawyer Marc Elias, are already setting the stage ahead of 2024, suggesting this theory is all a grand plan by Republicans to steal the election, which is not only ludicrous but completely untrue and unfounded.

In fact, we are even seeing some on the Left use this theory as a quote, "doomsday"-type scenario to fundraise and an excuse to cover their favorite topic, President Trump and the 2020 Presidential election, all in an effort to support the January 6th Select Committee's investigation.

But no matter how the Left tries to spin it, Republicans believe that the Constitution is clear. Article I, Section 4 states, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time, by law, make or alter such regulations."

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I invite any of my colleagues across the aisle to join me in supporting this bill that empowers States to run free, fair, and secure elections, elections that promote voters' confidence and drive strong voter turnout.

House Administration Republicans will continue to champion policies that respect the primary role of States over elections and ensure that it gets Congress out of the way. I yield back, Madam Chairperson.

The CHAIRPERSON. The gentleman yields back.

I will now turn to our witnesses, who I will introduce in just a minute.

I would just note for our witness who is appearing virtually, there is a timer on your screen. We ask each of our witnesses to confine their oral testimony to about five minutes, and your full written statement will be made part of the record.

So welcome to each of our witnesses and thank you for taking the time to be with us today.

Joining us are Professor Richard H. Pildes from the NYU School of Law, Professor Carolyn Shapiro from the Chicago-Kent School of Law, and Eliza Sweren-Becker, Counsel with the Brennan Center for Justice.

Professor Pildes is the Sudler Family Professor of Constitutional Law the NYU School of Law and is one of the Nation's leading scholars in constitutional law and a specialist in legal issues concerning democracy.

A former law clerk to Justice Thurgood Marshall, he has been elected to the American Academy of Arts and Sciences and the American Law Institute and has also received recognition as a Guggenheim Fellow and a Carnegie Scholar.

In dozens of articles and his acclaimed casebook, "The Law of Democracy," he has helped create an entirely new field of study in law schools. His work in this field systematically explores legal and policy issues concerning the structure of democratic elections and institutions, such as the role of money in politics, the design of election districts, the regulation of political parties, the structure of voting systems, and the representation of minority interests in democratic institutions, and similar issues.

Carolyn Shapiro is a Professor of Law at the Chicago-Kent College of Law. She is the Founder and co-Director of Chicago-Kent's Institute on the Supreme Court of the United States. From 2014 through 2016, she served as Illinois Solicitor General while on leave from the law school, and is a former law clerk to Associate Justice Stephen Breyer.

Her scholarship is largely focused on the Supreme Court, its relationship to other courts and institutions, and its role in our constitutional democracy. She teaches classes in legislation and statutory interpretation, constitutional law, employment law, and public interest law and policy.

Finally, Eliza Sweren-Becker is a Counsel with the Brennan Center for Justice, where she focuses on voting rights and elections. Ms. Sweren-Becker recently co-authored an article examining the history and original intent of the Constitution's Elections Clause.

Prior to joining the Brennan Center, she was a litigation associate in private practice at Boies Schiller Flexner, LLP, and served as a law clerk to the Honorable Christina A. Snyder of the United States District Court for the Central District of California.

She received her J.D. from Harvard Law and a master's degree in public policy from the Harvard Kennedy School.

Professor Pildes, you are now recognized for five minutes for your testimony.

STATEMENTS OF RICHARD PILDES, SUDLER FAMILY PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Mr. PILDES. Thank you, Chairperson Lofgren and Ranking Member Davis and the Committee, for giving me this opportunity to testify.

I will address two issues in my opening remarks: First, what are the potential practical implications should the Supreme Court recognize the independent State legislature theory? And second, what is the historical evidence either for or against the recognition of that theory?

In discussing these questions, it is crucial to recognize that the issue is not simply the yes-or-no one of whether the Constitution does or does not create an independent State legislature. There are several different versions of such a potential doctrine, as the Chairperson and the Ranking Member acknowledged, and they have quite different practical implications. Thus, if the Court were to recognize the doctrine, the question of its scope would be just as important as whether there is such a doctrine at all.

On the first issue, the most extreme version of such a doctrine would maintain that State legislatures cannot be bound by the substantive provisions in State constitutions or by voter-initiated enactments when States regulate national elections. If the Court were to embrace that version, here are just a few of the provisions that State constitutions or voter initiatives have adopted that could not be applied in Federal elections.

Voters in Maine, Alaska, California, and Washington have enacted top-two or top-four primary structures or ranked-choice voting for Federal elections. Those rules could not be applied unless State legislatures chose to adopt them through legislation.

Similarly, in some State constitutions are these initiatives that establish the criteria to be used in redistricting, such as whether districts must be compact, whether partisan considerations are banned or constrained, what weight should be given to competitiveness in drawing districts, and whether there should be independent commissions to do redistricting.

In addition, some State constitutions contain provisions banning straight-ticket voting, or establishing voter identification requirements, or creating all-mail voting systems, or banning voters who fail to vote in the general election from voting in a runoff election, or specifying how to fill vacant Senate seats, by special election rather than gubernatorial appointment.

A decision from the Court endorsing this extreme version of the doctrine would be highly destabilizing since all these rules could no longer be applied to Federal elections after the legislation.

A second, somewhat less extreme version of such a doctrine would be that State courts can enforce big constitutional provisions that are very specific, such as the provision that State and Senate vacancies must be filled by a special election, but cannot enforce more general State constitutional provisions, such as those that protect the right to vote or guarantee free and fair elections.

This version would be less extreme, but it would trigger a whole host of ambiguous questions that would be difficult to resolve in a consistent and principled way. Just how specific does a State con-

stitutional provision have to be for State courts to be able to enforce it against State legislatures in national elections?

A third version of the doctrine would focus not on State constitutions but the more routine acts of State election administration or judicial interpretation of State election laws. In this version, the U.S. Constitution would be violated if these actors strayed too far from the text of State election laws in applying them.

The practical consequence of this version of such a doctrine would be that it could potentially turn many issues of election administration and interpretation into Federal questions, which candidates and voters could try to exploit by running to the Federal courts to second-guess these judgments about the meaning of State election laws.

Now let me very briefly turn to the issue of what the historical basis is, if any, for the independent State legislature theory in these various versions. I will focus only on the State constitutional provision question.

First, scholars agree there is no evidence that the Framers expressly understood the Constitution to create such a doctrine. Indeed, what we have in the evidence is the opposite. At least five State constitutions in the founding era imposed substantive constraints on such legislation.

Second, before the Civil War, scholars have uncovered only one mention, not in any court decision, of such a doctrine.

Third, until the 2000 *Bush* v. *Gore* decision, there doesn't appear to be any Federal court precedent, including from the Supreme Court, which acknowledged any version of this doctrine.

There is a scholarly debate over whether a few State Supreme Courts in the Civil War era and a congressional resolution of a contested election during that period did recognize such a doctrine. But even if those pieces of evidence support the doctrine, the overwhelming weight of historical practice illustrates that State constitutions throughout American history have imposed substantive constraints on State legislation for national elections.

And, in sum, the practical consequences should the Court recognize the doctrine are potentially quite destabilizing, especially depending on which version the Court recognizes, and there is minimal historical support for such a doctrine.

Thank you.

[The statement of Mr. Pildes follows:]

Testimony of Richard H. Pildes

Hearing on "The Independent State Legislature Theory and its Potential to Disrupt our Democracy"

House Committee on Administration

July 28, 2022

Thank you for giving me this opportunity to testify. I am the Sudler Family Professor of Constitutional Law at NYU School of Law. Most of my professional career has been devoted to the law of democracy. I am the co-author of the casebook, *The Law of Democracy: Legal Regulation of the Political Process*, first published in 1998 and now in its sixth edition. I edited and contributed to the volume, *The Future of the Voting Rights Act*, published in 2006. I have published around 90 or so articles and book chapters on nearly all aspects of the voting and elections process, including the constitutional framework for elections. I have argued or been counsel before the Supreme Court on voting and election issues, and a diverse group of Justices has cited my scholarship on these issues. I have testified before to the Senate and the House on these issues, and I recently served as a commissioner on President Biden's Commission on the Supreme Court of the United States.

The focus of my testimony will be on potential ramifications of the independent state legislature theory (ISLT) and some assessment of the historical record for or against the existence of such a doctrine. A critical point is that the question is not the simple matter of whether the Constitution does or does not create an "independent state legislature" doctrine under the Elections Clause (for House and Senate elections) or the Electors Clause (for presidential elections). If the Supreme Court were to recognize an independent state legislature doctrine (ISLD), the question of the doctrine's *scope* would be just as important. There are a number of potential versions of such a doctrine that have been raised. The ramifications of any such doctrine depends, then, on *which* particular version the Court might potentially adopt. The same is true about the historical record: in asking what that record demonstrates regarding the ISLT, the answer will depend on which potential version of the theory is being considered. That is an important point often neglected in the general public commentary on the issue.

At the outset, it is also important to stress what the ISLT would *not* enable, even if the Court were to accept the theory in its strongest form. That would still not mean state legislatures could choose to ignore the popular vote in their state and appoint presidential electors themselves. Because I have seen a good deal of confusion about this in some public commentary, it is import to clarify this point.

The Constitution in Art. II expressly gives Congress the power to determine the "time" at which electors must be chosen. Since the Presidential Election Day Act of 1845, codified at 3 U.S.C. Sec. 1, Congress has set a nationally uniform day for appointment of the presidential electors (Election Day, in states which use an election – which of course is all states in the modern era). Congress has mandated that electors must be appointed on the Tuesday after the first Monday

in November. If a state chooses to use an election for choosing the presidential electors, that election must be on the day Congress has proscribed. Electors cannot be appointed after that day. Of course, it might take time to determine who the voters have in fact chosen on Election Day, given the need to tabulate the votes, conduct any possible recounts, and resolve any litigation over the outcome that might arise. But from a legal perspective, the electors have been chosen on election day.

Given Congress' clear constitutional power to determine the timing of the election, state legislatures would still not have the power to ignore the popular vote and decide to appoint electors after election day. Given Congress' power of Congress to set the time for appointing the state's electors, the state legislature is powerless to change its statutory law after Election Day to insert itself in the certification process. The ISLT, if the Court decides to recognize it, would have no bearing on Congress' power to lock in the date on which electors must be chosen. There has been loose talk that the doctrine would give state legislatures "plenary powers" over the presidential election, from which it supposedly follows that they could "reclaim" their power to appoint electors after the election has been held. That is incorrect – even if the Court recognizes an independent state legislature doctrine. In addition, should a state legislature attempt to insert itself into the counting of the state's popular vote for president, the state legislature–like any institution of state government–would be bound by *Bush v. Gore*[1] and related Fourteenth Amendment precedents that require all ballots cast in an election to be treated consistently with "equal protection" and "due process" principles. The federal Constitution would still constrain state legislatures, which have no more power to manipulate the counting of ballots in a presidential election to achieve a dishonestly partisan outcome contrary to what an accurate count would show than does a state or local canvassing board.

A second important initial point: the Constitution assigns to state "legislatures" and to "Congress" a number of different types of roles or functions. The issue that I will address is limited to the role of states and Congress in the *lawmaking process* of regulating the "manner" of national elections. But the Constitution assigns these entities functions other than lawmaking. In these other roles, it is possible that state legislatures or Congress have a degree of constitutional independence they do not have in the ordinary context of lawmaking.

For example, Congress has a distinct role in proposing constitutional amendments. Early Supreme Court precedent recognized that, unlike when Congress legislated, Congress did not have to present proposed amendments for the President's approval or veto.[2] Indeed, Congress has not presented numerous constitutional amendments for presidential approval or veto, including the Bill of Rights. But the fact that Congress might be "independent" in the context of proposing constitutional amendments does not mean, of course, that it is "independent" in the context of lawmaking, in which presentment to the President is constitutionally required. Similarly, the original Constitution assigned state legislatures a power to elect Senators. It is possible that, in their role as electors, state legislatures had a degree of independence they do not have in the context of regulating national elections. If a state constitution before the Seventeenth Amendment had

[1] *Bush v. Gore*, 531 U.S. 98 (2000).
[2] *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (statement at oral argument of Chase, J.).

purported to permit direct popular election of Senators, it is possible such a provision would have violated the role the Constitution assigned to state legislatures as electors. Indeed, in upholding the ability of a voter-initiated constitutional amendment to create an independent redistricting commission for House districts, the Supreme Court's opinion in the *Arizona State Legislature v. Arizona Independent Redistricting Commission* case, 576 U.S. 787 (2015) (*AIRC*) recognized that state legislatures might have had unique independence, prior to the Seventeenth Amendment, in their distinct role as electors. Thus, it is possible the Constitution creates a more "independent" Congress or state legislature for certain functions, but not for others, such as when these entities are engaged in the function of lawmaking, such as the regulation of federal elections. These conclusions are not based on reading the word "legislature" in isolation, but on structural inferences based on the nature of the power that the Constitution confers on Congress or state legislatures in these specific provisions.

Does the Constitution Deny the Ability of State Constitutions to Constrain State Laws Regulating National Elections? With respect to whether state legislatures cannot be bound by the substantive provisions in state constitutions when they regulate national elections, the most comprehensive examination of that history can be found in Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. (2022) (hereinafter *Revisiting History*). A second important article on the history is Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020).[3]

As an initial matter, these works agree that there is simply no evidence that the Framers understood the Constitution to create an independent state legislature with respect to the power to regulate national elections. As even Professor Morley, the most committed academic defender of some version of the doctrine, acknowledges: "It appears that the Framers neither expressly considered the independent state legislature doctrine nor addressed the potential significance of their use of the term 'legislature' in the Elections Clause and Presidential Electors Clause."[4] [5]Indeed, if we look to historical practice in the Founding era and for decades later, the evidence indicates that the general public understanding of the texts in these clauses was that no such doctrine existed. Smith points out that at least five state constitutions expressly imposed substantive constraints on state legislative regulation of national elections by requiring that all elections be conducted by ballot, rather than by voice vote – an issue that was one of the most important and contested ones of election administration in early constitutional history. State constitutional regulation of national elections expanded throughout American history.

Second, until the 2020 election, there does not appear to be any federal court precedent, including from the Supreme Court, which acknowledged any version of the ISLT at all with respect to state regulation of federal elections. The only time the Court spoke in the vicinity of the issue

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[3] For other works on the history, see Michael Weingartner, *Liquidating the Independent State Legislature Theory*, (forthcoming, Harv. J.L.Pub. Pol. (2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138; Mark Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. __ (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163.

[4] Michael Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021).

arguably came in the 1892 case of *McPherson v. Blacker*, 146 U.S. 1 (1892), in which the Court held that the Michigan legislature had not violated the Constitution in choosing to have presidential electors selected by district rather than statewide. While Professor Morley reads certain passages, admittedly dicta, as supporting the ISLT, other scholars conclude that reading is "not supported by any reasonable reading of the case,"[6] or that the case at best contains contradictory dicta that point in opposite directions on the issue.

I cannot survey here all the historical materials scholars have debated beyond these major points. Professor Morley suggests a few state court cases in the Civil War era dealing with absentee voting by soldiers in the battlefield, as well as the congressional resolution of a contested House election in 1866, *Baldwin v. Trowbridge*, evidence belief in the doctrine during that era. As an initial matter, for those who believe the Constitution's text should be understood in terms of the original public meaning those provisions reflect, this mid-19th century evidence would appear to have little weight. The reading of these few state court cases is also disputed by scholars, and the majority and dissent in the *AIRC* case disputed the weight to be given legal arguments made in the inevitably partisan context of the House's resolution of a disputed election.

Even accepting these few mid-19th century examples as evidence in support of the ISLT, the overwhelming weight of historical practice illustrates that state constitutions throughout American history have imposed substantive constraints on the terms under which state legislatures can regulate national elections. The fact that these constitutions have done so throughout American history makes the ISLT hard to square with historical practice. In dissenting in the *Arizona Independent Redistricting* case, Chief Justice Roberts left open the possibility that he might agree that state constitutions can limit the exercise of state legislative powers under the Elections Clause -- even though he concluded the Elections Clause prohibited a voter-initiated constitutional amendment that transferred redistricting to an independent commission. The flaw in the Arizona provision, in his dissenting view, was that it completely transferred the entire function of redistricting out of the hands of the legislature. As he put it: "Suffice it to say that none of [the other state constitutional constraints on state legislatures] purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process."[7]

The Potential Ramifications: State Constitutions and Voter-Initiated Amendments and Legislation

The most important issue concerning the scope of a potential ISLD is whether such a doctrine permits state legislatures to ignore substantive constraints that state constitutions otherwise impose on the regulation of elections. There are several different versions of the extent to which a potential ISLD might limit the role of state constitutions. The "maximalist" position would be that state constitutions cannot impose any substantive constraints on state regulation of federal elections. But there are also several more limited positions that would recognize only certain, more narrowly defined boundaries on the role of state constitutions. In addition to

[6] Smith, *Revisiting History*, at 531 n. 400.

[7] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

identifying these various potential versions of an ISLD, I will highlight some of the ramifications these various versions would have.

In forty-six states, the current state constitution was drafted by a constitutional "convention" without direct involvement by the state legislature.[8] These constitutions were arguably approved without state legislative or congressional endorsement. (In the other four, current constitutions were drafted by the state legislature and ratified by popular vote). The state constitutions in most of these forty-six convention states impose many regulations of congressional and presidential elections. If the Constitution is best read to permit only the institutional "legislature" to regulate federal elections, all the provisions in these constitutions that do so might be held unconstitutional. This is the maximalist version of the ISLT. Simply to state that conclusion is to indicate the breadth of such a position, as the concrete examples discussed below illustrate.

Closely related to the general role of state constitutions is the question of how popular lawmaking, in the twenty-four states in which such an option exists, would be affected by a potential ISLT. Popular lawmaking can take several forms. Approximately eighteen states allow voter-initiated constitutional amendments. An additional six states allow voter-initiated state statutes, which permit voters to enact new laws without legislative consent. While voter-initiated legislation is easier for legislatures to repeal, ten of these twenty-four states impose significantly higher hurdles than required for other legislation on legislative efforts to repeal voter-initiated legislation. Because popular lawmaking is not "the legislature" enacting laws, a maximalist version of the ISLT might render unconstitutional all the forms of regulating national elections that have been adopted through popular lawmaking initiatives. Note that the Framers could not have intentionally meant to exclude popular lawmaking as a valid means of state regulation of national elections when they used the word "legislature," because the statewide voter initiative was not even conceived of as a form of lawmaking until the late 19th and early 20th Century.

This is a sampling of the vast array of provisions regulating federal elections that are found in state constitutions or voter-initiated legislation, all of which would be threatened by the maximalist version of the ISLT: provisions banning straight-ticket voting; voter identification requirements; the deadlines for voter registration; provisions establishing all-mail voting systems; provisions regulating the absentee-ballot process; provisions banning voters who failed to vote in the general election from voting in run-off elections; how to fill vacant Senate seats (by special election rather than gubernatorial appointment); provisions on the thresholds required to be elected to office (plurality-vote or majority-vote provisions); provisions for challenging the validity of votes; the criteria to be used in redistricting, such as whether districts must be compact, whether partisan considerations are banned or constrained, what weight to be given to competitiveness; whether districting is to be done by independent commissions. A number of these provisions date to early state constitutions.[9]

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[8] The information in this paragraph and the next one comes from *Nathaniel Persily et al., When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio State Law Journal 689 (2016).

[9] *Id.*

The regulation of primaries for federal elections is an area particularly worth singling out. As voters have become dissatisfied with the nature of politics in recent years, they have sought to reform the structure of primaries in several states. These reforms are motivated, in part, by the belief that factional candidates can win nomination in the traditional form of primaries, and in safe seats, those candidates will go on to win the general election. These reforms seek to modify the structure of primaries and voting rules to make it more likely candidates with broad majority support, rather than more factional candidates, will be rewarded (and will also, therefore, be more likely to run in the first place). In Washington and California, voters adopted the Top-2 structure for primaries, in which all candidates run in a single primary and the top two then go on to compete in the general election. In Maine, voters adopted ranked-choice voting (RCV) for federal and state primaries and the general election. Most recently, in 2020 voters in Alaska adopted the Top-4 primary structure, with RCV to be used in the general election. Whether or not these reforms turn out to have the beneficial effects their proponents believe they will have, they are examples of the ways in which voters over the years have sought to reform the democratic process to make it more responsive to their concerns.

This brief sampling suggests how destabilizing the maximalist version of the ISLT would be. The way in which federal elections have been conducted for many decades in states would be overturned. The ability of voters, through voter-initiated constitutional amendments or voter-initiated legislation, to change the structure of elections would be eliminated. In theory, Congress could legislate to approve all these provisions, or legislatures in individual states could choose to adopt through legislation all the provisions in their states currently found in state constitutions or popular enactments. For certain rules that have become widely accepted by now, state legislatures would, if required by the federal Constitution, affirmatively enact those rules. But that hardly seems likely for the full range of these substantive provisions, in part because legislators have a strong self-interest in structuring election rules in ways that benefit themselves and their partisan allies.

In addition, nearly all these provisions apply to both state and federal elections. If they are unconstitutional as applied to federal elections, another consequence is that states would face the prospect of running dual election-administrative systems, with different rules governing state and federal elections (unless the legislature adopted these provisions for federal elections). It would also mean state legislatures have more power to regulate federal elections than they do their own state elections.

In identifying the destabilizing range of consequences that would flow from the maximalist version of the ISLT, the point is not the text of the Constitution should be ignored. The point is that for generations, back to the Founding era, a vast array of actors have acted on the view that the Elections and Electors Clauses do not prevent the enactment of these provisions, whether through state constitutions or voter-initiated forms of lawmaking. Nor, for generations, has the enactment or enforcement of these provisions drawn any significant objection that they are unconstitutional due to these two clauses.

I will turn now to less extreme versions of an ISLT, though those versions too would have substantial ramifications.

General v. specific state constitutional provisions. A different variant of the ISLT would not condemn all substantive state constitutional constraints on state legislatures in the exercise of their powers under the Elections and Electors Clauses, but would limit the power of state courts in interpreting their own constitutions. This position would distinguish state constitutional rules that are fairly "specific" and can be judicially enforced – such as a provision requiring that the state use a Top-2 or Top-4 primary structure for federal election primaries, or a provision banning taking partisan considerations into account in drawing districts – from more "general" state constitutional provisions, such as provisions common to many state constitutions that guarantee the right to "free and equal" elections. On this view, if a state court applies these type of "general" provisions to hold unconstitutional state election laws regulating federal elections, the state court has violated the federal Constitution. But state courts would retain the power to enforce more specific, substantive state constitutional provisions that regulate federal elections.

This view is hinted at in the statements of Justices Alito and Thomas in the 2020 election cases involving the Pennsylvania Supreme Court's decision, based on its interpretation of the state constitution, to require the absentee-ballot receipt deadline to be extended beyond the date the legislature had set in the state's election laws.[10] Justice Thomas criticized the court's reliance on what he called a "vague clause" in the state's constitution.[11] Similarly, Justice Alito stated that the federal Constitution would be violated if state courts could override state laws for federal elections "by claiming" that a state constitutional provision required that result. These statements might suggest that if state courts are enforcing specific provisions – rather than "vague" ones – they are not "claiming," in Justice Alito's view, that a provision applies in a particular way but are instead "directly" enforcing a specific substantive provision. The idea here might seem to be that when state courts, enforcing state constitutions, act in a "judicial capacity," there is no federal constitutional problem, but when they act, in effect, as rule-makers they are acting in a "legislative capacity" and the Elections and Electors Clauses prohibit that.

But this position would require federal courts to determine just how specific state constitutional provisions must be to "specific enough" rather than "too general" to constrain state election rules permissibly without violating the federal Constitution. It is not at all clear this distinction can be given principled, consistent content. Yet in the absence of such ability, there is a troubling risk that federal judicial judgments about this line would rest on highly subjective judgments. The New York courts, for example, recently struck down the Democratic gerrymander of the state's congressional districts on the basis of a popularly-adopted constitutional amendment in 2014 that provided: "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). Is this provision specific enough or too general for purposes of the approach suggested in the statements of Justices Alito and Thomas?

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[10] *Republican Party of Pennsylvania v. Boockvar,* 141 S. Ct. 1 (2021) (Alito, J., statement).

[11] *Republican Party of Pennsylvania v. Degraffenreid,* 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting from denial of certiorari).

Most state constitutions contain provisions guaranteeing the right to vote, or requiring equal protection of the laws, or securing the right to free and fair elections. Are these provisions unenforceable in federal elections because they are "too general"? Another issue this view would have to confront is how to address "general" constitutional provisions that state courts have given more specific content to over time, through the development of precedent. After all, many constitutional provisions are stated in highly general terms – consider all the Supreme Court precedents determining the meaning of the First Amendment or the federal Equal Protection Clause – but take on much more determinate meaning over time through judicial decisions. If a "general" state constitutional provision has been given "specific enough" content through precedent over time, can state courts now enforce that provision against state election laws regulating federal elections? Will federal courts review that series of state decisions to determine if the decision before them fairly follows from that earlier line of precedent or strays "too far" from it? If the same provision exists in two state constitutions – such as a provision guaranteeing the right to vote – would state enforcement of that provision not violate the federal Constitution in a state that has given the provision much more specific content over time but would violate the federal Constitution in a state with more sparse precedent on the provision?

An ISLT that would distinguish between "specific" and "general" state constitutional provisions would be less extreme than one which precluded application of all state constitutional constraints. But even leaving aside the intrusion on state court development of state constitutional law such a view would entail, any effort to apply that distinction would be fraught with uncertainty, difficult if not impossible to apply in a consistent, principled way, and would pose a serious risk of highly subjective federal court judgment about which constitutional provisions, in which states, could be applied to state laws regulating federal elections.

Limits Only on State Court Remedial Relief. A still more limited version of the ISLT is being argued for in the petition for certiorari filed in *Costello v. Carter* (No. 21-1509, June 1, 2022), a challenge to the Pennsylvania's Supreme Court adoption of a redistricting plan in the face of a political impasse over redistricting. The argument in that petition does not challenge the power of state courts to apply state constitutional provisions and invalidate legislatively enacted congressional redistricting maps. The argument, instead, is that the Elections Clause should be understood to constrain the state judiciary's remedial discretion when imposing congressional maps in response to a legislative impasse or a constitutional violation. The argument asserted is that, while a state court can impose a congressional map in response to constitutional violation or political impasse, its range of discretion should be understood to be constrained by virtue of the Elections Clause. Whether or not such a position is justified as a matter of constitutional interpretation, if this is as far as a Court-endorsed ISLT goes, it would be much less destabilizing than the more maximalist potential versions of an ISLT.

The Potential Ramifications: Non-constitutional Administration and Interpretation of State Election Laws Regulating Federal Elections

Some proponents of an ISLT believe it applies to the administration and interpretation of state election statutes. This position might be an alternative to the positions catalogued above – or it might be in addition to those positions. The view that there is an ISLD that applies to state court

interpretation of such state statutes arose, for the first time, in Justice Rehnquist's concurrence for three Justices in *Bush v. Gore*.[12] That concurrence concluded that the Florida courts had violated the Electors Clause because their interpretation of Florida election statutes departed from the "clearly expressed intent" of the Florida legislature – an intent that "must prevail" under the Electors Clause.

As an initial matter, state laws regulating federal elections, like all laws, often require some judgment about how to administer those laws and how to interpret them. Laws often contain gaps or ambiguities, because the drafters cannot have foreseen all the circumstances to which those laws must be applied or anticipated certain questions that might arise. Lawmakers might have clarity about how the law treats the core, paradigmatic instances that the law was designed to address but have given little thought to borderline cases that then arise – particularly when the laws are not recent enactments and circumstances have changed. Election statutes might expressly or by implication delegate some degree of discretion to election administrators, such as Secretaries of State, who must then exercise judgment about how to best apply the statute's text and purposes to fill in these gaps or address unforeseen issues.

For similar reasons, and despite the best drafting efforts of legislatures, laws will also often contain ambiguous provisions whose meaning courts must then determine. The majority of cases the Supreme Court decides involve the disputed interpretation of federal statutes, it is worth recalling, rather than matters of constitutional law.

Just as in the state constitutional context, there are two possible versions of the ISLT when it comes to state administration of election laws that regulate federal elections or state court interpretation of those laws. The narrower version is that these officials cannot apply or interpret these laws in a way that *directly contradicts* or conflicts with a provision in the state's election code. If the law requires some action on or before date X, for example, these actors cannot invoke various principles of interpretation that lead to an interpretation that changes that date. If an ISLD extended no further than this, much would depend on how federal courts understood the principle of "direct contradiction."

A more maximal position is that the federal constitutional clauses prohibit these state actors from applying or interpreting state election law for federal elections in a way that strays "too far" from the text of those laws. In effect, such a version of the ISLT would rest on the principle that the federal Constitution imposes a "plain meaning" rule of interpretation for state statutes regulating federal elections, regardless of how state courts normally interpret state statutes. Much would depend in this context on how to define when a state court decision strays "too far" from the text of those laws.

In either version, an ISLD that applied to administration and interpretation by state actors of state election laws regulating federal elections would be based on the principle that these actors cannot, in the guise of interpreting these laws, effectively re-write them. If applied in a consistent way, such a doctrine might be a check against attempted partisan manipulation of these election laws – particularly by state officials elected in partisan elections (such as Secretaries of State). But

[12] *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring in the judgment).

such a doctrine would also put federal courts in the position of policing the application and interpretation of state election law for federal elections, which in theory could prompt federal court litigation every time a candidate or voter disagrees with the application or interpretation of state election law regarding a federal election. Such a doctrine would also raise a whole host of troubling questions about what it would mean for federal courts to become the final arbiters of state laws regulating federal elections – questions canvassed in in a recent draft article entitled *Textualism, Judicial Supremacy, and the Independent State Legislative Theory*, by Professors Litman and Shaw. [13]

As to the historical record on the view that the ISLT constrains state court interpretation of state laws regulating federal elections: I am not aware of this argument ever having been made, let alone judicially endorsed, before the concurrence in *Bush v. Gore*. I do not believe any scholarship points to prior instances of this argument being made.

Moreover, Congress also has the power under the Elections Clause to regulate the times, places, and manner of elections to the House and Senate. Congress has exercised this power in several federal statutes.[14] Yet no federal court has ever suggested, as far as I am aware, that the Elections Clause creates an "independent Congress," which constrains how the federal courts engage in the process of interpreting these federal statutes. Indeed, I am also not aware of this argument even ever having been made with respect to Congress, whether in litigation or in scholarship. Instead, federal courts have engaged in the same methodological approaches to interpreting federal election statutes that they apply to any other federal statute. Yet if the Elections Clause imposes unique interpretive constraints on how state courts interpret state statutes regulating federal elections, it would seem to follow logically that the federal courts must function under similar unique constraints when they interpret federal statutes enacted pursuant to the Elections Clause.

To be sure, serious due process issues of fundamental fairness arise if, after votes have been cast, state courts -- in the guise of "interpreting" election law -- in effect change the ground-rules under which the election has been conducted. In effect, such decisions create "new law" -- after votes have been cast – while purporting to interpret election statutes. But there is already a body of federal due process law that guards against such actions, though only in decisions of the federal courts of appeals. This body of law is more expansive than an ISLD would be regarding state judicial interpretation, because it applies to all elections, not just federal ones. I have written about this body of law in an article entitled *Judging "New Law" in Election Disputes.*[15] The federal courts have been clear, though, that such a doctrine should apply only in extreme cases, and that ordinary disputes over the meaning of state election laws do not implicate due process. In addition, the federal courts have not found due process violations based merely on disagreeing

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[13] Leah Litman and Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory,* Wisconsin Law Review 5 (June 2022): 1–31. available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4141535.

[14] See, e.g., Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause,* 96 Wash. L. Rev. 997 (2021); Robert G. Natelson, *The Original Scope of Congressional Power to Regulate Elections,* 13 U. Pa. J. Const. L. 1 (2010).

[15] Richard Pildes, *Judging 'New Law' in Election Disputes,* 29 Florida State University L. Rev. 691 (2001).

with how to read the text of an election statute; instead, they have engaged in extensive fact-finding about prior state election practice before determining that state actors have in effect re-written election laws after the votes have been cast. Thus, even apart from any ISLT, there are constitutional protections already in place against such violations of fundamental fairness in the election context.

In sum, discussion in an all-or-nothing sense of whether the Constitution "does" or "does not" create an ISLD can be misleading. The Constitution might create a uniquely "independent" Congress or state legislature when those entities carry about certain specific functions, such as proposing constitutional amendments or, in the original Constitution, electing Senators. But that does not mean Congress or state legislatures are made constitutionally independent in their function of lawmaking with respect to national elections. In addition, discussions of a potential ISLD requires clarity about which particular version of such a doctrine is being considered. Different versions have different ramifications; the question of whether there is any historical support for such a doctrine, and what that support might be, also depend on which version of a potential ISLD is being considered. But there is little doubt that the maximalist version of such a doctrine – in which state constitutions and voter-initiated constitutional amendments or statutory initiatives are unconstitutional if they impose any substantive constraints on state legislatures' regulation of federal elections – would be highly destabilizing to the federal election process. All the substantive rules in such sources regulating federal elections would no longer be in effect, until state legislatures decided which of these rules to enact. The ability of voters and state constitutions to constrain state legislatures from self-interested manipulation of the laws regulating federal elections would be ended. That is a troubling prospect.

The CHAIRPERSON. Thank you very much, Professor.

I would now like to ask Professor Shapiro to give her testimony for five minutes.

STATEMENT OF CAROLYN SHAPIRO, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR ACADEMIC ADMINISTRATION AND STRATEGIC INITIATIVES, CHICAGO KENT COLLEGE OF LAW, CHICAGO, IL

Ms. SHAPIRO. Thank you, Chairperson Lofgren, Ranking Member Davis, and distinguished Members of the Committee.

The independent State legislature theory, or the ISLT, can take a variety of forms, as everybody acknowledges, and during the 2020 election litigation, some Supreme Court Justices appeared to embrace among the most extreme versions, such as second-guessing State courts' interpretations of their own laws.

Almost every version of the ISLT starts with the claim that the Elections and Electors Clauses, which give State legislatures the authority to regulate Federal elections, mean that, when legislatures do so, what their own State constitutions require or prohibit does not matter.

Nothing in the clauses compels that reading. An at least equally natural reading recognizes that legislatures are creatures of their constitutions and so may make laws only as allowed by them.

Historical understanding and practice overwhelmingly support this latter view. A few highlights:

From the time of the founding, State constitutions have regulated Federal elections. Between 1789 and 1803, at least six State constitutions regulated whether elections should be by ballot or by voice vote, which was extremely controversial at the time, and those provisions were understood to apply to Federal as well as State elections.

Some early State constitutions explicitly regulated Federal elections. The Delaware Constitution of 1792, for example, expressly regulated the election of congressional representatives.

In addition, the overwhelming majority of State courts to consider State constitutional challenges to State laws regulating Federal elections have applied their constitutions. Congress, too, has deferred to State constitutions when serving as the judge of its own elections.

ISLT proponents point to a handful of State supreme court cases declining to apply State constitutional provisions to laws governing Federal elections and to a single contested election in the House of Representatives in 1866. But those examples are, at most, outliers in a long swath of historical practice pointing in the other direction, and almost none of them unambiguously rely on the ISLT.

There is also absolutely no historical evidence supporting the more extreme versions of the ISLT. For example, the notion that Federal courts can second-guess State courts' interpretations of their own laws seems to have first appeared in Chief Justice Rehnquist's concurring opinion in *Bush* v. *Gore*, where it is presented as a bald statement without citation.

I turn now to the implications of the ISLT. To be blunt, it would be extraordinarily destabilizing. For example, most State election laws apply without distinction to Federal and State elections.

States generally have one voter registration system, for example. If a State court strikes down some aspect of those laws as violating the State constitution, the ISLT might require that the law nonetheless remain in effect for Federal elections. Depending on the specific provisions, this would be at best confusing and unwieldy, at worst impossible.

The same is true for statutory construction. The maximalist ISLT might require a different interpretation of the same statute to apply to Federal elections than to State elections. The ISLT would thus disrupt and undermine State election administration.

Despite rhetoric supporters use promising that the ISLT promotes predictability, it actually throws out centuries of State court precedent interpreting and applying State constitutions, including, for example, precedent establishing predictable approaches to the constitutional guarantees to free or equal elections that appear in more than half of State constitutions and have a history dating back to the founding era.

The ISLT also rejects longstanding State jurisprudence on statutory interpretation and might require ignoring precedent construing identical statutory language.

Likewise, despite rhetoric supporters use promising that the ISLT promotes political accountability, by undermining expectations and longstanding practice, it actually makes it harder for voters to know what their legislatures have done.

And by turning every question about State election law into a Federal constitutional question, it shifts decision-making about the meaning of State election law away from State courts and elections administrators and to the Federal courts, especially the Supreme Court. If nothing else, the ISLT will promote unending election litigation, bringing uncertainty and disruption.

Congress has the power to avert many of the worst implications of the ISLT as well as to protect democracy in other ways, and I urge you to use that power.

Thank you.

[The statement of Ms. Shapiro follows:]

The Independent State Legislature Theory and Its Potential to Disrupt Our Democracy

Hearing Before the House of Representatives
Committee on House Administration
Thursday, July 28, 2022

Testimony of Carolyn Shapiro
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology

Chairperson Lofgren, Ranking Member Davis, and distinguished members of the Committee:[1]

Thank you for the invitation to testify before this committee. I am a Professor of Law and an Associate Dean at Chicago-Kent College of Law, Illinois Institute of Technology, where I teach constitutional law, legislation, and public interest law. My scholarship focuses on our constitutional democracy, including research on the constitutional and statutory structures underlying our democracy and on the Supreme Court and its relationship with other courts and institutions. My CV contains a complete list of my scholarly publications, but of note, in 2020, I published an article entitled *Democracy, Federalism, and the Guarantee Clause,* arguing that Congress has the power and the obligation to act to protect representative democracy in the states.[2] And my testimony here today draws heavily from my article, *The Independent State Legislature Theory, Textualism, and State Law*, which is forthcoming in the University of Chicago Law Review.[3]

My testimony today has several goals. After a short introduction, I will first provide some background on what the historical record related to the Independent State Legislature Theory (ISLT) shows, with a special focus on the points of broad agreement among scholars. Second I will explain in more detail what forms the ISLT takes, including what versions are at issue in the pending Supreme Court case, *Moore v. Harper*.[4] Third, I will discuss the potential effects of an embrace of the ISLT, including in its more extreme forms. To preview, these effects include (a) massive uncertainty and chaos in the administration and regulation of elections and concomitant unpredictability about what the rules are and who makes them, (b) undermining the longstanding expectations and understandings of voters, state legislators, and other state officials about how state law governing elections will be interpreted and applied, and (c) a shift of authority over state election law from state courts, executive branch officials, and elections administrators, to the federal courts, in particular the Supreme Court. Finally, I will note some actions that Congress could consider to forestall at least some of these effects, regardless of how the Supreme Court rules in *Moore*.

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[1] This version of my written testimony contains non-substantive corrections from the version originally submitted.
[2] 62 Ariz. L. Rev. 183 (2020).
[3] 90 U. Chi. L. Rev. __ (forthcoming 2023), current draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322.
[4] Docket No. 21-1271.

Introduction

The ISLT arises from the Constitution's assignment of the obligation and authority to regulate federal elections. Article I, Section 4, known as the Elections Clause governs congressional elections. It provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, Section 1, governs the election of presidential electors and is often called the Electors Clause. It provides, in relevant part:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...

Proponents of the ISLT rely on the fact that both of these clauses assign the regulation of federal elections specifically to the legislatures of the states, not to each state as a whole. As a result, ISLT proponents argue that legislatures' substantive regulation of federal elections cannot be constrained by state constitutions. Critics of the ISLT respond that legislatures are creatures of state constitutions and thus cannot exercise powers beyond what those constitutions provide. As my testimony will indicate, however, there are many nuances to and variations among those positions.

The Historical Record

The ISLT emerged as a serious argument in litigation over the 2000 and 2020 presidential elections, as well as in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*, a 2015 case challenging Arizona's popularly-enacted constitutional amendment establishing an independent redistricting commission.[5] As a result, but especially since the 2020 election, a massive and increasing amount of scholarship has emerged addressing whether the ISLT has any historical justification. In this section, I will not attempt a comprehensive summary—I am omitting, for example, discussion of the drafting history of the Elections and Electors Clauses—but I will highlight some of the

[5] 576 U.S. 787 (2015). I will discuss *AIRC*'s holding in the next section.

points on which there appears to be general agreement and will indicate some of the areas of contention.[6]

- Beginning immediately after the Founding, many states either adopted or amended their constitutions to regulate federal elections.
    a. Sometimes, those constitutional provisions explicitly referenced congressional or presidential elections. For example:
        i. The Delaware Constitution of 1792 provided that congressional representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner."[7]
        ii. In 1810, Maryland amended its 1776 constitution to guarantee all free white men the right to vote for presidential electors.[8]
        iii. The Florida Constitution of 1838 required that '[r]eturns for elections of members of Congress ... shall be made to the secretary of state..."[9]

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[6] Much of this section of my testimony summarizes Part I.A of my forthcoming article, *The Independent State Legislature Theory, Textualism, and State Law*, which in turn relies heavily on the work of other scholars, including Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y __ (forthcoming 2023), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138; Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. __ (forthcoming 2022), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163; Vikram David Amar and Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. Ct. Rev. 1; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U.L. Rev. 731, 759–61 (2001) (hereinafter *History*); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445 (2022) (hereinafter *Revisiting History*); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1 (2020) (hereinafter Morley, *ISLD, Elections, and Constitutions*); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501 (2021) (hereinafter Morley, *ISLD*).

[7] Del. Const. of 1792, art. VIII, § 2.

[8] Md. Const. of 1776, art. XIV (adopted 1810). The amendment also expressly applied to elections for state offices and for congressional representatives, but the ISLT is not relevant to voter qualifications for congressional offices because the federal Constitution regulates voter qualifications for congressional elections, providing that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., art I, § 2. *See* Morley, *ILSD, Elections, and Constitutions*, *supra*, at 38-39 n.168. The Maryland amendment does, however, provide evidence against the ISLT for purposes of presidential elections, because the Electors Clause in Article II does not regulate voter qualifications.

[9] Fla. Const. of 1838, art IV, § 16.

iv. State constitutions in the nineteenth century sometimes expressly regulated congressional districting by, for example, "instituting districting criteria including compactness, population equality, and respect for county boundaries."[10]

v. State constitutions in the nineteenth century often regulated other aspects of federal elections, including the election of presidential electors.[11]

b. From the beginning, many state constitutions contained provisions that regulated elections generally, but were understood to apply to elections for federal offices.[12] For example, some required that elections be by ballot or, alternatively, by voice vote,[13] and these provisions were understood to apply to both state and federal elections.[14]

- State constitutional requirements for legislating apply to regulation of federal elections.
  a. The Supreme Court has long held that when state legislatures regulate federal elections, they do so using their ordinary lawmaking power. As a result, they must act consistent with their constitutions' procedural requirements for such lawmaking. Specifically, the Supreme Court has upheld the use of both a gubernatorial veto of and a popular referendum rejecting enactments governing federal elections.[15]

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[10] Weingartner, *supra*, at 37, citing Va, Const. of 1850, art. IV, § 13-14; Va. Const. of 1830, art. III, § 6; Iowa Const. of 1846, art. 3, Legislative Department, § 32; Cal. Const. of 1849, art. IV, § 30. *See also* Smith, *Revisiting History*, *supra*, at 525-28.

[11] *See* Smith, *Revisting History*, *supra*, at 525-27, citing, e.g., S.C. Const. of 1869, art VIII, § 9; Pa. Const. of 1873, art. VIII, § 7; Colo. Const. of 187, art. XIX, Schedule, §§ 19-20.

[12] *See* Smith, *Revisiting History*, *supra*, at 488-91.

[13] *See, e.g.*, Pa. Const. of 1790, art. III, § 2; Ga. Const. of 1789, art. IV, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art IV, § 2. *See also* Weingartner, *supra*, at 36-37; Smith, *Revisiting History, supra,* at 489.

[14] Weingartner, *supra*, at 36; Smith, *Revisiting History*, *supra*, at 488-91.

[15] *Smiley v. Holm*, 285 U.S. 355 (1932) (gubernatorial veto); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referendum). The Supreme Court has treated state legislatures' authority under the Electors and Elections Clauses differently from their authority to ratify constitutional amendments and (before the Seventeenth Amendment) to appoint Senators. Regulating federal elections is a form of lawmaking; ratification and appointment of Senators are not. *Compare Hawke v. Smith*, 253 U.S. 221 (1920) (holding that a state constitution cannot require a referendum to ratify a federal constitutional amendment); *id.* at 228 (explaining that the same was true for selection of Senators before the 17th Amendment); *id.* at 229 (distinguishing between those acts and regular legislation); *Leser v. Garnett*, 258 U.S. 130 (1922) (rejecting state constitutional challenges to ratification of the 19th Amendment where state constitutions prohibited such ratification).

b. Additionally, as the leading academic proponent of the ISLT has acknowledged, when acting as the judge of its own elections, Congress has "typically enforced state constitutions' procedural requirements concerning the legislative process."[16]

- The Supreme Court has never held that substantive state constitutional limitations cannot apply to state laws governing federal elections, and before 2000, it had discussed the issue only once, in the 1892 case of *McPherson v. Blacker*, and there only in dicta.[17]
    a. *McPherson* was about whether the Electors Clause requires a state to select all of its presidential electors at large or whether the state legislature could divide the state into districts for that purpose. In that context, the Court said that the Clause "convey[s] the broadest possible power of determination' [and] 'leaves it to the legislature exclusively to define the method of appointment.'"[18]
    b. Some read this language to support the ISLT, but that is an incomplete reading of the opinion. *McPherson* also said that "[w]hat is forbidden or required to be done by a State" when it comes to appointing presidential electors "is forbidden or required under the legislative power under the state constitutions as they exist" and the state's "legislative power is the supreme authority except as limited by the constitution of the State."[19] *McPherson*'s more explicit dicta thus actually undermines the ISLT.

- Historically, state courts have almost uniformly applied state constitutional provisions to laws governing federal elections, as scholars have documented in detail.[20] There are, however, a small number of cases, mostly dating from the late nineteenth century, in which state courts refused to apply particular state constitutional provisions to such laws.
    a. In at least two cases, the state courts concluded that the relevant constitutional provisions did not or likely did not address federal elections at all.[21]

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[16] Morley, *ISLD, Elections, and Constitutions*, *supra,* at 46.
[17] 146 U.S. 1 (1892).
[18] *Id.* at 27.
[19] *Id.* at 25.
[20] *See, e.g.,* Weingartner, *supra,* at 41-43.
[21] *See, e.g., Opinion of the Judges*, 37 Vt. 665, 677 (1864); *In re Plurality Elections*, 8 A.2d 881, 881-82 (R.I. 1887).

b. In *every* case, there was no ambiguity that the state legislature wanted to treat federal elections differently from state elections. Either state legislatures sought advisory opinions from state supreme courts about the scope of their authority with respect to federal elections or they passed laws that applied specifically to federal elections only.[22]

- The House of Representatives, when acting as judge of its own elections, has been inconsistent about whether to honor state constitutional provisions governing those elections.
    a. The most famous example, *Baldwin v. Trowbridge*, involves a Civil War-era congressional election.[23] The Michigan constitution required voters to vote in person, but the Michigan legislature passed a law allowing soldiers in the Union Army to vote absentee. The votes of those soldiers proved decisive in one congressional race, and the House ultimately decided to accept those votes. Although some House Members relied on the ISLT, others who agreed with the result argued that there was in fact no conflict between the statute and the state constitution, and at least one of those Members expressly rejected the ISLT.[24]
    b. In other contested elections, both predating and postdating *Baldwin*, the most intensive historical research demonstrates

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[22] *In re Opinion of the Justices*, 45 N.H. 595, 599 (1864) (advisory opinion) (permitting legislature to allow soldiers out-of-state to vote absentee in federal elections regardless of state constitutional restrictions); State *v. Williams*, 49 Miss. 640, 666 (Miss. 1873) (allowing state legislature to set congressional elections for dates that would be impermissible for state elections); *In re Plurality Elections*, 8 A.2d 881 (advisory opinion) (permitting legislature to allow federal elections to be decided by a plurality both despite majority-vote requirement in state constitution for certain other elections); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (upholding state laws specific to choosing presidential electors); *Dummit v. O'Connell*, 181 S.W.2d 691, 694-96 (Ky. 1944) (upholding statute allowing absent soldiers to vote in federal elections only); *Beeson v. March*, 34 N.W.2d 279, 285-87 (Neb. 1948) (upholding state law specific to presidential electors); *Opinion of the Judges*, 37 Vt. 665 (holding that Vermont constitution required in person voting in state elections but did not speak to federal elections).

[23] *Baldwin* is discussed at length by numerous scholars. *See, e.g.,* Smith, *Revisiting History, supra,* at 448, 458, 522-25, 541; Weingartner, *supra,* at 60-61; Morley, *ISLD, Elections, and Constitutions, supra,* at 48-51. *See also* Smith, *Revisiting History, supra,* at 546-70 (arguing that *Baldwin v. Trowbridge* cannot be treated as precedential in the way judicial opinions are).

[24] *See* Weingartner, *supra,* at 61, citing 39 Cong. Globe at 822, 840 (1866).

that the House "either rejected the ISL theory or assumed state constitutions controlled."[25]

c. The appropriate reading of the historical record about these cases is somewhat contested. In his 2020 article, Professor Michael Morley reads some of them as supporting the ISLT,[26] although he notes at least one twentieth-century case in which the House "enforced state constitutional restrictions."[27] The majority and dissent in *AIRC* also discussed *Baldwin* and disagreed about its import.[28] The more intensive historical research, however, has emerged since *AIRC* and Professor Morley's article, and expressly challenges both the *AIRC* dissent and Professor Morley's analysis. As far as I know, Professor Morley has not publicly responded.

- The historical evidence is overwhelming that delegation of discretion to executive officials who ran elections was common at the Founding.[29]

The ISLT in Practice

Issues related to the ISLT can arise in a variety of different circumstances. In this portion of my testimony, I set forth the major questions I am aware of, and I explain how the ISLT has arisen in contemporary election litigation.

Can state constitutions place substantive limits on state legislative power to regulate federal elections?

- As already noted, state constitutional requirements for lawmaking procedures undisputedly apply to state legislative enactments governing

[25] Weingartner, *supra*, at 60. *See also id.* at 56-62; Smith, *Revisiting History*, *supra*, at 522-25, 532-38.
[26] Morley, *ISLD, Elections, and Constitutions*, *supra*, at 48-61. *See also id.* at 61-65 (discussing Senate treatment of state constitutional regulation of the appointment of Senators and a Senate Committee report evaluating electoral college reform).
[27] *Id.* at 48, citing *Contested Election Case of Paul v. Harrison*, H.R. Rep. No. 67-1101 (1922).
[28] *AIRC*, 576 U.S. at 818-19 (discussing *Baldwin*'s tension with another contested election and suggesting that *Baldwin* was resolved on partisanship, not constitutional analysis); *id.* at 819 (concluding that "*Baldwin* is not a disposition that should attract this Court's reliance"); *id.* at 838-39 & n.3 (Roberts, C.J., dissenting) (relying on *Baldwin* for invocation of the ISLT).
[29] Krass, *supra*.

federal elections. ISLT proponents argue, however, that the Supreme Court cases that so hold speak only to *procedural* lawmaking requirements in state constitutions and that the content of laws governing federal elections cannot be constrained by *substantive* state constitutional provisions.[30] The Supreme Court has addressed (and rejected) this argument, at least in part, in recent cases (discussed in the next bullet points), and may address it further in *Moore v. Harper*.

- Some ISLT proponents have argued that popular initiatives amending state constitutions to require independent commissions for congressional redistricting violate the federal constitution because they remove control of congressional redistricting from the legislature. The Supreme Court rejected this version of the ISLT in 2015 in *AIRC*, by a 5-4 vote.[31] The majority reasoned that the people of the state of Arizona were exercising legislative power when they passed the initiative.[32] The dissent insisted that the Elections Clause's assignment of authority to the "legislature" is an assignment to the institutional legislature, not to the state's general legislative power.[33] The *AIRC* majority included Justices Kennedy, Ginsburg, and Breyer, none of whom are still on the Court.

- Although Chief Justice Roberts wrote the dissent in *AIRC*, four years later in *Rucho v. Common Cause, Inc.*, he—along with all eight of his colleagues—agreed that state constitutions can legitimately restrict partisan gerrymandering in congressional redistricting, and the majority specifically noted several popularly-enacted constitutional amendments, including some that created independent commissions.[34] Those statements, however, were either dicta in the majority opinion or were in dissent.

- As noted above, the Supreme Court may revisit these issues in *Moore v. Harper*. *Moore* is an appeal from a North Carolina Supreme Court case striking down the state's congressional redistricting (along with its state legislative redistricting) as an unconstitutional partisan gerrymander. (The map at issue drew ten Republican districts and three Democratic districts, even though North Carolina is about evenly split in terms of votes for Republicans and Democrats in general elections.) In holding both that

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[30] *See, e.g.*, Morley, *ISLD, Elections, and Constitutions*, *supra,* at 93.
[31] 576 U.S. 787.
[32] *Id.* at 806-09, 814-20.
[33] *Id.* at 828-42 (Roberts, C.J., dissenting).
[34] *Rucho v Common Cause*, 139 S. Ct. 2484, 2507-08 (2019); *see also id.* at 2524 (Kagan, J., dissenting).

partisan gerrymandering is justiciable under the North Carolina constitution and that these particular maps are unconstitutional, the North Carolina Supreme Court relied on the history and structure of the state constitution, including the unique history of its constitution and Declaration of Rights, and rested on several specific provisions of the Declaration of Rights, which I will discuss in more detail below.[35] Depending on the reasoning, if the Supreme Court holds that the North Carolina constitution cannot so limit the legislature in drawing the congressional map, the case could be a step backwards from *AIRC* and *Rucho*.

Assuming that some state constitutional provisions can apply to state laws governing federal elections, are there limits to which kinds of provisions can be given effect by state courts?

- Some ISLT proponents argue that state constitutions can limit state legislatures' regulation of federal elections, but only insofar as the constitutions include explicit and direct constitutional provisions like the creation of independent redistricting commissions. They argue that where the constitution contains broader guarantees, such as the guarantee, versions of which appeared in some of the earliest state constitutions and are common to this day, that elections be "free," or "free and fair," or "free and open,"[36] state courts cannot rely on those provisions to strike down laws governing federal elections. The basis for this version of the ISLT is that these more "open-ended" provisions shift too much power away from the state legislatures and to state courts, in violation of the Electors and Elections Clauses.[37] One of the unstated assumptions underlying this argument may be that state courts cannot be trusted to apply general constitutional provisions in an evenhanded and judicious manner.

- A version of this argument arose during the 2020 election, in the litigation surrounding the Pennsylvania Supreme Court's order extending the received-

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[35] *Harper v. Hall*, 868 S.E.2d 499, 535-47 (N.C. 2022).
[36] Smith, *Revisiting History, supra,* at 491 & n.208 (discussing early state constitutions); Weingartner, *supra,* at 36 & n.278 (same); *id.* at 54 & n.420 (discussing constitutions approved by Congress upon admission to statehood); *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019) (listing contemporary clauses in 30 state constitutions), available at https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx
[37] *See* Derek Muller, *Rucho v. Common Cause and a weak version of the claims in the North Carolina partisan gerrymandering dispute*, ELECTION LAW BLOG (March 8, 2022), available at https://electionlawblog.org/?p=128045.

by deadline for mail-in ballots,[38] and at least three U.S. Supreme Court justices indicated support for it. The Pennsylvania Supreme Court concluded unanimously that, under the unique circumstances of the November 2020 election, the statute as written could not operate consistent with the state constitution's guarantee of free and equal elections, although it split 4-3 on the appropriate remedy.[39] As we all know, in the end, the ballots that arrived after the original statutory deadline could not have made a difference in the result of any federal election in Pennsylvania, and the Supreme Court, after initially narrowly denying a stay and declining to expedite the petition for certiorari,[40] ultimately denied certiorari months after the election.[41] But dissenting from that denial, Justice Thomas criticized the Pennsylvania court for relying on a "vague clause" of the state constitution "to rewrite the rules."[42] Justice Alito, joined by Justice Gorsuch, described the state court's holding as "claim[ing] that a state constitutional provision guaranteeing 'free and equal' elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections."[43] And because the statute at issue governed both state and federal elections without distinction, the ISLT here would have resulted in different rules for state and federal elections.[44]

- This version of the ISLT is expressly implicated in *Moore v. Harper*, in which, as noted above, the North Carolina Supreme Court struck down an extreme

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[38] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 37-72 (Pa. 2020) (*Boockvar I*).
[39] *Id.* at 370-72; *id.* at 392 (Saylor, J., concurring and dissenting); *id.* at 394-98 (Donohue, J., concurring and dissenting). The dissenters agreed that the law as written could not operate constitutionally, but they would have kept the election day receipt deadline and instead altered the deadline to apply for a mail-in ballot, lengthening the period between the application and receipt deadlines. *Id.* at 392 (Saylor, J., concurring and dissenting); *id.* at 394-98 (Donohue, J., concurring and dissenting).
[40] *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 643 (2020); (denying stay by 4-4 vote); *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (same); *Republican Party of Pennsylvania v. Boockvar*, 114 S. Ct. 1 (2020) (denying motion to expedite petition for certiorari).
[41] *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021) (denying certiorari).
[42] *Id.* at 734 (Thomas, J., dissenting from denial of certiorari).
[43] *Id.* at 732 (Alito, J., dissenting from denial of certiorari).
[44] In 2020, it was possible for Pennsylvania to segregate late-arriving ballots so that it could count late-arriving votes in state elections but not federal ones. *Cf. Republican Party of Pennsylvania v. Boockvar*, __ S. Ct. __, 2020 WL 6536912 (2020) (ordering elections officials to segregate late-arriving ballots and count them separately). In many contexts, however, it will be impossible to apply the different rules to the different types of elections. I will discuss this issue further later in my testimony.

partisan gerrymander of the state's congressional districts. North Carolina's constitution does not have a provision that speaks directly to partisan gerrymandering or that creates an independent commission. In striking down the gerrymander, the state high court relied on the history and structure of the state constitution and Declaration of Rights, which predated the constitution itself. The court explained:

> [p]artisan gerrymandering ... violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirit[] and intent of our Declaration of Rights.[45]

The petition for certiorari directly challenges the North Carolina court's reliance on these provisions of the state constitution. The Question Presented asks:

> Whether a State's judicial branch may nullify the regulations governing [congressional elections] ... and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.[46]

As one scholar has pointed out, this version of the ILST, unlike some others, is not inconsistent with the majority opinions in both *AIRC* and *Rucho*, both of which approved of constitutional provisions explicitly creating redistricting commissions.[47]

Even if state courts and state constitutions can substantively regulate state laws governing federal elections, are state courts limited in the remedies they can order?

- Another version of the ISLT suggests that even if state courts have the power to declare a legislature's actions governing federal elections unconstitutional under state constitutions, they are limited in the remedies they can impose. More specifically, petitioners in *Moore v. Harper* argue that the state trial court exceeded its authority by imposing its own map after finding that the legislature's remedial map did not meet the standards the state high court

[45] *Harper*, 868 S.E.2d at 546.
[46] Petition for Certiorari, *Moore v. Harper*, No. 21-1271 (hereinafter *Moore* Petition), at i.
[47] Muller, *supra*.

had set.[48] This argument is, at the very least, in tension with prior Supreme Court precedent requiring deference to state courts as well as state legislatures when it comes to redistricting. In *Growe v. Emison*, for example, both the state and federal courts were hearing challenges to Minnesota's congressional maps.[49] Although the legislature passed new redistricting plans, they were vetoed by the governor, and shortly thereafter, the federal district court enjoined the state court from imposing its own maps, including a congressional map.[50] The Supreme Court unanimously held that the federal court should have deferred to the state court process. More specifically, the Court emphasized that "'reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*...,'"[51] and it expressly demanded deference to the state court in congressional redistricting.[52] But *Growe* did not directly consider the ISLT.

- This version of the ISLT, restricting state courts' remedial power, has implications beyond redistricting. In the 2020 Pennsylvania litigation, for example, although all seven state supreme court justices agreed that the mail-in ballot regime could not function constitutionally, this version of the ISLT might have prevented them from imposing a remedy as to federal elections, even though the same statute governed both state and federal elections and even though the statute was unconstitutional with respect to state elections and so could not operate as written for those races. (I will discuss the problem of applying the ISLT to statutes governing both state and federal elections in more detail later in my testimony.)

Are state courts limited in their ability to construe state laws governing federal elections?

- One version of the ISLT builds on the argument that state constitutions cannot limit state legislative action with respect to federal elections. If that is true, the argument goes, then invocations of state constitutional law in the process of statutory construction are also inappropriate. This version of the ISLT was at issue in the first case that went to the Supreme Court in the

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[48] *Moore* Petition, *supra*, at 34-38. A similar question is presented by a pending petition for certiorari from Pennsylvania. *Costello v. Carter*, Docket No. 21-1509. There, the legislature and the governor were unable to agree on congressional redistricting maps, and the state courts imposed their own. *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022). The petition for certiorari contends that ISLT imposes substantive constraints on the maps the state courts can order.

[49] 507 U.S. 25, 27 (1992).

[50] *Id.* at 30-31.

[51] *Id.* at 34 (emphasis added), quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

[52] *Id.* at 36-37.

2000 election, *Bush v. Palm Beach County Canvassing Board.*[53] There, Bush's legal team argued that the Florida Supreme Court improperly relied on the Florida constitution's "free elections" clause to require the Secretary of State to accept vote totals obtained by recount. The Supreme Court did not decide whether the state court's reliance on a state constitutional provision for purposes of statutory interpretation (or its use of a constitutional avoidance canon) violated the Electors Clause's assignment of authority to the state legislature. Instead, it remanded the case to the Florida Supreme Court to clarify its holding.[54]

- In *Bush v. Gore*, although the majority opinion did not implicate the ISLT, Chief Justice Rehnquist relied on a version of it in his concurring opinion (joined by Justices Scalia and Thomas). Rehnquist argued that the Florida Supreme Court's interpretation of the state statute governing recounts and allocating potentially overlapping authority to the state courts and the Secretary of State violated the Electors Clause. The specifics are less important than his argument that under the Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[55] He offered no citation or other support for this statement. Because he disagreed with the Florida Supreme Court's interpretation of the statute, he argued that its holding violated the federal constitution.

- In 2020, several Supreme Court justices embraced this view to varying degrees. The first time the justices discussed the ISLT was in a case involving federal court "interven[tion] in the thick of election season to enjoin enforcement of a State's laws."[56] In that case, the court declined to vacate a stay of a district court opinion enjoining enforcement of state laws.[57] Because the case involved federal judicial intrusion on state election law, as opposed to the relationship between state courts and the state legislature, the ISLT was not implicated, as Chief Justice Roberts explained.[58] Nonetheless, in his separate opinion concurring in the denial of the vacatur of a stay, Justice

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[53] 531 U.S. 70 (2000).
[54] *Id.* at 78. On remand, the Florida Supreme Court reached the same holding, making clear that it was relying on ordinary principles of statutory interpretation and not on the state constitution. *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1282 (Fla. 2000) (per curiam).
[55] 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).
[56] *Democratic Nat'l Comm. v. Wisconsin State Leg. (DNC)*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay).
[57] *Id.*
[58] *Id.*

Kavanaugh both quoted from Rehnquist's *Bush v. Gore* concurrence and cited *Palm Beach County,* and he concluded by explaining that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[59]

- Also in 2020, Justice Gorsuch (joined by Justice Alito) dissented from the Supreme Court's refusal to disrupt a settlement reached in North Carolina state court litigation.[60] One of settlement provisions extended the received-by deadline for mail-in ballots. In his opinion, Justice Gorsuch argued that the relevant statutes did not give the Board of Elections the authority to issue the regulations required by the settlement. His argument rested on a de novo reading of statutory language allowing for the Board to modify state election law in the face of a "natural disaster" that "disrupted" the "normal schedule" for the election.[61] He failed to discuss other state laws using comparable language, longstanding practice in North Carolina that allowed the Board to extend deadlines, or the fact that the settlement applied to federal and state elections alike. And his argument included an insinuation that the trial court had engaged in "egregious" and collusive action,[62] although he did not discuss that court's express rejection of the allegations of collusion,[63] its analysis of the relevant statutory language,[64] or the fact that the North Carolina Supreme Court had reviewed the settlement and declined to intervene.[65]

Are executive officials and elections administrators limited in their ability to interpret and apply state laws governing federal elections? Are state legislatures themselves limited in how much discretion they can delegate to such officials and administrators?

- Just as state courts' normal interpretation and application of state law might be disrupted by the ISLT, the same might be true for state executive officials and election administrators. No case directly presented that issue during the 2020 election, but Justice Gorsuch hinted at it when he said in one opinion

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[59] *Id.* at 34 n. 1 (Kavanaugh, J., concurring in denial of application to vacate stay).
[60] *Moore v. Circosta,* 141 S. Ct. 46 (2020). Justice Thomas indicated, without an opinion, that he would have granted a stay in both *Moore* and in a companion case, *Berger v. North Carolina Bd. of Elections,* 141 S. Ct. 658 (2020).
[61] N.C. G.S. § 163-27.1.
[62] *Moore,* 141 S. Ct. at 47.
[63] *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections,* 2020 WL 10758664, *3 (N.C. Super. Ct. 2020).
[64] *Id.* at *4.
[65] See *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections,* 848 S.E.2d 496 (N.C. 2020); *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections,* 848 S.E.2d 497 (N.C. 2020).

that "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[66]

- In a subsequent opinion, Justice Gorsuch also hinted at the possibility that the ISLT might actually *constrain* state legislatures as to how much they can delegate to state courts or to other state officials. Although he did not conclude that improper delegation occurred, he raised the issue: "even assuming the North Carolina General Assembly could delegate its Elections Clause authority to other officials…"[67] This language is an unmistakable invitation for candidates and parties to challenge state judicial and administrative decisions they do not like as reflecting unconstitutional delegations.

Potential Effects

- The ISLT often arises in the context of redistricting. The serious problem of extreme partisan gerrymandering is beyond the scope of this hearing, but it is worth noting that the ubiquity of the problem gives lie to one of the chief normative justifications for the ISLT. Proponents argue that regulation of elections, including redistricting, is an inherently political activity and that it thus makes sense to vest the authority to do so in what they claim is the most politically accountable branch.[68] But in large part because of extreme partisan gerrymandering, state legislatures are often highly countermajoritarian and non-accountable.[69] Precluding state constitutions, state courts, and executive officials from ensuring more political accountability thus undermines this justification for the ISLT.

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[66] *DNC*, 141 S. Ct. at 28-29 (Gorsuch, J., concurring in denial of application to vacate stay).
[67] *Moore*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief).
[68] *See, e.g., DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay); Morley, *ISLD, Elections, and Constitutions, supra,* at 33-35
[69] *See* Miriam Seifter, *Countermajoritarian Legislatures*, __ Colum. L. Rev. __ (forthcoming), draft available at http://ssrn.com/abstract=3782224 (arguing that in 2020, the states in which the ISLC arose were states with highly gerrymandered countermajoritarian legislatures); *id.* at *60 (discussing the 2020 litigation in North Carolina and arguing that "[i]t is hard to see how honoring the wishes of the two leaders of the unconstitutionally gerrymandered legislature [who filed suit in federal court] would have been a better approximation of the will of the people than adhering to the decision of the [bipartisan] officials appointed by the popularly elected governor").

- Most state election laws govern both state and federal elections without distinction. States generally have one voter registration system; one set of rules for absentee and mail-in ballots; one set of rules for how ballots are counted, etc. ISLT proponents, including the justices, do not generally address the implications of the ubiquity of unified election statutes. Instead, where there is a single statutory scheme that governs both state and federal elections, the extreme versions of the ISLT appear to presume that state legislatures have done or more of the following things:
    a. Decided, without saying so out loud, that they are willing to regulate federal elections in ways that would be unconstitutional when it comes to state elections.
    b. Decided, despite enacting a single unified statute, that they are creating the possibility of two systems of election regulation, either because the statute is struck down as to state elections but can't be struck down as to federal elections, or because the statute is interpreted differently with respect to state and federal elections.
    c. Decided, without saying so out loud, that any delegations of discretion or authority to state and local officials is controlled, at least as to federal elections, by an undefined (and unheard-of before 2020) ISLT nondelegation doctrine.

- These presumptions are problematic for a number of reasons.

    a. Those who promote this view of the ISLT are themselves entirely failing to engage in meaningful statutory interpretation. In any ISLT challenge involving a statute, the first question a court should ask is whether the laws in question incorporate the state constitution and all ordinary aspects of state law, from judicial review to relevant precedent to methods of statutory interpretation. The political accountability justification for the ISLT is undermined by the assumption that the legislature has silently rejected state constitutional limitations or set forth special rules for the interpretation of election law statutes as they apply to federal elections.

    This principle applies not only to constitutional provisions. Where states have a statute or case law dictating that courts should take a purposivist approach when interpreting statutes and/or should look to legislative history, that law should govern. Where a statute uses language that has been previously construed or otherwise passed on by the state high court, those holdings should be understood to have been incorporated into the statute. Where a state allows delegation to executive officials an elections

administrators, that delegation should be understood to be identical for state and federal elections.

b. There is absolutely no historical support for treating unified election laws differently for purposes of federal elections than for state elections. Even in the tiny number of cases where state courts have allowed state legislatures to regulate federal elections free from the constitutional constraints that apply to state elections, the laws in question applied expressly to federal elections. In other words, there is no historical precedent for treating the same law differently with respect to different elections, as either a matter of constitutionality under the state constitution, of statutory interpretation, or of delegation to other state officials. But the extreme view of the ISLT opens the door to a federal court requiring a state with a single unified law to have one system of regulation for federal elections and another for state elections, and to those systems being incompatible.

- The ISLT undermines not only political accountability, but also the other major justification offered for it: predictability. ISLT proponents are certainly correct in their argument that voters, elections officials, and candidates alike are best served by knowing ahead of time what the rules are and who sets them, but the ISLT, at least as some suggest it should operate, does not achieve that goal.

    a. The ISLT can undermine legislators' expectations about how statutory language will be interpreted. One of the issues that arose in Pennsylvania in 2020 involved an inseverability clause in the major election law enacted in 2019. The Pennsylvania Supreme Court unanimously refused to apply the clause, which was identical to statutory language it had declared ineffective in 2006. But under the textualist approach to statutory interpretation promoted by some ISLT proponents, the clause would have to apply, at least as to federal elections.

    b. The ISLT can undermine everyone's expectations and lead to chaos, which is what would have happened had the inseverability clause been given effect. The statute in question not only governed the received-by deadline for mail-in ballots, but it also eliminated straight-ticket voting, allowed for no-excuse mail-in voting, and provided for new voting machines. It would have been impossible for the statute to apply differently to the different types of elections.

c. The ISLT can similarly undermine expectations and revive long-settled disputes. In 2021, for example, the New Hampshire Supreme Court struck down new and onerous voter registration requirements as inconsistent with a constitutional guarantee that "[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election."[70] No party filed a petition for certiorari. But under the ISLT, perhaps a candidate or political party could collaterally attack this decision in the future, claiming that the registration law must apply to federal elections, even if it is unconstitutional as to state elections.

d. Similarly, if the ISLT restricts administrative and executive discretion and statutory interpretation, candidates and campaigns will have every incentive to comb through existing regulations, guidances, and practices, to seek any possible argument that the officials have exceeded their authority as a matter of federal constitutional law. And because states have unified elections systems, such a result could disrupt longstanding professional election administration and state administrative law.

- For all of these reasons, the ISLT, particularly in its most extreme forms, will undermine state courts and destabilize state law. It is also likely to undermine institutional and democratic legitimacy. State courts may be reluctant to apply their own constitutions or doctrines of statutory interpretation out of fear of the chaos that may ensue if federal courts disagree with their holdings. Citizens may question the integrity of their state courts if they understand that federal courts can and do routinely second-guess state judges' interpretation and application of state law. In fact, if the ISLT requires state courts to use different approaches to judging when evaluating statutes insofar as they apply to federal elections, it essentially converts all questions of statutory interpretation that affect federal elections into federal questions, not matters of state law.

- Despite its name and the rhetoric around it, the ISLT, particularly in its most extreme forms, does not empower state legislatures. Instead, it empowers federal courts, and particularly the Supreme Court. As we all know, election litigation is often rushed and hotly contested. The ISLT,

[70] *New Hampshire Democratic Party v. Secretary of State,* 262 A.2d 366, 374 (N.H. 2021), quoting N.H. CONST. pt. I, art. 11.

however, will function as a perpetual litigation machine. Virtually any question involving a state law that applies to federal elections could find its way to federal court, most likely the Supreme Court. And the Supreme Court's recent aggressive use of its emergency docket to intervene in all manner of disputes itself will invite that kind of litigation.

Options for Congressional Action

There are a variety of actions Congress can consider to eliminate or ameliorate the risks to democracy presented by the ISLT.[71] I offer here only a few, largely undeveloped ideas. I would be happy to discuss these or any other ideas with you or your staff.

(1) Legislation providing that state laws governing federal elections are subject to the same constitutional limitations, judicial review, statutory construction, and delegation doctrines as all other state laws. Alternatively, Congress could require that state laws must expressly disavow those aspects of state law if the legislature wants to avoid them.

(2) Legislation requiring state courts to pass on the statutory construction and constitutionality of state election laws before federal courts can do so, and requiring that federal courts defer to those determinations, including a requirement that litigants raise the ISLT issue in state court.

(3) Legislation imposing a presumption, to be applied by federal courts, of legislative acquiescence to state court rulings and administrative practices that apply to federal elections.

(4) Legislation limiting the timing under which federal courts, including the Supreme Court, can reverse or stay state administrative decisions or state court rulings.

Thank you again for inviting me to speak with you.

[71] I do not distinguish here between the Electors and Elections Clauses. Different legislation, or different forms of legislation, might be appropriate under the different clauses.

The CHAIRPERSON. Thank you very much.

And, finally, we will hear from Ms. Sweren-Becker her testimony for five minutes.

STATEMENT OF ELIZA SWEREN-BECKER, DEMOCRACY PROGRAM, BRENNAN CENTER FOR JUSTICE, WASHINGTON, D.C.

Ms. SWEREN-BECKER. Chairperson Lofgren, Ranking Member Davis, and Members of the Committee, thank you for the opportunity to testify about this dangerous and unprecedented legal claim being pressed by conservative activists.

As you know, the Supreme Court agreed to hear *Moore* v. *Harper*, a case in which some North Carolina legislators have asked the Court to embrace the so-called independent State legislature notion. This is the radical claim—"theory" is too generous a word—positing that the Constitution removes the normal checks on State legislatures when they regulate Federal elections.

You have already heard that the claim is wrong. The constitutional text, American history, Supreme Court precedent, sound policy, and common sense all refute the notion.

I will focus on the crushing consequences for American voters and our multiracial democracy if the Supreme Court turns this fringe notion into law. Here are four examples of what this idea could allow.

First, the notion would green-light partisan gerrymandering for congressional elections. A State legislature could draw an extreme partisan gerrymander without consequence, something that the State court would otherwise strike down as illegal under the State constitution.

That is just as backwards as it sounds. State lawmakers could violate their own constitutions. Redistricting commissions in up to nine States would become defunct. Fair representation could become even more difficult, if impossible. That is because the Supreme Court already took Federal constitutional protections off the table, ruling in the *Rucho* case that Federal courts cannot stop partisan gerrymandering. The Court pointed to State courts as the answer. If State courts can't stop partisan gerrymanders, the tactic will thrive.

Second, the radical claim will remove constraints on voter suppression. For example, a legislature could eliminate early voting, even if it is articulated in the State constitution and adopted by the people through direct democracy.

The Governor would be unable to stop this decision, and a State court would be powerless to stop it as well. Yes, voters could bring their case to Federal court, but the Supreme Court has gutted the most powerful provisions of the Voting Rights Act and undercut other Federal voter protections.

Third, the notion would create election chaos, disenfranchising voters, and overwhelming election officials. The claim would undo hundreds of election laws in State constitutions enacted by ballot initiative and implemented through administrative rules.

Policies enacted through direct democracy, like mail voting, same-day registration, and even voter I.D., could be wiped off the books for Federal elections. Voters could be blocked from voting for

candidates for Federal office, even if they are eligible and they properly registered to vote.

A range of other policies established in State constitutions rather than legislation would be voided. The right to cast a secret ballot, for example, is established in 44 State constitutions.

Election officials would be forced to administer a two-tiered, complex system with different policies for State and Federal elections. It would be unclear which rules actually apply. And if election officials don't know what the law is, voters surely won't.

Fourth, the notion would remove critical checks against election interference and sabotage. The radical idea could enable legislatures to manipulate election outcomes. For example, they could enact arbitrary rules for counting votes.

The claim would invite legal challenges asking Federal courts to throw out ballots cast in reliance on constitutional provisions, laws enacted by ballot initiative, or policies implemented by election officials.

To be clear, the independent State legislature claim is not a license to coup. Federal law prohibits State legislatures from overturning the results of elections. The notion would open the door to anti-democratic shenanigans and even failed efforts to manipulate our elections erode trust and, ultimately, participation in our democracy.

Even if the Court embraces this radical notion, Congress can thwart many of its worst consequences. The Elections Clause, the very same constitutional provision that activists are trying to weaponize against democracy, gives Congress the power to enhance and protect voting rights and ensure fair representation.

Regardless of how the Court rules, I urge you to revisit and pass the Freedom to Vote John R. Lewis Act. The bill would set national standards for voting access, prohibit partisan gerrymandering, and add Federal protections against election interference and sabotage. This legislation is critically needed.

Thank you.

[The statement of Ms. Sweren-Becker follows:]

BRENNAN
CENTER
FOR JUSTICE

TESTIMONY OF
ELIZA SWEREN-BECKER

VOTING RIGHTS & ELECTIONS COUNSEL AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW[1]

HEARING ON THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY

BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION

July 28, 2022

[1] The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice so they work for all. My testimony does not purport to convey the views, if any, of the New York University School of Law.

Chairperson Lofgren, Ranking Member Davis, and Members of the Committee:

Thank you for the opportunity to testify about the dangers of the "independent state legislature" theory. This is a fringe interpretation of the Constitution that—if adopted—could have devastating consequences for fair representation, voting rights, and election administration. It would deprive voters of free and fair elections and give nearly unrestrained power to state legislators, without the checks and balances that come from state courts, state constitutions, and other state institutions. To call it a "theory" confers far too much legitimacy – it is a meritless notion that would undermine our democracy. This testimony will spell out the specific, harmful consequences that would flow from a misguided Supreme Court opinion embracing it.

We face a perilous moment for our democracy. On January 6, 2021, a violent mob—bent on insurrection and fueled by President Trump's lies about a stolen election—attempted to overturn the will of American voters. A decade's worth of efforts to restrict voting rights have escalated sharply over the last two years, with 18 states passing 34 laws to make it harder for Americans to vote.[2] This year, six states also enacted laws that allow partisan interference in elections and threaten the people and processes that make elections work. Legislative majorities in at least nine states have also sought to adopt partisan gerrymanders during the most recent redistricting cycle, aiming to lock in an outsized share of seats for the next decade and insulate representatives from political accountability and the voters' will.[3] The U.S. Supreme Court has refused to police partisan gerrymandering and has not struck down a restrictive state voting law in over a decade, while repeatedly weakening the Voting Rights Act's protections against racial discrimination.[4]

Against this backdrop, the Supreme Court agreed to hear *Moore v. Harper*, a North Carolina partisan gerrymandering case that rests on the so-called "independent state legislature" theory.[5]

That notion, as argued in *Moore*, is a radical and erroneous misreading of the word "legislature" in the Elections Clause of the U.S. Constitution. That provision recognizes states' power to regulate federal elections, while giving Congress overriding authority to make or alter such laws.[6] As the Supreme Court held only seven years ago, the well-established understanding

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[2] Brennan Center for Justice, *Voting Laws Roundup: May 2022*, 2022, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022.

[3] According to a forthcoming Brennan Center analysis, nine states initially passed congressional maps that would be significant partisan gerrymanders under commonly accepted standards (including those articulated in the Freedom to Vote: John R. Lewis Act (H.R. 5746)), and maps in 13 other states bear strong indicia of gerrymandering. These include maps drawn by Democrats as well as Republicans. Pursuant to state constitutions, state courts have ordered that maps in three of the states be redrawn.

[4] See Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are nonjusticiable); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down Voting Rights Act's coverage formula for preclearance); and Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (making it more difficult for plaintiffs to bring claims under Section 2 of the Voting Rights Act).

[5] Moore v. Harper, 868 S.E.2d 499, *cert. granted* (No. 21-1271, OT 2022 Term).

[6] See U.S. Const. Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Election for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.").

is that the clause addresses each state's lawmaking process, including, for example, gubernatorial approval or veto, the state constitution, and state court interpretation of state law.

If the Supreme Court converts the independent state legislature theory from a fringe notion into the law of the land, the catastrophic consequences would stretch beyond North Carolina and redistricting to wreak havoc on elections nationwide. At bottom, this radical concept would strip away checks and balances that have existed for centuries, empowering the most partisan actors in many states to manipulate election processes and outcomes. That is because proponents of the theory insist the Elections Clause gives legislators virtually unencumbered power, prohibiting other branches of state government—including state courts or governors—from constraining them under state law.

The stakes are high. State courts could lose the power to check extreme partisan gerrymandering. So could redistricting commissions, depending on how the theory is applied. Hyper-partisan legislative majorities could again draw lines to entrench representatives in office with impunity. Governors could lose their power to veto vote suppressive legislation, just as courts could lose their traditional authority to review that legislation for consistency with state constitutional protections. Secretaries of state, election boards, governors, and the people—because they are not the "legislature"—could lose the authority they regularly exercise to set policy for federal elections.

Because the theory holds that *only* legislatures may make rules for federal elections, it would negate myriad state constitutional provisions, such as the right to a secret ballot guaranteed in 44 state constitutions. It would likewise negate countless rules and regulations created by state and local election officials—but for federal elections *only*. As a result, officials would be forced to administer bifurcated election processes—with one scheme applicable to state and local elections, and another to federal elections—making an already complex and difficult job nearly impossible. This confusion would increase the risk of election sabotage and interference by muddying the public's understanding of how elections work, deterring voters from participating. All of this would undermine the public's already-wavering faith in our democracy.[7]

This chaos should be enough to discredit the theory. But the notion is not just wrong as a policy matter: It is legally meritless. A wealth of historical evidence and over a century of Supreme Court precedent, summarized below, rejects it. As do over two centuries of elections practice.[8] The very purpose of the Elections Clause is to constrain state legislatures, not to

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[7] Jennifer Agiesta, "CNN Poll: Americans' Confidence In Elections Has Faded Since January 6," *CNN*, July 21, 2022, https://www.cnn.com/2022/07/21/politics/cnn-poll-elections/index.html.

[8] Proponents of the independent state legislature theory also argue that their interpretation applies to the Electors Clause, which governs presidential elections and has been understood to convey the same scope of authority over such elections. See U.S. Const. Art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."). "[C]ourts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races." Nicholas O. Stephanopoulos, "The Sweep of the Electoral Power," *Constitutional Commentary* 36 (2021): 54; see also Burroughs v. United States, 290 U.S. 534, 545 (1934); Voting Rgts. Coal. V. Wilson, 60 F.3d 1411, 1414 (9th Cir. 1995) ("The broad power given to Congress over congressional elections has been extended to presidential elections . . . ."); Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995) ("[Article II section 1] has been interpreted to grant Congress power over

liberate them to gerrymander, suppress the vote, or otherwise engage in the "abuse" James Madison warned of. This theory is not just dangerous, it is fundamentally misguided as a matter of law.

I. The independent state legislature theory would wreak havoc on American elections.

A. The independent state legislature theory would undermine fair representation and voting access and increase the risk of election interference.

The independent state legislature theory would sweep away many traditional checks and balances on state lawmakers, stripping away the constraints of gubernatorial vetoes, state constitutional limits, and state judicial review. In addition, it could fuel legal challenges in which litigants ask federal courts to throw out ballots cast in accordance with the state constitution, laws enacted via ballot initiative, or policies promulgated through rulemaking. As a result, the notion would remove critical protections against (1) partisan gerrymandering, (2) vote suppression, and (3) partisan manipulation of elections. Here are several examples.

(1) The theory would open the door to more partisan gerrymandering. For example, it would lay the groundwork for the following scenario: By ballot initiative, voters adopt a state constitutional amendment banning partisan gerrymandering. When the state legislature adopts an extreme partisan gerrymander of the state's congressional districts, voters turn to their state court to enforce that amendment and ensure a fair map for future elections. But state legislators obtain a federal court order holding that the state court and the state constitution have no power to limit their redistricting authority.

Of course, this is not a hypothetical exercise. In *Moore v. Harper*, we have seen state lawmakers pursue this very approach to nullify North Carolina's constitutional limits on partisan gerrymandering with respect to the state's congressional maps.

A ruling in favor of the state legislators in *Moore* would sweep away the decision of the state's highest court, thereby depriving North Carolina voters of their right to equal representation under the state constitution. It could also deprive *all* voters across the country of their last remaining judicial remedies against partisan gerrymandering. That is because, in 2019's *Rucho v. Common Cause*, the Supreme Court closed federal courthouse doors to partisan gerrymandering claims under the U.S. Constitution.[9] Notably, all nine justices pointed to state courts as an alternative and appropriate forum for voters to challenge partisan gerrymanders under state constitutions.[10] Just three years later, the Supreme Court now threatens to renege on

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Presidential elections coextensive with that which Article I section 4 grants it over congressional elections."); and Eugene Gressman, "Uniform Timing of Presidential Primaries," *North Carolina Law Review* 65 (1987): 355 ("[T]he Court employs the same constitutional analysis—the same broad treatment of vested congressional power—in dealing with article II, section 1.").

[9] Rucho v. Common Cause, 139 S. Ct. 2484, 2484–08 (2019).

[10] *Rucho*, 139 S. Ct. at 2507.

this assurance, and, in so doing, negate state constitutional protections against partisan gerrymandering.[11]

Likewise, independent redistricting commissions—because they are not the "legislature"—could be abnegated.[12] What is more, *all* ballot measures passed by voters to strengthen democratic electoral institutions in states could be affected or invalidated.

(2) States could adopt more restrictive voting laws. The theory would, for example, enable the following scenario: A state legislature enacts a law that makes it harder for voters, and particularly for voters of color, to cast their ballots. Federal courts, relying on the weakened interpretation of the Voting Rights Act proffered by the Supreme Court, let the law stand. The state supreme court strikes it down because the law violates the right to vote and the guarantee of free and fair elections enshrined in the more protective state constitution. But, if the independent state legislature theory were in force, that discriminatory voting law would remain in effect, because state courts would be powerless to apply their own state's constitution to protect their citizens' rights when it came to federal elections. This too is not a mere hypothetical exercise—it is playing out right now with respect to North Carolina's voter ID law.[13]

Over the last two decades, the Supreme Court has substantially undermined the Voting Rights Act's protections against racial discrimination in voting—striking critical blows in *Shelby County* and in *Brnovich*—all while undercutting other federal voting rights protections.[14] As a result, federal courts now play an ever smaller role in protecting voting rights.[15] As the Supreme Court has retreated from the field, governors (through their veto power), state courts, and state constitutions have emerged as the most potent protectors of voting rights. The theory could render them powerless.[16] Vote suppressors will likely step into that vacuum.

(3) Many critical constraints on election interference and sabotage would disappear. The theory could, for example, set in motion the following scenario. A highly infectious virus upends daily life during an election year. The overtaxed postal service warns that it cannot ensure that ballots mailed before election day will arrive on time

[11] At least seven state constitutions expressly ban partisan gerrymandering. See Cal. Const. art. XXI, § 2(e); Colo. Const. art. V, § 44.3; Fla. Const. art. III, § 20; Mich. Const. art. IV, § 6.13(d); Ohio Const. art. XIX, § 1(3)(a); N.Y. Const. art. III, § 4(c)(5); and Wash. Const. art. II, § 43(5).

[12] At least four state constitutions curb partisan gerrymandering by vesting redistricting power in independent redistricting commissions. See Ariz. Const. art. IV, Pt. 2 § 1(3); Cal. Const. art. XXI, § 2; Colo. Const. art. V, §§ 44(2), 46(2); and Mich. Const. art. IV, § 6.

[13] Compare N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020) (federal court allowing the voter ID law to take effect), with Holmes v. Moore, 840 S.E.2d 244 (N.C. Ct. App. 2020) (state court preliminarily enjoining the voter ID law).

[14] See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (holding that Indiana's photo ID law imposed only a limited burden on the right to vote and was justified by state interests); and Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (holding that Ohio's "use it or lose it" voter list maintenance law did not violate the National Voter Registration Act).

[15] See, e.g., Franita Tolson, "Parchment Rights," *Harvard Law Review Forum* 135 (2022): 533–34; and Cristina M. Rodríguez, "Foreword: Regime Change," *Harvard Law Review* 135 (2021): 146.

[16] Joshua A. Douglas, "The Right to Vote in State Constitutions," *Vanderbilt Law Review* 67 (2014): 91–92.

> because more voters than ever are seeking to vote by mail. The state supreme court extends the ballot receipt deadline by three days to ensure that validly cast ballots arrive in time to be counted, invoking the state constitution's free and fair elections provision and the court's own statutory authority to carry out the intent of the election code during emergencies. But the U.S. Supreme Court says the state court's ruling is impermissible and any ballots arriving after the initial statutory deadline are too late. Those ballots could go uncounted, potentially swinging the results of an election. This scenario likewise is not hypothetical, as litigation arising from the Pennsylvania courts teed up this possibility in 2020.
>
> The notion would also undermine protections against other efforts to manipulate election outcomes, like restrictive and arbitrary vote-counting rules, sham audits, the empowerment of poll watchers to disrupt voting and vote-counting processes, and threats against election officials. State lawmakers are already testing the guardrails. For example, proposed Arizona legislation purports to give the legislature the power to "accept or reject" election results.[17]

To be clear, the independent state legislature theory would not permit federal courts to retroactively change the rules under which ballots were cast or allow state legislatures to reject the results of an election.[18] And it would not let state legislatures select an alternate slate of presidential electors if state law requires that electors be selected by popular vote. Such conduct would violate federal law, both constitutional and statutory. Nor would it implicate or weaken Congress's expansive power to make laws for federal elections. Still, interference and sabotage efforts—even when they fail—contribute to a general sense of lawlessness and distrust that erodes faith and participation in our democracy. We saw just that in the aftermath of the 2020 elections, as President Trump and his lawyers repeatedly invoked the theory as rhetorical justification for their plot to overturn the will of American voters, falsely suggesting that any election-related decisions not made by state legislatures were invalid.

B. The independent state legislature theory would create chaos in election administration.

In its full form, the independent state legislature theory contends that existing laws—enshrined in state constitutions, set forth in state court decisions, promulgated in state- and local-agency-level regulations, or adopted by citizens through ballot initiative—do not apply to federal elections. In practice, this notion would create a cascade of chaos.

First, the theory would negate hundreds of laws and policies for federal elections. Take Michigan, for example, where voters amended the state constitution in 2018 to adopt same day registration, automatic voter registration, and absentee voting.[19] The independent state

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[17] H.B. 2596, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

[18] Helen White, "The Independent State Legislature Theory Should Horrify Supreme Court's Originalists," Just Security, June 30, 2022, https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists/.

[19] Bureau of Elections, "Official Full Text Proposal 18-3," Mich. Dep't of State, accessed July 26, 2022, https://www.michigan.gov/-/media/Project/Websites/sos/01vanderroest/Full_Text__PTV.pdf?rev=8fb03b06c2e043d4b149ef5c6a02e392; see Mich. Const. art. II, § 4.

legislature theory would wipe those policies off the books for purposes of federal elections. That would disenfranchise Michigan voters who registered through automatic or same-day registration in federal elections or force them to re-register by other means for those elections alone. Michigan voters could be required to vote in person for federal elections, even after they had voted by mail for state races held on the same day.

Michigan's Prop 3 is just one example of laws that would be wiped off the books for federal elections. Voters across the country have enacted major election policies through direct democracy. For example, through ballot initiatives, Arkansas and Mississippi adopted voter ID laws; Nevada voters adopted automatic voter registration; California and Florida restored voting rights to people with prior convictions; and Alaska and Maine secured rank-choice voting.[20] Even the most fundamental features of our elections are at risk. In 44 states, for example, the right to cast a secret ballot is enshrined in the state constitution.[21] If those guarantees did not apply to federal elections, state legislatures could adopt policies to force voice voting for federal offices, creating bedlam at the polls and surely exacerbating intimidation of voters and election officials.

Second, the theory would result in bifurcated bodies of policy—one for federal elections and another for state and local elections. Nullifying hundreds of laws, but only for purposes of federal elections, would force state and local election officials to administer chaotic parallel systems, in which the applicable policy would differ depending on whether a race is for state and federal office. A two-track system for voter registration, voter list maintenance, early voting, and mail voting (among other policies) would strain already overburdened election administrators.[22] Moreover, the radical notion would make it difficult for election officials to know what the law is for federal elections, because they would not be able to rely on longstanding regulations, court decisions, or even gubernatorial vetoes.

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[20] Ark. Const. art. III, § 1; Ark. Const. Amend. XCIX, § 1 (proposed by Ark. H.J. Res. 1016, § 1 (2017), https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2017R%2FPublic%2FHJR1016.pdf); Miss. Const. art. XII, § 249A; Miss. Sec'y of State, "Voter Identification," accessed July 26, 2022, http://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?Id=27; Cal. Const. art. II, § 2; Cal. Assemb. Const. Amendment no. 6, Chap. 24, (June 25, 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA6; Fla. Const. art. VI, § 4; Constitutional Amendment Petition Form for Voting Restoration Amendment, Fla. Dep't of State, Div. of Elections (Oct. 31, 2014), https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf; Nev. Rev. Stat. § 293.5732; State of Nevada 2018 Initiative Petition, Ballot Question No. 5, § 2, https://www.nvsos.gov/sos/home/showpublisheddocument/4381/637208298378230000; Alaska Stat. § 15.15.350; Alaska Ballot Measure No. 2, § 44 (2020); Alaska Division of Elections, "Alaska's Better Elections Initiative," Office of the Lt.-Gov. https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-TheBill.pdf; Me. Rev. Stat. tit. 21-A §§ 1(27-C), 1(35-A), 601(2)(J), 695, 722(1), 723; Maine Citizen's Guide to the Referendum Election (Nov. 8, 2016), https://www1.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf (see Question 5).

[21] Caitriona Fitzgerald, Pamela Smith, and Susannah Goodman, *The Secret Ballot at Risk: Recommendations for Protecting Democracy*, Electronic Privacy Information Center, Verified Voting Foundation, and Common Cause Education Fund, 2016, 6, https://secretballotatrisk.org/Secret-Ballot-At-Risk.pdf.

[22] Ruby Edlin and Turquoise Baker, "Poll of Local Election Officials Finds Safety Fears for Colleagues - and Themselves," *Brennan Center for Justice*, March 10, 2022, https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and; see also *Hearing on the Changing Election Security Landscape: Threats to Election Officials and Infrastructure, Before the H. Comm. on Homeland Security,* 117th Cong. (2022) (testimony of Elizabeth Howard, Senior Counsel, Democracy Program, Brennan Center for Justice), https://www.brennancenter.org/our-work/research-reports/testimony-threats-against-election-officials-committee-homeland-security.

Third, the theory would revoke the discretionary and emergency powers of state officials that are necessary for smooth and safe elections. For example, governors, secretaries of state, or election boards are expressly or impliedly empowered in states like Florida, Michigan, North Carolina, Pennsylvania, and Texas to exercise discretionary authority in the event of emergencies.[23] In 2018, Florida Governor Rick Scott used his emergency power to permit eight counties particularly affected by Hurricane Michael to extend early voting days and designate more early voting locations.[24] In 2020, the Harris County elections administrator implemented drive-through voting, enabling Texans in the county to cast their ballots at a safe distance during the Covid-19 pandemic; state and federal rejected legal challenges to this policy.[25] If state officials were unable to modify election procedures in the face of a natural disaster, terrorist attack, or another pandemic, voters and local election officials could be forced vote and work in dangerous circumstances.

II. The independent state legislature theory is meritless.

The independent state legislature theory has been debunked by scholars from every conceivable angle and under every accepted jurisprudential approach, including by conservative scholars and former judges. The undisputed history of the founding era, the plain meaning of the Constitution's text, more than a century of unbroken practice and Supreme Court precedent, and common sense all refute this radical notion.

Having conducted extensive research of the founding-era understanding of the Elections Clause and the way it has been interpreted since 1787, I can assure the Committee that the lessons of history are unambiguous: the theory is meritless as a constitutional matter.

The historical record makes clear that the founders did not give power to state legislatures absent the checks and balances of ordinary lawmaking processes (like state constitutions, governors, and courts).[26] The founders had two primary motivations as they drafted the Elections Clause: ensuring fair representation and guarding against their profound distrust of state legislators.[27] At the Constitutional Convention, James Madison gave a lengthy defense of the Elections Clause. He argued that it was essential to give Congress the power to override state laws for federal elections because state lawmakers would unquestionably misuse their authority over elections, warning, "It was impossible to foresee all the abuses that might be made of the

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[23] Fla. Stat. § 101.733(3) (department of state's division of elections duty to create statewide election emergency contingency plan); Fla. Stat. § 101.74 (supervisors of elections' emergency election management powers); Fla. Stat. § 252.36(5)(a) (governor's emergency powers); Mich. Comp. Laws § 30.405(1)(a) (governor's emergency powers); N.C. Gen. Stat. § 166A-19.30(a)(2) (governor's emergency powers); 25 Pa. Stat. § 2726 (county boards of elections may change polling locations in emergencies); 35 Pa. Stat. and Cons. Stat. §§ 7301(b), (f) (governor's emergency powers); and Tex. Gov't Code § 418.016 (governor's emergency powers).

[24] Florida Office of the Governor, Exec. Order No. 18-283 (October 22, 2018), https://www.flgov.com/wp-content/uploads/orders/2018/EO_18-283.pdf.

[25] Jolie McCullough, "Nearly 127,000 Harris County Drive-Thru Votes Appear Safe after Federal Judge Rejects GOP-Led Texas Lawsuit," *Texas Tribune*, November 2, 2020, https://www.texastribune.org/2020/11/02/texas-drive-thru-votes-harris-county/.

[26] See generally Eliza Sweren-Becker and Michael Waldman, "The Meaning, History, and Importance of the Elections Clause," *Washington Law Review* 96 (2021).

[27] Sweren-Becker and Waldman, "Elections Clause," 1007–08.

discretionary power."[28] He explicitly cautioned that state legislators would draw unrepresentative districts and worried that state politicians would manipulate the rules to affect election outcomes, "mould[ing] their regulations as to favor the candidates they wished to succeed."[29]

Madison was not alone. The debates leading up to the ratification of the new Constitution are replete with vocal distrust of state legislators.[30] At the ratification debates and in public writing, defenders of the Elections Clause warned against relying, even "for a moment, on the will of state legislatures," and expressed concern about state lawmakers trying to exercise "undue influence in elections" and making "improper regulations" arising from "sinister views."[31] It is simply not credible that the founders, aiming to curb abuses by state legislators, intended for or understood the Constitution to give those very same actors uniquely unchecked power to regulate federal elections.

Practice—before, during, and after the founding era—further elucidates the public meaning of the Constitution and likewise refutes the independent state legislature theory. For example, most state constitutions adopted between independence and the adoption of the United States Constitution regulated the selection of delegates to Congress, and several state constitutions adopted from 1789 to 1803 contained substantive restrictions on election law that were understood by the founding generation to apply to all elections held in the state, including federal elections.[32] Moreover, most state legislatures shared their elections power with other state actors during the founding era.[33] These practices, which are inconsistent with the independent state legislature theory, were uncontroversial at the time.

This original public meaning of the Constitution is consistent with its text. Indeed, the text of the Constitution reveals the absurdity of the independent state legislature theory. For example, when the Elections Clause gives power not only to state legislatures but also to "Congress" to make laws for federal elections, no one contends that it gives Congress the power to regulate federal elections in violation of the U.S. Constitution or to enact election laws without sending a bill to the President for his signature or veto. Similarly, the First Amendment prohibits only "Congress" from discriminating on the basis of speech and religion. But we understand the amendment, in context, to apply to the federal government in its entirety, including the judicial

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[28] *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), vol. 2: 240–41.
[29] *Records of Federal Convention*, 240–41.
[30] Sweren-Becker and Waldman, "Elections Clause," 1009–10.
[31] "Convention Debates, 25 June 1788," in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. John P. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. XXII: New York, no. 4: 1906; "Plain Truth: Reply to an Officer of the Late Continental Army, Independent Gazetteer 10 November," in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. II: Pennsylvania: 222; and "Text of a Federalist Speech Not Delivered in the Maryland Convention," in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. XII: Maryland, no. 2: 884.
[32] Hayward H. Smith, "Revisiting the History of the Independent State Legislature Doctrine," *St. Mary's Law Journal* 53 (2022): 479, 488.
[33] Mark Krass, "Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections," *Virginia Law Review* 108 (2022): 122–39.

and executive branches. That is why, to take one example, a judge cannot close off her courtroom to atheists.

It is no surprise, then, that the Supreme Court has affirmatively and repeatedly rejected the independent state legislature theory. The Court has long interpreted the term "legislature" in the Elections Clause to encompass the complete lawmaking apparatus in each state. For example, the Court has held that if the state constitution provides that legislation is subject to a gubernatorial veto or citizen referendum, those processes apply to election regulations.[34] If the state constitution permits citizens to legislate via ballot initiatives, then citizens may regulate federal elections.[35] And, of course, state courts are entitled—indeed, obligated—to ensure that their election laws comply with other state laws, both statutory and constitutional.[36] A state legislature, after all, is a creature of its state constitution.[37]

These are just a few of the reasons why the independent state legislature theory is wrong as a matter of constitutional law. The great weight of scholarship has identified the notion for what it is – a partisan and dangerous misreading of the Constitution that will distort our democracy.

III. Conclusion

Thank you for calling attention to the independent state legislature theory and its extraordinarily dangerous consequences. This radical notion is not yet the law, and in this critical moment for our democracy, it is important that Congress and the public speak out about the risks it poses. Fortunately, the facts and the law all point in the same direction: the independent state legislature theory is not a plausible reading of the Constitution, and the Supreme Court should not adopt it.

Even if the Court does embrace this radical theory, Congress has the power to thwart many of its worst consequences. The very same constitutional provision that activists are seeking to weaponize against democracy gives Congress the authority to enhance and protect voting rights and ensure fair representation. Indeed, that is the principal purpose of the Elections Clause.

We are encouraged by the introduction of the bipartisan legislation to reform the Electoral Count Act, which addresses the vulnerabilities in that law, and we urge Congress to pass those bills swiftly. However, that legislation does not remedy the risks posed by the independent state legislature theory. More is needed.

Last year, Congress came very close to enacting legislation that would not only enhance our democracy but would neutralize state legislative efforts to gerrymander, suppress votes, and sabotage elections. The Freedom to Vote: John R. Lewis Act would supersede state law, and

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[34] Smiley v. Holm, 285 U.S. 355 (1932) (redistricting power subject to gubernatorial veto); Davis v. Hildebrant, 241 U.S. 565 (1916) (redistricting power subject to referendum).
[35] Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808–09 (2015) (redistricting power subject to ballot initiative).
[36] See *Rucho*, 139 S. Ct. at 2507 (election power subject to state law).
[37] See Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795) ("What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void.").

would ensure national standards for voting access, prohibit partisan gerrymandering, and add federal protections against election interference. For the reasons the Brennan Center has repeatedly articulated,[38] we strongly urge Congress to pass the Freedom to Vote: John R. Lewis Act, regardless of how the Supreme Court rules in *Moore v. Harper*.

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[38] See, e.g., *Addressing the Election "Audit" in Arizona and Threats to American Democracy, Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (testimony of Gowri Ramachandran, Senior Counsel, Democracy Program, Brennan Center for Justice), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Ramachandran%20Testimony.pdf; *Election Subversion: A Growing Threat to Electoral Integrity, Hearing Before the H. Comm. on Administration*, 117th Cong. (2021) (testimony of Gowri Ramachandran, Senior Counsel, Democracy Program, Brennan Center for Justice), https://docs.house.gov/meetings/HA/HA00/20210728/113971/HHRG-117-HA00-Wstate-RamachandranG-20210728.pdf; *S.1, the For the People Act, Hearing Before the S. Comm. on Rules and Administration,* 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), https://www.brennancenter.org/our-work/research-reports/testimony-s-1-people-act-senate-committee-rules-administration; *Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act, Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), https://www.brennancenter.org/our-work/research-reports/testimony-protecting-precious-almost-sacred-right-john-r-lewis-voting; *Oversight of the Voting Rights Act: Potential Legislative Reforms, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf; *The Implication of Brnovich v. Democratic National Committee and Potential Legislative Responses, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf; *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Hearing Before the Subcomm. on Elections of the H. Comm. on Administration*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf; *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot, Hearing Before the Subcomm. on Elections of the H. Comm. on Administration*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf; and *Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on Judiciary*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf.

The CHAIRPERSON. Thank you very much.

And thanks to each of one of our witnesses for their testimony.

We are now at the time in the hearing when Members may ask questions of our witnesses for as much as five minutes. I would turn first to the gentleman from Georgia for his five minutes of questions.

Mr. LOUDERMILK. Thank you, Madam Chairperson. It is a pleasure to be with all of you here today.

And thank you to all our witnesses for being here. I was very intrigued with the testimonies there, especially with the extreme ISL theories that people are putting out there.

But first let me say, I am proud to join with Ranking Member Davis and my good friend Mr. Steil and several others on a bill that we are pushing forward, the American Confidence in Elections Act, that takes meaningful steps to secure our elections while still respecting the federalist principles that our Framers put into the Constitution.

As we discuss this ISL theory today, I think we should keep in mind that the versions that we have heard today include a very extreme version of this theory, and I don't want us to jump to conclusions that the Supreme Court would embrace an extreme version of this.

Look, just as the U.S. Constitution is a restriction on the power of the Federal Government, including a restriction on the legislature, State constitutions are restrictions on the State power, including their legislatures. And those constitutions exist for a purpose. I agree wholly that a legislature cannot override their constitution without some amendment to that constitution.

A lot of what I heard here explained today, ironically, sounds a lot about the arguments that our side made against the attempts for a Federal takeover of State elections by H.R. 1 from my colleagues on the other side of the aisle.

So, I agree with much of what you are saying, but we need to be clear that, I think, the more extreme version—we should not just assume the Supreme Court is going to agree with that.

I do have a few questions, though.

Ms. Sweren-Becker, when the Framers penned the Elections Clause in Article I, Section 4, what did they understand the term "legislature" to mean?

Now, I know from reading Federalist Papers and writings of our Framers and our Founders, they chose their words very carefully for specific meaning. So, what do you understand that the term "legislature" meant to them when they framed the Constitution?

Ms. SWEREN-BECKER. Thank you for that question.

I have had the pleasure of looking through this historical record, looking at the debate during the Constitutional Convention on the Elections Clause and the ratification debates in every State when they were discussing the Elections Clause.

What is clear is that the Framers were trying to constrain the power of State legislatures. They wanted to make sure that these State lawmakers, who they deeply distrusted, would not have exclusive power to regulate Federal elections. And that is why the second part of the Elections Clause gives Congress the power to make or alter Federal election law.

It is, therefore, absurd and, sort of, directly contrary to the historical record to think that those very same Framers would have given to the legislature alone in a State the power to regulate Federal elections without the normal checks and balances——

Mr. LOUDERMILK. If I could get you to narrow down to answer the question, what does the term "legislature" mean?

And we have a different interpretation from studying the founding era. What I read is, during the debates, they mostly distrusted the government they were creating. Most of them came from State legislatures. So, they were more concerned with the power of the Federal Government overriding State legislatures.

And look, I am not defending the ISL theory here. My question is, what did they mean by, in Article I, Section 4, the term "legislature"?

Ms. SWEREN-BECKER. I appreciate your question. I think we have a different reading of the historical record.

But, nevertheless, one thing that I think is instructive in understanding what the Framers meant when they used the word "legislature" is what the Framers meant when they used the word "Congress" in the other part of the Elections Clause.

Nobody understands that Elections Clause to give Congress the power to enact laws that don't need to be sent to the President for his signature or veto. Nobody understands that part of the Elections Clause to give Congress the power to enact laws that Federal courts can't adjudicate.

The same is true——

Mr. LOUDERMILK. I need you to hurry up and get to the point here, because——

Ms. SWEREN-BECKER [continuing]. For "legislature" in the first part of the Elections Clause.

Mr. LOUDERMILK [continuing]. We are quickly running out of time here.

I still don't know that we got the answer about what "legislature" means.

One of the things that the Framers did is, they wanted to make sure that future generations understood the meaning that they put in the document itself for future generations, because we have an evolution of language. So, actually, Noah Webster worked with many of them to create the first dictionary of American English language, the Webster's 1828 dictionary, which, in the forward, he said was to help future generations of Americans interpret.

The term "legislature" in that document, as he is saying our Founders intended it to mean, is "the body of persons in a state or a kingdom invested with the power to make and repeal laws." He then goes on and explains what the State legislatures mean, which is "those elected bodies within the State with the power to pass and repeal laws, as constrained by the Constitution."

So, I am sorry I wasn't able to get to any other questions, but I think we need to make sure that, if we are interpreting "legislature" one way, it needs to be consistently interpreted throughout the entire document of the Constitution, not being able to use one interpretation for one article and clause and not another.

With that, Madam Chairperson, yield back.

The CHAIRPERSON. The gentleman's time has expired.

Mr. Raskin is recognized for five minutes.

Mr. RASKIN. Thank you, Madam Chairperson, for calling this very important hearing.

And Professor Becker—am I calling you the right name?

Ms. SWEREN-BECKER. Sweren-Becker. But I am not a professor, so I can't claim that title.

Mr. RASKIN. Ms. Sweren-Becker. Forgive me. I don't have my glasses on, so I just—okay.

I want to go right to that point you were making before. If you go to the Elections Clause, it is set up, it seems purposefully, to create Congress as a backstop for the State legislatures, to make sure that Congress could regulate time, place, manner of elections and so on, over the States, if necessary.

Did that give Congress the power or the right to do that outside of a Presidential signature on bills we are passing? Outside of judicial review? In other words, is there an independent Congress doctrine too?

Ms. SWEREN-BECKER. Thank you for that question, Representative.

And, of course, there is no independent Congress doctrine. The Framers used the word "Congress" and the Framers used the word "legislature" in context—in the context of the checks and balances that apply both to State legislatures and to Congress.

Mr. RASKIN. So, in other words, if we were to exercise our power under the Elections Clause to, you know, legislate just, say, the Voting Rights Act, for example—I know that was Section 5 of the 14th Amendment, but I think Elections Clause was implicated too—when it was passed by Congress, it still needed to be signed by the President, right, even though it said Congress had the power to do it?

And so, similarly, State legislatures passing election laws have always sent their bills to their Governor, under their State constitutions, for signatures. Isn't that right?

Ms. SWEREN-BECKER. Yes.

Mr. RASKIN. So, the independent State legislature doctrine would suddenly announce that more than two centuries of State election laws are somehow unconstitutional or at least went through an unnecessary step of being signed by the Governor and operating under State constitutional veto requirements and so on. Is that right?

Ms. SWEREN-BECKER. Yes. This theory, if it were embraced, would nullify hundreds of election laws that have been in place for many, many years, in some cases centuries.

As my colleagues reflected, State constitutions were adopted around the time of the ratification of the Constitution that, themselves, constrained State legislatures. Everyone understood at the time that State legislatures are creatures of their own constitution and are constrained by them, including requirements for gubernatorial veto and judicial review.

Mr. RASKIN. Okay.

But there are some places in the Constitution where the legislature does operate independently, right, as opposed to in this normal legislative capacity? Are there not?

Ms. SWEREN-BECKER. Yes, there are certain instances.

Mr. RASKIN. What are some examples of that?

Maybe I could come to you, Professor Shapiro.

Ms. SHAPIRO. Yes. The legislature acts independently when it is, for example, being asked to ratify a Federal constitutional amendment. Or during the time when Senators were directly chosen, appointed by State legislatures, they acted——

Mr. RASKIN. Before the 17th Amendment.

Ms. SHAPIRO. Before the 17th Amendment.

Mr. RASKIN. Yes.

Ms. SHAPIRO [continuing]. They acted independently.

And the Constitution uses different verbs to describe what the legislatures do in those contexts. As opposed to saying "direct," for example, as the Electors Clause uses, they use words like "appoint," which is what the Constitution referred to before the 17th Amendment with respect to appointment of Senators.

And so, the word "legislature" must be understood in the context of precisely what it is that the legislature is being asked to do or being authorized to do by the Constitution.

Mr. RASKIN. Okay.

So, let's see. Professor Pildes, if you are still out there, I would like to ask you about that very point.

The claim seems to be made now that, if the State legislatures can act independently for any specific constitutional purpose, they must be able to act independently for all constitutional purposes, including the primary purpose of ordinary lawmaking. Is that right?

The CHAIRPERSON. Professor——

Mr. RASKIN. You need to unmute, Rick, I think.

Mr. PILDES. I thought I had. Is that unmuted?

The CHAIRPERSON. Yes, we can hear you now.

Mr. PILDES. Sorry about that.

I think your statement is correct, because if we take Congress, when Congress proposes constitutional amendments, Congress does not have to present those to the President. And, in fact, the Bill of Rights was not presented to the President before it was adopted or sent out to the States to be ratified.

So that is an example in the Federal context where we wouldn't, of course, conclude that Congress, when it exercises its powers to regulate Federal elections, doesn't have to present a bill to the President. So, I think that is a very good example from the Federal context.

I think Justice Ginsburg's opinion in the Arizona independent redistricting case does acknowledge that, before the 17th Amendment, State legislatures might have been independent in their role as elector but not in their role of regulating and ordinary lawmaking.

The CHAIRPERSON. The gentleman's time has expired.

We turn to Mr. Steil for his questions for five minutes.

Mr. STEIL. Thank you very much, Madam Chairperson. Appreciate you holding today's hearing.

I want to start just by jumping back to yesterday for a second on the importance of making sure that our elections are free, fair, and secure and note that I am proud to join the Ranking Member, Representative Davis, and my colleague Mr. Loudermilk, to my

right, in introducing the ACE Act to inspire voter confidence and election integrity. I think it is an important piece of legislation that was introduced yesterday and one that I would encourage folks to look into.

I would like to direct my questions on today's topic to Mr. Pildes if I can.

We have heard testimony today from witnesses stating that the independent State legislature theory is one that could impact our elections process. So, I would like to start by asking you if there is any specific legal precedence affirming legislators do not have the absolute power in elections. What have the courts held on this issue?

Mr. PILDES. Well, the courts have certainly always applied State constitutions to assess State election laws. The courts have never second-guessed the interpretation or administration of State election laws through the Federal Constitution.

We didn't get any indication of that until the three-Justice concurrence written by Chief Justice Rehnquist in *Bush* v. *Gore*. And no Federal court has ever adopted the doctrine, at least up to this point. Just a few opinions, statements, and that concurring opinion.

Mr. STEIL. So, you know that they have never held it. Have they ever held against the independent State legislative theory?

Mr. PILDES. I don't think the issue, as far as I know, was ever presented to Federal courts before it was raised in 2000.

Mr. STEIL. Okay.

Mr. PILDES. So, the practice has been to not apply to such a doctrine.

Mr. STEIL. Understood. But never ruled on. That is fine. Just helpful for us to understand the topic. Never been ruled on.

I want to walk through a couple implications here.

How would independent State legislative theory impact States that have independent redistricting commissions? We heard a previous witness reference the impact that it may have.

Mr. PILDES. Well, the Supreme Court has already upheld the power of voters through voter initiatives to create independent commissions for congressional districting. That was a five-to-four decision. There has been discussion about how solid the precedent will remain, but that is certainly the precedent today.

Mr. STEIL. Okay.

Shift gears slightly. How would ISLT theory impact a State's election certification process?

Mr. PILDES. Well, it depends, of course, on exactly which version of the theory we are talking about. But since certification is primarily administration, interpretation, it would only be impacted if the Supreme Court were to conclude that there is a Federal role in second-guessing the application and interpretation of State law.

Mr. STEIL. Okay.

Third question. How would it impact a State constitutional amendment that would be approved by the voters through a ballot measure?

Mr. PILDES. Well, the first answer is that, if State constitutional provisions are off the table altogether, then those would fall along with the general State constitution. Maybe there is an attraction among some to a doctrine that the State constitution is fine but not

voter-initiated amendments, but I am not sure exactly how one would defend that distinction.

Mr. STEIL. I appreciate your insights today.

And I appreciate you holding the hearing, Madam Chairperson. I will yield back.

The CHAIRPERSON. The gentleman yields back.

Mr. Butterfield is recognized for five minutes.

Mr. BUTTERFIELD. Thank you very much, Madam Chairperson, for convening this very important hearing.

And thank you to the witnesses for your testimony. I represent one of thirteen districts in North Carolina. And, as all of you certainly know, the *Rucho* case originated in my State, as well as the *Moore* v. *Harper* case. And so, I am a little bit more acquainted with these cases than, I would say, most Members of Congress. And so, I am real concerned about this.

Some years ago, we challenged the congressional map based on partisan gerrymandering. We took the case into Federal court, and the lower Federal courts ruled in our favor and ruled that the State legislature engaged in partisan gerrymandering and that it was a violation of the Federal Constitution.

And that case was taken to the U.S. Supreme Court, and, unfortunately, the High Court decided that political gerrymandering is not protected by the Federal Constitution. But, in that opinion, in that *Rucho* opinion, the Court suggested that it may be cognizable under the State constitution but not under the Federal Constitution.

And so, as the years went on, that is when the *Moore* v. *Harper* case came along, and so we decided to do what the Supreme Court had suggested. We litigated the redistricting map in State court, and again we prevailed in State court. In fact, the State supreme court ruled that the congressional map was an extreme, intentional partisan gerrymander and directed legislature to fix it, and the legislature had to follow the directive of the court.

So, now we have a new map. The map is a fairer map than it was originally. But unfortunately, the plaintiffs in the case have now—or at least the defendants in the case have now taken the matter to the U.S. Supreme Court, and now the Supreme Court is going to have to decide whether or not State courts have any authority whatsoever over election laws within the State.

And so, I guess my question is, Professor—I guess you are still with us online—are we overreacting? Are we overreacting? Or is it likely that the Supreme Court will decide that State legislatures can enact election laws affecting Federal elections and deny State courts the authority to make a constitutional ruling? Are we overreacting, or is this real?

Mr. PILDES. Representative Butterfield, let me start by saying I have been writing about North Carolina redistricting since the early 1990s, and I was actually part of the legal team representing Common Cause in the *Rucho* case that you described. I——

Mr. BUTTERFIELD. I was involved in the Gingles case. You may recall Gingles. I was very much involved in that.

Mr. PILDES. Oh, absolutely.

Mr. BUTTERFIELD. Yes.

Mr. PILDES. Absolutely.

I think, as all these questions have indicated, it is very difficult to say, because there are a whole variety of versions of this doctrine that have been hinted at. And some would have extremely destabilizing consequences, to be sure. And most of them would have significantly destabilizing consequences. And there are lots of legal uncertainties that would be unleashed under any version of this doctrine.

So, yes, I do think it is a concern, about what the doctrine might be, if such a doctrine is endorsed by the Court. And exactly, you know, how destabilizing it would be, how much litigation it would unleash—there is no question that disappointed candidates and voters will run to Federal court to try to overturn State court interpretations.

And so, you know, there is a lot of uncertainty here, but there is——

Mr. BUTTERFIELD. So you really believe——

Mr. PILDES [continuing]. No question it is a destabilizing prospect.

Mr. BUTTERFIELD. So you are saying that you really believe that the U.S. Supreme Court will decide that State courts do not have the authority to interpret and enforce the State constitution. You really believe the U.S. Supreme Court will go that far?

Mr. PILDES. Well, I am not going to make any predictions here, but I can tell you that Justice Alito and Justice Thomas, at the least, have signaled that they are very disturbed by—this is in the context of Pennsylvania—State court constitutional rulings about State election law.

So there is no question that that is a serious issue before the Court, and there are some indications that at least some Justices are prepared to accept such a view.

Mr. BUTTERFIELD. Thank you, Madam Chairperson. I yield back.

The CHAIRPERSON. The gentleman yields back.

Mr. Aguilar is recognized.

Mr. AGUILAR. Thank you, Madam Chairperson.

Ms. Sweren-Becker, leading up to January 6th, the former President and his loyalists invoked ISL theory. And I know that there are different doctrines out there, as we have heard, but that was cited as part of the creation of, quote, "fake electors" that would be submitted to Congress to get the then-Vice President Mike Pence to send the results of the electoral college back to the States to prevent certification.

Can you tell us how this theory informed the strategy that ended up being used by these individuals—John Eastman, Rudy Giuliani, and others—to undermine legally cast ballots of millions of Americans?

Ms. SWEREN-BECKER. Thank you for the question.

To be clear, the independent State legislature notion, if adopted, would not let State legislatures send a fake slate of electors to Congress to be certified. As I said, the theory is not a license to coup.

You are correct that President Trump relied on the theory in challenging policies that were in place in States across the country, trying to get ballots thrown out that were cast in reliance on policies adopted by Secretaries of State or Governors, for example. And

so, this notion was the legal backbone that informed this effort to overturn the will of voters.

Mr. AGUILAR. If the Supreme Court gives credence to extreme versions of this theory, are there scenarios where, you know, alternate slates are submitted and the President who fails to win 270 electoral votes could be certified as President?

Ms. SWEREN-BECKER. As I said, the theory wouldn't permit that kind of scenario, but it does open the door to efforts by State legislatures to attempt those kinds of anti-democratic shenanigans. Federal law would prohibit that from happening, but legislatures might try to change the rules for vote counting, for example, or it might try to institute sham audits to affect the results of elections.

So, there are other ways that legislatures might try to interfere with elections even beyond those fake electors and that strategy.

Mr. AGUILAR. Thank you.

Professor Shapiro, we talk often in this committee room about our local officials, election administrators, many of them who are, you know, struggling with resource issues, and some of them have received threats over the past few election cycles as well.

Can you describe what could happen to communities of color if basic and essential voting rights regulations, which State election officials administer, are gutted in response to some of these theories?

In your written testimony, you claim that some of those local election officials might struggle based on the interpretation of these theories.

Ms. SHAPIRO. Every decision that a local election official makes that involves discretion could be second-guessed and litigated in Federal court, even where those particular decisions have been affirmed or ratified by State courts.

In Pennsylvania, for example, in 2020, there was litigation about whether or not county clerks could have dropboxes in which voters could put their mail-in ballots, and the Pennsylvania Supreme Court concluded that the statute should be interpreted to allow those dropboxes at the discretion of the local officials.

Under the ISLT, or at least some of the extreme versions of it, the Federal courts would be able to come in and revisit that essentially de novo and say that that is not how they read the statute, even though under normal circumstances State courts have the final say over what State statutes mean and discretion is delegated to election officials so that they can do their job.

Mr. AGUILAR. What could this mean to communities of color?

Ms. SHAPIRO. Well, I think to the extent that communities of color are already in under-resourced areas or in areas with high population density, there may be more need in those contexts for election officials to try to find ways to ensure that everybody has the right to vote.

That means that they may need to exercise discretion in ways that perhaps in a small rural county that is predominantly White there just—the same issues simply don't arise, and so the need to exercise discretion in these ways might not be there.

It also, I think, opens the door for this kind of litigation that is essentially going to be incredibly time-consuming, incredibly resource-intensive any time somebody doesn't agree with a particular

discretionary decision or even sees it as strategically beneficial to challenge the decision, which will deter officials from making those kinds of decisions.

Mr. AGUILAR. Thank you so much.

I yield back, Madam Chairperson.

The CHAIRPERSON. The gentlemen's time has expired.

I have just a couple of questions.

You know, Article I says that the time, places, and manners will be prescribed in each State. And every State has decided to have an election, votes by their citizens. That is every single—all fifty States have decided the American citizens are going to decide this by a vote.

Some have suggested that if you took the extreme independent legislature theory to the maximum amount, that it could empower State legislatures to essentially decide otherwise. You have a vote, you don't like the result, the legislature appoints who they want.

So, Professor Pildes, I mean, I would like you to comment on that assertion—and some State legislators did indeed suggest that during the last Presidential election—and your comment on whether reform of the Electoral Count Act could play a role in remedying such a threat to the right of Americans to select their government.

Mr. PILDES. Thank you for that question.

So, first, even as things stand today, Congress decides the date on which electors must be appointed. That is a constitutional power Congress has. And it means that State legislatures cannot after election day suddenly decide that "We don't want a popular vote; we are going to appoint the electors." That is unconstitutional.

The Electoral Count Act reform, at least the bipartisan bill that has been publicly introduced, would help solidify that structure by making it clear—in ways that I think is already in the original act, but this would make it much more clear—that States have to act pursuant to laws and procedures established in advance of the election.

And that is what we all want. We want clear rules, established in advance of the election, that can't be manipulated after the fact for one partisan purpose or another.

So, I do think the bill that has been introduced would help secure the process against those kinds of——

The CHAIRPERSON. We have been working on a bill, as well, that is not quite done but should be introduced in the next couple of weeks, and we will be discussing with our Senate counterparts how to reach consensus. I am sure that we will come to a meeting of the minds in a very cordial way.

Here is a question for anyone. You know, I have often thought when some of the rhetoric that was pursued, that the State legislators could simply send in their own electoral slate despite what the vote had been in their State, what the role of Article IV, Section 4 has in such a decision.

The United States guarantees to every State in this union a republican form of government. And that, it would seem to me, does not include a State legislature throwing out the votes of its voters and imposing its own decision instead.

Does anybody have a comment on that?

Ms. SHAPIRO. I would say first, I agree with my colleagues that the State legislatures, under the Constitution, can't after the fact change the rules about how the electors are chosen.

The Independent State legislature theory, however, might allow them to put rules in place before the election that, say, for example, take away from the courts the ability to adjudicate disputes about the election after the fact and give the power to determine election contests to the legislature itself.

Now, you are asking if that might violate the Guarantee Clause. The Guarantee Clause, of course, has been held to be nonjusticiable, but surely it provides Congress with the opportunity to regulate how these types of decisions are made. I think it would be well within congressional power to say that the Guarantee Clause requires——

The CHAIRPERSON. Well, my question isn't whether it is justiciable, but when the Court looks at this in the whole context of the Constitution, to elevate State legislatures without looking at a framework that is a republican form of government would be inconsistent with that amendment, wouldn't it, with that section of the Constitution?

Ms. SHAPIRO. I think it would be inconsistent, but the Court has not shown itself to be very interested in looking to the Guarantee Clause when it interprets other relevant clauses of the Constitution. I will just reiterate, though, you have the power to rely on the Guarantee Clause.

The CHAIRPERSON. I understand.

My time has expired, and I am going to turn the gavel over to Mr. Raskin to recognize our new Member.

Mr. RASKIN [presiding]. Thank you, Madam Chairperson.

I recognize the gentlelady from Pennsylvania, Ms. Scanlon, for five minutes.

Ms. SCANLON. Thank you, Mr. Raskin.

You know, I have gotten a lot of questions from constituents over the last few weeks in the wake of the writ of certiorari for—or review for the case raising this ISL theory. So, I am trying to explain to constituents even as I investigate it further.

We do that in Pennsylvania through the lens of what has been going on in Pennsylvania for the last few years. We have had statutory gerrymandering. We have had strict voter ID laws. Those have both been pushed back through litigation. And then, of course, during the 2020 election, we found our results under attack, without basis, but nevertheless under attack through a variety of court cases—dozens of them, in fact.

I think you raised that in your testimony, Ms. Shapiro. Can you talk about the impact of that theory and what we need to be concerned about?

Ms. SHAPIRO. Well, you need to be concerned about, among other things, all these decisions that the State courts have made and all the precedent that exists that the State courts rely on and, indeed, that the legislature relies on, whether those will continue to be effective with respect to Federal elections.

You also need to be concerned about whether the rules might be different for Federal elections versus State elections, regardless of whether the legislature actually passes different laws, because they

might be interpreted differently or because, to the extent that the State court strikes down aspects of the laws with respect to—the Federal courts might say they still must be in effect with respect to Federal elections. So, there could be an enormous amount of chaos, to put it mildly.

Ms. SCANLON. And that has been one of the problems we have had to address, is that there has been chaos with changing rules, impacting the electorate and people not being certain of what is going forward. And, of course, that damages our institutions in general.

Do you have any recommendations on what we should do, as Congress, to protect the right to vote considering the kinds of things we have seen happening in Pennsylvania?

Ms. SHAPIRO. Well, I certainly—with respect to the ISLT, Congress could, for example, pass a law that says that, with respect to State laws governing Federal elections, the presumption is—or the actual rule is that they necessarily incorporate State constitutional provisions in all manner of ordinary judicial review, statutory interpretation, et cetera.

You could pass a law that limits the timing under which Federal courts, including the Supreme Court, can intervene, especially after a State court has already ruled on a particular issue.

You could also address other issues. You could, as you considered doing in H.R. 1, address extreme partisan gerrymandering. And, you could do that even with respect to State legislative offices, in my view, under the Guarantee Clause.

Ms. SCANLON. Yes.

I mean, it has been interesting. We hear a lot of, sort of, specious arguments that the Elections Clause, Article I, Section 4, and whether Congress has the power to address what is happening in our elections in the States. Can you just summarize that quickly?

Ms. SHAPIRO. There is no question that the Congress has the power to address congressional elections. Under Article I, Section 4, it expressly gives Congress the power to do so. The Congress also has the power under the Guarantee Clause to guarantee a republican form of government, and, in fact, has the obligation to do so.

There is nothing in the Constitution to suggest that the Federal Government can't ensure that States operate Federal elections properly. But it is Congress that has that power, not the Federal courts taking it away from State courts.

Ms. SCANLON. Thank you.

I would defer to our constitutional expert, but I believe my recollection is that it was misconduct in South Carolina that led the Framers of the Constitution to insert that clause and make sure——

Mr. RASKIN. Yes, the Elections Clause.

Ms. SCANLON. Yes.

Mr. RASKIN. I will take your word for it; I can't remember——

Ms. SCANLON. Okay.

Mr. RASKIN [continuing]. What State it was in. But I know the power is there and the purpose is clear.

I am going to ask a few more questions, and——

Ms. SCANLON. Yes. I would yield back.

Mr. RASKIN [continuing]. And we will open it to Mr. Steil and anybody else.

So, the gentlelady yields back.

Let's see. Under the extreme versions of this independent State legislature hypothesis—and I have not read the literature about it, and I would be interested to know whether there is a law review corpus around this, but—are they asserting that a legislature could actually enact legislative changes, say, repealing vote by mail or adopting vote by mail or moving to instant runoff voting or overthrowing instant runoff voting, without sending the legislation to the Governor of the State under the State constitution?

Ms. Sweren-Becker.

Ms. SWEREN-BECKER. Thank you for the question.

And I will first note that there is a wealth of scholarship rebutting this independent State legislature theory. So, there is lots of evidence——

Mr. RASKIN. But is there anything on the other side? I mean, are you guys just debating a mirage here? Or is it just an idea that popped up in the Supreme Court but there is no support for it either historically or academically?

Ms. SWEREN-BECKER. There is no serious evidence on the other side. There is no support historically; there is no support legally. The Supreme Court has repeatedly rejected this idea in precedent after precedent after precedent.

Mr. RASKIN. Recently as the *Arizona* case, right?

Ms. SWEREN-BECKER. Yes. As recently as 2015, the Court rejected this theory outright.

Mr. RASKIN. Okay. But is someone claiming somewhere that a legislature could adopt election laws without sending it to the Governor of the State under the State constitution?

Ms. SWEREN-BECKER. That is the logical extension of this theory.

Mr. RASKIN. Wow.

Ms. SWEREN-BECKER. The notion that—oh, excuse me. Sorry.

Mr. RASKIN. Yes. No, that was just a "wow."

Ms. SWEREN-BECKER. The notion that it is the legislature alone, outside of the ordinary lawmaking process and without the ordinary checks and balances that apply to the State lawmaking body, that is the premise of this independent State legislature notion. And it is just as radical and shocking as you suggest.

Mr. RASKIN. Okay.

Professor Shapiro, you mentioned something in passing that really caught my attention. You said that, under the doctrine, a State legislature could divest the courts of the ability to review the election laws they are adopting.

I mean, are you saying that the turbo-charged version of the independent State legislature theory would allow them to say, we are carving out an exception to *Marbury* v. *Madison* and there wouldn't even be Federal constitutional review?

Ms. SHAPIRO. No, I don't think that State legislature can prevent Federal constitutional review. But it certainly could, under the theory, under the turbo-charged version, prevent State courts——

Mr. RASKIN. But it sounds like it doesn't even have to, that that is the force of the independent State legislature——

Ms. SHAPIRO. Yes.

Mr. RASKIN [continuing]. Doctrine. In fact, it couldn't do it even if it wanted to, right? In other words, if the legislatures said, "And we will leave this up to an administrative agency to interpret the particular times or placement of voting precincts" or what have you, they couldn't do that?

Ms. SHAPIRO. Under some versions of the theory. Justice Gorsuch suggested that he might be open to that version in his opinion in one of the North Carolina cases in 2020.

Mr. RASKIN. The legislature of the State, under this more expansive notion, must act as a legislature and as an administrative agency and as its own court interpreting the State constitution, although the State constitution may be completely irrelevant here.

It is as if they are saying the State legislature acts in a completely different capacity and exists as a different kind of beast when it governs election law, and State constitutional law is just irrelevant.

Am I over-reading that, Ms. Sweren-Becker?

Ms. SWEREN-BECKER. No, that is exactly right. The logical extension of the theory is, there is no separation of powers, the judiciary doesn't get to say what the law is, the Constitution has no bearing on what the legislature can do, nor does the Governor, but only in the instance of regulating Federal elections.

Mr. RASKIN. Yes.

Ms. SWEREN-BECKER. And that exception makes absolutely no sense.

Mr. RASKIN. I just want to say that, you know, it seems to me, given that there is no historical basis for this, given that there is no real academic support for it, it seems like there is an effort to spot places that benefit a particular political destination or program and then say, we are in control there, let's dramatically inflate the power of that office or person.

It is sort of like what happened on January 6th, where it was said, well, the Vice President has the power to count Electoral College votes and unilaterally, without Congress being involved, reject Electoral College votes, and essentially determine who is going to be President. And there was never any basis for that. Nobody ever claimed it. It is surprising nobody would have noticed it for more than two centuries of American constitutional and senatorial and congressional practice. And yet that was a claim being made.

It was a coup in search of a legal theory, as Judge Carter said from California. I am afraid that this a little bit of a political fix in search of a legal theory too.

I am happy to recognize my friend Mr. Steil.

Mr. STEIL. Thank you very much.

Let's just dive back in here. We are on round two.

Ms. Sweren-Becker, you gave testimony regarding independent State legislature theory, claiming that the theory, if adopted by the courts, would deprive voters of free and fair elections, and you pivoted to January 6th and the fact that States have enacted various election reform measures.

Can you confirm, would your position on ISL be the same for Democratically controlled States, often with veto-proof legislatures, like Illinois or Maryland?

Ms. SWEREN-BECKER. Thank you for the question.

What I think you are pointing out here is that the independent State legislature theory is bad for Americans, no matter what side of the aisle you are on. It would remove——

Mr. STEIL. And is that your position?

Ms. SWEREN-BECKER. Absolutely.

Mr. STEIL. Okay.

Shift slightly. You also mentioned that, if ISL was adopted as a legal doctrine, then State legislatures would not have a check and balance on their power. Is that a fair analysis of your statement?

Ms. SWEREN-BECKER. Yes. This notion removes checks and balances that apply to State legislatures.

Mr. STEIL. Do you think that voters play a powerful check on State legislators, since they are the ones who elect them?

Ms. SWEREN-BECKER. Yes, absolutely. And that is why it is so concerning that this notion could remove the power of voters to enact laws through direct democracy.

Mr. STEIL. I appreciate your comments.

Mr. Chair, I yield back.

Mr. RASKIN. Thank you very much.

And I don't know, Ms. Scanlon, did you have any further questions?

Ms. SCANLON. No.

Mr. RASKIN. All right. Well, in that event, we are going to come to a close here.

I think that all our expert witnesses have demonstrated that there is no foundation in the text of the Constitution, in the structure of our constitutional system, in the history or the practice of elections, for this radical and brazen claim. I am glad we seem to have bipartisan agreement about the strangeness of this doctrine.

I want to thank all the witnesses for their valuable testimony, and I want to thank the Members for their excellent questioning today.

Members might have additional questions, going forward, for the witnesses. And, if so, we will ask you to respond in writing if you would. The hearing record will be held open for those responses.

Mr. RASKIN. And, without objection, the Committee on House Administration now stands adjourned.

[Whereupon, at 2:07 p.m., the Committee was adjourned.]

QUESTIONS FOR THE RECORD

RESPONSE TO COMMITTEE ON HOUSE ADMINISTRATION

RE: JULY 28, 2022 HEARING: "THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY"

MAJORITY QUESTIONS FOR THE RECORD

PROFESSOR RICHARD H. PILDES, SUDLER FAMILY PROFESSOR OF CONSTITUTIONAL LAW, NYU SCHOOL OF LAW

AUG. 12, 2022

COMMITTEE ON HOUSE ADMINISTRATION
JULY 28, 2022 HEARING: "THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY"
MAJORITY QUESTIONS FOR THE RECORD

For Richard Pildes

1) Please discuss the practical impact of adopting the independent state legislature theory on (1) voters, (2) state elections officials, (3) administrative state election rules put forth by chief elections officials of the state; or (4) state courts. For states where some manner of authority over elections has been delegated by the state constitution to a chief elections officer (e.g.: Secretary of State), what impact would the independent state legislature theory have?

    a. Do these impacts vary under various versions of the independent state legislature theory? If so, how?

    ANSWER: Yes, the impact depends greatly on which of several potential versions of such a theory the Supreme Court might endorse. At one end of the spectrum, if the Court holds that such a doctrine makes unconstitutional the application of state substantive constitutional provisions to state election laws regulating national elections and voter-initiated enactments regarding federal elections, the ramifications would be greatly destabilizing. In my written testimony at pages 4-6, I list some of the many such provisions that currently apply to federal elections that would no longer apply, unless the state legislature or Congress (under the Elections Clause) enacted such provisions into law.

    Under a version of the theory in which state election administration and judicial interpretation could not stray "too far" from the text of the election code, we should expect a great deal of litigation testing the boundaries of how far is "too far." Litigants disappointed by state administration and interpretation of election law would have strong incentives, if the election outcome might be affected, to turn to federal courts in an effort to overturn those decisions. Because the question how far is "too far" would be hard to specify, courts applying such a doctrine would run the risk of being accused of showing partisan favoritism to the candidate who benefits from rulings on this question.

    A more restrained version of an ISLT would apply only to the remedial stage of litigation. Under this version, state courts could still enforce all of state law against state legislatures regulating federal elections, but if a state constitutional violation is found, the courts would have to give the legislature the first chance to remedying that violation, absent exigent circumstances.

    b. States vary in the manner of the appointment of their chief elections officer and whether that role is served by an individual, a commission or board, or some combination of both. How would variations in how states elect or appoint a chief elections officer or other authority affect the impact of independent state legislature theory on their authority to oversee their states' elections?

    ANSWER: I do not believe these variations are likely to have any implications under any version of the ISLT that I discuss in my written testimony.

c. Representative Bryan Steil asked one witness at the hearing, Eliza Sweren-Becker, whether her position on the independent state legislature theory would "be the same for Democratically controlled states, often with veto-proof legislatures, like Illinois or Maryland." If the Supreme Court upheld the independent state legislature theory in some form, would legislatures in all states be able to avail themselves of newfound powers under that theory, without the checks provided by their state courts?

ANSWER: Any version of the doctrine the Supreme Court endorsed would apply equally to all states and all state legislatures.

d. Do the impacts of adopting a version of independent state legislature theory look different in "red" and "blue" states, or will there likely be disruptions to election processes in all 50 states?

ANSWER: There is no reason to think the disruptive effects would be limited to a few states, or states controlled by one party rather than the other. The disruption would likely be experienced across most or all states. The extent of the disruption would depend on which version of the doctrine the Court might adopt. But if new legal avenues are opened up for challenging federal elections, it is certain that campaigns, voters, and organized groups will attempt to exploit those openings whenever they believe it will be to their advantage to do so, regardless of which party controls state government or if state government is under divided partisan control.

2) The Supreme Court has historically been reluctant to make decisions that would "open the floodgates" to additional litigation. You testified that if the independent state legislature theory is upheld, "there is no question that disappointed candidates and voters will run to federal court to try to overturn state court interpretations." Please expand on how upholding a version of the theory would affect future related litigation in federal courts.

ANSWER: The precise answer depends on which particular version of such a theory the Court might adopt. If the Court were to hold that state election administration and state judicial interpretation could not depart "too far" from the text of a state election law, the question of how far is "too far" would immediately and continually arise. Campaigns have every incentive to litigate such questions, if they think the answer might potentially affect the outcome. This version of the doctrine would turn the question of how far is "too far" into a matter of federal constitutional law. That means the federal courts would now become available to challenge the application or interpretation of state election law by state officials. A candidate who lost in state court on such matters would now be able to petition the Supreme Court for certiorari, based on the argument that state officials had violated the Constitution. In addition, voters or groups supportive of that candidate who were not a party to the initial state court litigation would not be bound by res judicata, and could initiate a new action in federal court claiming the state court's interpretation of state election law violated the federal Constitution.

3) Professor Carolyn Shapiro testified that opening the door to litigation in this manner would be "incredibly time-consuming, incredibly resource-intensive" because "any time somebody doesn't agree with a particular discretionary decision or even sees it as strategically beneficial to challenge the particular decision, which will deter officials from making those kinds of decisions." In addition to subjecting elections officials to additional litigation, would adopting a form of independent state legislature theory impact how elections officials administer elections and make decisions on policy questions?

ANSWER: Depending on the scope of any independent-state legislature theory the Court might adopt, such a doctrine could well impact state election administration. State election laws, like most laws, often have gaps or ambiguities – some of which state election officials, such as Secretaries of State, routinely address through interpretive guidance or adoption of regulations. Legislators cannot always anticipate the range of situations in which issues about the application of state election law might arise; circumstances can change from the time a statute is first enacted, raising questions about how to remain faithful to the text and legislative intent in new circumstances. Statutes can be drafted poorly, causing confusion that leads election officials to provide helpful clarity. Legislatures can also delegate authority to election administrators to apply a statute's provisions properly to circumstances the legislature recognizes it cannot anticipate fully in advance.

In all these contexts, of course, election administrators must act in ways consistent with the requirements of state election law. But these statutes often leave room for administrative discretion, partly for the reasons noted above. Election administrators might become risk-averse about issuing guidance or regulations, even in areas where the laws give them discretion to do so, out of fear that their actions will later be overturned as a violation of the ISLT. That would be unfortunate, because we need clear rules in advance of the election, and given the nature of legislation as described above, sometimes that clarity can only come from election administrators in areas where the statutory text is not crystal clear.

4) The Supreme Court has long held that state courts are best positioned to address questions of state constitutional law. Do you agree? Why or why not?

ANSWER: Yes, it is a fundamental tenet of federal court doctrine that state courts are generally the final arbiters regarding the meaning of state law, including state constitutional law. The Supreme Court, for example, refrains from reviewing decisions from state courts that rest wholly on independent and adequate state-law grounds (rather than federal ones); as the Court has said, "[t]the process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar…". *Michigan v. Long*,463 U.S. 1032, 1039-40 (1983). I agree with this long-established principle. That principle reflects respect for the distinct role of states in our federal system, in which state constitutions, state legislatures, and state courts play a central role. State courts are permitted to adopt different methods of interpreting their own constitutions than apply to the federal Constitution. State constitutions are quite different from the federal Constitution; they are typically much longer, deal directly with a much wider range of issues, and are amended frequently. State court judges develop unique familiarity with their state constitutions, including the historical context for particular provisions, the ways they might interact in complex ways with other provisions, and the caselaw that has developed concerning those provisions.

5) The supremacy of state courts in deciding issues of state constitutional law is a principle that extends beyond the voting rights/democracy space. If the Supreme Court were to reverse this principle in the elections context, what are the implications in other areas of jurisprudence?

ANSWER: As an initial matter, I see any ISLT as affecting only the interpretation of the term "legislature" in the Constitution. The word "legislature" is mentioned seventeen times in the Constitution, and for those provisions that empower state "legislatures" to take certain actions, such a decision could mean that the state legislature is free of state constitutional substantive constraints in these provisions. Not all mentions of "legislature" empower state legislatures to act; for example, Art. I, §2, cl. 1 simply declares: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the

Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

6) In some states, the legislature has expressly delegated powers to amend the state constitution to the voters. In 2012, North Carolina voters used this power to establish a state constitutional requirement for voter ID. Under the independent state legislature theory, would voter-driven constitutional amendments on election policy be permitted? If not, could the independent state legislature theory be described as taking power away from voters?

ANSWER: In some states, such as North Carolina, the legislature must first vote to permit voters to vote directly on legislation or constitutional amendments. If the Court concludes that such voter-approved measures violate the Constitution when applied to federal elections, even when the legislature expressly decides to permit voters to vote on a specific proposal, that would certainly deny both the legislature and the voters the power to adopt such measures for federal elections.

In addition, most state constitutions that give voters the power to initiate legislation were adopted by a state constitutional convention, rather than by the legislature. If the ISLT denies voters in these states the power to use the initiative to regulate federal elections, that would take away powers from the voters that the state constitutional expressly grants.

Finally, even when voters amend the state constitution, if the Court endorses a version of the ISLT that rejects the power of state constitutions to impose substantive constraints on laws regulating federal elections, the doctrine would also take power away in this form from voters.

7) The Supreme Court's upcoming case involves the North Carolina Constitution's "Free Elections" Clause.[1] Was this clause written into the state constitution recently? Do other state constitutions have similar clauses? If so, were those other clauses enacted recently? Does North Carolina's Free Elections Clause, and other clauses like it in other state constitutions, have substantive case law attached to it with respect to federal elections? If so, what would happen to that precedent and those voter protection standards if the Supreme Court issues an adverse decision in Moore v. Harper?

   a. Relatedly, some of the ISL debate focuses on the alleged "vagueness" of certain provisions of state constitutions – are there any analogies we can draw from the United States Constitution, such as for example from the Bill of Rights, when thinking about judicial interpretation of what appear to be "vague" constitutional provisions?

ANSWER: As I understand the history from the state judicial opinions in the *Moore v. Harper* litigation, North Carolina's "free elections" clause was first adopted by the State's Constitutional Convention in the Declaration of Rights in 1776. The day after the Convention adopted the Declaration of Rights, it approved the State's Constitution, which incorporated the Declaration of Rights in Article 1 of the North Carolina Constitution. North Carolina's provision was enacted after the enactment of similar clauses in the Pennsylvania and Virginia constitutions.

Twenty-six state constitutions have provisions that provide that elections should be "free," or "free and equal," or "free and open." *See* Jessica Bulman-Pozen and Miriam Seifter, *The Democracy Principle in State Constitutions* 119 Mich. L. Rev. 859, 871 n.59 (2021). Nearly all state constitutions also expressly guarantee the right to vote in one set of terms or another. *See*

[1] N.C. Const. art. I, § 10 ("All elections shall be free.").

Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2019). For descriptions of how state courts have applied these provisions, including to federal elections, these articles provide useful starting points, as do compilations of state constitutional doctrine for individual states that various authors have put together for a number of states.

If the Court adopts a version of the ISL theory, the effect on state constitutional provisions and interpretation would depend on which version the Court might adopt.

In some states, for example, the constitution first had to be approved by the legislature before being submitted for popular approval. Indeed, North Carolina provides such an example: the North Carolina General Assembly in 1969 first voted to approve the draft of the state's current constitution before it was then submitted for a popular vote, in which voters in 1971 then approved its adoption. Even if the Court adopts some version of the ISLT, the Court might conclude that state constitutions, or specific constitutional provisions, that came with legislative approval satisfy whatever version of the ISLT the Court might adopt.

The text of many provisions in the U.S. Constitution and state constitutions are frequently cast in highly general terms. This is particularly true of provisions that protect constitutional rights. In the U.S. Constitution, for example, the First Amendment provides that Congress shall make no law "abridging the freedom of speech." The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." These general provisions, like many others, have taken on more determinate meaning through hundreds of Supreme Court and lower court decisions. The text of these and similar provisions might seem highly general when taken abstractly but have been given more specific content through the processes of constitutional interpretation and decision. That is the normal process of constitutional interpretation and development. Provisions that might appear "vague" or highly general in the abstract take on much more specific meaning through judicial decisions over time.

If the Court were to adopt a version of the ISLT that permitted state judicial enforcement of "specific" state constitutional provisions but not "general" ones, one issue that courts would then confront is whether to take into account the development of state judicial precedent concerning these provisions. If a provision is "highly general" in the abstract, but has been given more specific content through caselaw, is that provision then "specific enough" to be enforced under this version of the ISLT? How developed must that body of precedent be? In addition, a provision might be "general" before it is interpreted for the first time; would such a doctrine ban the first decision interpreting the state constitution with respect to state laws regulating federal elections? That would seem to freeze the development of state constitutional doctrine concerning provisions that regulate federal elections.

8) Is there any version of the independent state legislature theory that is supported by the balance of historical evidence?

ANSWER: I believe the answer is no. I will focus on two general, potential versions of the ISLT that the Court might consider with respect to the Elections and Electors Clauses. The Court could also consider or adopt both of these versions.

First, the Court might consider a version that applies to non-constitutional matters of election administration and statutory interpretation. Before the Court in 2000 raised the possibility of such a position in *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam), and before Chief Justice Rehnquist's concurrence in *Bush v. Gore* actually embraced this position, I am not aware of any historical support for this version. *See Bush v. Gore*, 531 U.S. 98,

112 (2000) (Rehnquist, C.J., concurring in the judgment). I am not aware of any scholar who advocated for such a position before 2000. I am not aware of any court addressing this argument, and I am not aware of any lawyer or commentator advocating this position before 2000.

Second, the Court might consider a version that bars enforcement of some or all state constitutional provisions against state laws that regulate federal elections. I believe the balance of historical evidence does not support this version of the ISLT, particularly if we focus on the original public meaning of the relevant constitutional clauses.

From the Constitution's adoption until the post-Civil War period, scholars have unearthed only a single instance in which any figure or any court suggested that state constitutions could not constrain state legislative laws regulating national elections. That single instance involved the 1820 Massachusetts Constitutional Convention, at which Justice Story argued against adopting a provision that, in his view, would unconstitutionally interfere with the state legislature's power over national elections. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020). Throughout this period, a number of state constitutions did impose substantive constraints on state legislative regulation of national elections, and there does not appear to have been any objection to those provisions based on the ISLT. Historical practice before the Civil War does not support the ISLT.

Even so, the most comprehensive historical study of this issue – from an author who nonetheless strongly concludes that the balance of historical evidence does not support the doctrine – notes that, for a brief period of time after the Civil War, the ISLT "does have a history in Congress and state courts." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 504 (2022) (hereinafter *Revisiting History*). In this post-Civil War period, a few state court cases and a congressional resolution of a contested House election arguably suggest some support for the ISLT, as does one more recent decision, during WWII, from the Kentucky Court of Appeals. *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944) (legislative permitting soldiers to vote absentee constitutional despite state constitutional provision banning such voting).

The Supreme Court debated the relevance of Congress's resolution of the contested election in the 1866 case of *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). Scholars have pointed out that, whatever the correct interpretation of *Baldwin,* Congress was at best erratic during the 19th century over whether state constitutions could constrain state statutes regulating national elections. *See* Derek Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. State L. Rev. 717, 725-28 (2017). Scholars also dispute whether the handful of state court cases from the 19th century do or do not endorse the ISLT. In my answer to Question 11, I discuss the proper interpretation of *McPherson v. Blacker*, 146 U. S. 1 (1892), which proponents of the ISLT also offer in support.

On balance, after examining the evidence, I conclude that the weight of historical practice stands against the view that state constitutions cannot constrain state legislatures in the exercise of their powers under the Elections Clause. That is the same conclusion reached in the most comprehensive survey of the historical evidence, the *Revisiting History* article by Hayward Smith. Bits of historical evidence exist that might support the ISLT, though scholars dispute many of these examples. But the overall weight of historical practice supports the position that state constitutions can constrain state legislatures in the exercise of their ordinary lawmaking powers under the Elections and Electors Clauses.

9) Some have voiced a concern that the upcoming case could empower state legislatures to unilaterally appoint presidential electors against the will of the people. Do you view that as a threat? What other constitutional and statutory provisions would constrain a state legislature in that context?

ANSWER: No matter what the Supreme Court might decide about the ISLT, state legislatures do not have the power to appoint electors after Election Day in defiance of the popular vote in their state. As I said in my written testimony, Art. II of the Constitution expressly gives Congress the power to determine the "time" at which electors must be chosen. Since the Presidential Election Day Act of 1845, codified at 3 U.S.C. Sec. 1, Congress has set a nationally uniform day for appointment of the presidential electors. Congress mandates that electors must be appointed on the Tuesday after the first Monday in November. Electors cannot be appointed after that day; doing so would violate federal law. It might take time to determine who the voters have in fact chosen on Election Day, given the need to tabulate the votes, conduct any possible recounts, and resolve any litigation over the outcome that might arise. But from a legal perspective, the electors have been chosen on election day. Given the constitutional power of Congress to set the time for appointing the state's electors, the state legislature is powerless to give itself the power to appoint electors after Election Day.

There has been loose talk that the doctrine would give state legislatures "plenary powers" over the presidential election, from which it supposedly follows that they could "reclaim" their power to appoint electors after the election has been held. That is legally incorrect – no matter what version of the ISLT the Court might recognize, if it recognizes any such doctrine at all. Congress has locked in the date on which electors must be appointed, and no state law can give legislatures the power to appoint electors after Election Day.

There is a different path through which state legislatures might try to inject themselves into the presidential election process. Instead of appointing electors after Election Day in defiance of the state's popular vote, state legislatures might try to insert themselves into some stage of the vote-counting process; here the legislature would claim that is helping to determine which candidate did in fact win the popular vote. The legislature might still not have the power to appoint electors itself; state law determines who has the legal authority to certify the outcome of the election, and I am not aware of any state that currently gives the legislature the power to certify the outcome.

But if the legislature did involve itself in the vote-counting process, it would be subject to the same constraints of federal law and the U.S. Constitution that apply to any institution of state government involved in the vote-tabulation process, whether a county canvassing board or a state board of elections or any other state entity. This includes the Equal Protection principle that all votes in a statewide election must be treated equally, a principle reflected in the substantive holding of *Bush v. Gore*, 531 U.S. 98 (2000). In addition, the Due Process clause protects voters who have cast valid votes under the laws that exist at the time of the election from having those laws changed after the fact – including in the guise of decisions that purport to "interpret" state election law but that in effect create "new law" and thus change state election law after the election. *See* Richard Pildes, *Judging 'New Law' in Election Disputes,* 29 Florida State University L. Rev. 691 (2001). 42 U.S.C. Sec. 1983 provides a mechanism for enforcing these constitutional requirements against state officials. The state legislature would also be bound by state laws; no matter what version of the ISLT the Supreme Court might adopt, it would not free state legislatures from being bound by existing state laws, unless the legislature enacted legislation to override those laws. If the Court

adopts a version of the ISLT under which state courts could continue to enforce specific provisions in state constitutions but not "highly general" ones, legislatures would still be bound by those specific provisions; in my written testimony, I explain the problems that would be opened up should the Court endorse that version of the ISLT.

In addition, Congress is considering legislation to update and reform the Electoral Count Act. The Senate is currently considering a bipartisan Electoral Count Act reform bill, and I understand this Committee is also working on legislation to reform the Electoral Count Act. The Senate bill that has been made public would confirm that presidential elections must be resolved through state laws enacted in advance of the election. These current and potential constraints on state legislatures would all still apply.

Finally, under current law, there is also a provision that empowers state legislatures to appoint electors if the election has "failed" in that state. This provision, enacted originally in 1845, was primarily designed to deal with risks like natural disasters that prevent holding the election on Election Day. There is a danger a state legislature might try to abuse this provision by claiming that the election had "failed" in that state due to the legislature's claims about problems in the voting process. It is my view that Congress should repeal this provision and replace it with one that gives *voters* an opportunity to cast a vote after Election Day if the election must be postponed due to extraordinary circumstances, such as a natural disaster that prevents a state from holding the election on Election Day.

10) What actions could Congress take in response to a ruling endorsing the independent state legislature theory in Moore v. Harper?

ANSWER: Under the Elections Clause, Art. I, Sec. 4, Congress has the power to regulate the time, place, and manner of elections to the House and Senate. Congress can directly regulate the manner of those elections, as it has, for example, in requiring that members of the House be elected from single-member districts. In a recent opinion for the Court, *Arizona v. Inter Tribal Council,* 133 S.Ct. 2247 (2013), Justice Scalia quoted earlier Supreme Court decisions on the breadth of this congressional power: The power of Congress over the "Times, Places and Manner" of congressional elections "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Ex parte Siebold,* 100 U.S. 371, 392 (1880).

Under this power, Congress could, for example, provide that state laws regulating House and Senate elections must comply with all state constitutional requirements. State legislatures are not independent of the Congress' power under the Elections Clause to regulate House and Senate elections.

11) Ms. Sweren-Becker testified that, "There is no support historically; there is no support legally," for the independent state legislature theory, and that, "The Supreme Court has repeatedly rejected this idea in precedent after precedent after precedent." Has the Supreme Court ever considered the independent state legislature theory directly? If so, what was the result(s)? When opinions of the Court have discussed the theory, have they cited legal authority that supports the theory?

ANSWER: With respect to the Elections Clause or the Electors Clause, the Supreme Court has directly addressed versions of the ISLT in three major cases. It has rejected the doctrine in all three cases.

The first two cases tested whether the ordinary processes of state lawmaking under state constitutions were in any way affected by these federal constitutional provisions. In both cases, the Court rejected the ISLT argument. In *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565 (1916), the Ohio constitution gave voters the power through a popular referendum to approve or disapprove any law the legislature enacted. When voters used this power to reject a legislatively-approved redistricting map, that action was challenged as violating the "legislature's" power under the Elections Clause. The Court rejected this claim, holding that state constitutions could give voters the power to reject laws for congressional redistricting and, by implication, for other exercises of the state legislative power under the Elections Clause. *See* 241 U.S. at 569 (holding that the Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

The second case, *Smiley v. Holm*, 285 U. S. 355 (1932), tested whether governors could veto state legislation regulating national elections, such as redistricting legislation, when state constitutions gave governors that general power over state legislation. Again, the Court held that, because state legislatures under the Elections Clause are engaged in the ordinary task of legislating, the ordinary processes for lawmaking a state constitution establishes are not overridden by the Elections Clause. The Elections Clause does not create an independent state legislature that is free from a governor's power to veto legislation. The Court in *Smiley* distinguished the different types of functions the Constitution assigns in various provisions to state legislatures, and held that legislation enacted under the Elections Clause "involves lawmaking in its essential features" and, for that reason, lawmaking under this Clause "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.*, at 367. The issue of whether governors retain their veto power for legislation enacted pursuant to the Elections Clause is long-settled, and I am not aware of any defender of the ISLT who argues that it denies governors their ordinary veto powers.

The third and most recent case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (*AIRC*), rejected the ISLT in the context of upholding the ability of a voter-initiated constitutional amendment to create an independent redistricting commission for congressional districts, and to provide the standards for the commission under which redistricting was to take place. The Court has never held that state constitutions cannot impose substantive constraints on state regulation under the Elections Clause. The *AIRC* case is the closest the Court has come to holding affirmatively that state constitutions can impose substantive constraints on the power of legislatures under the Elections Clause. The logic of that decision suggests state constitutions can indeed do so. If voters can take redistricting out of the hands of the legislature altogether, it would seem directly to follow they can take the lesser step of leaving redistricting in the hands of the legislature but impose substantive constraints on the use of that power.

When the Constitution assigns state legislatures specific functions *other* than ordinary lawmaking, the Supreme Court has endorsed a version of the ISLT. Thus, when the legislature acts in its constitutionally assigned role of ratifying proposed constitutional amendments, state constitutions cannot subject the legislature's ratification to a popular referendum for approval. *Hawke v. Smith (No. 1),* 253 U. S. 221 (1920). Similarly, the Court has held that Congress does not need to submit proposed constitutional amendments to the President for a potential veto, even though Congress must do so for ordinary legislation. *Hollingsworth et al. v. Virginia,* 3 Dall. 378, 1 L. Ed. 644. Congress is "independent" in its role of proposing constitutional amendments, even though it is not independent in its ordinary role of lawmaking.

The concurrence of Chief Justice Rehnquist in *Bush v. Gore* did not cite any historical precedent or evidence regarding the ISLT in support of its version of that theory. In some of the statements of individual Justices that endorse a version of the ISLT or in Chief Justice Roberts' dissenting opinion in *AIRC,* the Justices cite the *Hawke* case or rely on the bits of historical evidence discussed in my answer to Question 8. In addition, Chief Justice Roberts and some scholars argue that the Court's decision in *McPherson v. Blacker*, 146 U. S. 1 (1892), supports the ISLT. *McPherson* held that the Constitution permits state legislatures, when they exercise their power to determine the "manner" of selecting presidential electors, to choose whether to have them elected statewide or by district (as Maine and Nebraska do, in part, today). The case did not directly involve the ISLT. Contradictory dicta exists in *McPherson*, some of which is quoted in support of the ISLT (the legislature's power under the Electors Clause "can neither be taken away nor abdicated"), while other passages state clearly that legislatures must comply with state constitutions when exercising this power ("The legislative power is the supreme authority except as limited by the constitution of the State. . . ."). The Court in *AIRC* rejected the argument that *McPherson* recognized an ISLT.

COMMITTEE ON HOUSE ADMINISTRATION
JULY 28, 2022, HEARING: "THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY"
MAJORITY QUESTIONS FOR THE RECORD

PROFESSOR CAROLYN SHAPIRO
CHICAGO-KENT COLLEGE OF LAW

AUGUST 12, 2022

For Carolyn Shapiro

1) **Please discuss the practical impact of adopting the independent state legislature theory on (1) voters, (2) state elections officials, (3) administrative state election rules put forth by chief elections officials of the state; or (4) state courts. For states where some manner of authority over elections has been delegated by the state constitution to a chief elections officer (e.g.: Secretary of State), what impact would the independent state legislature theory have?**

ANSWER: There would be significant impacts, but because they vary depending on the version of ISLT that is adopted, I discuss them under (a). In my written testimony, at 7-15, I discuss these different versions of the ISLT.

a. **Do these impacts vary under various versions of the independent state legislature theory? If so, how?**

ANSWER: If state constitutions, or certain types of state constitutional provisions, cannot apply to federal elections, if state courts are limited in the types of remedies they can order, and/or if state statutes must be construed using a particular textualist methodology and federal courts owe no deference to state court interpretations, there will be a number of effects on state courts. Most obviously, state courts' state constitutional holdings with respect to laws governing federal elections will not be honored and their statutory interpretations may be overruled by federal courts. Finally, even if the adopted version of the ISLT is limited to a state court's ability to impose a remedy, depending on timing, there could be confusion for voters and administrators alike, and potentially a need for special legislative sessions that might have their own challenges.

To the extent that the same laws govern both federal and state elections, different legal treatment of those statutes will create enormous headaches for elections officials and could require new administrative rules to be issued setting out how to handle the different laws (if a law is struck down as to state elections but remains in effect for federal elections) or different interpretations of the same laws.

Similar problems could arise in challenges to administrative rules and other discretionary decisions about how to run elections. Under some versions of the ISLT, such administrative decisions would be subject to challenge as being beyond the scope of the delegated discretion under the statute as read with the particular textualist methodology

required by the federal courts. Finally, under the version of the ISLT that might limit a legislature's authority to delegate discretionary decisionmaking to elections officials, entire sets of decisions and existing rules and practices could be deemed to violate the federal constitution with respect to federal elections; administrators could find themselves effectively paralyzed and needing to seek legislative authority for all kinds of decisions they currently have the power to make.

There are also likely effects on how state courts and administrators approach their jobs. For example, if a federal court interpreted a state election law before the state courts did so, that might create significant pressure on state courts to accept that interpretation with respect to state elections. State courts might be tempted to alter their own approaches to statutory interpretation and judicial review with respect to election law if they fear federal court reversal or contradiction, both out of a desire to preserve their own legitimacy and to avoid the problems that might arise from a dual system of elections. Elections officials might experience similar pressure and they might seek to exercise their discretion as conservatively as possible. For example, if a statute might allow elections officials to set up dropboxes for mail-in ballots, as the Pennsylvania Supreme Court decided about its election law in 2020, the administrators might choose not to do so out of fear that they would discover that a federal court might hold otherwise. Officials might be worried about developing innovative methods to run elections fairly and efficiently even if they believe those methods are allowable under state law.

And officials are likely to choose the methods that are least confusing to voters, which in some situations will may mean that their discretion will be bounded by the federal courts' statutory interpretation. If a federal court were to disagree with the Pennsylvania Supreme Court's ruling allowing dropboxes, then dropboxes would be permissible for state elections but not federal elections. Under those circumstances, I would expect most elections officials to choose not to have them.

Finally, for voters, there could be different rules for state elections than for federal elections about everything from voter registration requirements to absentee voting rules. There could also be many last-minute changes, as litigation over numerous decisions heats up near election day. The potential for voter confusion is significant, and some voters might find themselves unable to vite in federal elections through no fault of their own. The broader the version of the theory adopted, the greater the likelihood of such problems.

b. States vary in the manner of the appointment of their chief elections officer and whether that role is served by an individual, a commission or board, or some combination of both. How would variations in how states elect or appoint a chief elections officer or other authority affect the impact of independent state legislature theory on their authority to oversee their states' elections?

ANSWER: I don't immediately see that the manner of appointment matters, although if the manner is established by statute (enacted by the legislature), as opposed to by the state constitution, the ISLT might have less effect on such officials.

c. Representative Bryan Steil asked one witness at the hearing, Eliza Sweren-Becker, whether her position on the independent state legislature theory would "be the same

for Democratically controlled states, often with veto-proof legislatures, like Illinois or Maryland." If the Supreme Court upheld the independent state legislature theory in some form, would legislatures in all states be able to avail themselves of newfound powers under that theory, without the checks provided by their state courts?

ANSWER: Yes, this would be true in all states.

d. Do the impacts of adopting a version of independent state legislature theory look different in "red" and "blue" states, or will there likely be disruptions to election processes in all 50 states?

ANSWER: Over time, there might be differences in how the ISLT affects which party gains an electoral advantage in which states, but there would undoubtedly be disruptions to election processes everywhere. The scope of those disruptions would vary depending on which version(s) of the ISLT the Court adopted, but candidates for federal office would have every incentive to go to federal court to challenge judicial and administrative decisions they disagree with, including, for example, decisions such as that a particular candidate did not submit enough signatures to get on the ballot. Such cases might arise not only in general elections, but also with respect to primaries.

2) **The Supreme Court has historically been reluctant to make decisions that would "open the floodgates" to additional litigation. Professor Richard Pildes testified that if the independent state legislature theory is upheld, "there is no question that disappointed candidates and voters will run to federal court to try to overturn state court interpretations." In your view, how would upholding a version of the theory affect future related litigation in federal courts?**

ANSWER: Yes. Even if the Supreme Court adopts a relatively narrow version of the ISLT in *Moore v. Harper*, that will encourage future litigation to determine if the Court might adopt others. And if the Court adopts a broad version, that will invite litigation challenging state court decisions and administrative decisions and litigation seeking to collaterally attack even longstanding state court precedent. Every single state supreme court decision that implicates federal elections might lead to a petition for certiorari in the United States Supreme Court.

3) **You testified that opening the door to litigation in this manner would be "incredibly time-consuming, incredibly resource-intensive" because "any time somebody doesn't agree with a particular discretionary decision or even sees it as strategically beneficial to challenge the particular decision, which will deter officials from making those kinds of decisions." In addition to subjecting elections officials to additional litigation, would adopting a form of independent state legislature theory impact how elections officials administer elections and make decisions on policy questions?**

ANSWER: See my answer to 1(a).

4) **The Supreme Court has long held that state courts are best positioned to address questions of state constitutional law. Do you agree? Why or why not?**

ANSWER: Yes. Each state has a unique body of law and unique legal culture. Something that is completely obvious to legislators, lawyers, and judges in one state might be, at best, opaque to outsiders. For example, in Pennsylvania in 2020, the state supreme court unanimously refused to give effect to a nonseverability clause in the state statute allowing for mail-in ballots. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). That clause identified a number of specific provisions as "non-severable" and stated: "If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77, Section 11. A purely textualist reading of this provision might conclude that the Pennsylvania court erred, but there is longstanding precedent in Pennsylvania that such clauses are not necessarily given effect. More specifically, in 2006, the Pennsylvania supreme court refused to give force to a nonseverability because it concluded that the clause exceeded the legislature's authority largely because of the "separation of powers concerns" that arise when the legislature attempts to influence the outcome of a judicial proceeding. *Stilp v. Commonwealth*, 905 A.2d 918, 973 (Pa. 2006), citing Act 44, § 6. The court reasoned that where a nonseverability clause is designed to deter the judiciary from finding statutory provisions unconstitutional—that is from doing its job—by making the consequences of doing so terrible—the clause should not necessarily be enforced. *Id.* And that particular clause was identical to the one at issue in 2020. All of this background would be well understood by the courts, legislators, and litigants in Pennsylvania, but might be opaque to federal judges and justices..

5) **The supremacy of state courts in deciding issues of state constitutional law is a principle that extends beyond the voting rights/democracy space. If the Supreme Court were to reverse this principle in the elections context, what are the implications in other areas of jurisprudence?**

ANSWER: I do not think that the ISLT has immediately obvious implications in other areas of jurisprudence. Having said that, however, I note how path-dependent law is. In other words, as areas of law develop, new arguments become apparent.

6) **In some states, the legislature has expressly delegated powers to amend the state constitution to the voters. In 2012, North Carolina voters used this power to establish a state constitutional requirement for voter ID. Under the independent state legislature theory, would voter-driven constitutional amendments on election policy be permitted? If not, could the independent state legislature theory be described as taking power away from voters?**

ANSWER: It depends on the specific version of the ISLT that is adopted. Under current case law, at least some constitutional amendments (and probably statutes) adopted by citizen initiative are permissible. In 2015, the Supreme Court upheld a constitutional amendment, adopted by citizen initiative, that created an independent redistricting commission in Arizona, on the grounds that the citizen initiative was an exercise of state legislative power. *Arizona State Legislature v Arizona Independent Redistricting Commission (AIRC)*, 576 U.S. 787 (2015). The opinion was 5-4, with a dissent by Chief Justice Roberts, and three of the justices in the majority (Justice Ginsburg, Breyer, and Kennedy) are no longer on the Court. In 2019, however, when the Court held that partisan gerrymandering is not justiciable in federal court, also 5-4, in that opinion, which was written by Chief Justice Roberts, the Court spoke favorably of such initiatives:

> Our conclusion does not condone excessive partisan gerrymandering. Nor does it condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. … Indeed numerous other states are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions, For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating or approving district maps for congressional and legislative districts.

Rucho v Common Cause, 139 S. Ct. 2484, 2507-08 (2019).The majority opinion went on to approvingly discuss other constitutional amendments and statutes. *Id.* at 2507-08. The dissent in *Rucho* also approvingly noted the ability of voters in some states to pass constitutional amendments by initiative. *Id.* at 2524 (Kagan, J., dissenting).

The upshot of this discussion is that the extent to which the ISLT would take power away from voters depends in part on whether a majority of the Supreme Court is willing to overrule *AIRC* and to disavow its statements in *Rucho*. And it's worth noting that were it to do so, an enormous number of constitutional provisions and statutes would be called into question. *AIRC*, 576 U.S. at 822-23; Nathaniel Persily, et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L. J. 689, 708-38 (2016) (documenting numerous constitutional provisions and statutes that would be endangered by such a holding). However, there are ways the Supreme Court could narrow *AIRC*'s holding without overruling it outright by, for example, focusing on whether the particular enactment was too "vague" or "general." See my answer to Question 7.

Finally, the question asks about the North Carolina constitutional amendment process, by which the legislature passes the amendment first and it is then sent to the voters. N.C. CONST., art. II, § 22(2). There is no citizen initiative process in North Carolina. Because the legislature itself approves any amendment, whether constitutional provisions adopted that way would run afoul of the ISLT presents somewhat different questions. I believe that most commentators presume that those provisions would survive even a broad version of the ISLT, *see, e.g.*, Persily, et al., *supra*, at 720, but see my answer to Question 5.

7) **The Supreme Court's upcoming case involves the North Carolina Constitution's "Free Elections" Clause.[1] Was this clause written into the state constitution recently? Do other state constitutions have similar clauses? If so, were those other clauses enacted recently? Does North Carolina's Free Elections Clause, and other clauses like it in other state constitutions, have substantive case law attached to it with respect to federal elections? If so, what would happen to that precedent and those voter protection standards if the Supreme Court issues an adverse decision in Moore v. Harper?**

   a. **Relatedly, some of the ISL debate focuses on the alleged "vagueness" of certain provisions of state constitutions – are there any analogies we can draw from the**

[1] N.C. Const. art. I, § 10 ("All elections shall be free.").

United States Constitution, such as for example from the Bill of Rights, when thinking about judicial interpretation of what appear to be "vague" constitutional provisions?

ANSWER: Many states have constitutional provisions comparable to North Carolina's, and some of those date to the Founding. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 491 & n.208 (2022) (discussing early state constitutions); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y __ (forthcoming 2023), at 36 & n.278; draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138; *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019) (listing contemporary clauses in 30 state constitutions), available at https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx.

I have not studied all of these provisions, but it is undoubtedly the case that different states have interpreted them differently, and that in some states judicial precedent has developed in more detail than in others. As Professor Pildes pointed out in his written and oral testimony, that reality would mean that if the Supreme Court adopts the version of the ISLT that precludes enforcement of "vague" or "general" constitutional provisions, there might be questions about whether the precedent has provided sufficient guidance to make the provision "specific." There also might well be questions about whether those older precedents still apply to federal elections. See, for example, my discussion of New Hampshire case law in my written testimony at p. 18.

8) **Is there any version of the independent state legislature theory that is supported by the balance of historical evidence?**

ANSWER: No. In my article, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. __ (forthcoming 2023), I survey the historical research. See pages 9-19 of the current draft, which is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322, and my written testimony at 2-7. Although there are occasional outlier episodes, the historical evidence powerfully undermines the ISLT. Below is a summary of some of that evidence:

(a) There is no evidence that the Framers discussed or even considered the ISLT. Moreover, the Elections Clause contained very comparable language to Article V of the Articles of Confederation, which provided that congressional delegates "be annually appointed in the such manner as the legislatures of each State shall direct." U.S. ARTICLES OF CONFEDERATION OF 1781, art. V. Confederation-era constitutions in a number of states regulated that appointment. *See* Smith, *supra*; Vikram David Amar and Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1.

(b) At and after the ratification of the Constitution, a number of state constitutions contained provisions that regulated all elections, including federal elections, and beginning shortly after ratification, some states adopted constitutional provisions that spoke directly to federal elections. State constitutions have continued to regulate federal elections. *See, e.g.*, Weingartner, *supra*, at 41ff; Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 38-39 & n. 168 (2020); Smith, *supra*, at 487-92; Amar and Amar, *supra*, at 22-24. And state courts, with

a tiny number of arguable exceptions, have enforced those provisions. Weingartner, *supra*, at 37-40; Smith, *supra*, at 505-09, 525-28.

(c) Congress has long assumed the legitimacy of state constitutional regulation of federal elections, including when admitting (and re-admitting) states, and it has approved numerous state constitutions that include regulations of federal elections. Weingartner, *supra*, at 51-55. And when Congress has resolved election disputes as "the Judge of the Elections … of its own Members...," U.S. CONST., art. I § 5, it frequently looks to state constitutions and state court decisions. Weingartner, *supra* note __, at 56-62 (documenting numerous instances). The primary counterexample on which ISLT proponents rely is a Civil War era election contest from Michigan, *Baldwin v. Trowbridge*, in which the House Committee on Elections issued a report supporting Trowbridge and relying on the ISLT. *See* Morley, *supra*, at 48-52. But the episode is at best ambiguous, as a number of Members who voted to seat Trowbridge expressly rejected the ISLT, arguing instead that the statute did not in fact violate the Michigan Constitution, thereby making the absentee votes valid. Smith, *supra,* at 523-24.

(d) Delegation of substantial discretionary decisionmaking to executive branch and local elections officials was widespread and remarkably broad at the Founding, with elections officials making decisions about where, when, and how voting would take place. *See generally* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 101 (forthcoming 2022).

(e) I am aware of no historical support for arguments that the Clauses give the federal courts the power to reject state court interpretations of state laws governing federal elections. In fact, before 2000, no Supreme Court justice—nor any other judge, so far as I can tell—ever suggested such a possibility. Likewise, there is no historical support for the suggestion that federal courts can second-guess elections administrators' discretion about how to implement state law.

9) **Some have voiced a concern that the upcoming case could empower state legislatures to unilaterally appoint presidential electors against the will of the people. Do you view that as a threat? What other constitutional and statutory provisions would constrain a state legislature in that context?**

ANSWER: There are several potential limitations on a legislature's power in this context. First, a legislature cannot decide after the election has taken place to disregard the results and appoint its own electors for several potential reasons. First, the Constitution provides that Congress sets the time for the election to occur nationwide. U.S. Const., art. II, § 1. Second, there may be due process limitations especially to the extent that voters and candidates have relied on the popular election process and equal protection limitations pursuant to *Bush v. Gore*, 531 U.S. 98 (2000). Third, every state already has a statute in place providing that presidential electors are chosen by popular election. To take control of that process, the legislature would have to pass a new law giving itself that authority, using all the regular lawmaking procedures, including, for example, presentment to the governor for signature. *Smiley v. Holm*, 285 U.S. 355 (1932). In my view, either state or federal courts would have the authority to enforce the law that was in effect on election day. And that is all somewhat reinforced by the current version of the Electoral Count

Act, although that statute is in need of amendment to clarify some of these points, in particular in that it purports to allow the legislature to appoint electors in case of a "failed" election. 3 U.S.C. § 2. To the extent that it is impossible for an election to occur on the designated day, due to a catastrophic event, voters should have the chance to choose the electors.

It might be possible, however, for a legislature to pass a law *before* the next presidential election giving itself authority to choose the electors itself or to appoint itself the adjudicator of any election disputes. There could be constitutional challenges to such a statute, including, for example, due process and equal protection challenges. An amended version of the Electoral Count Act should clarify an expectation that Congress defers to slates of electors when election disputes are resolved through judicial, not legislative, processes.

10) What actions could Congress take in response to a ruling endorsing the independent state legislature theory in Moore v. Harper?

ANSWER: Congress could directly regulate congressional redistricting by, for example, requiring independent redistricting commissions and/or outlawing extreme partisan gerrymandering. Congress could also pass a bill that "ratifies non-legislative state regulations of congressional elections." *See* https://twitter.com/ProfNickStephan/status/1542720570906771456. Congress could probably pass such a law as to presidential elections as well. *See Burroughs v. United States*, 290 U.S. 534, 544-48 (1934). Moreover, Congress can take these actions before the Supreme Court rules in *Moore*.

11) Ms. Sweren-Becker testified that, "There is no support historically; there is no support legally," for the independent state legislature theory, and that, "The Supreme Court has repeatedly rejected this idea in precedent after precedent after precedent." Has the Supreme Court ever considered the independent state legislature theory directly? If so, what was the result(s)? When opinions of the Court have discussed the theory, have they cited legal authority that supports the theory?

ANSWER: In *Smiley v. Holm*, 285 U.S. 355 (1932), and *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Supreme Court held that the Elections Clause provides that state legislatures must use the ordinary lawmaking procedures set out in state constitutions, including presentment to the governor (*Smiley*) and a popular referendum (*Davis*). In 2015, the Court decided the *AIRC* case, which upheld a popular initiative governing congressional redistricting. See my answer to Question 6 for a discussion of *AIRC*.

In the 1892 case *McPherson v. Blacker*, the Court considered whether the Electors Clause itself imposed any restrictions on the legislature, which had determined that presidential electors be chosen by districts instead of statewide. 146 U.S. 1 (1892). The language of the Electors Clause, the Court said in that context, was "conveying the broadest possible power of determination" and "leaves it to the legislature exclusively to define the method" for appointing presidential electors." *Id.* at 27. The Clause, the Court said, thus "operat[es] as a limitation on upon the state in respect of any attempt to circumscribe the legislative power." *Id.* at 24. But despite this broad language, *McPherson* has no holding exempting the legislature from the constraints of the state constitution. To the contrary, in that opinion, the

Court noted that Article II specifically directed "each state" to appoint electors and said that "[w]hat is forbidden or required to be done by a state is forbidden or required of the legislative power under the state constitutions as they exist," and that "[t]he [state's] legislative power is the supreme authority except as limited by the constitution of the state..." *Id.* at 25, 24. In my view, the best reading of *McPherson* is that it holds that the Electors Clause itself does not limit the method a state uses to appoint its presidential electors, requiring only that the legislature chooses that method, and that it assumes, although does not hold, that the legislature is subject to state constitutional limitations.

Some ISLT supporters argue that *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam), upholds the ISLT. I do not think that is an accurate reading of that case. There, the Supreme Court asked the Florida Supreme Court to clarify whether it had relied on the state constitution in construing the election statute at issue. I read that case to mean that the U.S. Supreme Court wanted to avoid deciding whether the ISLT exists and whether it would restrict the Florida court's statutory construction.

COMMITTEE ON HOUSE ADMINISTRATION
JULY 28, 2022, HEARING: "THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY"
MAJORITY QUESTIONS FOR THE RECORD

For Eliza Sweren-Becker

1) **Please discuss the practical impact of adopting the independent state legislature theory on (1) voters, (2) state elections officials, (3) administrative state election rules put forth by chief elections officials of the state; or (4) state courts. For states where some manner of authority over elections has been delegated by the state constitution to a chief elections officer (e.g.: Secretary of State), what impact would the independent state legislature theory have?**

If adopted, the independent state legislature theory would harm voters of all political stripes. As I explained in greater detail in my written testimony (pages 4-6), the claim would remove checks on state legislatures' abuses of the electoral system, such as partisan gerrymandering and voter suppression. It would also remove checks on legislatures' ability to interfere or facilitate interference in election processes and outcomes.

The independent state legislature notion would harm election officials, as well. As I explain in my written testimony (page 6-8), the notion could completely remove their authority to make rules for federal elections, even in emergencies. It would likely force them to administer a two-tiered system with different policies for state and federal elections. And by eliminating their ability to rely on state court decisions or regulations, it would make it very difficult for election officials to determine what the law is in their state and to promote uniformity.

Relatedly, the independent state legislature theory would nullify existing state administrative election rules. As I describe in my written testimony (pages 6-7), nullifying those rules would throw elections into chaos, causing confusion for voters and election officials.

Finally, the radical notion would disempower state courts. Such courts would be unable to interpret the state's laws for federal elections and unable to strike down state laws when they violate the state's constitution. This would deprive voters of state constitutional protections and deprive election officials of judicial guidance they use to implement constitutional guarantees.

   a. **Do these impacts vary under various versions of the independent state legislature theory? If so, how?**

All versions of the independent state legislature theory invalidate crucial checks and balances that constrain state legislatures from abusing the electoral system. The only question is how many checks and balances the Supreme Court would eliminate by adopting one or another form of the theory. The most extreme versions of the theory would nullify—for federal elections—all state court decisions, all state constitutional provisions, all state administrative rules, all ballot initiatives, and all gubernatorial vetoes. Other versions would potentially eliminate only a portion of them. But all these checks and balances are critical to a functioning democracy. And the existence of a range of possible harms does not make the less extreme versions of the notion more legitimate, as a legal matter. In any form, the independent state legislature theory relies on a meritless misreading of the Constitution that would remove state checks on legislative abuses.

b. States vary in the manner of the appointment of their chief elections officer and whether that role is served by an individual, a commission or board, or some combination of both. How would variations in how states elect or appoint a chief elections officer or other authority affect the impact of independent state legislature theory on their authority to oversee their states' elections?

The impact of the independent legislature theory does not vary depending on the method of selection of a chief elections officer or the composition of the state elections authority.

c. Representative Bryan Steil asked you at the hearing whether your position on the independent state legislature theory would "be the same for Democratically controlled states, often with veto-proof legislatures, like Illinois or Maryland." If the Supreme Court upheld the independent state legislature theory in some form, would legislatures in all states be able to avail themselves of newfound powers under that theory, without the checks provided by their state courts?

The independent state legislature notion would remove checks and balances on state legislatures regardless of the political majority in the statehouse and regardless of the governor's party. Thus, any state legislature could avail itself of, and abuse, unchecked power.

d. Do the impacts of adopting a version of independent state legislature theory look different in "red" and "blue" states, or will there likely be disruptions to election processes in all 50 states?

Converting the independent state legislature theory into law would disrupt election processes in all 50 states. As I testified, hundreds of state constitutional provisions, regulations, and practices would be called into question or reversed.

2) The Supreme Court has historically been reluctant to make decisions that would "open the floodgates" to additional litigation. Professor Richard Pildes testified that if the independent state legislature theory is upheld, "there is no question that disappointed candidates and voters will run to federal court to try to overturn state court interpretations." In your view, how would upholding a version of the theory affect future related litigation in federal courts?

I agree with Professor Pildes that the Supreme Court's embrace of the independent state legislature theory would lead to a flood of litigation in federal courts, in which parties would seek to overturn or question state court interpretations of law, as well as challenge the applicability of state constitutional provisions and policies adopted through ballot initiatives and regulatory processes. Such litigation is likely to persist and could become a permanent feature of our system.

3) Professor Carolyn Shapiro testified that opening the door to litigation in this manner would be "incredibly time-consuming, incredibly resource-intensive" because "any time somebody doesn't agree with a particular discretionary decision or even sees it as strategically beneficial to challenge the particular decision, which will deter officials from making those kinds of decisions." In addition to subjecting elections officials to additional litigation, would adopting a form of independent state legislature theory impact how elections officials administer elections and make decisions on policy questions?

The Supreme Court's embrace of the independent state legislature theory could strip election officials of their authority to make policies for federal elections, power that the state constitution or state legislation typically grants them. This cabining of their policy-making authority and discretion would

make it harder for officials to address emergent situations, like power outages and natural disasters. It would make it harder for them to ensure uniform application of state election laws through the regulatory process. Election officials would also face new complications in implementing state statutes that govern federal elections because they would no longer have the benefit of existing state court interpretations of state law. Finally, election officials would also be forced to administer two sets of elections policies simultaneously—with one set of laws for state elections and another set for federal elections—which would inevitably create chaos.

4) **The Supreme Court has long held that state courts are best positioned to address questions of state constitutional law. Do you agree? Why or why not?**

I agree. The Supreme Court has "repeatedly has held that state courts are the ultimate expositors of state law[.]" *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Indeed, "the highest court of the state is the final arbiter of what is state law." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). In keeping with this principle, the Court has held that "a fixed and received construction of the statutes of a State in its own courts makes a part of the statutes." *Murdock v. City of Memphis*, 87 U.S. 590, 609 (1874) (quotation marks omitted).

5) **The supremacy of state courts in deciding issues of state constitutional law is a principle that extends beyond the voting rights/democracy space. If the Supreme Court were to reverse this principle in the elections context, what are the implications in other areas of jurisprudence?**

The independent state legislature notion is an interpretation of the Elections and Electors Clauses of the Constitution. Therefore, on its face, the notion is limited to claims related to federal election regulation.

6) **In some states, the legislature has expressly delegated powers to amend the state constitution to the voters. In 2012, North Carolina voters used this power to establish a state constitutional requirement for voter ID. Under the independent state legislature theory, would voter-driven constitutional amendments on election policy be permitted? If not, could the independent state legislature theory be described as taking power away from voters?**

Any form of the independent state legislature theory would take power away from voters by removing checks on state legislative abuses of the electoral process. Further, the Supreme Court could embrace the notion in a manner that would invalidate all voter-adopted policies for federal elections – whether enacted as constitutional amendments or statutes. That could include voter ID policies approved by voters in Arkansas, Mississippi, and Missouri, for example.[1]

7) **The Supreme Court's upcoming case involves the North Carolina Constitution's "Free Elections" Clause.[2] Was this clause written into the state constitution recently? Do other state constitutions have similar clauses? If so, were those other clauses enacted recently? Does North Carolina's Free Elections Clause, and other clauses like it in other state constitutions, have substantive case law attached to it with respect to federal elections? If so, what would**

[1] A North Carolina voter ID mandate, adopted by legislatively referred constitutional amendment in 2018, is the subject of ongoing state and federal litigation.
[2] N.C. Const. art. I, § 10 ("All elections shall be free.").

happen to that precedent and those voter protection standards if the Supreme Court issues an adverse decision in Moore v. Harper?

Twenty six states have constitutional requirements that their elections are free and 49 state constitutions contain an explicit grant of the right to vote.[3] North Carolina's free elections clause has been part of the state's constitution for more than 150 years.[4] Likewise, many state constitutional guarantees of free elections have been in place for more than a century.[5] These free elections clauses, along with other state constitutional provisions guaranteeing the right to vote, reflect the states' decisions to provide special protections for voting rights that go above and beyond what the federal constitution provides. The independent state legislature theory threatens these protections as they pertain to federal elections.

a. Relatedly, some of the ISL debate focuses on the alleged "vagueness" of certain provisions of state constitutions – are there any analogies we can draw from the United States Constitution, such as for example from the Bill of Rights, when thinking about judicial interpretation of what appear to be "vague" constitutional provisions?

While some commentators may refer to free elections clauses as vague, I disagree with that characterization. Many of the most cherished constitutional rights in both state and federal constitutions rights are written in broad language, reflecting their importance. For example, federal courts regularly enforce the federal rights to free speech, to equal protection under law, and to keep and bear arms. The constitutional provisions on which these rights are based are no less broad than a free elections clause.

8) Is there any version of the independent state legislature theory that is supported by the balance of historical evidence?

The historical record clearly shows that the independent state legislature theory is unfounded, as I have described in my written testimony (pages 8–9). The notion—in any and all of its forms—is contrary to the Constitution's text, the intent of the framers, the original public meaning of the Constitution, and practice at the time of the founding. That history is rehearsed at length in, for example: Eliza Sweren-Becker and Michael Waldman, "The Meaning, History, and Importance of the Elections Clause," Washington Law Review 96 (2021); Hayward H. Smith, "Revisiting the History of the Independent State Legislature Doctrine," St. Mary's Law Journal 53 (2022); Mark Krass, "Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections," Virginia Law Review 108 (2022).

9) Some have voiced a concern that the upcoming case could empower state legislatures to unilaterally appoint presidential electors against the will of the people. Do you view that as a threat? What other constitutional and statutory provisions would constrain a state legislature in that context?

The independent state legislature theory removes some critical checks on state legislatures' ability to override the will of the people in elections. For example, it could license partisan gerrymandering, vote suppression, and changes to vote-counting procedures, including changes that empower certain partisans in the process. By altering the ways votes are cast and counted, partisan actors could manipulate election outcomes to favor a particular politician or party. However, the theory would not undermine federal protections. For example, the Fourteenth, Fifteenth, Nineteenth and Twenty Sixth Amendments to the U.S. Constitution govern presidential elections, as does federal legislation including the Electoral Count

[3] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104 (2014).
[4] N.C. Const. art. I, § 10 (1868).
[5] *See, e.g.*, Del. Const. Art. I, § 3 (1897); Ky. Const. Art 13, § 7 (1850); Mo. Const. Art. 13, § 6 (1820); Penn. Const. Decl. VII (1776).

Act and 3 U.S.C. § 1 (setting the time for appointing electors). Other federal laws—like the Voting Rights Act, Uniformed and Overseas Citizens Absentee Voting Act, Help America Vote Act, and National Voter Registration Act—provide additional constraints on abuse. But more constraints are needed.

10) What actions could Congress take in response to a ruling endorsing the independent state legislature theory in Moore v. Harper?

The principal purpose of the Elections Cause is to empower Congress to override state legislatures' abuses of their power over federal elections. Congress should exercise that power robustly to protect voting rights, prevent extreme partisan gerrymanders, and guard against election sabotage and interference. The Brennan Center strongly supports the Freedom to Vote: John R. Lewis Act, which would neutralize many of the abuses that state legislatures might pursue if the independent state legislature theory liberated them to do so. We urge Congress to revisit and pass that legislation. Additionally, efforts underway to improve the Electoral Count Act are encouraging. The fairness of our elections and the voting rights of all Americans depends on Congress enacting stronger guardrails against state abuses.

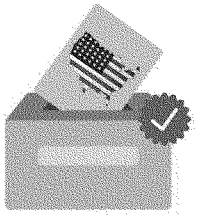
11) You testified that, "There is no support historically; there is no support legally," for the independent state legislature theory, and that, "The Supreme Court has repeatedly rejected this idea in precedent after precedent after precedent." Has the Supreme Court ever considered the independent state legislature theory directly? If so, what was the result(s)? When opinions of the Court have discussed the theory, have they cited legal authority that supports the theory?

No Supreme Court majority has ever held in favor of the independent state legislature theory. The Supreme Court squarely rejected the independent state legislature theory in 2015.[6] The Court held that the word "legislature" as used in the Elections Clause encompasses the "State's prescriptions for lawmaking," including the people's exercise of initiative power to create an independent redistricting commission.[7] And in 2019, in deciding that that federal courts cannot stop partisan gerrymandering under the U.S. Constitution, the Court approved of the limits state courts and state constitutions impose on partisan gerrymandering, thus rejecting the premise of the independent state legislature theory.[8]

The Court has long rejected the independent state legislature notion, as noted in my written testimony (page 10). For example, in 1932, the Court held that a state's power to make laws for federal elections could be subject to gubernatorial veto.[9] And, in 1916, the Court ruled that a state's citizens, through referendum, could reject the redistricting plan that the state legislature adopts.[10] Neither of those holdings is compatible with the theory; in fact, they are directly hostile to it.

[6] *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).
[7] *Id.* at 808.
[8] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).
[9] *Smiley v. Holm*, 285 U.S. 355 (1932).
[10] *Davis v. Hildebrant*, 241 U.S. 565 (1916).

SUBMISSIONS FOR THE RECORD



AMERICAN CONFIDENCE IN ELECTIONS ACT

Educate. Engage. Reform.

.....

(Original Signature of Member)

117TH CONGRESS
2D SESSION

H. R. _____

To promote election integrity, voter confidence, and faith in elections by removing Federal impediments to, providing State tools for, and establishing voluntary considerations to support effective State administration of Federal elections, improving election administration in the District of Columbia, improving the effectiveness of military voting programs, and protecting political speech, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. RODNEY DAVIS of Illinois (for himself and [see ATTACHED LIST of cosponsors]) introduced the following bill; which was referred to the Committee on _____

A BILL

To promote election integrity, voter confidence, and faith in elections by removing Federal impediments to, providing State tools for, and establishing voluntary considerations to support effective State administration of Federal elections, improving election administration in the District of Columbia, improving the effectiveness of military voting programs, and protecting political speech, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Confidence in Elections Act" or the "ACE Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. General findings.

TITLE I—ELECTION ADMINISTRATION INTEGRITY

Subtitle A—Findings Relating to Election Administration

Sec. 101. Findings Relating to Election Administration.

Subtitle B—Voluntary Considerations for State Administration of Federal Elections

Sec. 111. Short title.
Sec. 112. Election integrity voluntary considerations.

Subtitle C—Requirements to Promote Integrity in Election Administration

Sec. 121. Ensuring only eligible American citizens may participate in Federal elections.
Sec. 122. State reporting requirements with respect to voter list maintenance.
Sec. 123. Contents of State mail voter registration form.
Sec. 124. Provision of photographic citizen voter identification tools for State use.
Sec. 125. Mandatory provision of identification for certain voters not voting in person.
Sec. 126. Confirming access for Congressional election observers.
Sec. 127. Use of requirements payments for post-election audits.
Sec. 128. Certain tax benefits and simplification with respect to election workers.
Sec. 129. Voluntary guidelines with respect to nonvoting election technology.
Sec. 130. Status reports by National Institute of Standards and Technology.
Sec. 131. 501(c)(3) organizations prohibited from providing direct or indirect funding for election administration.
Sec. 132. Requirements with respect to election mail.
Sec. 133. Clarification of right of State to appeal decisions through duly authorized representative.
Sec. 134. Clarification of Federal agency involvement in voter registration activities.
Sec. 135. Prohibition on use of Federal funds for election administration in States that permit ballot harvesting.
Sec. 136. Clarification with respect to Federal election record-keeping requirement.
Sec. 137. Clarification of rules with respect to hiring of election workers.
Sec. 138. United States Postal Service coordination with States to ensure mailing addresses.

Sec. 139. State defined.

Subtitle D—District of Columbia Election Integrity and Voter Confidence

Sec. 141. Short title.
Sec. 142. Requirements for elections in District of Columbia.
Sec. 143. Effective date.

Subtitle E—Administration of the Election Assistance Commission

Sec. 151. Short title.
Sec. 152. Findings relating to the administration of the Election Assistance Commission.
Sec. 153. Requirements with respect to staff and funding of the Election Assistance Commission.
Sec. 154. Exclusive authority of Election Assistance Commission to make election administration payments to States.
Sec. 155. Executive Board of the Standards Board authority to enter into contracts.
Sec. 156. Election Assistance Commission primary role in election administration.

Subtitle F—Prohibition on Involvement in Elections by Foreign Nationals

Sec. 161. Prohibition on contributions and donations by foreign nationals in connection with ballot initiatives and referenda.

Subtitle G—Constitutional Experts Panel With Respect to Presidential Elections

Sec. 171. Short title.
Sec. 172. Establishment of panel of constitutional experts.

TITLE II—MILITARY VOTING ADMINISTRATION

Subtitle A—Findings Relating to Military Voting

Sec. 201. Findings relating to military voting.

Subtitle B—GAO Analysis on Military Voting Access

Sec. 211. GAO analysis and report on effectiveness of Federal government in meeting obligations to promote voting access for absent uniformed services voters.

TITLE III—PROTECTION OF POLITICAL SPEECH AND CAMPAIGN FINANCE REFORM

Subtitle A—Protecting Political Speech

Sec. 301. Findings.
Sec. 302. Repeal of limits on coordinated political party expenditures.
Sec. 303. Repeal of limit on aggregate contributions by individuals.
Sec. 304. Equalization of contribution limits to State and national political party committees.
Sec. 305. Expansion of permissible Federal election activity by State and local political parties.
Sec. 306. Participation in joint fundraising activities by multiple political committees.

Sec. 307. Protecting privacy of donors to tax-exempt organizations.
Sec. 308. Reporting requirements for tax-exempt organizations.
Sec. 309. Maintenance of standards for determining eligibility of section 501(c)(4) organizations.
Sec. 310. Increased funding for the 10–Year Pediatric Research Initiative Fund.

Subtitle B—Prohibition on Use of Federal Funds for Congressional Campaigns

Sec. 311. Prohibiting use of Federal funds for payments in support of congressional campaigns.

Subtitle C—Registration and Reporting Requirements

Sec. 321. Reporting requirements with respect to electioneering communications.
Sec. 322. Increased qualifying threshold and establishing purpose for political committees.
Sec. 323. Increased threshold with respect to independent expenditure reporting requirement.
Sec. 324. Increased qualifying threshold with respect to candidates.
Sec. 325. Repeal requirement of persons making independent expenditures to report identification of certain donors.

Subtitle D—Exclusion of Certain Amounts From Treatment as Contributions or Expenditures

Sec. 331. Increased threshold for exemption of certain amounts as contributions.
Sec. 332. Exemption of uncompensated internet communications from treatment as contribution or expenditure.
Sec. 333. Media exemption.

Subtitle E—Prohibition on Issuance of Regulations on Political Contributions

Sec. 341. Prohibition on issuance of regulations on Political Contributions.

Subtitle F—Miscellaneous Provisions

Sec. 351. Permanent extension of fines for qualified disclosure requirement violations.
Sec. 352. Political committee disbursement requirements.
Sec. 353. Designation of individual authorized to make campaign committee disbursements in event of death of candidate.
Sec. 354. Prohibition on contributions in name of another.
Sec. 355. Unanimous consent of Commission members required for Commission to refuse to defend actions brought against Commission.
Sec. 356. Federal Election Commission member pay.
Sec. 357. Uniform statute of limitations for proceedings to enforce Federal Election Campaign Act of 1971.
Sec. 358. Deadline for promulgation of proposed regulations.

TITLE IV—ELECTION SECURITY

Subtitle A—Promoting Election Security

Sec. 401. Short title.

Sec. 402. Reports to Congress on foreign threats to elections.
Sec. 403. Rule of construction.

Subtitle B—Cybersecurity for Election Systems

Sec. 411. Cybersecurity advisories relating to election systems.
Sec. 412. Process to test for and monitor cybersecurity vulnerabilities in election equipment.
Sec. 413. Duty of Secretary of Homeland Security to notify State and local officials of election cybersecurity incidents.

TITLE V—SENSE OF CONGRESS WITH RESPECT TO ROLE OF STATES IN CONGRESSIONAL REDISTRICTING

Sec. 501. Sense of Congress with respect to role of States in congressional redistricting.

TITLE VI—DISINFORMATION GOVERNANCE BOARD

Sec. 601. Termination of the Disinformation Governance Board.
Sec. 602. Prohibition on funding the activities of the Disinformation Governance Board.

TITLE VII—SEVERABILITY

Sec. 701. Severability.

SEC. 3. GENERAL FINDINGS.

Congress finds the following:

(1) According to Article 1, Section 4 of the Constitution of the United States, the States have the primary role in establishing "(t)he Times, Places and Manners of holding Elections for Senators and Representatives", while Congress has a purely secondary role in this space and must restrain itself from acting improperly and unconstitutionally.

(2) Federal election legislation should never be the first step and must never impose burdensome, unfunded Federal mandates on State and local elections officials. When Congress does speak, it must devote its efforts only to resolving highly significant

and substantial deficiencies to ensure the integrity of our elections. State legislatures are the primary venues to establish rules for governing elections and correct most issues.

(3) All eligible voters who wish to participate must have the opportunity to vote, and all lawful votes must be counted.

(4) States must balance appropriate election administration structures and systems with accessible access to the ballot box.

(5) Political speech is protected speech.

(6) The First Amendment protects the right of all Americans to state their political views and donate money to the candidates, causes, and organizations of their choice without fear of retribution.

(7) Redistricting decisions are best made at the State level.

(8) States must maintain the flexibility to determine the best redistricting processes for the particular needs of their citizens.

(9) Congress has independent authority under the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to ensure elections are conducted without unlawful discrimination.

(10) The Voting Rights Act, which is not anchored in Article 1, Section 4 of the Constitution, has seen much success since its first passage in 1965, and Congress should continue to exercise its constitutional authority in this space as appropriate.

TITLE I—ELECTION ADMINISTRATION INTEGRITY

Subtitle A—Findings Relating to Election Administration

SEC. 101. FINDINGS RELATING TO ELECTION ADMINISTRATION.

(a) SENSE OF CONGRESS.—It is the sense of Congress that constitutional scholar Robert Natelson has done invaluable work with respect to the history and understanding of the Elections Clause.

(b) FINDINGS.—Congress finds the following:

(1) The Constitution reserves to the States the primary authority to set election legislation and administer elections—the ''times, places, and manner of holding of elections''—and Congress' power in this space is purely secondary to the States' power and is to be employed only in the direst of circumstances. History, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself make it exceedingly clear

that Congress' power over elections is not unfettered.

(2) The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had exclusive authority over Federal elections held within their territory; but, given the difficulties the national government had experienced with State cooperation (e.g., the failure of Rhode Island to send delegates to the Confederation Congress), the Federalists, including Alexander Hamilton, were concerned with the possibility that the States, in an effort to destroy the Federal government, simply might not hold elections or that an emergency, such as an invasion or insurrection, might prevent the operation of a State's government, leaving the Congress without Members and the Federal government unable to respond.

(3) Quite plainly, Alexander Hamilton, a leading Federalist and proponent of our Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process. Writing as Publius to the people of New York, Hamilton fur-

ther expounds on the correct understanding of the Elections Clause: ''T[he] natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members.''. Alexander Hamilton (writing as Publius), *Federalist* no. 59, *Concerning the Power of Congress to Regulate the Election of Members*, N.Y. PACKET (Fri., Feb. 22, 1788).

(4) When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4. (''[C]onvention delegate James McHenry added that the risk to the federal government [without a fail-safe provision] might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election.''); (''An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war).''); (''Sir, let it be remembered that

this power can only operate in a case of necessity, after the factious or listless disposition of a particular state has rendered an interference essential to the salvation of the general government.''). *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12–13 (Nov. 2010).

(5) John Jay made similar claims in New York. And, as constitutional scholar Robert Natelson notes in his invaluable article, *The Original Scope of the Congressional Power to Regulate Elections*, ''Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular, stated flatly that Congress would exercise its times, places, and manner authority only in cases of invasion, legislative neglect or obstinate refusal to pass election laws [providing for the election of Members of Congress], or if a state crafted its election laws with a 'sinister purpose' or to injure the general government.'' Cementing his point, Hanson goes further to decree, ''The exercise of this power must at all times be so very invidious, that congress will not venture upon it without some very cogent and substantial reason.''. Alexander Contee Hanson (writing as Astrides), *Remarks on the Proposed Plan:*

31 January, reprinted in John P. Kaminski, Gaspare J. Saladino, and Richard Leffler (eds.), *3 Commentaries on the Constitution, public and private 18 December 1787 to 31 January 1788* 522–26 (1984).

(6) In fact, had the alternate view of the Elections Clause been accepted at the time of the Constitution's drafting—that is, that it offers Congress unfettered power over Federal elections— it is likely that the Constitution would not have been ratified or that an amendment to this language would have been required.

(7) Indeed, at least seven of the original 13 States—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. *See* 1 Annals of Cong. 799 (1789), Joseph Gales (ed.) (1834). However, "[l]eading Federalists..." assured them "...that, even without amendment, the [Elections] Clause should be construed as limited to emergencies". Three States, New York, North Carolina, and Rhode Island, specifically made their ratification contingent on this understanding being made express. *Ratification of the Constitution by the State of New York* (July 26, 1788) ("Under these impres-

sions and declaring that the rights aforesaid cannot be abridged or violated, and the Explanations aforesaid are consistent with the said Constitution, And in confidence that the Amendments which have been proposed to the said Constitution will receive early and mature Consideration: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises"); *Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789) ("That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe

the same."); *Ratification of the Constitution by the State of Rhode Island* (May 29, 1790) ("Under these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments hereafter mentioned, will receive an early and mature consideration, and conformably to the fifth article of said constitution, speedily become a part thereof; We the said delegates, in the name, and in [sic] the behalf of the People, of the State of Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution. In full confidence . . . That the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators and representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that [i]n those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises[.]").

(8) Congress finds that the Framers designed and the ratifying States understood the Elections

Clause to serve solely as a protective backstop to ensure the preservation of the Federal Government, not as a font of limitless power for Congress to wrest control of Federal elections from the States.

(9) This understanding was also reinforced by debate during the first Congress that convened under the Constitution where Representative Aedanus Burke proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies. Although the amendment failed, those on both sides of the Burke amendment debate already understood the Elections Clause to limit Federal elections power to emergencies.

(10) History clearly shows that even in the first Congress that convened under the Constitution, it was acknowledged and understood through the debates that ensued over the Elections Clause provision that Congress' control over elections is limited.

(11) Similarly, proponent Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government's power over Federal elections to emergencies and so thought there would be no harm in supporting an amendment to make that language express. Annals of Congress 801 (1789) Joseph Gales

Edition. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875 (loc.gov)*. So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over Federal elections.

(12) Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary "...authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections', and involves lawmaking in its essential features and most important

aspect.". *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

(13) This holding is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* Court also held that while Congress maintains the authority to "...supplement these state regulations or [to] substitute its own[]", such authority remains merely "a general supervisory power over the whole subject.". *Id.*

(14) More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that "[t]his grant of congressional power [that is, the fail-safe provision in the Elections Clause] was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.". *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7–9 (2013). The Court explained that the Elections Clause "...imposes [upon the States] the duty...to prescribe the time, place, and manner of electing Representatives and Senators[.]". *Id.* at 8. And, while, as the Court noted, "[t]he power of Congress over the 'Times, Places, and Manner' of congressional elections is paramount, and may be exercised at any

time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith[]", *id.* at 9, the *Inter-Tribal* Court explained, quoting extensively from the *Federalist* no. 59, that it was clear that the congressional fail-safe included in the Elections Clause was intended for the sorts of governmental self-preservation discussed here: "[E]very government ought to contain in itself the means of its own preservation[.]"; "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.". *Id.* at 8.

(15) It is clear in every respect that the congressional fail-safe described in the Elections Clause vests purely secondary authority over Federal elections in the Federal legislative branch and that the primary authority rests with the States. Congressional authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as invasion or other

matters that might lead to a State not electing representatives to constitute the two Houses of Congress. Congress' authority has never extended to the day-to-day authority over the "Times, Places and Manner of Election" that the Constitution clearly reserves to the States.

(16) Congress must act within the bounds of its constitutional authority when enacting legislation concerning the administration of our nation's elections.

Subtitle B—Voluntary Considerations for State Administration of Federal Elections

SEC. 111. SHORT TITLE.

This subtitle may be cited as the "Voluntarily Offered Tools for Election Reforms by States Act" or the "VOTERS Act".

SEC. 112. ELECTION INTEGRITY VOLUNTARY CONSIDERATIONS.

(a) IN GENERAL.—Subtitle C of title II of the Help America Vote Act of 2002 (52 U.S.C. 20981 et seq.) is amended—

(1) by redesignating section 247 as section 248; and

(2) by inserting after section 246 the following new section:

"SEC. 247. RELEASE OF VOLUNTARY CONSIDERATIONS BY STANDARDS BOARD WITH RESPECT TO ELECTION ADMINISTRATION.

"(a) IN GENERAL.—The Standards Board shall draw from experiences in their home jurisdictions and information voluntarily provided by and between States on what has worked and not worked and release voluntary considerations with respect to the administration of an election for Federal office.

"(b) MATTERS TO CONSIDER.—In releasing the voluntary considerations under subsection (a), the Standards Board shall examine and consolidate information provided by States and release considerations with respect to each of the following categories:

"(1) The process for the administration of ballots delivered by mail, including—

"(A) deadlines for the return and receipt of such ballots to the appropriate election official;

"(B) the design of such ballots, including the envelopes used to deliver the ballots;

"(C) the process for requesting and tracking the return of such ballots; and

"(D) the processing of such ballots upon receipt by the appropriate election official, including the schedule for counting the ballots and the reporting of the unofficial results of such counting.

"(2) The signature verification procedures used to verify the identity of voters in an election, which shall include an evaluation of human and machine methods of signature verification, an assessment of the training provided to individuals tasked to carry out such verification procedures, and the proposal of other less subjective methods of confirming the identity of a voter such as requiring the identification number of a valid government-issued photo identification or the last four digits of the voter's social security number to be provided along with the voter's signature.

"(3) The processes used to carry out maintenance of the official list of persons registered to vote in each State.

"(4) Rules and requirements with respect to the access provided to election observers.

"(5) The processes used to ensure the timely and accurate reporting of the unofficial results of ballot counting in each polling place in a State and

the reporting of the unofficial results of such counting.

"(6) The methods used to recruit poll workers and designate the location of polling places during a pandemic, natural disaster, or other emergency.

"(7) The education of the public with respect to the certification and testing of voting machines prior to the use of such machines in an election for Federal office, including education with respect to how such machines are tested for accuracy and logic.

"(8) The processes and procedures used to carry out a post-election audit.

"(9) The processes and procedures used to ensure a secure chain of custody with respect to ballots and election equipment.

"(c) RELEASE OF VOLUNTARY CONSIDERATIONS.—

"(1) DEADLINE FOR RELEASE.—Not later than December 31, 2023, the Standards Board shall release voluntary considerations with respect to each of the categories described in subsection (b).

"(2) TRANSMISSION AND NOTIFICATION REQUIREMENTS.—Not later than 15 days after the date the Standards Board releases voluntary considerations with respect to a category described in subsection (b), the Commission shall—

"(A) transmit the considerations to the chief State election official of each State and the elected leadership of the legislature of each State, including the elected leadership of any committee of the legislature of a State with jurisdiction with respect to elections;

"(B) make the considerations available on a publicly accessible Government website; and

"(C) notify and transmit the considerations to the chair and ranking minority member of the Committee on House Administration of the House of Representatives and the chair and ranking minority member of the Committee on Rules and Administration of the Senate.

"(d) USE OF REQUIREMENTS PAYMENTS FOR IMPLEMENTATION OF VOLUNTARY CONSIDERATIONS.—A State may use a requirements payment provided under this Act to implement any of the voluntary considerations released under subsection (a).

"(e) RULE OF CONSTRUCTION.—Nothing in this section may be construed to require compliance with the voluntary considerations released under subsection (a), including as a condition of the receipt of Federal funds.".

(b) CLERICAL AMENDMENT.—The table of contents of such Act is amended—

(1) by redesignating the item relating to section 247 as relating to section 248; and

(2) by inserting after the item relating to section 246 the following new item:

"Sec. 247. Release of voluntary considerations by Standards Board with respect to election administration.".

Subtitle C—Requirements to Promote Integrity in Election Administration

SEC. 121. ENSURING ONLY ELIGIBLE AMERICAN CITIZENS MAY PARTICIPATE IN FEDERAL ELECTIONS.

(a) SHORT TITLE.—This section may be cited as the "Non-Citizens: Outlawed from Voting in Our Trusted Elections Act of 2022" or the "NO VOTE for Non-Citizens Act of 2022".

(b) FINDINGS; SENSE OF CONGRESS.—

(1) FINDINGS.—Congress finds the following:

(A) Every eligible person who wishes to cast a ballot in a Federal election must be permitted to do so according to law, and their ballot must be examined according to law, and, if it meets all lawful requirements, counted.

(B) Congress has long required States to maintain Federal voter registration lists in a manner that promotes voter confidence.

(C) The changes included herein are not intended to be an expansion of Federal power but rather a clarification of State authority.

(D) The Fifteenth Amendment, the Nineteenth Amendment, the Twenty-Fourth Amendment, and the Twenty-Sixth Amendment, among other references, make clear that the Constitution prohibits voting by non-citizens in Federal elections.

(E) Congress has the constitutional authority, including under the aforementioned amendments, to pass statutes preventing non-citizens from voting in Federal elections, and did so with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(F) Congress may further exercise its constitutional authority to ensure the Constitution's prohibition on non-citizen voting in Federal elections is upheld.

(G) Since the Constitution prohibits non-citizens from voting in Federal elections, such ineligible persons must not be permitted to be placed on Federal voter registration lists.

(H) Improper placement of an ineligible non-citizen on a Federal voter registration list leads to—

(i) confusion on the part of the ineligible person with respect to their ineligibility to cast a ballot; and

(ii) an increased likelihood that human error will permit ineligible persons to cast ballots in Federal elections.

(I) State officials have confirmed that poorly maintained voter registration lists lead to ineligible persons casting ballots in Federal elections.

(J) A former Broward County, Florida, elections supervisor has confirmed that ineligible non-voters were able to cast ballots in previous elections and that she was not able to locate as many as 2,040 ballots during the 2018 midterm recount.

(K) This clarification of State authority to maintain Federal voter registration lists to ensure non-citizens are not included on such lists will promote voter confidence in election processes and outcomes.

(L) Congress has the authority to ensure that no Federal elections funding is used to support States that permit non-citizens to cast ballots in any election.

(M) Federal courts and executive agencies have much of the information States may need to maintain their Federal voter registration lists, and those entities should make that information accessible to State election authorities.

(N) It is important to clarify the penalty for any violation of law that allows a non-citizen to cast a ballot in a Federal election.

(O) To protect the confidence of voters in Federal elections, it is important to implement the policy described herein.

(2) SENSE OF CONGRESS.—It is the sense of Congress that—

(A) many States have not adequately met the requirements concerning the removal of ineligible persons from State voter registration rolls pursuant to section 8 of the National Voter Registration Act of 1993 (52 U.S.C. 20507) and should strive to audit and update their voter registration rolls on a routine basis;

(B) allowing non-citizens to cast ballots in American elections weakens our electoral system and the value of citizenship and sows distrust in our elections system;

(C) even if a State has the sovereign authority, no State should permit non-citizens to cast ballots in State or local elections;

(D) States should use all information available to them to maintain Federal voter registration lists and should inform Congress if such data is insufficient; and

(E) Congress may take further action in the future to address this problem.

(c) CLARIFYING AUTHORITY OF STATES TO REMOVE NONCITIZENS FROM VOTING ROLLS.—

(1) AUTHORITY UNDER REGULAR REMOVAL PROGRAMS.—Section 8(a)(4) of the National Voter Registration Act of 1993 (52 U.S.C. 20507(a)(4)) is amended—

(A) by striking "or" at the end of subparagraph (A);

(B) by redesignating subparagraph (B) as subparagraph (C); and

(C) by inserting after subparagraph (A) the following new subparagraph:

"(B) the registrant's status as a noncitizen of the United States; or".

(2) CONFORMING AMENDMENT RELATING TO ONGOING REMOVAL.—Section 8(c)(2)(B)(i) of such Act (52 U.S.C. 20507(c)(2)(B)(i)) is amended by striking "(4)(A)" and inserting "(4)(A) or (B)".

(d) REQUIREMENT TO MAINTAIN SEPARATE STATE VOTER REGISTRATION LIST FOR NONCITIZENS.—Section 8(a) of the National Voter Registration Act of 1993 (52 U.S.C. 20507(a)) is amended—

(1) in paragraph (5)(B), by striking "and" at the end;

(2) in paragraph (6), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(7) in the case of a State that allows individuals who are not citizens of the United States to vote in elections for public office in the State or any local jurisdiction of the State, ensure that the name of any registrant who is not a citizen of the United States is maintained on a voter registration list that is separate from the official list of eligible voters with respect to registrants who are citizens of the United States.".

(e) REQUIREMENTS FOR BALLOTS FOR STATE OR LOCAL JURISDICTIONS THAT ALLOW NONCITIZEN VOTING.—Section 301(a)(1) of the Help America Vote Act of 2002 (52 U.S.C. 21081(a)(1)) is amended by adding at the end the following new subparagraph:

"(D) In the case of a State or local jurisdiction that allows individuals who are not citizens of the United States to vote in elections for public office in the State or local jurisdiction, the ballot used for the casting of votes by a noncitizen in such State or local jurisdiction may only include the candidates for the elections for public office in the State or local jurisdiction for which the noncitizen is permitted to vote.".

(f) REDUCTION IN PAYMENTS FOR ELECTION ADMINISTRATION TO STATES OR LOCAL JURISDICTIONS THAT ALLOW NONCITIZEN VOTING.—

(1) IN GENERAL.—Title IX of the Help America Vote Act of 2002 (52 U.S.C. 21141 et seq.) is amended by adding at the end the following new section:

"SEC. 907. REDUCTION IN PAYMENTS TO STATES OR LOCAL JURISDICTIONS THAT ALLOW NONCITIZEN VOTING.

"(a) IN GENERAL.—Notwithstanding any other provision of this Act, the amount of a payment under this Act to any State or local jurisdiction that allows individuals who are not citizens of the United States to vote in elections for public office in the State or local jurisdiction shall be reduced by 30 percent.

"(b) PROHIBITION ON USE OF FUNDS FOR CERTAIN ELECTION ADMINISTRATION ACTIVITIES.—Notwithstanding any other provision of law, no Federal funds may be used to implement the requirements of section 8(a)(7) of the National Voter Registration Act of 1993 (52 U.S.C. 20507(a)(7)) (as added by section 121(d) of the American Confidence in Elections Act) or section 301(a)(1)(D) of the Help America Vote Act of 2002 (52 U.S.C. 21081(a)(1)(D)) (as added by section 121(e) of the American Confidence in Elections Act) in a State or local jurisdiction that allows individuals who are not citizens of the United States to vote in elections for public office in the State or local jurisdiction.".

(2) CLERICAL AMENDMENT.—The table of contents of such Act is amended by adding at the end the following new item:

"Sec. 907. Reduction in payments to States or local jurisdictions that allow noncitizen voting.".

(g) PROMOTING PROVISION OF INFORMATION BY FEDERAL ENTITIES.—

(1) IN GENERAL.—Each entity of the Federal government which maintains information which is relevant to the status of an individual as a registered voter in elections for Federal office in a State shall, upon the request of an election official of the State, provide that information to the election official.

(2) POLICIES AND PROCEDURES.—Consistent with section 3506(g) of title 44, United States Code, an entity of the Federal government shall carry out this subsection in accordance with policies and procedures which will ensure that the information is provided securely, accurately, and in a timely basis.

(3) CONFORMING AMENDMENT RELATING TO COVERAGE UNDER PRIVACY ACT.—Section 552a(b) of title 5, United States Code, is amended—

(A) by striking "or" at the end of paragraph (11);

(B) by striking the period at the end of paragraph (12) and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(13) to an election official of a State in accordance with section 121(h) of the American Confidence in Elections Act.".

(h) ENSURING PROVISION OF INFORMATION TO STATE ELECTION OFFICIALS ON INDIVIDUALS RECUSED FROM JURY SERVICE ON GROUNDS OF NONCITIZENSHIP.—

(1) REQUIREMENT DESCRIBED.—If a United States district court recuses an individual from serving on a jury on the grounds that the individual is not a citizen of the United States, the court shall transmit a notice of the individual's recusal—

(A) to the chief State election official of the State in which the individual resides; and

(B) to the Attorney General.

(2) DEFINITIONS.—For purposes of this subsection—

(A) the "chief State election official" of a State is the individual designated by the State under section 10 of the National Voter Registration Act of 1993 (52 U.S.C. 20509) to be responsible for coordination of the State's responsibilities under such Act; and

(B) the term "State" means each of the several States, the District of Columbia, the

Commonwealth of Puerto Rico, American Samoa, Guam, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(i) PROHIBITION ON VOTING BY NONCITIZENS IN FEDERAL ELECTIONS.—

(1) IN GENERAL.—Section 12 of the National Voter Registration Act of 1993 (52 U.S.C. 20511) is amended—

(A) by striking "A person" and inserting "(a) IN GENERAL.—A person"; and

(B) by adding at the end the following new subsection:

"(b) PROHIBITION ON VOTING BY ALIENS.—

"(1) IN GENERAL.—It shall be unlawful for any alien to vote in any election in violation of section 611 of title 18, United States Code.

"(2) PENALTIES.—Any person who violates this subsection shall be fined under title 18, United States Code, imprisoned not more than one year, or both.".

(2) EFFECTIVE DATE.—This subsection and the amendments made by this subsection shall apply with respect to elections held on or after the date of the enactment of this Act.

SEC. 122. STATE REPORTING REQUIREMENTS WITH RESPECT TO VOTER LIST MAINTENANCE.

Section 8 of the National Voter Registration Act of 1993 (52 U.S.C. 20507) is amended—

(1) in subsection (i), by adding at the end the following:

"(3) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all registrants in a State who were inactive according to the criteria described in subsection (d)(1)(B) and the length of time each such registrant has been inactive according to such criteria.";

(2) by redesignating subsection (j) as subsection (k); and

(3) by inserting after subsection (i) the following new subsection:

"(j) REPORTING REQUIREMENTS.—Not later than June 30 of each odd-numbered year, each State shall submit to the Election Assistance Commission a report that includes, with respect to such State during the preceding 2-year period, the total number of—

"(1) registrants who were inactive according to the criteria described in subsection (d)(1)(B) and the length of time each such registrant has been inactive according to such criteria;

"(2) registrants who voted in at least one of the prior 2 consecutive general elections for Federal office;

"(3) registrants removed from the list of official voters in the State pursuant to subsection (d)(1)(B);

"(4) notices sent to registrants pursuant to subsection (d)(2); and

"(5) registrants who received a notice described in paragraph (4) who responded to such notice.".

SEC. 123. CONTENTS OF STATE MAIL VOTER REGISTRATION FORM.

(a) SHORT TITLE.—This section may be cited as the "State Instruction Inclusion Act".

(b) IN GENERAL.—Section 6(a) of the National Voter Registration Act of 1993 (52 U.S.C. 20505(a)) is amended—

(1) in paragraph (1), by inserting ", except that a State may, in addition to the criteria stated in section 9(b), require that an applicant provide proof that the applicant is a citizen of the United States" after "elections for Federal office"; and

(2) in paragraph (2), by inserting "and such form may include a requirement that the applicant provide proof that the applicant is a citizen of the United States" after "elections for Federal office".

SEC. 124. PROVISION OF PHOTOGRAPHIC CITIZEN VOTER IDENTIFICATION TOOLS FOR STATE USE.

(a) SHORT TITLE.—This section may be cited as the "Citizen Vote Protection Act".

(b) FINDINGS; SENSE OF CONGRESS.—

(1) FINDINGS.—Congress finds the following:

(A) Photo voter identification programs established by the States should be administered without unlawful discrimination and with an eye toward balancing appropriate access to the ballot box with election integrity and voter confidence goals.

(B) As confirmed by the bipartisan Commission on Federal Election Reform (commonly known as the Carter-Baker Commission), "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement of their rights".

(C) As confirmed by the Carter-Baker Commission, "[t]he right to vote is a vital component of U.S. citizenship and all States should use their best efforts to obtain proof of citizenship before registering voters.".

(D) The Carter-Baker Commission was correct in its 2005 report when it recommended that the REAL ID Act be "modestly adapted

for voting purposes to indicate on the front or back whether the individual is a U.S. citizen.".

(E) Congress acknowledges the important work completed by the Carter-Baker Commission and, by amending the REAL ID Act, resolves the concerns in the Commission's report that "[t]he REAL ID Act does not require that the card indicates citizenship, but that would need to be done if the card is to be used for voting purposes".

(F) Photographic voter identification is important for ensuring voter confidence in election processes and outcomes.

(G) Requiring photographic voter identification is well within States' constitutional competence, including pursuant to the Qualifications Clause of the Constitution of the United States (article I, section 2, clause 2), the Presidential Electors Clause of the Constitution (article II, section 1, clause 2), and the Seventeenth Amendment.

(H) The Fifteenth Amendment, the Nineteenth Amendment, the Twenty-Fourth Amendment, and the Twenty-Sixth Amendment, among other references, make clear that the

Constitution prohibits voting by non-citizens in Federal elections.

(I) Congress has the constitutional authority, including under the aforementioned amendments, to pass statutes preventing non-citizens from voting in Federal elections, and did so with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(J) Congress may further exercise its constitutional authority to ensure the Constitution's prohibition on non-citizen voting in Federal elections is upheld.

(2) SENSE OF CONGRESS.—It is the sense of Congress that the States should implement the substance of the recommendation of the Carter-Baker Commission that, "[t]o ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states [encourage] voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005".

(c) REAL ID ACT AMENDMENT.—

(1) AMENDMENT.—Section 202(b) of the Real ID Act of 2005 (49 U.S.C. 30301 note) is amended by adding at the end the following new paragraph:

"(10) If the person is a citizen of the United States, an indication of that citizenship, except that no other information may be included with respect to the immigration status of the person.".

(2) APPLICABILITY.—The amendment made by this subsection shall be effective January 1, 2026, and shall apply with respect to any driver's license or identification card issued by a State on and after such date.

(d) RULE OF CONSTRUCTION.—Nothing in this section or in any amendment made by this section may be construed to establish or mandate the use of a national identification card or to authorize any office of the executive branch to establish or mandate the use of a national identification card.

SEC. 125. MANDATORY PROVISION OF IDENTIFICATION FOR CERTAIN VOTERS NOT VOTING IN PERSON.

(a) REQUIRING VOTERS TO PROVIDE IDENTIFICATION.—Title III of the Help America Vote Act of 2002 (52 U.S.C. 21081 et seq.) is amended—

(1) by redesignating sections 304 and 305 as sections 305 and 306; and

(2) by inserting after section 303 the following new section:

"SEC. 304. MANDATORY PROVISION OF IDENTIFICATION FOR CERTAIN VOTERS WHO VOTE BY MAIL.

"(a) FINDING OF CONSTITUTIONAL AUTHORITY.—Congress finds that it has the authority to establish the terms and conditions that States must follow with respect to the administration of voting by mail because article I, section 8, clause 7 of the Constitution of the United States and other enumerated powers grant Congress the power to regulate the operations of the United States Postal Service.

"(b) REQUIRING PROVISION OF IDENTIFICATION TO RECEIVE A BALLOT OR VOTE IN CERTAIN CASES.—

"(1) INDIVIDUALS REQUESTING A BALLOT TO VOTE BY MAIL.—Notwithstanding any other provision of law, the appropriate State or local election official may not provide an individual a ballot to vote by mail for an election for Federal office in a case in which the individual requested such ballot other than in person from the appropriate State or local election official of the State at a State designated elections office unless the individual submits with the application for the ballot a copy of an identification described in paragraph (3).

"(2) INDIVIDUALS VOTING BY MAIL IN CERTAIN CASES.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, in a case in which the appropriate State or local election official provides an individual a ballot to vote by mail for an election for Federal office without requiring such individual to submit a separate application or request to receive such ballot for each such election, the election official may not accept the voted ballot unless the individual submits with the voted ballot a copy of an identification described in paragraph (3).

"(B) FAIL-SAFE VOTING.—An individual who desires to vote other than in person but who does not meet the requirements of subparagraph (A) may cast such a ballot other than in person and the ballot shall be counted as a provisional ballot in accordance with section 302(a).

"(3) IDENTIFICATION DESCRIBED.—An identification described in this paragraph is, with respect to an individual—

"(A) a current and valid photo identification of the individual;

"(B) a copy of a current utility bill, bank statement, government check, paycheck, or

other government document that shows the name and address of the individual;

"(C) a valid driver's license or an identification card issued by a State or the identification number for such driver's license or identification card issued by a State;

"(D) the last 4 digits of the individual's social security number; or

"(E) such other documentation issued by a Federal, State, or local government that provides the same or more identifying information as required by subparagraphs (A) through (D) such that the election official is reasonably certain as to the identity of the individual.

"(c) EXCEPTIONS.—This section does not apply with respect to any individual who is—

"(1) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.);

"(2) provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (52 U.S.C. 20102(b)(2)(B)(ii)); or

"(3) entitled to vote otherwise than in person under any other Federal law.

"(d) RULE OF CONSTRUCTION.—Nothing in this section may be construed as prohibiting a State from imposing identification requirements to request a ballot to vote by mail or cast a vote by mail that are more stringent than the requirements under this section.

"(e) EFFECTIVE DATE.—This section shall take effect on January 1, 2024.".

(b) CONFORMING AMENDMENTS RELATING TO EXISTING IDENTIFICATION REQUIREMENTS.—

(1) TREATMENT AS INDIVIDUALS REGISTERING TO VOTE BY MAIL FOR PURPOSES OF FIRST-TIME VOTER IDENTIFICATION REQUIREMENTS.—Section 303(b)(1)(A) of the Help America Vote Act of 2002 (52 U.S.C. 21083(b)(1)(A)) is amended by striking "by mail" and inserting "by mail or otherwise not in person at an elections office or voter registration agency of the State".

(2) EXCEPTIONS.—Section 303(b)(3) of the Help America Vote Act of 2002 (52 U.S.C. 21083(b)(3)) is amended—

(A) in subparagraph (A), by striking "by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4)" and inserting "by mail under section 6 of the National Voter Registration Act of 1993 (52

U.S.C. 20505) or otherwise not in person at a voter registration agency of the State"; and

(B) in subparagraph (B)(i), by striking "by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4)" and inserting "by mail under section 6 of the National Voter Registration Act of 1993 (52 U.S.C. 20505) or otherwise not in person at a voter registration agency of the State".

(3) EXPANSION OF TYPES OF IDENTIFICATION PERMITTED.—Section 303(b)(2)(A) of the Help America Vote Act of 2002 (52 U.S.C. 21083(b)(2)(A)) is amended—

(A) in clause (i)—

(i) in subclause (I), by striking "or" at the end; and

(ii) by adding at the end the following new subclause:

"(III) such other documentation issued by a Federal, State, or local government that provides the same or more identifying information as required by subclauses (I) and (II) such that the election official is reasonably

certain as to the identity of the individual; or''; and

(B) in clause (ii)—

(i) in subclause (I), by striking ''or'' at the end;

(ii) in subclause (II), by striking the period at the end and inserting ''; or''; and

(iii) by adding at the end the following new subclause:

''(III) such other documentation issued by a Federal, State, or local government that provides the same or more identifying information as required by subclauses (I) and (II) such that the election official is reasonably certain as to the identity of the individual.''.

(c) CONFORMING AMENDMENT RELATING TO ENFORCEMENT.—Section 401 of such Act (52 U.S.C. 21111) is amended by striking ''and 303'' and inserting ''303, and 304''.

(d) CLERICAL AMENDMENT.—The table of contents of such Act is amended—

(1) by redesignating the items relating to sections 304 and 305 as relating to sections 305 and 306; and

(2) by inserting after the item relating to section 303 the following:

"Sec. 304. Mandatory provision of identification for certain voters who vote by mail.".

SEC. 126. CONFIRMING ACCESS FOR CONGRESSIONAL ELECTION OBSERVERS.

(a) SHORT TITLE.—This section may be cited as the "Confirmation of Congressional Observer Access Act of 2022" or the "COCOA Act of 2022".

(b) FINDINGS RELATING TO CONGRESSIONAL ELECTION OBSERVERS.—Congress finds the following:

(1) The Constitution delegates to each of House of the Congress the authority to "be the Judge of the Elections, Returns and Qualifications of its own Members".

(2) While, in general, Congress shall respect the determination of State authorities with respect to the election of members to each House, each House of Congress serves as the final arbiter over any contest to the seating of any putative Member-elect or Senator-elect.

(3) These election contest procedures are contained in the precedents of each House of Congress.

Further, for the House of Representatives the procedures exist under the Federal Contested Elections Act.

(4) In the post-Civil War modern era, more than 100 election contests have been filed with the House of Representatives.

(5) For decades, Congress has appointed and sent out official congressional observers to watch the administration of congressional elections in the States and territories.

(6) These observers serve to permit Congress to develop its own factual record in preparation for eventual contests and for other reasons.

(7) This section and the amendments made by this section do not establish any new authorities or procedures but are provided simply to permit a convenient statutory reference for existing Congressional authority and activity.

(c) CONFIRMING REQUIREMENT THAT STATES PROVIDE ACCESS.—Title III of the Help America Vote Act of 2002 (52 U.S.C. 21081 et seq.), as amended by section 125(a), is amended—

(1) by redesignating sections 305 and 306 as sections 306 and 307; and

(2) by inserting after section 304 the following new section:

"SEC. 305. CONFIRMING ACCESS FOR CONGRESSIONAL ELECTION OBSERVERS.

"(a) FINDING OF CONSTITUTIONAL AUTHORITY.—Congress finds that it has the authority to require that States allow access to designated Congressional election observers to observe the election administration procedures in an election for Federal office because the authority granted to Congress under article I, section 5 of the Constitution of the United States gives each House of Congress the power to be the judge of the elections, returns and qualifications of its own Members.

"(b) REQUIRING STATES TO PROVIDE ACCESS.—A State shall provide each individual who is a designated Congressional election observer for an election with full access to clearly observe all of the elements of the administration procedures with respect to such election, including but not limited to in all areas of polling places and other facilities where ballots in the election are processed, tabulated, cast, canvassed, and certified, in all areas where voter registration activities occur before such election, and in any other such place where election administration procedures to prepare for the election or carry out any post-election recounts take place. No designated Congressional

election observer may handle ballots, elections equipment (voting or non-voting), advocate for a position or candidate, take any action to reduce ballot secrecy, or otherwise interfere with the elections administration process.

"(e) DESIGNATED CONGRESSIONAL ELECTION OBSERVER DESCRIBED.—In this section, a 'designated Congressional election observer' is an individual who is designated in writing by the chair or ranking minority member of the Committee on House Administration of the House of Representatives or the Committee on Rules and Administration of the Senate, or the successor committee in either House of Congress to gather information with respect to an election, including in the event that the election is contested in the House of Representatives or the Senate and for other purposes permitted by article 1, section 5 of the Constitution of the United States.".

(d) CONFORMING AMENDMENT RELATING TO ENFORCEMENT.—Section 401 of such Act (52 U.S.C. 21111), as amended by section 125(c), is amended by striking "and 304" and inserting "304, and 305".

(e) CLERICAL AMENDMENT.—The table of contents of such Act, as amended by section 125(d), is amended—

(1) by redesignating the items relating to sections 305 and 306 as relating to sections 306 and 307; and

(2) by inserting after the item relating to section 304 the following:

"Sec. 305. Confirming access for Congressional election observers.".

SEC. 127. USE OF REQUIREMENTS PAYMENTS FOR POST-ELECTION AUDITS.

Section 251(b)(1) of the Help America Vote Act of 2002 (52 U.S.C. 21001(b)(1)) is amended by inserting ", including to conduct and publish an audit of the effectiveness and accuracy of the voting systems, election procedures, and outcomes used to carry out an election for Federal office in the State and the performance of the State and local election officials who carried out the election" after "requirements of title III".

SEC. 128. CERTAIN TAX BENEFITS AND SIMPLIFICATION WITH RESPECT TO ELECTION WORKERS.

(a) SHORT TITLE.—This section may be cited as the "Election Worker Employer Participation Act".

(b) EXCLUSION FROM GROSS INCOME FOR CERTAIN ELECTION WORKER COMPENSATION.—

(1) IN GENERAL.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139H the following new section:

"SEC. 139I. CERTAIN COMPENSATION OF ELECTION WORKERS.

"(a) IN GENERAL.—Gross income shall not include qualified election worker compensation.

"(b) LIMITATION.—The amount excludible from gross income under subsection (a) with respect to any taxpayer for any taxable year shall not exceed the dollar amount in effect under section 3121(b)(7)(F)(iv) for the calendar year in which such taxable year begins.

"(c) QUALIFIED ELECTION WORKER COMPENSATION.—For purposes of this section, the term 'qualified election worker compensation' means amounts otherwise includible in gross income which are paid by a State, political subdivision of a State, or any instrumentality of a State or any political subdivision thereof, for the service of an individual as an election official or election worker (within the meaning of section 3121(b)(7)(F)(iv))."

(2) CLERICAL AMENDMENT.—The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139H the following new item:

"Sec. 139I. Certain compensation of election workers."

(c) EXCLUSION FROM GROSS INCOME FOR CERTAIN STUDENT LOAN REPAYMENTS OF ELECTION WORKERS.—Section 127(c) of such Code is amended by adding at the end the following new paragraph:

"(8) SPECIAL RULE FOR ELECTION WORKERS.—In the case of any payment by a State, political subdivision of a State, or any instrumentality of a State or any political subdivision thereof, for the service of an individual as an election official or election worker (within the meaning of section 3121(b)(7)(F)(iv)), paragraph (1)(B) shall be applied without regard to the phrase 'in the case of payments made before January 1, 2026,'.".

(d) INFORMATION REPORTING NOT REQUIRED BY REASON OF CERTAIN AMOUNTS EXCLUDIBLE FROM GROSS INCOME.—Section 6041 of such Code is amended by adding at the end the following new subsection:

"(h) TREATMENT OF CERTAIN EXCLUDIBLE COMPENSATION OF ELECTION WORKERS.—In the case of any payment by a State, political subdivision of a State, or any instrumentality of a State or any political subdivision thereof, for the service of an individual as an election official or election worker (within the meaning of section 3121(b)(7)(F)(iv)), the determination of whether the $600 threshold described in subsection (a) has been met with respect to such individual shall be determined by not taking into account—

"(1) any such payment which is qualified election worker compensation (as defined in section

139I(c)) which does not exceed the limitation described in section 139I(b), and

"(2) any such payment which is excludible from the gross income of such individual under section 127.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to payments made after December 31, 2022, in taxable years ending after such date.

SEC. 129. VOLUNTARY GUIDELINES WITH RESPECT TO NONVOTING ELECTION TECHNOLOGY.

(a) SHORT TITLE.—This section may be cited as the "Protect American Voters Act".

(b) ADOPTION OF VOLUNTARY GUIDELINES BY ELECTION ASSISTANCE COMMISSION.—

(1) ADOPTION OF GUIDELINES.—Title II of the Help America Vote Act of 2002 (52 U.S.C. 20921 et seq.) is amended by adding at the end the following new subtitle:

"Subtitle E—Voluntary Guidelines for Use of Nonvoting Election Technology

"SEC. 298. ADOPTION OF VOLUNTARY GUIDELINES BY COMMISSION.

"(a) ADOPTION.—The Commission shall adopt voluntary guidelines for election officials on the use of non-

voting election technology, taking into account the recommendations of the Standards Board under section 298A.

"(b) REVIEW.—The Commission shall review the guidelines adopted under this subtitle not less frequently than once every 4 years, and may adopt revisions to the guidelines as it considers appropriate.

"(c) PROCESS FOR ADOPTION.—The adoption of the voluntary guidelines under this subtitle shall be carried out by the Commission in a manner that provides for each of the following:

"(1) Publication of notice of the proposed guidelines in the Federal Register.

"(2) An opportunity for public comment on the proposed guidelines.

"(3) An opportunity for a public hearing on the record.

"(4) Publication of the final recommendations in the Federal Register.

"(d) DEADLINE FOR INITIAL SET OF GUIDELINES.—The Commission shall adopt the initial set of voluntary guidelines under this section not later than December 31, 2025.

"SEC. 298A. ROLE OF STANDARDS BOARD.

"(a) DUTIES.—The Standards Board shall assist the Commission in the adoption of voluntary guidelines under section 298, including by providing the Commission with recommendations on appropriate standards for the use of nonvoting election technology, including standards to ensure the security and accuracy, and promote the usability, of such technology, and by conducting a review of existing State programs with respect to the testing of nonvoting election technology.

"(b) SOURCES OF ASSISTANCE.—

"(1) CERTAIN MEMBERS OF TECHNICAL GUIDELINES DEVELOPMENT COMMITTEE.—The following members of the Technical Guidelines Development Committee under section 221 shall assist the Standards Board in carrying out its duties under this section:

"(A) The Director of the National Institute of Standards and Technology.

"(B) The representative of the American National Standards Institute.

"(C) The representative of the Institute of Electrical and Electronics Engineers.

"(D) The 4 members of the Technical Guidelines Development Committee appointed under subsection (c)(1)(E) of such section as

the other individuals with technical and scientific expertise relating to voting systems and voting equipment.

"(2) DETAILEE FROM CISA.—The Executive Board of the Standards Board may request the Director of the Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security to provide a detailee to assist the Standards Board in carrying out its duties under this section, so long as such detailee has no involvement in the drafting of any of the voluntary guidelines.

"SEC. 298B. USE OF PAYMENTS TO OBTAIN OR UPGRADE TECHNOLOGY.

"A State may use funds provided under any law for activities to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements, to obtain nonvoting election technology which is in compliance with the voluntary guidelines adopted under section 298 or to upgrade nonvoting election technology so that the technology is in compliance with such guidelines, and may, notwithstanding any other provision of law, use any unobligated grant funding provided to the State by the Election Assistance Commission from amounts appropriated under the heading 'Independent Agencies—Election Assistance

Commission—Election Security Grants' in title V of division C of the Consolidated Appropriations Act, 2020 (Public Law 116–93) for the purposes of enhancing election technology and making election security improvements until December 31, 2024.

"SEC. 298C. NONVOTING ELECTION TECHNOLOGY DEFINED.

"In this subtitle, the term 'nonvoting election technology' means technology used in the administration of elections for Federal office which is not used directly in the casting, counting, tabulating, or collecting of ballots or votes, including each of the following:

"(1) Electronic pollbooks or other systems used to check in voters at a polling place or verify a voter's identification.

"(2) Election result reporting systems.

"(3) Electronic ballot delivery systems.

"(4) Online voter registration systems.

"(5) Polling place location search systems.

"(6) Sample ballot portals.

"(7) Signature systems.

"(8) Such other technology as may be recommended for treatment as nonvoting election technology as the Standards Board may recommend.".

(2) CLERICAL AMENDMENT.—The table of contents of such Act is amended by adding at the end of the items relating to title II the following:

"Subtitle E—Voluntary Guidelines for Use of Nonvoting Election Technology

"Sec. 298. Adoption of voluntary guidelines by Commission.
"Sec. 298A. Role of Standards Board.
"Sec. 298B. Use of payments to obtain or upgrade technology.
"Sec. 298C. Nonvoting election technology defined.".

(c) TREATMENT OF TECHNOLOGY USED IN MOST RECENT ELECTION.—Any nonvoting election technology, as defined in section 298C of the Help America Vote Act of 2002 (as added by subsection (a)(1)), which a State used in the most recent election for Federal office held in the State prior to the date of the enactment of this Act shall be deemed to be in compliance with the voluntary guidelines on the use of such technology which are adopted by the Election Assistance Commission under section 298 of such Act (as added by subsection (a)(1)).

SEC. 130. STATUS REPORTS BY NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY.

Section 231 of the Help America Vote Act of 2002 (52 U.S.C. 20971) is amended by adding at the end the following new subsection:

"(e) STATUS REPORTS BY NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY.—Not later than 60 days after the end of each fiscal year (beginning with 2023), the Director of the National Institute of Standards and

Technology shall submit to Congress a status report describing—

"(1) the extent to which the Director carried out the Director's responsibilities under this Act during the fiscal year, including the responsibilities imposed under this section and the responsibilities imposed with respect to the Technical Guidelines Development Committee under section 222, together with the Director's best estimate of when the Director will completely carry out any responsibility which was not carried out completely during the fiscal year; and

"(2) the extent to which the Director carried out any projects requested by the Commission during the fiscal year, together with the Director's best estimate of when the Director will complete any such project which the Director did not complete during the fiscal year.".

SEC. 131. 501(C)(3) ORGANIZATIONS PROHIBITED FROM PROVIDING DIRECT OR INDIRECT FUNDING FOR ELECTION ADMINISTRATION.

(a) SHORT TITLE.—This section may be cited as the "End Zuckerbucks Act of 2022".

(b) IN GENERAL.—Section 501(c)(3) of the Internal Revenue Code of 1986 is amended—

(1) by striking "and which does not participate" and inserting "which does not participate", and

(2) by striking the period at the end and inserting "and which does not provide direct funding to any State or unit of local government for the purpose of the administration of elections for public office or any funding to any State or unit of local government in a case in which it is reasonable to expect such funding will be used for the purpose of the administration of elections for public office (except with respect to the donation of space to a State or unit of local government to be used as a polling place in an election for public office).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to funding provided in taxable years beginning after December 31, 2023.

SEC. 132. REQUIREMENTS WITH RESPECT TO ELECTION MAIL.

(a) SHORT TITLE.—This section may be cited as the "Election Integrity Mail Reform Act of 2022".

(b) PRIORITIZING ELECTION MAIL.—Title 39, United States Code, is amended by adding after chapter 36 the following:

"CHAPTER 37—ELECTION AND POLITICAL MAIL

"Sec.
"3701. Prioritization of processing and delivery of election mail.
"3702. Use of nonprofit permit for cooperative mailings.
"3703. Marking or notice on election mail
"3704. Application to Uniformed and Overseas Citizens Absentee Voting Act.

"§ 3701. Prioritization of processing and delivery of election mail

"(a) IN GENERAL.—The Postal Service shall give priority to the processing and delivery of election mail. In carrying out this subsection, the Postal Service shall at a minimum—

"(1) deliver any election mail regardless of the amount of postage paid;

"(2) shall, to the greatest extent practicable, process and clear election mail from any postal facility each day; and

"(3) carry and deliver election mail expeditiously.

"(b) ELECTION MAIL WITH INSUFFICIENT POSTAGE.—In carrying out subsection (a)(1), the Postal Service shall process and deliver election mail with insufficient postage in the same manner as election mail with sufficient postage, but may collect insufficient postage after delivery of any election mail with insufficient postage.

"(c) UNDERFUNDED OR OVERDRAWN ACCOUNTS.—The Postal Service shall process and deliver election mail,

under the standards in place under subsection (a), sent from a customer using an account registered with the Postal Service (including a corporate account or an advance deposit account) even if such account is underfunded or overdrawn. Nothing in this section shall be construed to limit or otherwise prevent the Postal Service from seeking reimbursement from any person regarding unpaid postage.

"(d) ELECTION MAIL DEFINED.—In this chapter, the term 'election mail' means any item mailed to or from an individual for purposes of the individual's participation in an election for public office, including balloting materials, voter registration cards, absentee ballot applications, polling place notification and photographic voter identification materials.

"§ 3702. Use of nonprofit permit for cooperative mailings

"Notwithstanding any other law, rule, or regulation, a national, State, or local committee of a political party (as defined under the Federal Election Campaign Act of 1971) which is eligible to mail at the nonprofit rate may conduct a cooperative mailing at that nonprofit rate with a candidate, a candidate's committee, or another committee of a political party, and may seek reimbursement

from such a candidate, candidate's committee, or committee of a political party for the costs of such mailing.

"§ 3703. Marking or notice on election mail

"(a) IN GENERAL.—For the purposes of assisting election officials in processing election mail, the Postal Service shall place a marking or notice indicating that a piece of mail is election mail.

"(b) REQUIREMENTS.—The Postal Service may determine the appropriate manner in which subsection (a) is carried out, but at a minimum such marking or notice shall—

"(1) be placed, as soon as practicable, at the time the election mail is received by the Postal Service, in a conspicuous and legible type or in a common machine-readable technology on the envelope or other cover in which the election mail is mailed; and

"(2) clearly demonstrate the date and time that such marking or noticed was so placed.

"(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed as requiring any change to the processes and procedures used by the Postal Service with respect to Postal Service barcodes on envelopes carried or delivered by the Postal Service.

"§ 3704. Application to Uniformed and Overseas Citizens Absentee Voting Act

"This chapter shall not apply to balloting materials under the Uniformed and Overseas Citizens Absentee Voting Act and nothing in this chapter shall be construed to alter or otherwise affect the operation of such Act or section 3406 of this title.".

(c) POSTMARKING STAMPS.—Section 503 of title 18, United States Code, is amended—

(1) by striking "Whoever forges" and inserting "(a) Whoever forges";

(2) by striking "or such impression thereof," and all that follows and inserting the following: "or such impression thereof—

"(1) shall be fined under this title or imprisoned not more than five years, or both; or

"(2) if the impression from a postmarking stamp or impression thereof forged, counterfeited, used, sold, or possessed in violation of this section is applied to a mailed ballot for an election for Federal, State, or local office, shall be fined under this title or imprisoned not more than 10 years, or both."; and

(3) by adding at the end following new subsection:

"(a) Whoever, with the intent to falsify the date on which a postmark was applied, applies to a mailed ballot described in subsection (a)(2) a genuine postmark that bears a date other than the date on which such postmark was applied, shall be subject to the penalties set forth in such subsection.".

SEC. 133. CLARIFICATION OF RIGHT OF STATE TO APPEAL DECISIONS THROUGH DULY AUTHORIZED REPRESENTATIVE.

Section 1254 of title 28, United States Code, is amended—

(1) in paragraph (1), by striking the semicolon at the end and inserting a period; and

(2) by adding at the end the following:

"(3) By appeal by a party (including the State as represented by any agent authorized as a party under State law) relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.".

SEC. 134. CLARIFICATION OF FEDERAL AGENCY INVOLVEMENT IN VOTER REGISTRATION ACTIVITIES.

Executive Order 14019 (86 Fed. Reg. 13623; relating to promoting access to voting) shall have no force or effect to the extent that it is inconsistent with section 7 of the National Voter Registration Act of 1993 (52 U.S.C. 20506).

SEC. 135. PROHIBITION ON USE OF FEDERAL FUNDS FOR ELECTION ADMINISTRATION IN STATES THAT PERMIT BALLOT HARVESTING.

(a) SHORT TITLE.—This section may be cited as the "No Federal Funds for Ballot Harvesting Act".

(b) FINDINGS.—Congress finds that—

(1) the right to vote is a fundamental right of citizens of the United States, as described by the Constitution of the United States;

(2) the Committee on House Administration of the House of Representatives, which is charged with investigating election irregularities, received reports through its official Election Observer Program for the 2018 general election and the 2020 general election, as well as from other stakeholders, that individuals other than voters themselves were depositing large amounts of absentee ballots at polling places throughout California and other States, a practice colloquially known as "ballot harvesting";

(3) the practice of ballot harvesting creates significant vulnerabilities in the chain-of-custody of ballots because individuals collecting ballots are not required to be registered voters and are not required to identify themselves at a voter's home, and the State does not track how many ballots are harvested in an election;

(4) in North Carolina, a congressional election was invalidated due to fraud associated with ballot harvesting committed by a political operative, and it is unlikely such activity would have been detected were it not for the prohibition against ballot harvesting in the State;

(5) ballot harvesting invites electioneering activity at home and weakens States' long-standing voter protection procedures, which remain in place at polling locations, creating the possibility of undue influence over voters by political operatives and other bad actors; and

(6) the Supreme Court of the United States has affirmed State authority to restrict ballot harvesting (*Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021)).

(c) PROHIBITION ON FEDERAL FUNDS FOR ELECTION ADMINISTRATION FOR STATES ALLOWING COLLEC-

TION AND TRANSMISSION OF BALLOTS BY CERTAIN THIRD PARTIES.—

(1) IN GENERAL.—The Help America Vote Act of 2002 (52 U.S.C. 20901 et seq.) is amended by adding at the end the following new section:

"SEC. 908. PROHIBITION ON FEDERAL FUNDS FOR ELECTION ADMINISTRATION FOR STATES ALLOWING COLLECTION AND TRANSMISSION OF BALLOTS BY CERTAIN THIRD PARTIES.

"(a) IN GENERAL.—Notwithstanding any other provision of law, no Federal funds may be used to administer any election for Federal office in a State unless the State has in effect a law that prohibits an individual from the knowing collection and transmission of a ballot in an election for Federal office that was mailed to another person, other than an individual described as follows:

"(1) An election official while engaged in official duties as authorized by law.

"(2) An employee of the United States Postal Service or other commercial common carrier engaged in similar activities while engaged in duties authorized by law.

"(3) Any other individual who is allowed by law to collect and transmit United States mail, while engaged in official duties as authorized by law.

"(4) A family member, household member, or caregiver of the person to whom the ballot was mailed.

"(b) DEFINITIONS.—For purposes of this section, with respect to a person to whom the ballot was mailed:

"(1) The term 'caregiver' means an individual who provides medical or health care assistance to such person in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility, or adult foster care home.

"(2) The term 'family member' means an individual who is related to such person by blood, marriage, adoption or legal guardianship.

"(3) The term 'household member' means an individual who resides at the same residence as such person.".

(2) CLERICAL AMENDMENT.—The table of contents of such Act is amended by adding at the end the following new item:

"Sec. 908. Prohibition on Federal funds for election administration for States allowing collection and transmission of ballots by certain third parties.".

SEC. 136. CLARIFICATION WITH RESPECT TO FEDERAL ELECTION RECORD-KEEPING REQUIREMENT.

Section 301 of the Civil Rights Act of 1960 (52 U.S.C. 20701) is amended by inserting " including envelopes used to deliver ballots by mail," after "requisite to voting in such election,".

SEC. 137. CLARIFICATION OF RULES WITH RESPECT TO HIRING OF ELECTION WORKERS.

(a) IN GENERAL.—With respect to hiring election workers in a State or local jurisdiction, the State or local jurisdiction may give preference to individuals who are veterans or individuals with a disability.

(b) INDIVIDUAL WITH A DISABILITY DEFINED.—In this section, an "individual with a disability" means an individual with an impairment that substantially limits any major life activities.

SEC. 138. UNITED STATES POSTAL SERVICE COORDINATION WITH STATES TO ENSURE MAILING ADDRESSES.

(a) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Postmaster General shall, in coordination with the appropriate State executives of each State, carry out a program to identify and assign a mailing address to each home in each State that, as of the date of the enactment of this Act, does not have a mailing address assigned to such home, with a priority

given to assigning mailing addresses to such homes located on Indian lands.

(b) DEFINITIONS.—In this section:

(1) INDIAN.—The term ''Indian'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

(2) INDIAN LANDS.—The term ''Indian lands'' includes—

(A) any Indian country of an Indian Tribe, as defined under section 1151 of title 18, United States Code;

(B) any land in Alaska owned, pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), by an Indian Tribe that is a Native village (as defined in section 3 of that Act (43 U.S.C. 1602)) or by a Village Corporation that is associated with an Indian Tribe (as defined in section 3 of that Act (43 U.S.C. 1602));

(C) any land on which the seat of the Tribal Government is located; and

(D) any land that is part or all of a Tribal designated statistical area associated with an Indian Tribe, or is part or all of an Alaska Na-

tive village statistical area associated with an Indian Tribe, as defined by the Census Bureau for the purposes of the most recent decennial census.

(3) INDIAN TRIBE.—The term "Indian Tribe" has the meaning given the term "Indian tribe" in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

(4) STATE.—The term "State" has the meaning given such term in section 901 of the Help America Vote Act of 2002 (52 U.S.C. 21141).

(5) TRIBAL GOVERNMENT.—The term "Tribal Government" means the recognized governing body of an Indian Tribe.

(c) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated $5,000,000 to carry out this section.

SEC. 139. STATE DEFINED.

Section 901 of the Help America Vote Act of 2002 (52 U.S.C. 21141) is amended by striking "and the United States Virgin Islands" and inserting "the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands".

Subtitle D—District of Columbia Election Integrity and Voter Confidence

SEC. 141. SHORT TITLE.

This subtitle may be cited as the "American Confidence in Elections: District of Columbia Election Integrity and Voter Confidence Act".

SEC. 142. REQUIREMENTS FOR ELECTIONS IN DISTRICT OF COLUMBIA.

(a) REQUIREMENTS DESCRIBED.—Title III of the Help America Vote Act of 2002 (52 U.S.C. 21801 et seq.) is amended by adding at the end the following new subtitle:

"Subtitle C—Requirements for Elections in District of Columbia

"SEC. 321. STATEMENT OF CONGRESSIONAL AUTHORITY; FINDINGS.

"Congress finds that it has the authority to establish the terms and conditions for the administration of elections for public office in the District of Columbia—

"(1) under article I, section 8, clause 17 of the Constitution of the United States, which grants Congress the exclusive power to enact legislation with respect to the seat of the government of the United States; and

"(2) under other enumerated powers granted to Congress.

"SEC. 322. REQUIREMENTS FOR PHOTO IDENTIFICATION.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Voter Identification Act'.

"(b) REQUIRING PROVISION OF IDENTIFICATION TO RECEIVE A BALLOT OR VOTE.—

"(1) INDIVIDUALS VOTING IN PERSON.—A District of Columbia election official may not provide a ballot for a District of Columbia election to an individual who desires to vote in person unless the individual presents to the official an identification described in paragraph (3).

"(2) INDIVIDUALS VOTING OTHER THAN IN PERSON.—A District of Columbia election official may not provide a ballot for a District of Columbia election to an individual who desires to vote other than in person unless the individual submits with the application for the ballot a copy of an identification described in paragraph (3).

"(3) IDENTIFICATION DESCRIBED.—An identification described in this paragraph is, with respect to an individual, any of the following:

"(A) A current and valid motor vehicle license issued by the District of Columbia or any other current and valid photo identification of the individual which is issued by the District of Columbia or the identification number for such motor vehicle license or photo identification.

"(B) A current and valid United States passport, a current and valid military photo identification, or any other current and valid photo identification of the individual which is issued by the Federal government.

"(C) Any current and valid photo identification of the individual which is issued by a Tribal Government.

"(D) A student photo identification issued by a secondary school (as such term is defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801)) or an institution of higher education (as such term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

"(E) The last 4 digits of the individual's social security number.

"(4) ENSURING PROOF OF RESIDENCE.—If an individual presents or submits an identification de-

scribed in paragraph (3) which does not include the address of the individual's residence, the District of Columbia election official may not provide a ballot to the individual unless the individual presents or submits a document or other written information from a third party which—

"(A) provides the address of the individual's residence; and

"(B) such document or other written information is of sufficient validity such that the election official is reasonably certain as to the identity of the individual.

"(e) PROVISION OF IDENTIFICATION WITHOUT COST TO INDIGENT INDIVIDUALS.—If the District of Columbia charges an individual a fee for an identification described in subsection (b)(3) and the individual provides an attestation that the individual is unable to afford the fee, the District of Columbia shall provide the identification to the individual at no cost.

"(d) SPECIAL RULE WITH RESPECT TO SINCERELY HELD RELIGIOUS BELIEFS.—In the case of an individual who is unable to comply with the requirements of subsection (b) due to sincerely held religious beliefs, the District of Columbia shall provide such individual with an alternative identification that shall be deemed to meet the

requirements of an identification described in subsection (b)(3).

"(e) DESIGNATION OF DISTRICT OF COLUMBIA AGENCY TO PROVIDE COPIES OF IDENTIFICATION.—The Mayor of the District of Columbia shall designate an agency of the District of Columbia government to provide an individual with a copy of an identification described in subsection (b)(3) at no cost to the individual for the purposes of meeting the requirement under subsection (b)(2).

"(f) INCLUSION OF PHOTOS IN POLL BOOKS.—

"(1) METHODS FOR OBTAINING PHOTOS.—

"(A) PROVISION OF PHOTOS BY OFFICES OF DISTRICT OF COLUMBIA GOVERNMENT.—If any office of the District of Columbia government has a photograph or digital image of the likeness of an individual who is eligible to vote in a District of Columbia election, the office, in consultation with the chief election official of the District of Columbia, shall provide access to the photograph or digital image to the chief election official of the District of Columbia.

"(B) TAKING OF PHOTOS AT POLLING PLACE.—If a photograph or digital image of an individual who votes in person at a polling place is not included in the poll book which contains

the name of the individuals who are eligible to vote in the District of Columbia election and which is used by election officials to provide ballots to such eligible individuals, the appropriate election official shall take a photograph of the individual and provide access to the photograph to the chief election official of the District of Columbia.

"(C) COPIES OF PHOTOS PROVIDED BY INDIVIDUALS NOT VOTING IN PERSON.—The election official who receives a copy of an identification described in subsection (b)(3) which is submitted by an individual who desires to vote other than in person at a polling place shall provide access to the copy of the identification to the chief election official of the District of Columbia.

"(2) INCLUSION IN POLL BOOKS.—The chief election official of the District of Columbia shall ensure that a photograph, digital image, or copy of an identification for which access is provided under paragraph (1) is included in the poll book which contains the name of the individuals who are eligible to vote in the District of Columbia election and which

is used by election officials to provide ballots to such eligible individuals.

"(3) PROTECTION OF PRIVACY OF VOTERS.—The appropriate election officials of the District of Columbia shall ensure that any photograph, digital image, or copy of an identification which is included in a poll book under this subsection is not used for any purpose other than the administration of District of Columbia elections and is not provided or otherwise made available to any other person except as may be necessary to carry out that purpose.

"(g) EXCEPTIONS.—This section does not apply with respect to any individual who is—

"(1) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.);

"(2) provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (52 U.S.C. 20102(b)(2)(B)(ii)); or

"(3) entitled to vote otherwise than in person under any other Federal law.

"(h) DEFINITIONS.—For the purposes of this section, the following definitions apply:

"(1) INDIAN TRIBE.—The term 'Indian Tribe' has the meaning given the term 'Indian tribe' in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

"(2) TRIBAL GOVERNMENT.—The term 'Tribal Government' means the recognized governing body of an Indian Tribe.

"SEC. 323. REQUIREMENTS FOR VOTER REGISTRATION.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Voter List Maintenance Act'.

"(b) ANNUAL LIST MAINTENANCE.—

"(1) REQUIREMENTS.—

"(A) IN GENERAL.—The District of Columbia shall carry out annually a program to remove ineligible persons from the official list of persons registered to vote in the District of Columbia, as required by section 8 of the National Voter Registration Act of 1993 (52 U.S.C. 20507) and pursuant to the procedures described in subparagraph (B).

"(B) REMOVAL FROM VOTER ROLLS.—In the case of a registrant from the official list of eligible voters in District of Columbia elections who has failed to vote in a District of Columbia

election during a period of two consecutive years, the District of Columbia shall send to such registrant a notice described in section 8(d)(2) of the National Voter Registration Act of 1993 (52 U.S.C. 20507(d)(2)) and shall remove the registrant from the official list of eligible voters in District of Columbia elections if—

"(i) the registrant fails to respond to such notice; and

"(ii) the registrant has not voted or appeared to vote in a District of Columbia election during the period beginning the date such notice is sent and ending the later of 4 years after the date such notice is sent or after two consecutive District of Columbia general elections have been held.

"(2) TIMING.—In the case of a year during which a regularly scheduled District of Columbia election is held, the District of Columbia shall carry out the program described in paragraph (1) not later than 90 days prior to the date of the election.

"(c) PROHIBITING SAME-DAY REGISTRATION.—The District of Columbia may not permit an individual to vote in a District of Columbia election unless, not later than

30 days prior to the date of the election, the individual is duly registered to vote in the election.

"SEC. 324. BAN ON COLLECTION AND TRANSMISSION OF BALLOTS BY CERTAIN THIRD PARTIES.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Election Fraud Prevention Act'.

"(b) IN GENERAL.—The District of Columbia may not permit an individual to knowingly collect and transmit a ballot in a District of Columbia election that was mailed to another person, other than an individual described as follows:

"(1) An election official while engaged in official duties as authorized by law.

"(2) An employee of the United States Postal Service or other commercial common carrier engaged in similar activities while engaged in duties authorized by law.

"(3) Any other individual who is allowed by law to collect and transmit United States mail, while engaged in official duties as authorized by law.

"(4) A family member, household member, or caregiver of the person to whom the ballot was mailed.

"(c) DEFINITIONS.—For purposes of this section, with respect to a person to whom the ballot was mailed:

"(1) The term 'caregiver' means an individual who provides medical or health care assistance to such person in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility, or adult foster care home.

"(2) The term 'family member' means an individual who is related to such person by blood, marriage, adoption or legal guardianship.

"(3) The term 'household member' means an individual who resides at the same residence as such person.

"SEC. 325. TIMELY PROCESSING AND REPORTING OF RESULTS.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Timely Reporting of Election Results Act'.

"(b) TIME FOR PROCESSING BALLOTS AND REPORTING RESULTS.— The District of Columbia shall begin processing ballots received by mail in a District of Columbia election as soon as such ballots are received and shall ensure that the results of such District of Columbia elec-

tion are reported to the public not later than 10:00 am on the date following the date of the election, but in no case shall such ballots be tabulated or such results be reported earlier than the closing of polls on the date of the election.

"(c) REQUIREMENT TO PUBLISH NUMBER OF VOTED BALLOTS ON ELECTION DAY.—The District of Columbia shall, as soon as practicable after the closing of polls on the date of a District of Columbia election, make available on a publicly accessible website the total number of voted ballots in the possession of election officials in the District of Columbia as of the time of the closing of polls on the date of such election, which shall include, as of such time—

"(1) the number of voted ballots delivered by mail;

"(2) the number of ballots requested for such election by individuals who are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.); and

"(3) the number of voted ballots for such election received from individuals who are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C.

20301 et seq.), including from individuals who, under such Act, voted by absentee ballot without requesting such a ballot.

"(d) REQUIREMENTS TO ENSURE BIPARTISAN ELECTION ADMINISTRATION ACTIVITY.—With respect to a District of Columbia election, District of Columbia election officials shall ensure that all activities are carried out in a bipartisan manner, which shall include a requirement that, in the case of an election worker who enters a room which contains ballots, voting equipment, or non-voting equipment as any part of the election worker's duties to carry out such election, the election worker is accompanied by an individual registered to vote with respect to a different political party than such election worker, as determined pursuant to the voting registration records of the District of Columbia.

"SEC. 326. BAN ON NONCITIZEN VOTING.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Citizen Voter Act'.

"(b) BAN ON NONCITIZEN VOTING.—No individual may vote in a District of Columbia election unless the individual is a citizen of the United States.

"SEC. 327. REQUIREMENTS WITH RESPECT TO PROVISIONAL BALLOTS.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Provisional Ballot Reform Act'.

"(b) IN GENERAL.—Except as provided in subsection (c), the District of Columbia shall permit an individual to cast a provisional ballot pursuant to section 302 if—

"(1) the individual declares that such individual is a registered voter in the District of Columbia and is eligible to vote in a District of Columbia election but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote; or

"(2) the individual declares that such individual is a registered voter in the District of Columbia and is eligible to vote in a District of Columbia election but does not provide an identification required under section 322, except that the individual's provisional ballot shall not be counted in the election unless the individual provides such identification to the chief State election official of the District of Columbia not later than 5:00 pm on the second day which begins after the date of the election.

"(c) REQUIREMENTS WITH RESPECT TO COUNTING PROVISIONAL BALLOTS IN CERTAIN CASES.—If the name of an individual who is a registered voter in the District of Columbia and eligible to vote in a District of Columbia election appears on the official list of eligible voters for a polling place in the District of Columbia, such individual may cast a provisional ballot pursuant to section 302 for such election at a polling place other than the polling place with respect to which the name of the individual appears on the official list of eligible voters, except that the individual's provisional ballot shall not be counted in the election unless the individual demonstrates pursuant to the requirements under section 302 that the individual is a registered voter in the jurisdiction of the polling place at which the individual cast such ballot.

"SEC. 328. MANDATORY POST-ELECTION AUDITS.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Mandatory Post-Election Audits Act'.

"(b) REQUIREMENT FOR POST-ELECTION AUDITS.—Not later than 30 days after each District of Columbia election, the District of Columbia shall conduct and publish an audit of the effectiveness and accuracy of the voting systems used to carry out the election and the performance of the election officials who carried out the elec-

tion, but in no case shall such audit be completed later than 2 business days before the deadline to file an election contest under the laws of the District of Columbia.

"SEC. 329. PUBLIC OBSERVATION OF ELECTION PROCEDURES.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Public Observation of Election Procedures Act'.

"(b) DESIGNATED REPRESENTATIVES OF CANDIDATES, POLITICAL PARTIES, AND COMMITTEES AFFILIATED WITH BALLOT INITIATIVES.—

"(1) AUTHORITY TO OBSERVE PROCEDURES.—An individual who is not a District of Columbia election official may observe election procedures carried out in a District of Columbia election, as described in paragraph (2), if the individual is designated to observe such procedures by a candidate in the election, a political party, or a committee affiliated with a ballot initiative or referendum in the election.

"(2) AUTHORITY AND PROCEDURES DESCRIBED.—The authority of an individual to observe election procedures pursuant to this subsection is as follows:

"(A) The individual may serve as a poll watcher to observe the casting and tabulation of

ballots at a polling place on the date of the election or on any day prior to the date of the election on which ballots are cast at early voting sites, and may challenge the casting or tabulation of any such ballot.

"(B) The individual may serve as a poll watcher to observe the canvassing and processing of absentee or other mail-in ballots, including the procedures for verification of signed certificates of transmission under section 330(c)(2).

"(C) The individual may observe the recount of the results of the election at any location at which the recount is held, and may challenge the tabulation of any ballot tabulated pursuant to the recount.

"(3) PROVISION OF CREDENTIALS.—The chief State election official of the District of Columbia shall provide each individual who is authorized to observe election procedures under paragraph (1) with appropriate credentials to enable the individual to observe such procedures.

"(4) EXCEPTION FOR CANDIDATES AND LAW ENFORCEMENT OFFICERS.—An individual may not serve as a poll watcher under subparagraph (A) or

(B) of paragraph (2), and the chief State election official of the District of Columbia may not provide the individual with credentials to enable the individual to serve as a poll watcher under such subparagraph, if the individual is a candidate in the election or a law enforcement officer.

"(c) OTHER INDIVIDUALS.—

"(1) PETITION FOR OBSERVER CREDENTIALS.—In addition to the individuals described in subsection (b), any individual, including an individual representing or affiliated with a domestic or international organization, may petition the chief State election official of the District of Columbia to provide the individual with credentials to observe election procedures carried out in a District of Columbia election, as described in subsection (b).

"(2) AUTHORITY DESCRIBED.—If the chief State election official provides an individual with credentials under paragraph (1), the individual shall have the same authority to observe election procedures carried out in the election as an individual described in subsection (b), except that the individual may not challenge the casting, tabulation, canvassing, or processing of any ballot in the election.

"(3) EXCEPTION FOR CANDIDATES AND LAW ENFORCEMENT OFFICERS.—The chief State election official of the District of Columbia may not provide an individual who is a candidate in the election or a law enforcement officer with credentials to serve as a poll watcher, as described in subparagraph (A) or (B) of subsection (b)(2).

"(d) AUTHORITY OF MEMBERS OF PUBLIC TO OBSERVE TESTING OF EQUIPMENT.—In addition to the authority of individuals to observe procedures under subsections (b) and (c), any member of the public may observe the testing of election equipment by election officials prior to the date of the election.

"(e) PROHIBITING LIMITS ON ABILITY TO VIEW PROCEDURES.—An election official may not obstruct the ability of an individual who is authorized to observe an election procedure under this section to view the procedure as it is being carried out.

"(f) PROHIBITION AGAINST CERTAIN RESTRICTIONS.—An election official may not require that an individual who observes election procedures under this section stays more than 3 feet away from the procedure as it is being carried out.

"SEC. 330. REQUIREMENTS FOR VOTING BY MAIL-IN BALLOT.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Mail Balloting Reform Act'.

"(b) PROHIBITING TRANSMISSION OF UNSOLICITED BALLOTS.—The District of Columbia may not transmit an absentee or other mail-in ballot for a District of Columbia election to any individual who does not request the District of Columbia to transmit the ballot.

"(c) SIGNATURE VERIFICATION.—

"(1) INCLUSION OF CERTIFICATE WITH BALLOT.—The District of Columbia shall include with each absentee or other mail-in ballot transmitted for a District of Columbia election a certificate of transmission which may be signed by the individual for whom the ballot is transmitted.

"(2) REQUIRING VERIFICATION FOR BALLOT TO BE COUNTED.—Except as provided in subsection (d), the District of Columbia may not accept an absentee or other mail-in ballot for a District of Columbia election unless—

"(A) the individual for whom the ballot was transmitted—

"(i) signs and dates the certificate of transmission included with the ballot under paragraph (1); and

"(ii) includes the signed certification with the ballot and the date on such certification is accurate and in no case later than the date of the election; and

"(B) the individual's signature on the ballot matches the signature of the individual on the official list of registered voters in the District of Columbia or other official record or document used by the District of Columbia to verify the signatures of voters.

"(d) NOTICE AND OPPORTUNITY TO CURE.—

"(1) NOTICE AND OPPORTUNITY TO CURE DISCREPANCY IN SIGNATURES.—If an individual submits an absentee or other mail-in ballot for a District of Columbia election and the appropriate District of Columbia election official determines that a discrepancy exists between the signature on such ballot and the signature of such individual on the official list of registered voters in the District of Columbia or other official record or document used by the District of Columbia to verify the signatures of voters, such election official, prior to making a final

determination as to the validity of such ballot, shall—

"(A) make a good faith effort to immediately notify the individual by mail, telephone, or (if available) text message and electronic mail that—

"(i) a discrepancy exists between the signature on such ballot and the signature of the individual on the official list of registered voters in the District of Columbia or other official record or document used by the District of Columbia to verify the signatures of voters; and

"(ii) if such discrepancy is not cured prior to the expiration of the 48-hour period which begins on the date the official notifies the individual of the discrepancy, such ballot will not be counted; and

"(B) cure such discrepancy and count the ballot if, prior to the expiration of the 48-hour period described in subparagraph (A)(ii), the individual provides the official with information to cure such discrepancy, either in person, by telephone, or by electronic methods.

"(2) NOTICE AND OPPORTUNITY TO CURE MISSING SIGNATURE OR OTHER DEFECT.—If an individual submits an absentee or other mail-in ballot for a District of Columbia election without a signature on the ballot or the certificate of transmission included with the ballot under subsection (c)(1) or submits an absentee ballot with another defect which, if left uncured, would cause the ballot to not be counted, the appropriate District of Columbia election official, prior to making a final determination as to the validity of the ballot, shall—

"(A) make a good faith effort to immediately notify the individual by mail, telephone, or (if available) text message and electronic mail that—

"(i) the ballot or certificate of transmission did not include a signature or has some other defect; and

"(ii) if the individual does not provide the missing signature or cure the other defect prior to the expiration of the 48-hour period which begins on the date the official notifies the individual that the ballot or certificate of transmission did not include

a signature or has some other defect, such ballot will not be counted; and

"(B) count the ballot if, prior to the expiration of the 48-hour period described in subparagraph (A)(ii), the individual provides the official with the missing signature on a form proscribed by the District of Columbia or cures the other defect.

This paragraph does not apply with respect to a defect consisting of the failure of a ballot to meet the applicable deadline for the acceptance of the ballot, as described in subsection (e).

"(e) DEADLINE FOR ACCEPTANCE.—

"(1) DEADLINE.—Except as provided in paragraph (2), the District of Columbia may not accept an absentee or other mail-in ballot for a District of Columbia election which is received by the appropriate election official following the close of polls on Election Day.

"(2) EXCEPTION FOR ABSENT MILITARY AND OVERSEAS VOTERS.—Paragraph (1) does not apply to a ballot cast by an individual who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.).

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed as prohibiting the District of Columbia from accepting an absentee or other mail-in ballot for a District of Columbia election that is delivered in person by the voter to an election official at an appropriate polling place or the District of Columbia Board of Elections if such ballot is received by the election official by the deadline described in paragraph (1).

"SEC. 331. REQUIREMENTS WITH RESPECT TO USE OF DROP BOXES.

"(a) SHORT TITLE.—This section may be cited as the 'American Confidence in Elections: District of Columbia Ballot Security Act'.

"(b) REQUIREMENTS.—With respect to a District of Columbia election, the District of Columbia may not use a drop box to accept a voted absentee or other mail-in ballot for any such election unless—

"(1) any such drop box is located inside a District of Columbia government building or facility;

"(2) the District of Columbia provides for the security of any such drop box through 24-hour remote or electronic surveillance; and

"(3) the District of Columbia Board of Elections collects any ballot deposited in any such drop

box each day after 5:00 p.m. (local time) during the period of the election.

"SEC. 332. SPECIAL RULE WITH RESPECT TO APPLICATION OF REQUIREMENTS TO FEDERAL ELECTIONS.

"With respect to an election for Federal office in the District of Columbia, to the extent that there is any inconsistency with the requirements of this subtitle and the requirements of subtitle A, the requirements of this subtitle shall apply.

"SEC. 333. DISTRICT OF COLUMBIA ELECTION DEFINED.

"In this subtitle, the term 'District of Columbia election' means any election for public office in the District of Columbia, including an election for Federal office, and any ballot initiative or referendum.".

(b) CONFORMING AMENDMENT RELATING TO ENFORCEMENT.—Section 401 of such Act (52 U.S.C. 21111) is amended by striking the period at the end and inserting the following: ", and the requirements of subtitle C with respect to the District of Columbia.".

(c) CLERICAL AMENDMENT.—The table of contents of such Act is amended by adding at the end of the items relating to title III the following:

"Subtitle C—Requirements for Elections in District of Columbia

"Sec. 321. Statement of Congressional authority; findings.
"Sec. 322. Requirements for photo identification.
"Sec. 323. Requirements for voter registration.
"Sec. 324. Ban on collection and transmission of ballots by certain third parties.

"Sec. 325. Timely processing and reporting of results.
"Sec. 326. Ban on noncitizen voting.
"Sec. 327. Requirements with respect to provisional ballots.
"Sec. 328. Mandatory post-election audits.
"Sec. 329. Public observation of election procedures.
"Sec. 330. Requirements for voting by mail-in ballot.
"Sec. 331. Requirements with respect to use of drop boxes.
"Sec. 332. Special rule with respect to application of requirements to Federal elections.
"Sec. 333. District of Columbia election defined.

SEC. 143. EFFECTIVE DATE.

The amendments made by this subtitle shall apply with respect to District of Columbia elections held on or after January 1, 2024. For purposes of this section, the term "District of Columbia election" has the meaning given such term in section 333 of the Help America Vote Act of 2002, as added by section 142(a).

Subtitle E—Administration of the Election Assistance Commission

SEC. 151. SHORT TITLE.

This subtitle may be cited as the "Positioning the Election Assistance Commission for the Future Act of 2022".

SEC. 152. FINDINGS RELATING TO THE ADMINISTRATION OF THE ELECTION ASSISTANCE COMMISSION.

Congress finds the following:

(1) The Election Assistance Commission best serves the American people when operating within its core statutory functions, including serving as a clearinghouse for information on election administra-

tion, providing grants, and testing and certifying election equipment.

(2) The American people are best served when Federal agency election assistance is offered by a single agency with expertise in this space. The Election Assistance Commission, composed of four election experts from different political parties, is best situated among the Federal government agencies to offer assistance services to citizens and to guide other Federal agencies that have responsibilities in the elections space. The Commission is also best suited to determine the timing of the issuance of any advisories and to disburse all appropriated election grant funding.

(3) To this end, Congress finds that the Election Assistance Commission should be viewed as the lead Federal government agency on all election administration matters, and other Federal agencies operating in this space should look to the Commission for guidance, direction, and support on election administration-related issues.

SEC. 153. REQUIREMENTS WITH RESPECT TO STAFF AND FUNDING OF THE ELECTION ASSISTANCE COMMISSION.

(a) STAFF.—Section 204(a)(5) of the Help America Vote Act of 2002 (52 U.S.C. 20924(a)(5)) is amended by striking "of such additional personnel" and inserting "of not more than 55 full-time equivalent employees to carry out the duties and responsibilities under this Act and the additional duties and responsibilities required under the American Confidence in Elections Act".

(b) FUNDING.—Section 210 of the Help America Vote Act of 2002 (52 U.S.C. 20930) is amended—

(1) by striking "for each of the fiscal years 2003 through 2005" and inserting "for each of the fiscal years 2023 through 2025"; and

(2) by striking "(but not to exceed $10,000,000 for each such year)" and inserting "(but not to exceed $25,000,000 for each such year)".

(c) PROHIBITION ON CERTAIN USE OF FUNDS.—

(1) PROHIBITION.—None of the funds authorized to be appropriated or otherwise made available under subsection (b) may be obligated or expended for the operation of an advisory committee established by the Election Assistance Commission pursuant to and in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2),

except with respect to the operation of the Local Leadership Council.

(2) NO EFFECT ON ENTITIES ESTABLISHED BY HELP AMERICA VOTE ACT OF 2002.—Paragraph (1) does not apply with respect to the operation of any entity established by the Help America Vote Act of 2002, including the Election Assistance Commission Standards Board, the Election Assistance Commission Board of Advisors, and the Technical Guidelines Development Committee.

(d) REQUIREMENTS WITH RESPECT TO COMPENSATION OF MEMBERS OF THE COMMISSION.—Section 203(d) of the Help America Vote Act of 2002 (52 U.S.C. 20923(d)) is amended—

(1) in paragraph (1), by striking "at the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code" and inserting "at an annual rate of basic pay equal to the amount of $186,300, as adjusted under section 5318 of title 5, United States Code, in the same manner as the annual rate of pay for positions at each level of the Executive Schedule";

(2) in paragraph (2), by striking ''No member appointed'' and inserting ''Except as provided in paragraph (3), no member appointed''; and

(3) by adding at the end the following new paragraph:

''(3) SUPPLEMENTAL EMPLOYMENT AND COMPENSATION.—An individual serving a term of service on the Commission shall be permitted to hold a position at an institution of higher education (as such term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) if—

''(A) the Inspector General of the Election Assistance Commission determines that such position does not create a conflict of interest with the individual's position as a sitting member of the Commission and grants the individual approval to hold the position; and

''(B) the annual rate of compensation received by the individual from such institution is not greater than the amount equal to 49.9% of the annual rate of basic pay paid to the individual under paragraph (1).''.

(e) OFFICE OF INSPECTOR GENERAL.—Section 204 of the Help America Vote Act of 2002 (52 U.S.C. 20924)

is amended by adding at the end the following new subsection:

"(f) OFFICE OF INSPECTOR GENERAL.—The Inspector General of the Election Assistance Commission may appoint not more than 7 full-time equivalent employees to assist the Inspector General to carry out the duties and responsibilities under section 4 of the Inspector General Act of 1978 (5 U.S.C. App. 4), of whom 2 shall have primarily administrative duties and responsibilities.".

(f) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on October 1, 2022.

SEC. 154. EXCLUSIVE AUTHORITY OF ELECTION ASSISTANCE COMMISSION TO MAKE ELECTION ADMINISTRATION PAYMENTS TO STATES.

(a) IN GENERAL.—No entity of the Federal Government other than the Election Assistance Commission may make any payment to a State for purposes of administering elections for Federal office, including obtaining election and voting equipment and infrastructure, enhancing election and voting technology, and making election and voting security improvements, including with respect to cybersecurity and infrastructure.

(b) EFFECTIVE DATE.—Subsection (a) shall apply with respect to payments made on or after the date of the enactment of this Act.

SEC. 155. EXECUTIVE BOARD OF THE STANDARDS BOARD AUTHORITY TO ENTER INTO CONTRACTS.

Section 213(c) of the Help America Vote Act of 2002 (52 U.S.C. 20943(c)) is amended by adding at the end the following new paragraph:

"(5) AUTHORITY TO ENTER INTO CONTRACTS.—The Executive Board of the Standards Board may, using amounts already made available to the Commission, enter into contracts to employ and retain no more than 2 individuals to enable the Standards Board to discharge its duties with respect to the examination and release of voluntary considerations with respect to the administration of elections for Federal offices by the States under section 247, except that—

"(A) no more than 1 individual from the same political party may be employed under such contracts at the same time;

"(B) the authority to enter into such contracts shall end on the earlier of the date of the release of the considerations or December 31, 2023; and

"(C) no additional funds may be appropriated to the Commission for the purposes of carrying out this paragraph.".

SEC. 156. ELECTION ASSISTANCE COMMISSION PRIMARY ROLE IN ELECTION ADMINISTRATION.

Except as provided in any other provision of law, the Election Assistance Commission shall, with respect to any other entity of the Federal Government, have primary jurisdiction to address issues with respect to the administration of elections for Federal office.

Subtitle F—Prohibition on Involvement in Elections by Foreign Nationals

SEC. 161. PROHIBITION ON CONTRIBUTIONS AND DONATIONS BY FOREIGN NATIONALS IN CONNECTION WITH BALLOT INITIATIVES AND REFERENDA.

(a) SHORT TITLE.—This section may be cited as the "Keeping Foreign Money out of Ballot Measures Act of 2022".

(b) IN GENERAL.—Chapter 29 of title 18, United States Code, is amended by adding at the end the following new section:

"§ 612. Foreign nationals making certain political contributions

"(a) PROHIBITION.—It shall be unlawful for a foreign national, directly or indirectly, to make a contribution as such term is defined in section 301(8)(A) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(8)(A)) or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a State or local ballot initiative or referendum.

"(b) PENALTY.—Any person who violates subsection (a) shall be fined not more than the greater of $10,000 or 300 percent of the amount of the contribution or value of the donation of money or other thing of value made by the person, imprisoned for not more than 1 year, or both.

"(c) FOREIGN NATIONAL DEFINED.—In this section, the term 'foreign national' has the meaning given such term in section 319(b) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30121(b)).".

(c) CLERICAL AMENDMENT.—The table of sections for chapter 29 of title 18, United States Code, is amended by adding at the end the following new item:

"612. Foreign nationals making certain political contributions.".

(d) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to contributions and

donations made on or after the date of the enactment of this Act.

Subtitle G—Constitutional Experts Panel With Respect to Presidential Elections

SEC. 171. SHORT TITLE.

This subtitle may be cited as the ''Solving an Overlooked Loophole in Votes for Executives (SOLVE) Act''.

SEC. 172. ESTABLISHMENT OF PANEL OF CONSTITUTIONAL EXPERTS.

(a) ESTABLISHMENT.—There is established the ''Twentieth Amendment Section Four Panel'' (in this section referred to as the ''Panel'').

(b) MEMBERSHIP.—

(1) IN GENERAL.—The Panel shall be composed of 6 constitutional experts, of whom—

(A) 1 shall be appointed by the majority leader of the Senate;

(B) 1 shall be appointed by the minority leader of the Senate;

(C) 1 shall be appointed jointly by the majority and minority leader of the Senate;

(D) 1 shall be appointed by the Speaker of the House of Representatives;

(E) 1 shall be appointed by minority leader of the House of Representatives; and

(F) 1 shall be appointed jointly by the Speaker of the House of Representatives and the minority leader of the House of Representatives.

(2) DATE.—The appointments of the members of the Panel shall be made not later than 180 days after the date of enactment of this Act.

(3) VACANCY.—Any vacancy occurring in the membership of the Panel shall be filled in the same manner in which the original appointment was made.

(4) CHAIRPERSON AND VICE CHAIRPERSON.—The Panel shall select a Chairperson and Vice Chairperson from among the members of the Panel.

(c) PURPOSE.—The purpose of the Panel shall be to recommend to Congress model legislation, which shall provide for an appropriate process, pursuant to section 4 of the Twentieth Amendment to the United States Constitution, to resolve any vacancy created by the death of a candidate in a contingent presidential or vice-presidential election.

(d) REPORTS.—

(1) INITIAL REPORT.—Not later than 1 year after the date on which all of the appointments have been made under subsection (b)(2), the Panel shall submit to Congress an interim report containing the Panel's findings, conclusions, and recommendations.

(2) FINAL REPORT.—Not later than 6 months after the submission of the interim report under paragraph (1), the Panel shall submit to Congress a final report containing the Panel's findings, conclusions, and recommendations.

(e) MEETINGS; INFORMATION.—

(1) IN GENERAL.—Meetings of the Panel shall be held at the Law Library of Congress.

(2) INFORMATION.—The Panel may secure from the Law Library of Congress such information as the Panel considers necessary to carry out the provisions of this section.

(f) FUNDS.—

(1) COMPENSATION OF MEMBERS.—Members of the Panel shall receive no compensation.

(2) OTHER FUNDING.—No amounts shall be appropriated for the purposes of this section, except for any amounts strictly necessary for the Law Library of Congress to execute its responsibilities under subsection (e).

(g) TERMINATION.—

(1) IN GENERAL.—The panel established under subsection (a) shall terminate 90 days after the date on which the panel submits the final report required under subsection (d)(2).

(2) RECORDS.—Upon termination of the panel, all of its records shall become the records of the Secretary of the Senate and the Clerk of the House of Representatives.

TITLE II—MILITARY VOTING ADMINISTRATION

Subtitle A—Findings Relating to Military Voting

SEC. 201. FINDINGS RELATING TO MILITARY VOTING.

Congress finds the following:

(1) Participation in the voting process by Americans who serve in the Armed Forces is vital to the future of the Republic; however, due to the realities of service around the globe and despite many best efforts, the nation has not always lived up to its commitment to servicemembers that their vote be counted.

(2) The Military and Overseas Empowerment (MOVE) Act made great progress in solving problems with voting that many servicemembers faced.

Yet, for many, it is still difficult to exercise the franchise, with many ballots not reaching State elections officials until after the deadline, negating their voice. After 13 years, Congress must address the remaining issues.

(3) Congress finds that it is a moral imperative of national importance that every eligible American servicemember has the opportunity to cast a ballot in each election and, not only that such ballot be received in time to be counted, but that it actually be counted according to law.

Subtitle B—GAO Analysis on Military Voting Access

SEC. 211. GAO ANALYSIS AND REPORT ON EFFECTIVENESS OF FEDERAL GOVERNMENT IN MEETING OBLIGATIONS TO PROMOTE VOTING ACCESS FOR ABSENT UNIFORMED SERVICES VOTERS.

(a) ANALYSIS.—The Comptroller General of the United States shall conduct an analysis with respect to the effectiveness of the Federal government in carrying out its responsibilities under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.) to promote access to voting for absent uniformed services voters (as such term is defined in section 107 of such Act (52 U.S.C. 20310)).

(b) REPORT.—Not later than December 31, 2023, the Comptroller General shall submit to the chair and ranking minority member of the Committee on House Administration of the House of Representatives and the chair and ranking minority member of the Committee on Rules and Administration of the Senate a report that contains the results of the analysis required by subsection (a).

TITLE III—PROTECTION OF POLITICAL SPEECH AND CAMPAIGN FINANCE REFORM

Subtitle A—Protecting Political Speech

SECTION 301. FINDINGS.

Congress finds the following:

(1) The structure of the Constitution and its amendments represents the radical idea that any sovereign power exercised by the federal government flows either directly from the people or through the States they established to govern themselves. In the words of the Ninth and Tenth Amendments, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." "The powers not delegated to the United States by the Constitution, nor prohib-

ited by it to the States, are reserved to the States respectively, or to the people."

(2) Among the many freedoms it protects, the First Amendment prevents Congress from making any law abridging the freedom of speech, the right of the people peaceably to assemble, or the right of the people to petition the Government for the redress of grievances.

(3) Any proposed federal action concerning freedom of speech, protest, or petition must start with an analysis of the First Amendment. Congress must ask whether the proposed action would abridge these freedoms, and any uncertainty must be determined in favor of fewer restrictions on speech.

(4) In particular, political speech, uttered in the furtherance of self-government, must raise an even higher bar to congressional abridgement. The mechanisms and media used to offer political speech must realize the same protections.

(5) As the Supreme Court has recognized, the Constitution grants Congress only a very narrow interest in the regulation of political speech, the prevention of corruption or the appearance of corruption.

(6) In order to uphold and effectuate the Constitution, any federal statute that goes beyond this interest must be repealed, and Congress must exercise its Article 1 authorities to do so.

SEC. 302. REPEAL OF LIMITS ON COORDINATED POLITICAL PARTY EXPENDITURES.

(a) REPEAL OF LIMITS.—Section 315(d) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30116(d)) is amended—

(1) in paragraph (1)—

(A) by striking "may make expenditures" and inserting "may make expenditures, including coordinated expenditures,", and

(B) by striking "Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection" and inserting "Federal office in any amount"; and

(2) by striking paragraphs (2), (3), (4), and (5).

(b) CLARIFYING TREATMENT OF CERTAIN PARTY COMMUNICATIONS AS COORDINATED EXPENDITURES.—Section 315(d) of such Act (52 U.S.C. 30116(d)), as amended by subsection (a), is amended by adding at the end the following new paragraph:

"(2) For purposes of this subsection, if a public communication paid for by a committee of a political party or its agent refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction, the communication shall be treated as a coordinated expenditure in connection with the campaign of a candidate for purposes of this subsection.".

(c) CONFORMING AMENDMENT RELATING TO INDEXING.—Section 315(c) of such Act (52 U.S.C. 30116(c)) is amended—

(1) in paragraph (1)(B)(i), by striking "(d),"; and

(2) in paragraph (2)(B)(i), by striking "subsections (b) and (d)" and inserting "subsection (b)".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 303. REPEAL OF LIMIT ON AGGREGATE CONTRIBUTIONS BY INDIVIDUALS.

(a) FINDINGS.—Congress finds that the Supreme Court of the United States in *McCutcheon v. FEC*, 572 U.S. 185 (2014) determined the biennial aggregate limits under section 315(a)(3) of the Federal Election Campaign

Act of 1971 (52 U.S.C. 30116(a)(3)) to be unconstitutional.

(b) REPEAL.—Section 315(a) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30116(a)) is amended by striking paragraph (3).

(c) CONFORMING AMENDMENTS.—Section 315(c) of such Act (52 U.S.C. 30116(c)) is amended by striking "(a)(3)," each place it appears in paragraph (1)(B)(i), (1)(C), and (2)(B)(ii).

SEC. 304. EQUALIZATION OF CONTRIBUTION LIMITS TO STATE AND NATIONAL POLITICAL PARTY COMMITTEES.

(a) IN GENERAL.—Section 315(a)(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30116(a)(1)) is amended—

(1) in subparagraph (B), by striking "a national political party" and inserting "a national or State political party";

(2) by adding "or" at the end of subparagraph (B);

(3) in subparagraph (C), by striking "; or" and inserting a period; and

(4) by striking subparagraph (D).

(b) CONTRIBUTIONS BY MULTICANDIDATE POLITICAL COMMITTEES.—

(1) IN GENERAL.—Section 315(a)(2)(B) of such Act (52 U.S.C. 30116(a)(2)(B)) is amended by striking ''a national political party'' and inserting ''a national or State political party''.

(2) PRICE INDEX ADJUSTMENT.—Section 315(c) of such Act (52 U.S.C. 30116(c)) is amended—

(A) in paragraph (1), by adding at the end the following new subparagraph:

''(D) In any calendar year after 2022—

''(i) a threshold established by subsection (a)(2) shall be increased by the percent difference determined under subparagraph (A);

''(ii) each amount so increased shall remain in effect for the calendar year; and

''(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.''; and

(B) in paragraph (2)(B)—

(i) in clause (i), by striking ''and'' at the end;

(ii) in clause (ii), by striking the period at the end and inserting ''; and''; and

(iii) by adding at the end the following new clause:

"(iii) for purposes of subsection (a)(2), calendar year 2022.".

(c) ACCEPTANCE OF ADDITIONAL AMOUNTS FOR CERTAIN ACCOUNTS.—

(1) PERMITTING ACCEPTANCE OF ADDITIONAL AMOUNTS IN SAME MANNER AS NATIONAL PARTIES.—Section 315(a) of such Act (52 U.S.C. 30116(a)) is amended—

(A) in paragraph (1)(B), by striking "paragraph (9)" and inserting "paragraph (9) or paragraph (10)"; and

(B) in paragraph (2)(B), by striking "paragraph (9)" and inserting "paragraph (9) or paragraph (10)".

(2) ACCOUNTS.—Section 315(a)(9) of such Act (52 U.S.C. 30116(a)(9)) is amended by striking "national committee of a political party" each place it appears in subparagraphs (A), (B), and (C) and inserting "committee of a national or State political party".

(3) STATE PARTY CONVENTION ACCOUNTS DESCRIBED.—Section 315(a) of such Act (52 U.S.C.

30116(a)) is amended by adding at the end the following new paragraph:

"(10) An account described in this paragraph is a separate, segregated account of a political committee established and maintained by a State committee of a political party which is used solely to defray—

"(A) expenses incurred with respect to carrying out State party nominating activities or other party-building conventions; or

"(B) expenses incurred with respect to providing for the attendance of delegates at a presidential nominating convention, but only to the extent that such expenses are not paid for from the account described in paragraph (9)(A).".

(d) CLARIFICATION OF INDEXING OF AMOUNTS TO ENSURE EQUALIZATION OF PARTY CONTRIBUTION LIMITS.—For purposes of applying section 315(c) of such Act (52 U.S.C. 30116(c)) to limits on the amount of contributions to political committees established and maintained by a State political party, the amendments made by this section shall be considered to have been included in section 307 of the Bipartisan Campaign Reform Act of 2002 (Public Law 107–55; 116 Stat. 102).

(e) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 305. EXPANSION OF PERMISSIBLE FEDERAL ELECTION ACTIVITY BY STATE AND LOCAL POLITICAL PARTIES.

(a) EXPANSION OF PERMISSIBLE USE OF FUNDS NOT SUBJECT TO CONTRIBUTION LIMITS OR SOURCE PROHIBITIONS BY STATE AND LOCAL POLITICAL PARTIES FOR FEDERAL ELECTION ACTIVITY.—Section 323(b)(2) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30125(b)(2)) is amended to read as follows:

"(2) APPLICABILITY.—Notwithstanding section 301(20), for purposes of paragraph (1), an amount that is expended or disbursed by a State, district, or local committee of a political party shall be considered to be expended or disbursed for Federal election activity only if the committee coordinated the expenditure or disbursement of the amount with a candidate for election for Federal office or an authorized committee of a candidate for election for Federal office.".

(b) CONFORMING AMENDMENTS.—

(1) FUNDRAISING COSTS.—Section 323(c) of such Act (52 U.S.C. 30125(c)) is amended by add-

ing at the end the following new sentence: ''In the case of a person described in subsection (b), the previous sentence applies only if the amount was spent by such person in coordination with a candidate for election for Federal office or an authorized committee of a candidate for election for Federal office, as determined pursuant to regulations promulgated by the Commission for the purpose of determining whether a political party communication is coordinated with a candidate, a candidate's authorized committee, or an agent thereof.''.

(2) APPEARANCE OF FEDERAL CANDIDATES OR OFFICEHOLDERS AT FUNDRAISING EVENTS.—Section 323(e)(3) of such Act (52 U.S.C. 30125(e)(3)) is amended by striking ''subsection (b)(2)(C)'' and inserting ''subsection (b)''.

SEC. 306. PARTICIPATION IN JOINT FUNDRAISING ACTIVITIES BY MULTIPLE POLITICAL COMMITTEES.

(a) FINDINGS.—Congress finds the following:

(1) While federal law permits the Federal Election Commission to engage in certain ''gap-filling'' activities as it administers the Federal Election Campaign Act of 1971, the regulations promulgated by the Federal Election Commission to govern joint fundraising activities of multiple political committees

are not tied specifically to any particular provision of the Act, and while these regulations generally duplicate the provisions of the Act, they also impose additional and unnecessary burdens on political committees which seek to engage in joint fundraising activities, such as a requirement for written agreements between the participating committees.

(2) It is therefore not necessary at this time to direct the Federal Election Commission to repeal the existing regulations which govern joint fundraising activities of multiple political committees, as some political committees may have reasons for following the provisions of such regulations which impose additional and unnecessary burdens on these activities.

(b) CRITERIA FOR PARTICIPATION IN JOINT FUNDRAISING ACTIVITIES.—Section 302 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30102) is amended by adding at the end the following new subsection:

"(j) CRITERIA FOR PARTICIPATION IN JOINT FUNDRAISING ACTIVITIES BY MULTIPLE POLITICAL COMMITTEES.—

"(1) CRITERIA DESCRIBED.—Two or more political committees as defined in this Act may participate in joint fundraising activities in accordance with the following criteria:

"(A) The costs of the activities shall be allocated among and paid for by the participating committees on the basis of the allocation among the participating committees of the contributions received as a result of the activities.

"(B) Notwithstanding subparagraph (A), a participating committee may make a payment (in whole or in part) for the portion of the costs of the activities which is allocated to another participating committee, and the amount of any such payment shall be treated as a contribution made by the committee to the other participating committee.

"(C) The provisions of section 315(a)(8) regarding the treatment of contributions to a candidate which are earmarked or otherwise directed through an intermediary or conduit shall apply to contributions made by a person to a participating committee which are allocated by the committee to another participating committee.

"(2) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to prohibit two or more political committees from participating in joint fundraising activities by designating or establishing

a separate, joint committee subject to the registration and reporting requirements of this Act or by publishing a joint fundraising notice.''.

SEC. 307. PROTECTING PRIVACY OF DONORS TO TAX-EXEMPT ORGANIZATIONS.

(a) SHORT TITLE.—This section may be cited as the ''Speech Privacy Act of 2022''.

(b) RESTRICTIONS ON COLLECTION OF DONOR INFORMATION.—

(1) RESTRICTIONS.—An entity of the Federal government may not collect or require the submission of information on the identification of any donor to a tax-exempt organization.

(2) EXCEPTIONS.—Paragraph (1) does not apply to the following:

(A) The Internal Revenue Service, acting lawfully pursuant to section 6033 of the Internal Revenue Code of 1986 or any successor provision.

(B) The Secretary of the Senate and the Clerk of the House of Representatives, acting lawfully pursuant to section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1604).

(C) The Federal Election Commission, acting lawfully pursuant to section 510 of title 36, United States Code.

(D) An entity acting pursuant to a lawful order of a court or administrative body which has the authority under law to direct the entity to collect or require the submission of the information, but only to the extent permitted by the lawful order of such court or administrative body.

(c) RESTRICTIONS ON RELEASE OF DONOR INFORMATION.—

(1) RESTRICTIONS.—An entity of the Federal government may not disclose to the public information revealing the identification of any donor to a tax-exempt organization.

(2) EXCEPTIONS.—Paragraph (1) does not apply to the following:

(A) The Internal Revenue Service, acting lawfully pursuant to section 6104 of the Internal Revenue Code of 1986 or any successor provision.

(B) The Secretary of the Senate and the Clerk of the House of Representatives, acting

lawfully pursuant to section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1604).

(C) The Federal Election Commission, acting lawfully pursuant to section 510 of title 36, United States Code.

(D) An entity acting pursuant to a lawful order of a court or administrative body which has the authority under law to direct the entity to disclose the information, but only to the extent permitted by the lawful order of such court or administrative body.

(E) An entity which discloses the information as authorized by the organization.

(d) TAX-EXEMPT ORGANIZATION DEFINED.—In this section, a ''tax-exempt organization'' means an organization which is described in section 501(c) of the Internal Revenue Code of 1986 and is exempt from taxation under section 501(a) of such Code. Nothing in this subsection may be construed to treat a political organization under section 527 of such Code as a tax-exempt organization for purposes of this section.

(e) PENALTIES.—It shall be unlawful for any officer or employee of the United States, or any former officer or employee, willfully to disclose to any person, except as authorized in this section, any information revealing the

identification of any donor to a tax-exempt organization. Any violation of this section shall be a felony punishable upon conviction by a fine in any amount not exceeding $250,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

SEC. 308. REPORTING REQUIREMENTS FOR TAX-EXEMPT ORGANIZATIONS.

(a) SHORT TITLE.—This section may be cited as the "Don't Weaponize the IRS Act".

(b) ORGANIZATIONS EXEMPT FROM REPORTING.—

(1) GROSS RECEIPTS THRESHOLD.—Clause (ii) of section 6033(a)(3)(A) of the Internal Revenue Code of 1986 is amended by striking "$5,000" and inserting "$50,000".

(2) ORGANIZATIONS DESCRIBED.—Subparagraph (C) of section 6033(a)(3) of the Internal Revenue Code of 1986 is amended—

(A) by striking "and" at the end of clause (v),

(B) by striking the period at the end of clause (vi) and inserting a semicolon, and

(C) by adding at the end the following new clauses:

"(vii) any other organization described in section 501(c) (other than a private foundation or a supporting organization described in section 509(a)(3)); and

"(viii) any organization (other than a private foundation or a supporting organization described in section 509(a)(3)) which is not described in section 170(c)(2)(A), or which is created or organized in a possession of the United States, which has no significant activity (including lobbying and political activity and the operation of a trade or business) other than investment activity in the United States.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable years ending after the date of the enactment of this Act.

(c) CLARIFICATION OF APPLICATION TO SECTION 527 ORGANIZATIONS.—

(1) IN GENERAL.—Paragraph (1) of section 6033(g) of the Internal Revenue Code of 1986 is amended—

(A) by striking ''This section'' and inserting ''Except as otherwise provided by this subsection, this section'', and

(B) by striking ''for the taxable year.'' and inserting ''for the taxable year in the same manner as to an organization exempt from taxation under section 501(a).''.

(2) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable years ending after the date of the enactment of this Act.

(d) REPORTING OF NAMES AND ADDRESSES OF CONTRIBUTORS.—

(1) IN GENERAL.—Paragraph (1) of section 6033(a) of the Internal Revenue Code of 1986 is amended by adding at the end the following: ''Except as provided in subsections (b)(5) and (g)(2)(B), such annual return shall not be required to include the names and addresses of contributors to the organization.''.

(2) APPLICATION TO SECTION 527 ORGANIZATIONS.—Paragraph (2) of section 6033(g) of the Internal Revenue Code of 1986 is amended—

(A) by striking ''and'' at the end of subparagraph (A),

(B) by redesignating subparagraph (B) as subparagraph (C), and

(C) by inserting after subparagraph (A) the following new subparagraph:

"(B) containing the names and addresses of all substantial contributors, and".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable years ending after the date of the enactment of this Act.

SEC. 309. MAINTENANCE OF STANDARDS FOR DETERMINING ELIGIBILITY OF SECTION 501(C)(4) ORGANIZATIONS.

(a) IN GENERAL.—The Department of the Treasury, including the Internal Revenue Service, may not issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71535 (November 29, 2013)).

(b) APPLICATION OF CURRENT STANDARDS AND DEFINITIONS.—The standard and definitions as in effect on January 1, 2010, which are used to make determinations described in subsection (a) shall apply after the date

of the enactment of this Act for purposes of determining status under section 501(c)(4) of such Code of organizations created on, before, or after such date.

SEC. 310. INCREASED FUNDING FOR THE 10–YEAR PEDIATRIC RESEARCH INITIATIVE FUND.

(a) SHORT TITLE.—This section may be cited as the "Jonny Wade Pediatric Cancer Research Act".

(b) FINDINGS RELATING TO PEDIATRIC CANCER.—Congress finds that pediatric cancer—

(1) kills over 100,000 children annually worldwide;

(2) reduces a child's life expectancy by 69 years once diagnosed;

(3) increases the likelihood of a secondary cancer;

(4) is the leading cause of death by disease in children;

(5) affects over 300,000 children annually worldwide; and

(6) gives life-long adverse side effects to the patient.

(c) FINDINGS RELATING TO PEDIATRIC CANCER RESEARCH.—Congress finds that pediatric cancer research—

(1) increases new treatments for safety and effectiveness;

(2) increases the likelihood of identifying a secondary cancer after treatment;

(3) increases survival rates for children;

(4) increases the identity factors that may be associated with reducing risk;

(5) enhances our understanding of the fundamental mechanisms of cancer;

(6) increases survivorship research to reduce the long-term adverse effects of cancer and its treatment; and

(7) increases the ability to identify the likely causes of pediatric cancer.

(d) FINDINGS RELATING TO PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS.—Congress finds that—

(1) the Presidential Election Campaign Fund has a surplus of $392 million; and

(2) no major party candidate in the general Presidential election has accepted public financing since 2008.

(e) TERMINATION OF DESIGNATION OF INCOME TAX PAYMENTS.—Section 6096 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(d) TERMINATION.—This section shall not apply to taxable years beginning after December 31, 2022.".

(f) TERMINATION OF FUND AND ACCOUNT.—

(1) TERMINATION OF PRESIDENTIAL ELECTION CAMPAIGN FUND.—

(A) IN GENERAL.—Chapter 95 of subtitle H of such Code is amended by adding at the end the following new section:

"SEC. 9014. TERMINATION.

"The provisions of this chapter shall not apply with respect to any presidential election (or any presidential nominating convention) after the date of the enactment of this section, or to any candidate in such an election.".

(B) TRANSFER OF REMAINING FUNDS.—Section 9006 of such Code is amended by adding at the end the following new subsection:

"(d) TRANSFER OF FUNDS REMAINING AFTER TERMINATION.—The Secretary shall transfer the amounts in the fund as of the date of the enactment of this subsection to the 10–Year Pediatric Research Initiative Fund described in section 9008(c)(2), to be available as described in such section and to remain so available until expended.".

(2) TERMINATION OF ACCOUNT.—Chapter 96 of subtitle H of such Code is amended by adding at the end the following new section:

"SEC. 9043. TERMINATION.

"The provisions of this chapter shall not apply to any candidate with respect to any presidential election after the date of the enactment of this section.".

(g) PAYMENTS FOR PRESIDENTIAL NOMINATING CONVENTIONS.—Section 9008 of the Internal Revenue Code of 1986 is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking "under paragraph (3)";

(B) in paragraph (2), by striking "under paragraph (3)";

(C) by striking paragraph (3); and

(D) by redesignating paragraphs (4) and (5) as paragraphs (3) and (4);

(2) by striking subsections (c) through (h); and

(3) by redesignating subsection (i) as subsection (c).

(h) CLERICAL AMENDMENTS.—

(1) The table of sections for chapter 95 of subtitle H of such Code is amended by adding at the end the following new item:

"Sec. 9014. Termination.".

(2) The table of sections for chapter 96 of subtitle H of such Code is amended by adding at the end the following new item:

"Sec. 9043. Termination.".

(i) SENSE OF CONGRESS REGARDING NIH RESEARCH.—The Congress encourages the Director of the National Institutes of Health to oversee and coordinate research that is conducted or supported by the National Institutes of Health for research on pediatric cancer and other pediatric diseases and conditions, including through the 10–Year Pediatric Research Initiative Fund.

(j) AVOIDING REPLICATE.—Clause (ii) of section 402(b)(7)(B) of the Public Health Service Act (42 U.S.C. 282(b)(7)(B)) is amended by inserting "and shall prioritize such pediatric research that does not replicate existing research activities of the National Institutes of Health" before "; and".

Subtitle B—Prohibition on Use of Federal Funds for Congressional Campaigns

SEC. 311. PROHIBITING USE OF FEDERAL FUNDS FOR PAYMENTS IN SUPPORT OF CONGRESSIONAL CAMPAIGNS.

No Federal funds, including amounts attributable to the collection of fines and penalties, may be used to make any payment in support of a campaign for election for the

office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

Subtitle C—Registration and Reporting Requirements

SEC. 321. REPORTING REQUIREMENTS WITH RESPECT TO ELECTIONEERING COMMUNICATIONS.

Section 304(a)(11)(A)(i) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30104(a)(11)(A)(i)) is amended by inserting "or makes, or has reason to expect to make, electioneering communications" after "expenditures".

SEC. 322. INCREASED QUALIFYING THRESHOLD AND ESTABLISHING PURPOSE FOR POLITICAL COMMITTEES.

(a) IN GENERAL.—Section 301(4) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(4)) is amended to read as follows:

"(4) The term 'political committee' means—

"(A) any committee, club, association, or other group of persons, including any local committee of a political party, which receives contributions aggregating in excess of $25,000 during a calendar year or which makes expenditures aggregating in excess of $25,000 during a calendar year and which is under the control

of a candidate or has the major purpose of nominating or electing a candidate; or

"(B) any separate segregated fund established under the provisions of section 316(b).".

(b) DEFINITION.—Section 301 of such Act (52 U.S.C. 30101) is amended by adding at the end the following new paragraph:

"(27) MAJOR PURPOSE OF NOMINATING OR ELECTING A CANDIDATE.—The term 'major purpose of nominating or electing a candidate' means, with respect to a group of persons described in paragraph (4)(A)—

"(A) a group whose central organizational purpose is to expressly advocate for the nomination, election, or defeat of a candidate; or

"(B) a group for which the majority of its spending throughout its lifetime of existence has been on contributions, expenditures, or independent expenditures.".

(c) PRICE INDEX ADJUSTMENT FOR POLITICAL COMMITTEE THRESHOLD.—Section 315(c) of such Act (52 U.S.C. 30116(c)), as amended by section 304(b), is amended—

(1) in paragraph (1), by adding at the end the following new subparagraph:

"(E) In any calendar year after 2022—

"(i) a threshold established by sections 301(4)(A) or 301(4)(C) shall be increased by the percent difference determined under subparagraph (A);

"(ii) each amount so increased shall remain in effect for the calendar year; and

"(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100."; and

(2) in paragraph (2)(B)—

(A) in clause (ii), by striking "and" at the end;

(B) in clause (iii), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new clause:

"(iv) for purposes of sections 301(4)(A) and 301(4)(C), calendar year 2022.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 323. INCREASED THRESHOLD WITH RESPECT TO INDEPENDENT EXPENDITURE REPORTING REQUIREMENT.

(a) IN GENERAL.—Section 304(c)(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30104(c)(1)) is amended by striking "$250" and inserting "$1,000".

(b) PRICE INDEX ADJUSTMENT FOR INDEPENDENT EXPENDITURE REPORTING THRESHOLD.—Section 315(c) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30116(c)), as amended by sections 304(b) and 322(b), is amended—

(1) in paragraph (1), by adding at the end the following new subparagraph:

"(F) In any calendar year after 2022—

"(i) a threshold established by section 304(c)(1) shall be increased by the percent difference determined under subparagraph (A);

"(ii) each amount so increased shall remain in effect for the calendar year; and

"(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100."; and

(2) in paragraph (2)(B)—

(A) in clause (iii), by striking "and" at the end;

(B) in clause (iv), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new clause:

"(v) for purposes of section 304(e)(1), calendar year 2022.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 324. INCREASED QUALIFYING THRESHOLD WITH RESPECT TO CANDIDATES.

(a) INCREASE IN THRESHOLD.—Section 301(2) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(2)) is amended by striking "$5,000" each place it appears and inserting "$10,000".

(b) PRICE INDEX ADJUSTMENT FOR EXEMPTION OF CERTAIN AMOUNTS AS CONTRIBUTIONS.—Section 315(c) of such Act (52 U.S.C. 30116(c)), as amended by sections 304(b), 322(b), and 323(b), is amended—

(1) in paragraph (1), by adding at the end the following new subparagraph:

"(G) In any calendar year after 2022—

"(i) a threshold established by sections 301(2) shall be increased by the percent difference determined under subparagraph (A);

"(ii) each amount so increased shall remain for the 2-year period that begins on the first day following the date of the general election in the year preceding the year in which the amount is increased and ending on the date of the next general election; and

"(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100."; and

(2) in paragraph (2)(B)—

(A) in clause (iv), by striking "and" at the end;

(B) in clause (v), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new clause:

"(vi) for purposes of sections 301(2), calendar year 2022.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 325. REPEAL REQUIREMENT OF PERSONS MAKING INDEPENDENT EXPENDITURES TO REPORT IDENTIFICATION OF CERTAIN DONORS.

(a) REPEAL.—Section 304(c)(2) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30104(c)(2)) is amended—

(1) in subparagraph (A), by adding "and" at the end;

(2) in subparagraph (B), by striking "; and" and inserting a period; and

(3) by striking subparagraph (C).

(b) CONFORMING AMENDMENT.—Section 304(c)(1) of such Act (52 U.S.C. 30104(c)(1)) is amended by striking "the information required under subsection (b)(3)(A) for all contributions received by such person" and inserting "the information required under paragraph (2)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to independent expenditures made on or after the date of the enactment of this Act.

Subtitle D—Exclusion of Certain Amounts From Treatment as Contributions or Expenditures

SEC. 331. INCREASED THRESHOLD FOR EXEMPTION OF CERTAIN AMOUNTS AS CONTRIBUTIONS.

(a) REAL OR PERSONAL PROPERTY EXEMPTION.—Section 301(8)(B)(ii) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(8)(B)(ii)) is amended—

(1) by striking "$1,000" and inserting "$2,000"; and

(2) by striking "$2,000" and inserting "$4,000".

(b) TRAVEL EXPENSES EXEMPTION.—Section 301(8)(B)(iv) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(8)(B)(iv)) is amended—

(1) by striking "$1,000" and inserting "$2,000"; and

(2) by striking "$2,000" and inserting "$4,000".

(c) PRICE INDEX ADJUSTMENT FOR EXEMPTION OF CERTAIN AMOUNTS AS CONTRIBUTIONS.—Section 315(c) of such Act (52 U.S.C. 30116(c)), as amended by sections 304(b), 322(b), 323(b), and 324(b) is amended—

(1) in paragraph (1), by adding at the end the following new subparagraph:

"(H) In any calendar year after 2022—

"(i) the exemption amounts established by sections 301(8)(B)(ii) or 301(8)(B)(iv) shall be increased by the percent difference determined under subparagraph (A);

"(ii) each amount so increased shall remain for the 2-year period that begins on the first day following the date of the general election in the year preceding the year in which the amount is increased and ending on the date of the next general election; and

"(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100."; and

(2) in paragraph (2)(B)—

(A) in clause (v), by striking "and" at the end;

(B) in clause (vi), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new clause:

"(vii) for purposes of sections 301(8)(B)(ii) or 301(8)(B)(iv), calendar year 2022.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 332. EXEMPTION OF UNCOMPENSATED INTERNET COMMUNICATIONS FROM TREATMENT AS CONTRIBUTION OR EXPENDITURE.

(a) EXEMPTIONS.—

(1) EXEMPTION FROM TREATMENT AS CONTRIBUTION.—Section 301(8)(B) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(8)(B)) is amended—

(A) by striking "and" at the end of clause (xiii);

(B) by striking the period at the end of clause (xiv) and inserting "; and"; and

(C) by adding at the end the following new clause:

"(xv) any payment by any person in producing and disseminating any information or communication on the Internet, Internet platform or other Internet-enabled application, unless the information or communication is disseminated for a fee on another person's website, platform or other Internet-enabled application, whether coordinated or not.".

(2) EXEMPTION FROM TREATMENT AS EXPENDITURE.—Section 301(9)(B) of such Act (52 U.S.C. 30101(9)(B)) is amended—

(A) by striking "and" at the end of clause (ix);

(B) by striking the period at the end of clause (x) and inserting "; and"; and

(C) by adding at the end the following new clause:

"(xi) any cost incurred by any person in producing and disseminating any information or communication on the Internet, Internet platform or other Internet-enabled application, unless the information or communication is disseminated for a fee on another person's website, platform or other Internet-enabled application.".

(b) APPLICATION TO DEFINITION OF PUBLIC COMMUNICATIONS.—Section 301(22) of such Act (52 U.S.C. 30101(22)) is amended by adding at the end the following: "In the previous sentence, the terms 'public communication' and 'general public political advertising' do not include communications disseminated over the Internet or via an Internet platform or other Internet-enabled application, unless the communication or advertising is dissemi-

nated for a fee on another person's website, platform or other internet-enabled application.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

SEC. 333. MEDIA EXEMPTION.

(a) EXPANSION OF EXEMPTION TO ADDITIONAL FORMS OF MEDIA.—Section 301(9)(B)(i) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(9)(B)(i)) is amended to read as follows:

> "(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting, cable, satellite, or internet-based station, programmer, operator or producer; newspaper, magazine, or other periodical publisher; electronic publisher, platform, or application; book publisher; or filmmaker or film producer, distributor or exhibitor, unless such facilities are owned or controlled by any political party, political committee, or candidate;".

(b) APPLICATION TO CONTRIBUTIONS.—Section 301(8)(B) of such Act (52 U.S.C. 30101(8)(B)), as amended by section 332(a)(1), is amended—

(1) by redesignating clauses (i) through (xv) as clauses (ii) through (xvi); and

(2) by inserting before clause (ii) (as so redesignated) the following new clause:

"(i) any payment for any news story, commentary, or editorial distributed through the facilities of any broadcasting, cable, satellite, or internet-based station, programmer, operator or producer; newspaper, magazine, or other periodical publisher; electronic publisher, platform, or application; book publisher; or filmmaker or film producer, distributor or exhibitor.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to elections held during 2024 or any succeeding year.

Subtitle E—Prohibition on Issuance of Regulations on Political Contributions

SEC. 341. PROHIBITION ON ISSUANCE OF REGULATIONS ON POLITICAL CONTRIBUTIONS.

The Securities and Exchange Commission may not finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.

Subtitle F—Miscellaneous Provisions

SEC. 351. PERMANENT EXTENSION OF FINES FOR QUALIFIED DISCLOSURE REQUIREMENT VIOLATIONS.

Section 309(a)(4)(C)(v) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30109(a)(4)(C)(v)) is amended by striking ", and that end on or before December 31, 2023".

SEC. 352. POLITICAL COMMITTEE DISBURSEMENT REQUIREMENTS.

Section 302(h)(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30102(h)(1)) is amended by striking "except by check drawn on such accounts in accordance with this section" and inserting "except from such accounts".

SEC. 353. DESIGNATION OF INDIVIDUAL AUTHORIZED TO MAKE CAMPAIGN COMMITTEE DISBURSEMENTS IN EVENT OF DEATH OF CANDIDATE.

(a) IN GENERAL.—Section 302 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30102), as amended by section 307(b), is amended by adding at the end the following new subsection:

"(k)(1) Each candidate may, with respect to each authorized committee of the candidate, designate an indi-

vidual who shall be responsible for disbursing funds in the accounts of the committee in the event of the death of the candidate, and may also designate another individual to carry out the responsibilities of the designated individual under this subsection in the event of the death or incapacity of the designated individual or the unwillingness of the designated individual to carry out the responsibilities.

"(2) In order to designate an individual under this subsection, the candidate shall file with the Commission a signed written statement (in a standardized form developed by the Commission) that contains the name and address of the individual and the name of the authorized committee for which the designation shall apply, and that may contain the candidate's instructions regarding the disbursement of the funds involved by the individual. At any time after filing the statement, the candidate may revoke the designation of an individual by filing with the Commission a signed written statement of revocation (in a standardized form developed by the Commission).

"(3)(A) Upon the death of a candidate who has designated an individual for purposes of paragraph (1), funds in the accounts of each authorized committee of the candidate may be disbursed only under the direction and in accordance with the instructions of such individual, sub-

ject to the terms and conditions applicable to the disbursement of such funds under this Act or any other applicable Federal or State law (other than any provision of State law which authorizes any person other than such individual to direct the disbursement of such funds).

"(B) Subparagraph (A) does not apply with respect to an authorized committee if, at the time of the candidate's death, the authorized committee has a treasurer or a designated agent of the treasurer as described in section 302(a), unless the treasurer or designated agent is incapacitated or cannot be reached by the authorized committee.

"(C) Nothing in this paragraph may be construed to grant any authority to an individual who is designated pursuant to this subsection other than the authority to direct the disbursement of funds as provided in such paragraph, or may be construed to affect the responsibility of the treasurer of an authorized committee for which funds are disbursed in accordance with such paragraph to file reports of the disbursements of such funds under section 304(a).".

(b) INCLUSION OF DESIGNATION IN STATEMENT OF ORGANIZATION OF COMMITTEE.—Section 303(b) of such Act (52 U.S.C. 30103(b)) is amended—

(1) in paragraph (5), by striking ''and'' at the end;

(2) in paragraph (6), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following new paragraph:

''(7) in the case of an authorized committee of a candidate who has designated an individual under section 302(k) (including a second individual designated to carry out the responsibilities of that individual under such section in the event of that individual's death or incapacity or unwillingness to carry out the responsibilities) to disburse funds from the accounts of the committee in the event of the death of the candidate, a copy of the statement filed by the candidate with the Commission under such section (as well as a copy of any subsequent statement of revocation filed by the candidate with the Commission under such section).''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to authorized campaign committees which are designated under section 302(e)(1) of the Federal Election Campaign Act of 1971 before, on, or after the date of the enactment of this Act.

SEC. 354. PROHIBITION ON CONTRIBUTIONS IN NAME OF ANOTHER.

Section 320 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30122) is amended by adding at the end the following new sentence: "No person shall knowingly direct, help, or assist any person in making a contribution in the name of another person.".

SEC. 355. UNANIMOUS CONSENT OF COMMISSION MEMBERS REQUIRED FOR COMMISSION TO REFUSE TO DEFEND ACTIONS BROUGHT AGAINST COMMISSION.

(a) UNANIMOUS CONSENT.—Section 307 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30107) is amended by adding at the end the following new subsection:

"(f)(1) Except as provided in paragraph (2), the Commission shall defend each action brought against the Commission under this Act or chapter 95 and 96 of the Internal Revenue Code of 1986—

"(A) through the general counsel, as provided in subsection (a)(6);

"(B) by appointing counsel as provided in section 306(f)(4); or

"(C) by referral to the Attorney General in the case of a criminal action.

"(2) The Commission may refuse to defend an action brought against the Commission pursuant to the unanimous vote of its Members.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply with respect to actions brought on or after the date of the enactment of this Act.

SEC. 356. FEDERAL ELECTION COMMISSION MEMBER PAY.

Section 306(a)(4) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30106(a)(4)) is amended by striking "equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315)" and inserting "at an annual rate of basic pay of $186,300, as adjusted under section 5318 of title 5, United States Code, in the same manner as the annual rate of pay for positions at each level of the Executive Schedule".

SEC. 357. UNIFORM STATUTE OF LIMITATIONS FOR PROCEEDINGS TO ENFORCE FEDERAL ELECTION CAMPAIGN ACT OF 1971.

(a) 5-YEAR LIMITATION.—Section 406(a) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30145(a)) is amended—

(1) by striking "(a)" and inserting "(a)(1)"; and

(2) by adding at the end the following new paragraph:

"(2) No person shall be subject to a civil penalty for any violation of title III of this Act unless the proceeding is initiated in accordance with section 309 not later than 5 years after the date on which the violation occurred.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply with respect to violations occurring on or after the date of the enactment of this Act.

SEC. 358. DEADLINE FOR PROMULGATION OF PROPOSED REGULATIONS.

Not later than 120 days after the date of the enactment of this Act, the Federal Election Commission shall publish in the Federal Register proposed regulations to carry out this title and the amendments made by this title.

TITLE IV—ELECTION SECURITY

Subtitle A—Promoting Election Security

SEC. 401. SHORT TITLE.

This title may be cited as the "Election Security Assistance Act".

SEC. 402. REPORTS TO CONGRESS ON FOREIGN THREATS TO ELECTIONS.

(a) IN GENERAL.—Not later than 30 days after the date of enactment of this Act, and 30 days after the end of each fiscal year thereafter, the Secretary of Homeland Security and the Director of National Intelligence, in co-

ordination with the heads of the appropriate Federal entities, shall submit a joint report to the appropriate congressional committees and the chief State election official of each State on foreign threats to elections in the United States, including physical and cybersecurity threats.

(b) VOLUNTARY PARTICIPATION BY STATES.—The Secretary shall solicit and consider voluntary comments from all State election agencies. Participation by an election agency in the report under this section shall be voluntary and at the discretion of the State.

(c) APPROPRIATE FEDERAL ENTITIES.—In this section, the term ''appropriate Federal entities'' means—

(1) the Department of Commerce, including the National Institute of Standards and Technology;

(2) the Department of Defense;

(3) the Department of Homeland Security, including the component of the Department that reports to the Under Secretary responsible for overseeing critical infrastructure protection, cybersecurity, and other related programs of the Department;

(4) the Department of Justice, including the Federal Bureau of Investigation;

(5) the Election Assistance Commission; and

(6) the Office of the Director of National Intelligence, the National Security Agency, and such

other elements of the intelligence community (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003)) as the Director of National Intelligence determines are appropriate.

(d) OTHER DEFINITIONS.—In this section—

(1) the term ''appropriate congressional committees'' means—

(A) the Committee on Rules and Administration, the Committee on Homeland Security and Governmental Affairs, the Select Committee on Intelligence, and the Committee on Foreign Relations of the Senate; and

(B) the Committee on House Administration, the Committee on Homeland Security, the Permanent Select Committee on Intelligence, and the Committee on Foreign Affairs of the House of Representatives;

(2) the term ''chief State election official'' means, with respect to a State, the individual designated by the State under section 10 of the National Voter Registration Act of 1993 (52 U.S.C. 20509) to be responsible for coordination of the State's responsibilities under such Act;

(3) the term ''election agency'' means any component of a State or any component of a unit of

local government of a State that is responsible for administering Federal elections;

(4) the term ''Secretary'' means the Secretary of Homeland Security; and

(5) the term ''State'' has the meaning given such term in section 901 of the Help America Vote Act of 2002 (52 U.S.C. 21141).

SEC. 403. RULE OF CONSTRUCTION.

Nothing in this title may be construed as authorizing the Secretary of Homeland Security to carry out the administration of an election for Federal office.

Subtitle B—Cybersecurity for Election Systems

SEC. 411. CYBERSECURITY ADVISORIES RELATING TO ELECTION SYSTEMS.

(a) CYBERSECURITY ADVISORIES.—

(1) IN GENERAL.—The Director of the Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security (in this subtitle referred to as the ''Director'') shall collaborate with the Election Assistance Commission (in this subtitle referred to as the ''Commission'') to determine if an advisory relating to the cybersecurity of election systems used in the administration of elections for Federal office or the cybersecurity of elections for Fed-

eral office generally is necessary. If such a determination is made in the affirmative, the Director shall collaborate with the Commission in the preparation of such an advisory.

(2) PROHIBITION.—The Director may not issue an advisory described in paragraph (1) unless the Commission has provided input relating thereto.

(b) NOTIFICATION.—If the Director issues an advisory described in subsection (a), the Director, in collaboration with the Commission, shall provide to appropriate State election officials and vendors of covered voting systems notification relating thereto.

SEC. 412. PROCESS TO TEST FOR AND MONITOR CYBERSECURITY VULNERABILITIES IN ELECTION EQUIPMENT.

(a) PROCESS FOR COVERED VOTING SYSTEMS.—

(1) IN GENERAL.—The Director and the Commission (in consultation with the Technical Guidelines Development Committee and the Standards Board of the Commission), shall jointly establish a voluntary process to test for and monitor covered voting systems for cybersecurity vulnerabilities. Such process shall include the following:

(A) Mitigation strategies and other remedies.

(B) Notice to the Commission and appropriate entities of the results of testing conducted pursuant to such process.

(2) IMPLEMENTATION.—The Director shall implement the process established under paragraph (1) at the request of the Commission.

(b) LABELING FOR VOTING SYSTEMS.—The Commission (in consultation with the Technical Guidelines Development Committee and the Standards Board of the Commission), shall establish a process to provide for the deployment of appropriate labeling available through the website of the Commission to indicate that covered voting systems passed the most recent cybersecurity testing pursuant to the process established under subsection (a).

(c) RULES OF CONSTRUCTION.—The process established under subsection (a), including the results of any testing carried out pursuant to this section, shall not affect—

(1) the certification status of equipment used in the administration of an election for Federal office under the Help America Vote Act of 2002; or

(2) the authority of the Commission to so certify such equipment under such Act.

(d) DEFINITION.—In this section, the term ''covered voting systems'' means equipment used in the administra-

tion of an election for Federal office that is certified in accordance with versions of Voluntary Voting System Guidelines under the Help America Vote Act of 2002 under which such equipment is not required to be tested for cybersecurity vulnerabilities.

SEC. 413. DUTY OF SECRETARY OF HOMELAND SECURITY TO NOTIFY STATE AND LOCAL OFFICIALS OF ELECTION CYBERSECURITY INCIDENTS.

(a) DUTY TO SHARE INFORMATION WITH DEPARTMENT OF HOMELAND SECURITY.—If a Federal entity receives information about an election cybersecurity incident, the Federal entity shall promptly share that information with the Department of Homeland Security, unless the head of the entity (or a Senate-confirmed official designated by the head) makes a specific determination in writing that there is good cause to withhold the particular information.

(b) RESPONSE TO RECEIPT OF INFORMATION BY SECRETARY OF HOMELAND SECURITY.—

(1) IN GENERAL.—Upon receiving information about an election cybersecurity incident under subsection (a), the Secretary of Homeland Security, in consultation with the Attorney General, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence, shall promptly (but

in no case later than 96 hours after receiving the information) review the information and make a determination whether each of the following apply:

(A) There is credible evidence that the incident occurred.

(B) There is a basis to believe that the incident resulted, could have resulted, or could result in voter information systems or voter tabulation systems being altered or otherwise affected.

(2) DUTY TO NOTIFY STATE AND LOCAL OFFICIALS.—

(A) DUTY DESCRIBED.—If the Secretary makes a determination under paragraph (1) that subparagraphs (A) and (B) of such paragraph apply with respect to an election cybersecurity incident, not later than 96 hours after making the determination, the Secretary shall provide a notification of the incident to each of the following:

(i) The chief executive of the State involved.

(ii) The State election official of the State involved.

(iii) The local election official of the election agency involved.

(B) TREATMENT OF CLASSIFIED INFORMATION.—

(i) EFFORTS TO AVOID INCLUSION OF CLASSIFIED INFORMATION.—In preparing a notification provided under this paragraph to an individual described in clause (i), (ii), or (iii) of subparagraph (A), the Secretary shall attempt to avoid the inclusion of classified information.

(ii) PROVIDING GUIDANCE TO STATE AND LOCAL OFFICIALS.—To the extent that a notification provided under this paragraph to an individual described in clause (i), (ii), or (iii) of subparagraph (A) includes classified information, the Secretary (in consultation with the Attorney General and the Director of National Intelligence) shall indicate in the notification which information is classified.

(3) EXCEPTION.—

(A) IN GENERAL.—If the Secretary, in consultation with the Attorney General and the Director of National Intelligence, makes a de-

termination that it is not possible to provide a notification under paragraph (1) with respect to an election cybersecurity incident without compromising intelligence methods or sources or interfering with an ongoing investigation, the Secretary shall not provide the notification under such paragraph.

(B) ONGOING REVIEW.—Not later than 30 days after making a determination under subparagraph (A) and every 30 days thereafter, the Secretary shall review the determination. If, after reviewing the determination, the Secretary makes a revised determination that it is possible to provide a notification under paragraph (2) without compromising intelligence methods or sources or interfering with an ongoing investigation, the Secretary shall provide the notification under paragraph (2) not later than 96 hours after making such revised determination.

(4) COORDINATION WITH ELECTION ASSISTANCE COMMISSION.—The Secretary shall make determinations and provide notifications under this subsection in the same manner, and subject to the same terms and conditions relating to the role of the Election Assistance Commission, in which the Direc-

tor of the Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security makes determinations as to the necessity of an advisory and the issuance of an advisory under section 411(a) and the provision of notification under section 411(b).

(c) DEFINITIONS.—In this section, the following definitions apply:

(1) ELECTION AGENCY.—The term ''election agency'' means any component of a State, or any component of a unit of local government in a State, which is responsible for the administration of elections for Federal office in the State.

(2) ELECTION CYBERSECURITY INCIDENT.—The term ''election cybersecurity incident'' means an occurrence that actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or availability of information on an information system of election infrastructure (including a vote tabulation system), or actually or imminently jeopardizes, without lawful authority, such an information system of election infrastructure.

(3) FEDERAL ELECTION.—The term ''Federal election'' means any election (as defined in section 301(1) of the Federal Election Campaign Act of

1971 (52 U.S.C. 30101(1))) for Federal office (as defined in section 301(3) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(3))).

(4) FEDERAL ENTITY.—The term ''Federal entity'' means any agency (as defined in section 551 of title 5, United States Code).

(5) LOCAL ELECTION OFFICIAL.—The term ''local election official'' means the chief election official of a component of a unit of local government of a State that is responsible for administering Federal elections.

(6) SECRETARY.—The term ''Secretary'' means the Secretary of Homeland Security.

(7) STATE.—The term ''State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and the United States Virgin Islands.

(8) STATE ELECTION OFFICIAL.—The term ''State election official'' means—

(A) the chief State election official of a State designated under section 10 of the National Voter Registration Act of 1993 (52 U.S.C. 20509); or

(B) in the case of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands, a chief State election official designated by the State for purposes of this Act.

(d) EFFECTIVE DATE.—This section shall apply with respect to information about an election cybersecurity incident which is received on or after the date of the enactment of this Act.

TITLE V—SENSE OF CONGRESS WITH RESPECT TO ROLE OF STATES IN CONGRESSIONAL REDISTRICTING

SEC. 501. SENSE OF CONGRESS WITH RESPECT TO ROLE OF STATES IN CONGRESSIONAL REDISTRICTING.

It is the sense of Congress that, while Congress is authorized under the Constitution of the United States to ensure that congressional redistricting is carried out in a manner consistent with the Constitution, only a State has the authority to establish maps of the congressional districts of the State and to determine the procedures and criteria used to establish such maps.

TITLE VI—DISINFORMATION GOVERNANCE BOARD

SEC. 601. TERMINATION OF THE DISINFORMATION GOVERNANCE BOARD.

The Disinformation Governance Board of the Department of Homeland Security is hereby terminated.

SEC. 602. PROHIBITION ON FUNDING THE ACTIVITIES OF THE DISINFORMATION GOVERNANCE BOARD.

No Federal funds authorized to be appropriated or otherwise made available may be used to establish or carry out the activities of any other entity that is substantially similar to the Disinformation Governance Board terminated by section 701.

TITLE VII—SEVERABILITY

SEC. 701. SEVERABILITY.

If any provision of this Act or any amendment made by this Act, or the application of any such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and the application of such provision or amendment to any other person or circumstance, shall not be affected by the holding.



AMERICAN CONFIDENCE IN ELECTIONS ACT

Educate. Engage. Reform.

American Confidence in Elections (ACE) Act
Section-by-Section

Summary: The American Confidence in Elections Act (ACE Act), the key Republican election integrity bill as we move into the Majority, focuses on strong election integrity reforms that meet the moment while respecting the Constitution, federalism, and conservative principles. Further, the ACE Act continues to address disappointing challenges faced by military and overseas voters and makes the biggest legislative effort in a generation to protect political speech in a climate where Democrats are doing everything in their power to silence conservative voices.

General Findings

- States have the primary role in establishing election law and administering elections.
- All eligible voters must be able to vote, and all lawful votes must be counted.
- Political speech is protected speech and all voices—including conservative voices—must be protected.

Title I—Election Administration Integrity

Subtitle A—Findings Related to Election Administration

- Sec. 101: Findings Relating to Election Administration
  - General findings that explain Congress' proper role under federalism and the Constitution.
  - Includes the Committee's Elections Clause Report

Subtitle B—Voluntary Considerations for State Administration of Federal Elections

- Sec. 111: Short title.
  - This subtitle may be cited as the "Voluntarily Offered Tools for Election Reforms by States Act" or the "VOTERS Act."

- Sec. 112: Election integrity voluntary considerations.
  - Establishes with the existing, bipartisan EAC Standards Board a federal forum for states to share best practices and discuss successes and failures so that all may benefit from innovation and lessons learned across the country. The forum will create no binding recommendations but will release records of its conversations in the form of voluntary considerations no later than December 31, 2023:
    - The administration of ballots delivered by mail;
    - Signature verification procedures;
    - Voter list maintenance;
    - Access for election observers;

  - Timely and accurately reporting of the results of ballot counting and reporting unofficial results;
  - Recruiting poll workers and designating the location of polling places during a pandemic, natural disaster, or other emergency.
  - Public education with respect to the certification and testing of voter machines prior to Federal elections;
  - The conduct of post-election audits; and
  - Processes and procedures on secure chain of custody for ballots and election equipment.
- Nothing in this section may be construed to require compliance with the voluntary considerations as a condition of the receipt of Federal funds.
- Permits a State to use unused Help America Vote Act (HAVA) grant funds (requirements payments) to implement any voluntary considerations, including election audits.

Subtitle C—Requirement to Promote Integrity in Election Administration

- Sec. 121: Ensuring only eligible American citizens may participate in Federal elections.
  - Offers findings to support the need for effective voter list maintenance.
  - Offers the sense of Congress that many States are not currently complying with the important list maintenance requirements of the National Voter Registration Act (NVRA).
  - Clarifies that States have the authority to remove non-citizens from their federal voter registration lists under their regular voter list maintenance programs
  - Prohibits states from maintaining a single voter registration roll for state and Federal elections if the state permits non-citizens to vote in state and local elections. Prohibits states from using federal dollars to build or maintain a state-specific roll containing non-citizens.
  - Requires states that allow non-citizen voting to have separate ballots for local races if the election occurs during a federal election and prohibits federal dollars to create ballots for non-citizens.
  - Penalizes States that allow non-citizens to vote in state or local elections by reducing their share by 30% of any new HAVA dollars appropriated by Congress.
  - Requires federal agencies to share upon request relevant information with state agencies for list maintenance and voter registration purposes.
  - Requires federal courts to notify the chief state election official and attorney general of non-citizens excused from jury duty
  - Expressly restates that it is a felony for non-citizens to vote in federal elections.

- Sec. 122: State reporting requirements with respect to voter list maintenance.
  - Requires states to include with their existing biannual reports to the EAC the total number of inactive registrants and the number of registrants removed from the list of official voters, information already required to be collected and made available publicly under federal law. (Palmer).

- Sec. 123: Contents of State mail voter registration form.
  - Allows a state's proof of citizenship requirement to be included in the state instructions on the national mail voter registration form maintained by EAC.
    - State Instruction Inclusion Act (Palmer).

- Sec. 124: Provision of photographic citizen voter identification tools for State use.
  - Reforms existing REAL ID Act to require "CITIZEN" to be printed on all qualifying individuals' REAL ID identification documents issued or renewed after January 1, 2026.
  - Recognizes REAL ID identification documents as appropriate for photographic voter

identification, as recommended by the bipartisan Carter-Baker Commission.

- Sec. 125: Mandatory provision of identification for certain voters not voting in person.
  - Modernizes the existing HAVA first-time mail voter ID requirement to include all first-time voter registrations made using any method other than in-person at an election's office or state voter registration agency. Also requires certain voters who request a mail ballot or vote by mail to provide HAVA ID.

- Sec. 126: Confirming access for Congressional election observers.
  - Confirmation of Congressional Observer Access Act of 2022 (COCOA Act [Steil]).
  - Creates a citation of convenience for state and local elections officials who may have questions about the constitutional authority for the already-existing congressional observer program.
  - Confirming access for official Congressional election observers including, but without limitation, to all areas of polling places and other facilities where ballots in the election are processed, tabulated, and canvassed, in accordance with Congress' Constitutional role to serve as the "Judge of the Elections, Returns and Qualifications of its own Members[.]"
  - Does not expand the program beyond its current form.

- Sec. 127: Use of requirements payments for post-election audits.
  - Expressly allows States to use HAVA grant funds for the purpose of conducting and publishing post-election audits.

- Sec. 128: Certain tax benefits and simplification with respect to election workers.
  - Amends the IRS code by allowing compensation of election workers to be excluded from gross income.
  - Removes the federal requirement that elections officials issue 1099 or W-2 forms to election workers, eliminating a major administrative burden.
  - Encourages individuals to serve as poll workers through earned student loan repayments. This provision permanently extends the CARES Act provision (the Employer Participation in Repayment Act of 2022 [Davis]) for election workers.

- Sec. 129: Voluntary guidelines with respect to nonvoting election technology.
  - Directs the EAC to develop voluntary guidelines for the use of non-voting equipment, such as electronic pollbooks.

- Sec. 130: Status reports by National Institute of Standards and Technology.
  - Requires annual status reports by the Director of the National Institute of Standards and Technology (NIST) with respect to their requirement to carry out technical guidelines and the status of any projects requested by the Commission during the fiscal year.

- Sec. 131: 501(c)(3) organizations prohibited from providing direct or indirect funding for election administration.
  - End Zuckerbucks Act of 2022 (Tenney).
  - Removes federal tax exemption for provision of direct or indirect private funding for election administration.

- Sec. 132: Requirements with respect to election mail.
  - Requires the USPS to prioritize and mark all election mail with date of receipt and process and deliver all election mail, even if the sending jurisdiction's account is overdrawn or lacks sufficient

funds or the mail piece otherwise lacks sufficient postage. Allows the USPS to collect payment in arrears.
  - Allows national, state, and local political committees to use the non-profit rate for the purpose of cooperative mailings.
  - Adds criminal penalties for any individual who forges or backdates a postmark (Massie amendment).

- Sec. 133: Clarification of right of State to appeal decisions through duly authorized representative.
  - Confirms States' constitutional, sovereign authority to decide who may represent the state in court and requires SCOTUS to hear appeals in any case that invalidates a state statute on federal constitutional grounds. This codifies the recent *Berger v. NAACP* decision and overturns a failed Biden policy from the 1980s.

- Sec. 134: Clarification of Federal agency involvement in voter registration activities.
  - Executive Order 14019 (Biden election executive order) shall have no force (except as may otherwise be required by law).

- Sec. 135: Prohibition on use of Federal funds for election administration in States that permit ballot harvesting.
  - Prohibits the use of federal funds by states to administer elections for federal office unless the state imposes certain restrictions on ballot harvesting and on the transmission of mail ballots.

- Sec. 136: Clarification with respect to Federal election record-keeping requirement.
  - Election materials that must be preserved for 22 months pursuant to HAVA includes ballot envelopes.

- Sec. 137: Clarification of rules with respect to hiring election workers.
  - States may provide preference to veterans and individuals with disabilities when hiring election workers.

- Sec. 138: United States Postal Service coordination with States to ensure mailing addresses.
  - Within 2 years of this act, the Postmaster and State executives shall identify and assign a mailing address to each home in every state, including those residences on Native American land (Cole).

- Sec. 139: State defined.
  - Technical amendment to the definition of "State" in HAVA to include the Commonwealth of the Northern Mariana Islands, which did not have a congressional delegate at the time HAVA was enacted.

Subtitle D—District of Columbia Election Integrity and Voter Confidence

- Sec. 141: Short title.
  - This subtitle may be cited as the "American Confidence in Elections: District of Columbia Election Integrity and Voter Confidence Act."

- Sec. 142: Requirements for elections in District of Columbia.
  - Includes the text of all American Confidence in Elections model state legislation paired with the federal American Confidence in Elections Act, which would require D.C., for which Congress has

a duty to provide effective government, to implement election integrity and voter confidence measures, including:

- Requires voters present photo voter ID to vote in person or when requesting a mail ballot. Directs the District of Columbia to provide a free copy of the voter's ID and include photos or digital images of registered voters in the poll books with measures in place to protect privacy.
  - American Confidence in Elections: District of Columbia Voter Identification Act.
- Requires voter roll list maintenance be conducted annually. Prohibits same-day registration.
  - American Confidence in Elections: District of Columbia Voter List Maintenance Act.
- Prohibits ballot harvesting.
  - American Confidence in Elections: District of Columbia Election Fraud Prevention Act.
- Requires election officials report unofficial results no later than 10:00 a.m. the following day. After the closing of polls on the date of a District of Columbia election, the District must available on a publicly accessible website the total number of voted ballots in the possession of election officials in the District of Columbia as of the time of the closing of polls (Donalds) and publish the total number of UOCAVA ballots requested and received, including UOCAVA ballots received that may have been sent pursuant to law without a request. District of Columbia officials must ensure that all election administration activities are carried out in a bipartisan manner.
  - American Confidence in Elections: District of Columbia Timely Reporting of Election Results Act.
- Prohibits non-citizen voting.
  - American Confidence in Elections: District of Columbia Citizen Voter Act.
- Requires that provisional ballots only be counted when cast in the correct precinct.
  - American Confidence in Elections: District of Columbia Provisional Ballot Reform Act.
- Requires post-election audits be conducted after each election before the time to contest the election expires.
  - American Confidence in Elections: District of Columbia Post-Election Audits Act.
- Requires meaningful election observer access.
  - American Confidence in Elections: District of Columbia Public Observation of Election Procedures Act.
- Prohibits mailing ballots except upon a voter's request, establishes a signature verification process, requires signatures to be dated, and requires all mail ballots except military/overseas ballots be received by the close of polls.
  - American Confidence in Elections: District of Columbia Mail Balloting Reform Act.
- Places restrictions on the use of ballot drop boxes/receptacles.
  - American Confidence in Elections: District of Columbia Ballot Security Act.

- Sec. 143: Effective date.
  - Elections held on or after January 1, 2024

Subtitle E—Administration of the Election Assistance Commission

- Sec. 151: Short title.
  - This subtitle may be cited as the "Positioning the Election Assistance Commission for the Future Act of 2022."

- Sec. 152: Findings related to the administration of the Election Assistance Commission.
  - Election Assistance Commission is the lead federal agency on all election administration matters.
  - Includes certain findings relating to the EAC and their limited role in our decentralized election system.

- Sec. 153: Requirements with respect to staff and funding of the Election Assistance Commission.
  - No more than 55 full-time employees with a budget of $25,000,000 each fiscal year between 2023 through 2025.
  - Prohibits any new EAC funds from being used to establish any additional advisory committees.
  - Raises the Commissioner's annual rate of pay of $183,300 and indexes this amount for inflation in the same manner as the annual rate of pay for positions at each level of the Executive Schedule.

- Sec. 154: Exclusive authority of Election Assistance Commission to make election administration payments to States.
  - Grants the EAC exclusive authority to make election administration grant disbursements to the States, including obtaining election and voting equipment and infrastructure, enhancing election and voting technology, and making election and voting security improvements.

- Sec. 155: Executive Board of the Standards Board authority to enter into contracts.
  - Authorizes the Executive Board of the Standards Board to enter contracts to employ and retain no more than 2 individuals to enable them to discharge its duties with respect to providing voluntary considerations in accordance with Sec. 112.

- Sec. 156: Election Assistance Commission primary role in election administration.
  - EAC has primary jurisdiction on election administration issues for federal office.

Subtitle F—Prohibition on Involvement in Elections by Foreign Nationals

- Sec. 161: Prohibition on contributions and donations by foreign nationals
  - Prohibits foreign nationals from contributing money or in-kind donations in connection with State or local ballot initiatives or referenda and adds criminal penalties.

Subtitle G—Constitutional Experts Panel With Respect to Presidential Elections

- Sec. 171: Short title.
  - This subtitle may be cited as the "Solving an Overlooked Loophole in Votes for Executives (SOLVE) Act."

- Sec. 172: Establishment of panel of constitutional experts.
  - Includes the *Solving an Overlooked Loophole in Votes for Executives (SOLVE) Act*, (Davis, Spanberger, A. King, Portman) which establishes the "Twentieth Amendment Section Four Panel" ("Panel")

- The bipartisan panel, appointed by the Majority and Minority leaders of the Senate, and the Speaker and Minority Leader of the House, shall recommend to Congress model legislation providing for an appropriate process to resolve any vacancy created by the death of a candidate in a contingent presidential or vice-presidential election.
- Not later than a year and six months after all the appointments have been made, the Panel shall submit to Congress a final report containing the Panel's findings, conclusions, and recommendations.
- The volunteer panel shall terminate 90 days after the date of which the panel submits the final report and will not be extended.

Title II—Military Voting Administration

Subtitle A—Findings

- Sec. 201: Findings relating to military voting.
  - Supplies certain Congressional findings related to military voting.

Subtitle B—GAO Analysis on Military Voting Access

- Sec. 211: GAO analysis and report on effectiveness of Federal government in meeting obligations to promote voting access for absent uniformed services voters.
  - Directs GAO to conduct a study on voting access for absent uniformed services voters.
  - Requires the Comptroller General to submit a report to Congress by December 31, 2023, containing the results of the analysis required above.

Title III—Protection of Political Speech and Campaign Finance Reform

Subtitle A—Protecting Political Speech

- Sec. 301: Findings
  - Presents Congressional findings related to the importance of the First Amendment and the protection of political speech and its methods for dissemination.

- Sec. 302: Repeal of limits on coordinated party expenditures.
  - Repeals limits on coordinated political party expenditures, allowing party committees to work directly with candidates without current restrictions that require the use of IE units, hybrid advertisements, and other cumbersome methods.

- Sec. 303: Repeal of limit on aggregate contributions by individuals.
  - Codifies the Supreme Court's decision in *McCutcheon v. FEC*, which held that statutory limits on aggregate individual contributions were unconstitutional.

- Sec. 304: Equalization of contribution limits to State and national political party committees.
  - Raises contribution limits for State political party committees to match national party committee contribution limits and allows the establishment of higher-limit convention, headquarters building, and legal proceedings funds as used by the national party committees.

- Sec. 305: Expansion of permissible Federal election activity by State and local political parties.
  - Expands the permissible use of funds not subject to contribution limits or source prohibitions by state and local political parties for federal election activity so long as the funds are not spent in coordination with a federal candidate.

- Sec. 306: Participation in joint fundraising activities by multiple political committees.
  - Allows two or more political committees to participate in joint fundraising activities without the hassle of establishing a joint fundraising agreement or a separate joint committee.

- Sec. 307: Protecting privacy of donors to tax-exempt organizations.
  - Codifies Supreme Court decisions in *NAACP v. Alabama* and *AFPF v. Bonta* to require privacy protections for donors to certain tax-exempt organizations.
    - Speech Privacy Act of 2022.

- Sec. 308: Reporting requirements for tax-exempt organizations.
  - Increases from $5,000 to $50,000 the gross receipts threshold used to determine the eligibility of tax-exempt organizations for the exemption from certain disclosure and reporting requirements.
    - Don't Weaponize the IRS Act (M. Kelly, McConnell, Braun, Cassidy).

- Sec. 309: Maintenance of standards for determining eligibility of section 501(c)(4) organizations.
  - Directs the Department of the Treasury to not issue, revise, or finalize any regulation revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986.

- Sec. 310: Increased funding for the 10-Year Pediatric Research Initiative Fund.
  - Sunsets the $392 million currently in the Presidential Election Campaign Fund by transferring those funds to the pediatric cancer research initiatives.
    - Jonny Wade Pediatric Cancer Research Act (Davis).

Subtitle B—Prohibition on Use of Federal Funds for Congressional Campaigns

- Sec. 311: Prohibiting use of Federal funds for payments in support of congressional campaigns.
  - States that no federal funds, including amounts attributable to the collection of fines and penalties, may be used to make another payment in support of a campaign for election for the office of Senator or Representatives in, or Delegate or Resident Commissioner to, the Congress.

Subtitle C—Registration and Reporting Requirements

- Sec. 321: Reporting requirements with respect to electioneering communications.
  - Modernizes reporting requirements for electioneering communications.

- Sec. 322: Increased qualifying threshold and establishing purpose for political committees.
  - Modernizes threshold amount and establishes a price index adjustment for political committee threshold.

- Sec. 323: Increased threshold with respect to independent expenditure reporting requirement.
  - Increases the threshold from $250 to $1,000 and then indexes it for inflation.

- Sec. 324: Increased qualifying threshold with respect to candidates.
  - Increases the threshold from $5,000 to $10,000 and then indexes it for inflation.

- Sec. 325: Repeal requirement of persons making independent expenditures to report identification of certain donors.
  - Repeals Section 304(c)(2) of the Federal Election Campaign Act of 1971 to ensure public disclosure draws associations only between political committees and those donors who support their activities.

Subtitle D—Exclusion of Certain Amounts From Treatment as Contributions or Expenditures

- Sec. 331: Increased threshold for exemption of certain amounts as contributions.
  - Increases the threshold limits for the real or personal property exemption and the travel expenses exemption and then indexes them for inflation.

- Sec. 332: Exemption of uncompensated internet communications from treatment as contribution or expenditure.
  - Codifies existing regulatory exemption.
  - Exempts any payment for information or communication on the internet as a contribution unless it is disseminated for a fee on another person's website.

- Sec. 333: Media exemption
  - Technical amendment to extend existing media exemption from a federal election activity to include media described in Sec. 332.

Subtitle E—Prohibition on issues of regulations on Political Contributions

- Sec. 341: Prohibition on issuance of regulations on Political Contributions.
  - Directs the Securities and Exchange Commission to not finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.

Subtitle F—Miscellaneous Contributions

- Sec. 351: Permanent extension of fines for qualified disclosure requirement violations.
  - Implements the FEC legislative recommendation to make permanent the extension of fines for qualified disclosure requirement violations, which for years has been extended on a temporary basis.

- Sec. 352: Political committee disbursement requirements.
  - Technical amendment to allow political committees to use payment methods other than check.

- Sec. 353: Designation of individual authorized to make campaign committee disbursements in event of death of candidate.

- Includes a modified version of H.R.149 (114th [W.B. Jones]), which would permit the funds of a federal campaign committee to be dispersed in the event of a candidate's death and a vacancy in the office of treasurer and successors or the incapacity of the treasurer and successors or the campaign's inability to locate treasurer or successors.

- Sec. 354: Prohibition on contributions in the name of another.
  - Codifies the existing regulatory prohibition on making political contributions in the name of another person and requires the FEC to promptly conduct notice and comment rulemaking to implement the provisions in this section.

- Sec. 355: Unanimous consent of Commission members required for Commission to refuse to defend actions brought against the Commission.
  - The FEC may refuse to defend an action brought against the Commission subject only to the unanimous vote of its Members.

- Sec. 356: Federal Election Commission pay.
  - Raises the annual rate of pay of $183,300 and indexes this amount for inflation in the same manner as the annual rate of pay for positions at each level of the Executive Schedule.

- Sec. 357: Uniform statute of limitations for proceedings to enforce Federal Election Campaign Act of 1971.
  - Establishes a 5-year statute of limitations for all violations of the Federal Election Campaign Act of 1971.

- Sec. 358: Deadline for promulgation of proposed regulations.
  - Imposes a 120-day deadline for the FEC to publish proposed regulations to carry out Title III.

Title IV—Election Security

Subtitle A—Promoting Election Security

- Sec. 401: Short title.
  - This subtitle may be cited as the "Election Security Assistance Act."

- Sec. 402: Reports to Congress on foreign threats to elections.
  - Establishes requirements for the Secretary of the Department of Homeland Security and the Director of National Intelligence to report on physical and cybersecurity threats to elections to the appropriate congressional committees and the chief State election official of each State.
  - Permits voluntary participation in development of record by all States.

- Sec. 403. Rule of Construction.
  - Confirms that the Secretary of Homeland Security is not authorized to carry out the administration of an election for federal office.

Subtitle B—Cybersecurity for Election Systems

- Sec. 411: Cybersecurity advisories relating to election systems.
  - Directs the Directory of the Cybersecurity and Infrastructure Security Agency (CISA), in collaboration with the EAC, to determine if an elections-related cybersecurity advisory should be issued.

- Sec. 412: Process to test for and monitor cybersecurity vulnerabilities in election equipment.
  - Directs the Director of CISA, in collaboration with the Technical Guidelines Development Committee and the Standards Board of the EAC, to establish a voluntary process to test for and monitor covered voting systems for cybersecurity vulnerabilities.

- Sec. 413: Duty of Secretary of Homeland Security to notify State and local officials of election cybersecurity incidents.
  - Directs any Federal entity who receives information about an election cybersecurity incident to promptly inform the Department of Homeland Security (DHS).
  - Directs DHS to then analyze and make a decision as to next steps to this newly received information within 96 hours.
  - Requires DHS to collaborate with the EAC using the same process established for the development and release of any cybersecurity advisories.

Title V—Sense of Congress with Respect to Role of State Legislatures in Congressional Redistricting

- Sec. 501: Sense of Congress with respect to role of States in congressional redistricting.
  - Sense of Congress has a very limited role in Congressional redistricting, ensuring that States carry out the process consistent with the Constitution, as states are best situated—and constitutionally hold the power—to determine the best redistricting methods in their jurisdictions.

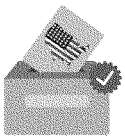
Title VI—Disinformation Governance Board

- Sec. 601: Termination of the Disinformation Governance Board.
  - Terminates the Disinformation Governance Board at DHS.

- Sec. 602: Prohibition on funding the activities of the Disinformation Governance Board.
  - Prevents the use of funds to establish the Disinformation Governance Board, or any board that is similar in nature.

Title VII—Severability

- Sec. 701: Severability.
  - Provides that if any provision of the Act is held to be unconstitutional, the remainder of the Act shall not be affected.



AMERICAN CONFIDENCE IN ELECTIONS ACT

Educate. Engage. Reform.

STATE TOOLS:

- Provides states with tools to boost election integrity and removes outdated federal policies that get in their way.
- Prohibits non-citizen voting, allows states to use REAL ID as proof of citizenship, and directs bipartisan EAC standards board to establish a federal forum that will help states discuss best practices.
- Paired with model state legislation for state legislatures to consider.

D.C. AS EXAMPLE:

- Will exercise Congress' responsibility over D.C. to implement election integrity measures outlined in the model state legislation.
- Requires photo ID to vote in person or request absentee ballot, requires annual list maintenance, prohibits same-day registration & ballot harvesting, prohibits automatically mailed ballots, requires post-election audits.

PROTECTING FREE SPEECH:

- Protects conservative voices and Americans' First Amendment right to speak political views and support candidates, causes and organizations without fear of retribution.
- Strengthens state party committees & non-profit organizations.
- Curbs the use of "Zuckerbucks" and prevents the creation of any "Misinformation Czar."

ELECTION INTEGRITY.
VOTER CONFIDENCE.

COMMITTEE ON HOUSE ADMINISTRATION - RANKING MEMBER RODNEY DAVIS (R-IL)

50 State Survey: Election Worker Protections



Committee on House Administration
Republican Office
July 2022

Alabama

Ala.Code 1975 § 13A-11-8

(a)(1) Prohibits harassment which includes physical contact, abusive/obscene language or gestures and verbal or non-verbal threats.

Ala.Code 1975 § 13A-10-132

(f) Unlawful for a person to falsely assert authority of law to intimidate or hinder state or local officials or employees in the discharge of official duties by means of threats, harassment, physical abuse, or use of sham legal process.

Ala.Code 1975 § 13A-10-2

(a) Prohibits obstructing governmental operations by intimidation, physical force, or interference if he intentionally prevents a public servant from performing a governmental function.

Alaska

AS § 11.61.118

(a) Prohibits harassment in the first degree which includes physical contact to the privates or any type of blood exc.

AS § 11.61.120

(a) Prohibits harassment in the second degree which includes insults, taunts, repeated telephone calls, offensive physical contact, explicit photographs, or repeated electronic communication.

AS § 11.76.110

(a)(1) Prohibits injury, oppression, or intimidation of another with intent to deprive a person of a right, privilege, or immunity granted by the constitution or state law.

AS § 11.56.810

(a)(1)(a) crime of terroristic threatening for any threat that places a person in reasonable fear of serious physical injury by means of a dangerous instrument.

AS § 15.56.060

(a)(1) Prohibits attempts or induces an election official to fail in the official's duty by force, threat, intimidation, or offers of reward.

Arizona

A.R.S. § 13-1202

Prohibits anyone who threatens or intimidates by word or conduct to cause physical injury to another person or serious damage to the property of another, to cause, or evacuation of a building, place of assembly or transportation facility.

A.R.S. § 13-2916

(a) It is unlawful for a person to knowingly terrify, intimidate, threaten, or harass by electronic communication by using obscene or profane language, threatening to inflict physical harm, repeated disturbance or distribute unwanted images.

A.R.S. § 13-2402

(a) Prohibits obstructing governmental operations by using or threatening to use violence or physical force which obstructs the governmental function by a public servant acting under official authority.

A.R.S. § 16-1004

(a) Prohibits a person who at any election knowingly interferes in any manner with an officer of such election in the discharge of the officer's duty, or who induces an officer of an election or officer whose duty it is to ascertain.

Arkansas

A.C.A. § 5-54-102

(a) Prohibits obstructing governmental operations by obstructing, impairing, or hindering performance of any governmental function.
(b)(1) Prohibits obstructing governmental operations by using or threatening to use physical force.

A.C.A. § 5-52-105

(a) A person commits the offense of attempting to influence a public servant if he or she threatens violence or economic reprisal.

A.C.A. § 5-71-208

(a) Prohibits harassment if with purpose to harass, annoy, or alarm he or she makes, attempts, or threatens offensive physical contact, directs obscene language or gestures, follows a person in a public place, repeatedly insults, taunts, or challenges, seriously annoys, or remains outside the person's school, place of employment, or vehicle.

A.C.A. § 5-71-209

(b) Prohibits electronic communication that is likely to harass, annoy, or cause alarm, making calls for no legitimate purpose, or threatening though electronic communication.

A.C.A. § 7-1-103

(a)(19)(G) No person shall interfere with the officials lawfully conducting the election.

California

West's Ann.Cal.Penal Code § 602.1

(b) Prohibits intentionally interferes with any lawful business carried on by the employees of a public agency, by obstructing or intimidating those attempting to carry on business, or those persons there to transact business with the public agency.

West's Ann.Cal.Penal Code § 646.9

(a) Prohibits a person from maliciously and repeatedly following or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety.

West's Ann.Cal.Penal Code § 422

(a) Prohibits any person who threatens to commit a crime which will result in death or great bodily injury to another person by means of statement, made verbally, in writing, or electronic communication and causes that person reasonably to be in sustained fear.

West's Ann.Cal.Elec.Code § 18502

Prohibits any person who in any manner interferes with the officers holding an election as to prevent the election from being fairly held and lawfully conducted.

Colorado

C.R.S.A. § 18-8-102

(a) Prohibits anyone from intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant, by using or threatening to use violence, force, or physical interference or obstacle.

C.R.S.A. § 18-3-206

(a) Prohibits any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury.

C.R.S.A. § 18-9-111

(1)(a) Prohibits anyone who, with intent to harass, annoy, or alarm another person, strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact.

C.R.S.A. § 1-13-701

(1) At any election provided by law, it is unlawful for any person to interfere in any manner with any election official in the discharge of the election official's duty or to induce any election official to violate or refuse to comply with the election official's duty or any law regulating the same.

(2) It is unlawful for any person, whether verbally, in writing, or in person, to threaten, coerce, or intimidate an election official.

Connecticut

C.G.S.A. § 53a-182b

(a) Prohibits anyone with the intent to harass, annoy, alarm, or terrorize another person, he threatens to kill or physically injure that person or any other person.

C.G.S.A. § 53a-183

(a) Prohibits anyone with intent to harass, terrorize or alarm another person, and for no legitimate purpose, causes terror, intimidation, or alarm.

C.G.S.A. § 53a-61aa

(a) Prohibits threatens to commit any crime involving the use of a hazardous substance with the intent to terrorize another person, commit such crime in reckless disregard, or use or display a firearm.

C.G.S.A. § 53a-62

(a) Prohibits threats that are physical, crimes of violence, and buildings.

Delaware

11 Del.C. § 1311

(a) Prohibits, with intent to harass, annoy, or alarm a person insults, taunts, or challenges another or communicates in a manner that is likely to cause annoyance or alarm.

11 Del.C. § 621

(a) Prohibits threatening to commit any crime that is likely to result in death, serious injury, evacuation, or serious inconvenience.

11 Del.C. § 1240

(a) Prohibits a person threatening to commit any crime likely to result in death or in serious injury to a public official or public servant.

15 Del.C. § 5118

(a) Prohibits attempts to molest, disturb or prevent the election officers from proceeding regularly with any general or special election.

15 Del.C. § 5161

Prohibits anyone who hinders, coerces, or intimidates or attempts to hinder, coerce, or intimidate any person who has been appointed an election officer under the laws of this State from qualifying and performing such person's duties.

Florida

West's F.S.A. § 784.048

(2) Prohibits a person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another.

(3) Prohibits a person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another and makes a credible threat.

West's F.S.A. § 838.021

(1) It is unlawful to harm or threaten to harm any public servant with the intent to influence the performance or to induce the public servant.

West's F.S.A. § 876.19

(a) Prohibits any exhibit of any kind whatsoever with the intention of intimidating any person.

West's F.S.A. § 104.0615

(2)(d) A person may not directly or indirectly use or threaten to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual from acting as a legally authorized election official.

Georgia

Ga. Code Ann., § 16-5-90

(a)(1) Prohibits a person following, places under surveillance, or contacts another person at a place without the consent of the other person for the purpose of harassing and intimidating the other person.

Ga. Code Ann., § 16-11-37

(b)(1) Prohibits threats to commit any crime of violence, release hazardous substance, or damage property for the purpose of terrorizing, causing evacuation, serious inconvenience or in reckless disregard.

Ga. Code Ann., § 21-2-566

(2) Uses or threatens violence in a manner that would prevent poll officer from the execution of his or her duties or materially interrupts interfere with the poll officer's duties.

Hawaii

HRS § 710-1010

(1)(a) Prohibits obstructing government operations by using or threatening use violence, force, or physical interference if the person intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant.

HRS § 711-1106

(1) Prohibits harassment if, with intent to harass, annoy, or alarm, he or she makes physical contact, insults, taunts, challenges to provoke an immediate violent response, makes electronic communication repeatedly or at extremely inconvenient hours.

HRS § 707-716

(1)(c) Prohibits threats against a public servant arising out of the performance of the public servant's official duties.

Idaho

I.C. § 18-2306

Prohibits interfering in any manner with the officers holding elections.

I.C. § 18-7906

(1) Prohibits a person who knowingly and maliciously engages in conduct that seriously alarms, annoys, or harasses the victim or conduct that would cause a reasonable person to be in fear of death or physical injury.

I.C. § 18-1353

(1)(a) Prohibits a person who threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant.

I.C. § 18-6710

(1) Prohibits individuals by telephone with intent to annoy, terrify, threaten, intimidate, harass, or offend and use profane language, threaten inflict injury, or call to disturb the peace, quiet, or right of privacy of any person.

Illinois

720 ILCS 5/12-9

(a)(1) Prohibits threatening a public official when a person knowingly delivers or conveys, directly or indirectly a threat containing a public official or his family of future bodily harm, sexual assault, confinement, restraint, or damage to property.

720 ILCS 5/12-6

(a) Prohibits with the intent to cause another to perform or omit any act he or she threatens physical harm, confinement, or restraint.

720 ILCS 5/12-7.3

(a) Prohibits individuals from engaging in conduct that would cause a reasonable person to fear for his safety or suffer emotional distress.

Indiana

IC 3-14-3-4

(a) Prohibits knowingly obstructing or interfering with an election officer.

IC 35-45-2-1

(a) Prohibits a person who communicates a threat with the intent to put someone in fear or engage in a conduct.

IC 35-45-2-2

(a) Prohibits a person who, with intent to harass, annoy, or alarm for no reason to make phone calls, communicate by telegraph, mail, or form of written communication, and transmit an obscene message.

IC 35-45-10-5

(a) Prohibits a person who stalks a victim and makes an explicit or implicit threat to cause a serious bodily injury, sexual battery, or death.

Iowa

I.C.A. § 39A.4
(13) Prohibits interfering with a person permitted at a polling place.

I.C.A. § 39A.5
(a)(2) Prohibits refusing to comply with an order of an election official.

I.C.A. § 216.11A
It is unlawful to coerce, intimidate, or threaten anyone exercising any right granted.

I.C.A. § 708.6
Prohibits shooting, throwing, launching, or discharging any dangerous weapon.

I.C.A. § 708.7
Prohibits a person who with intent to intimidate, annoy, or alarm communicates without a legitimate purpose, places explosives in another's property, reports false information to law enforcement, or shows sexual images of another without consent.

Kansas

K.S.A. 21-5427
(a) Recklessly engaging in a course of conduct targeted at a specific person which would knowingly or reasonably put the person in fear of safety.

K.S.A. 21-5415
(a)(1) Prohibits anyone who communicates with intent to place another in fear.

K.S.A. 21-6206
(a) Prohibits harassment by telecommunication that is obscene, lewd, lascivious, or indecent, threatening or harassing, or repeatedly with intent to annoy.

K.S.A. 21-5922
(a)(2) Prohibits anyone who knowingly impeding any public official or employee in the lawful performance of duties or activities through the use of restraint, abduction, coercion or intimidation or by force and violence or threat.

Kentucky

KRS § 519.020

(1) Prohibits a person who obstructs, impairs, or hinders the performance of a governmental function by using or threatening to use violence, force, or physical interference.

KRS § 119.155

(1) Prohibits any person who unlawfully interferes with the election officers in the discharge of their duties.

KRS § 119.255

Prohibits by threat of violence or in any other manner, intimidates or attempts to intimidate the election officers.

KRS § 525.070

(1)(b) Prohibits anyone who, with intent to intimidate, harass, annoy, or alarm attempts or threatens to strike, shove, kick, or other physical contact.

KRS § 508.080

(1) Prohibits threatening that is likely results in death or serious injury.

Louisiana

LSA-R.S. 14:122

Prohibits use of violence, force, extortionate threats, or true threats upon a public officer.

LSA-R.S. 18:1461.5

(a) Prohibits a person to engage in any form of intimidation to influence the action or encourage inaction of any election official.

LSA-R.S. 14:40.2

Prohibits the repeated pattern of verbal communications or nonverbal behavior without invitation that would cause a reasonable person to feel alarmed or suffer emotional distress.

Maine

17-A M.R.S.A. § 751

(1) Prohibits a person from intentionally interferes with a public servant by force, violence, or intimidation from performing an official function.

5 M.R.S.A. § 4651

(2)(a) Prohibits three or more acts of intimidation, confrontation, physical force, or the threat of physical force against a person with the intention of causing fear or intimidation.

17-A M.R.S.A. § 209

Prohibits intentionally or knowingly places another person in fear of imminent bodily injury.

17-A M.R.S.A. § 210

Prohibits communication to any person a threat to commit a crime of violence dangerous to human life.

Maryland

MD Code, Election Law, § 16-205

(a)(1) A person may not interfere with an election official in the performance of the official duties of the election official.

MD Code, Criminal Law, § 3-803

(a) A person may not follow another in a public place or maliciously engage in a course of conduct that would cause seriously annoys with the intent to harass the other, after receiving a request to stop, and without a legal purpose.

MD Code, Criminal Law, § 3-708

Prohibits any person who makes a threat to take the life of, kidnap, or cause physical injury to any local official.

Massachusetts

M.G.L.A. 56 § 48

Prohibits any person who interferes with an election commissioner, town clerk, election officer, or director of the count or assistant appointed in the performance of his duties.

M.G.L.A. 265 § 43

(a) Prohibits anyone who willfully and maliciously engages in a series of acts over a period directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury.

M.G.L.A. 265 § 43A

(a) Prohibits anyone who willfully and maliciously engages in a series of acts over a period directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress.

Michigan

M.C.L.A. 750.352

Prohibits any person who shall, by threats or intimidations interfere with any person, in the pursuit of his lawful occupation or on the way to and from such occupation.

M.C.L.A. 750.411h

(c) Prohibits repeated unconsented contact that would cause a reasonable individual to suffer emotional distress.
(d) Prohibits a willful course of conduct involving repeated harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

M.C.L.A. 750.478a

(1) A person shall not attempt to intimidate, hinder, or obstruct a public employee in the discharge of his or her official duties by a use of unauthorized process.

Minnesota

M.S.A. § 609.749

Subd. 2(c) Prohibits direct or indirect intent to injure another, following, return to property without a claim, repeatedly makes calls, texts, or emails with no purpose, knowingly making false allegations to a peace officer, or use another's personal information to solicit a third party to engage in sexual acts with the person.
Subd. 5(a) Prohibits a person who engages in stalking which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized.

M.S.A. § 609.713

Prohibits anyone who threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience.

Mississippi

Miss. Code Ann. § 97-3-107

(1)(a) Prohibits anyone who purposefully engages in a course of conduct directed at a specific person, or who makes a credible threat, and who knows or should know that the conduct would cause a reasonable person to fear for his or another's safety.

Miss. Code Ann. § 97-9-127

(1) Prohibits any person who intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of a public servant.

Missouri

V.A.M.S. 576.030

Prohibits a person from purposely obstructing, impairing, hindering, or perverting the performance of a governmental function by the use or threat of violence, force, or other physical interference or obstacle.

V.A.M.S. 565.090

1. Prohibits any person, without good cause, engages in any act with the purpose to cause emotional distress, and such act does cause such person to suffer emotional distress.

V.A.M.S. 565.091

1. Prohibits any person, without good cause, engages in any act with the purpose to cause emotional distress to another.

V.A.M.S. 565.225

Prohibits any person who purposely, through his or her course of conduct, disturbs or follows with the intent of disturbing another and makes a reasonable threat to the safety of another.

V.A.M.S. 565.227

Prohibits any person who purposely, through his or her course of conduct, disturbs or follows with the intent of disturbing another.

Montana

MCA 45-7-302

(1) Prohibits any person who knowingly obstructs, impairs, or hinders the performance of a governmental function.

MCA 45-7-102

(1)(iii) Prohibits any person who purposely or knowingly threatens harm to a public servant with the purpose to influence his public duty.

MCA 45-5-220

(1) Prohibits any person who purposely or knowingly engages in a course of conduct directed at a specific person and should know that the course of conduct would cause a reasonable person to fear for safety or suffer substantial emotional distress.

MCA 45-5-203

(1) Prohibits any person who communicates to another a reasonable threat of physical harm, confinement, or any felony with the purpose to cause another to perform or to omit the performance of any act.

Nebraska

Neb.Rev.St. § 28-901

Prohibits anyone who intentionally obstructs, impairs, or perverts governmental functions by force, violence, physical interference or obstacle, or any other unlawful act.

Neb.Rev.St. § 28-311.02

(2)(a) Prohibits anyone who knowing and willful engages in a course of conduct directed at a person which seriously terrifies, threatens, or intimidates the person.

Neb.Rev.St. § 28-311.01

(1) Prohibits anyone who threatens to commit any crime of violence with the intent to terrorize another.

Neb.Rev.St. § 32-1510

Prohibits any person who causes any breach of the peace or uses any disorderly violence or threat of violence which impedes or hinders any registration of voters or revision of voter registration lists or interferes with the lawful proceedings of any deputy registrar.

Nevada

N.R.S. 200.571

(1) Prohibits any person who knowingly threatens to cause bodily injury, cause physical damage to the property, subject the person to physical confinement, or do any act which is intended to substantially harm the person.

N.R.S. 200.575

(1) Prohibits anyone who willfully or maliciously engages in a course of conduct directed towards a victim that would cause a reasonable person under similar circumstances to feel terrorized, frightened, intimidated, harassed, or fearful for safety.

N.R.S. 199.300

(1) A person shall not address any threat or intimidation to a public employee with intent to induce a person contrary to his duty.

N.R.S. 293.730

Prohibits anyone who is not officer on official duty to remain in or outside of any polling place to interfere with the conduct of the election.

New Hampshire

N.H. Rev. Stat. § 642:1

(I) Prohibits any person who uses intimidation, force, or violence with a purpose to hinder with a public servant performing or an official function or to retaliate for the performance of such a function.

N.H. Rev. Stat. § 633:3-a

(1) Prohibits anyone who purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety.

N.H. Rev. Stat. § 644:4

Prohibits anyone who makes a call with no legitimate communicative purpose, makes repeated communications at inconvenient hours or in offensively language, insults, taunts, or challenges another in a manner likely to provoke, knowingly communicates any matter of a character tending to incite murder, assault, or arson, or communicates any matter containing any threat to kidnap any person or a threat to the life.

N.H. Rev. Stat. § 640:3

(a) Prohibits any person who threatens harm to a public servant with the purpose of influencing his action.

N.H. Rev. Stat. § 631:4

I. Prohibits any person places or attempts to place another in fear of imminent bodily injury or physical contact or threatens another of any crime with a purpose to terrorize.

New Jersey

N.J.S.A. 2C:29-1

Prohibits anyone who prevent a public servant from lawfully performing an official function by means of intimidation, force, violence, or physical interference or obstacle.

N.J.S.A. 2C:12-10

Prohibits anyone who purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety.

N.J.S.A. 2C:33-4

Prohibits any person who purposefully harasses another by making communications anonymously or at extremely inconvenient hours, or in offensively coarse language, subjects or threatens another to striking, kicking, shoving, or other offensive touching, or engages in any other course of alarming conduct.

N.J.S.A. 2C:12-3

(a) Prohibits threats to commit a crime of violence with the purpose to terrorize another.
(b) Prohibits threats to kill another with the purpose to put him in imminent fear of death.

N.J.S.A. 2C:27-3

(a)(1) Prohibits anyone who threatens unlawful harm to any person with purpose to influence the exercise of discretion of a public servant in any public election.
(a)(3) Prohibits anyone who threatens harm to any public servant with the purpose to influence him to violate his official duty.

New Mexico

N. M. S. A. 1978, § 1-20-20

Prohibits disturbing the polling place by creating any disorder or disruption at the polling place on election day or consists of interfering with any manner the conduct of the election or with a member of the precinct board, challenger, or watcher, in the performance of his duties.

N. M. S. A. 1978, § 1-20-14

Prohibits inducing or attempting to induce fear in any member of a precinct board, challenger, or watcher by use of or threatened use of force, violence, infliction of damage, harm or loss or any form of economic retaliation for the purpose of impeding the impartial administration of the election.

N. M. S. A. 1978, § 30-3A-2

Prohibits knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm, or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress.

N. M. S. A. 1978, § 30-3A-3

Prohibits knowingly pursuing a pattern of conduct directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement, or restraint.

New York

McKinney's Penal Law § 195.05

Prohibits any person who intentionally obstructs, impairs, or perverts or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force, or interference, or by means of any independently unlawful act.

McKinney's Penal Law § 240.25

Prohibits anyone who intentionally and repeatedly harasses another person by following such person in a public place or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

McKinney's Penal Law § 240.26

Prohibits anyone who, with intent to harass, annoy or alarm another person, strikes, shoves, kicks, or other physical contact, or attempts or threatens to do the same, follows a person in a public place or places, or repeatedly commits acts which alarm or seriously annoy such other person and serve no legitimate purpose.

North Carolina

N.C.G.S.A. § 163-274

(4) Prohibits interfering in any manner with the performance of any duty imposed by law upon any election officer or member of any board of elections.

N.C.G.S.A. § 163-275

(10) Prohibits any person to assault any chief judge, judge of election or other election officer while in conducting any election.

(11) Prohibits any person, by threats, menaces or in any other manner, to intimidate or attempt to intimidate any chief judge, judge of election or other election officer in the discharge of duties in conducting any election.

N.C.G.S.A. § 14-277.1

Prohibits any person who willfully threatens to physically injure someone that under circumstances which would cause a reasonable person to believe the threat is likely.

North Dakota

NDCC, 12.1-08-01

Prohibits any person who intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function.

NDCC, 12.1-14-02

Prohibits any person who, by force or threat of force, injures, intimidates, or interferes with an election official or election observer.

NDCC, 12.1-17-07

Prohibits any person who, with intent to frighten or harass another, communicates in a threat to inflict injury on any person, makes a telephone call anonymously or in offensively coarse language or repeated with no purpose, or communicates a falsehood and causes mental anguish.

NDCC, 12.1-12-06

Prohibits a person who threatens harm to a public servant with intent to influence the public servant's official action.

NDCC, 12.1-17-04

Prohibits any person who threatens to commit any crime of violence or act dangerous to human life with intent to place another human being in fear.

Ohio

R.C. § 2921.31

(A) No person shall prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's capacity.

R.C. § 3599.24

(3) Prohibits attempts to intimidate an election officer or prevent an election official from performing the official's duties.

R.C. § 2921.03

(A) No person, knowingly and by force, by unlawful threat of harm to any person shall attempt to influence, intimidate, or hinder a public servant.

Oklahoma

26 Okl.St.Ann. § 16-113

Prohibits any person who interferes with the orderly and lawful conduct of an election.

21 Okl.St.Ann. § 1533

Prohibits any person who, while acting falsely in asserting authority of law, attempts to intimidate or hinder a public official in the discharge of official duties by means of threats, harassment, physical abuse, or use of sham legal process shall.

21 Okl.St.Ann. § 1173

Prohibits any person who willfully, maliciously, and repeatedly follows or harasses another person in a manner that would cause a reasonable person to feel frightened, intimidated, threatened, harassed, or molested and causes the feeling of terrorized, frightened, intimidated, threatened, harassed, or molested.

21 Okl.St.Ann. § 1176

Prohibits whoever, with the intent to threaten, intimidate or harass, uses an electronic communication device to knowingly make publicly available personally identifiable information of a public official, and as a result places that peace officer or public official in reasonable fear of death or serious bodily injury.

Oregon

O.R.S. § 162.235

(1)(a) Prohibits anyone who intentionally obstructs, impairs, or hinders governmental functions by means of intimidation, force, physical or economic interference or obstacle.

O.R.S. § 166.065

(1)(a) Prohibits a person who intentionally harasses or annoys another person by offensive physical contact.

O.R.S. § 163.732

Prohibits a person who knowingly alarms another person by engaging in repeated and unwanted contact, is objectively reasonable for the victim to be alarmed or coerced and causes the victim reasonable apprehension regarding the personal safety of the victim.

Pennsylvania

18 Pa.C.S.A. § 4702

(1) Prohibits threats of unlawful harm to any public servant, party official or voter.

18 Pa.C.S.A. § 2709

Harassment is a crime if any person makes physical contact, follows person in public place, commits acts with no purpose, communicates threatening languages, repeatedly annoying manner, or extremely inconvenient hours.

25 Pa.C.S.A. § 1710

Prohibits interference with any other person in the performance of any act or duty in the election process.

25 Pa.C.S.A. § 3527

Prohibits anyone who shall uses or threatens any violence to any election officer; or interrupts or improperly interferes with him in the execution of his duty in an election.

Rhode Island

Gen.Laws 1956, § 11-59-2

(a) Prohibits any person who harasses another person or willfully, maliciously, and repeatedly follows another person with the intent to place that person in reasonable fear of bodily injury.

Gen.Laws 1956, § 11-42-4

(a) Prohibits whoever knowingly and willfully threatens to take the life of, or to inflict bodily harm upon, a public official because of the performance or nonperformance of some public duty, because of hostility of the person making the threat toward the

status or position of the public official, or because of some other factor related to the official's public existence.

South Carolina

Code 1976 § 16-3-1700

(a) Prohibits anyone who has a pattern of intentional, substantial, and unreasonable intrusion into a private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress.

Code 1976 § 16-3-1040

(a) It is unlawful for a person knowingly and willfully to deliver to a public official any writing, or electronic communication or verbal communication which contains a threat to take the life of or to inflict bodily harm.

(b) It is unlawful for a person knowingly and willfully to deliver to a public employee a writing, or electronic communication or verbal communication which contains a threat to take the life of or to inflict bodily harm upon the public employee.

Code 1976 § 16-17-430

(1) Prohibits any threats in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person.

South Dakota

SDCL § 22-11-3

Prohibits any person who intentionally obstructs or attempts to obstruct a public officer or employee or who resists a public officer in performance of that duty.

SDCL § 12-26-22

Prohibits any use of threats of violence, whereby an election is impeded or hindered, or whereby the lawful proceedings of the precinct superintendent, ballot counters, or canvassers of an election, in the discharge of the person's duty, are interfered with.

SDCL § 22-19A-1

Prohibits anyone who willfully, maliciously, and repeatedly follow or harass another, make a credible threat to another, or harass another by means of verbal, electronic, or written communication.

SDCL § 12-18-3

Prohibits any person who, in any polling place or within or on any building in which a polling place is located or within one hundred feet from any entrance leading into a polling place, use any communication or photographic device in a manner which repeatedly distracts, interrupts, or intimidates any election worker.

Tennessee

T. C. A. § 39-17-315

Prohibits the repeated or continuing harassment of another individual that would cause a reasonable person to feel and cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

T. C. A. § 39-17-308

Prohibits anyone who intentionally communicates a threat to another person and intends the communication to be a threat of harm and a reasonable person would perceive the communication to be a threat of harm.

Texas

V.T.C.A., Penal Code § 42.07

Prohibits anyone if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person threatens bodily harm, conveys a false report about a death or serious injury, makes an obscene proposal, repeated phone calls or electronic communications.

V.T.C.A., Penal Code § 22.11

Prohibits anyone if, with the intent to assault, harass, or alarm, the person causes a public servant to contact the blood, seminal fluid, vaginal fluid, saliva, urine, or feces while the public servant is lawfully discharging an official duty or in retaliation of the official's power or performance of a duty.

V.T.C.A., Penal Code § 36.06

Prohibits anyone who intentionally or knowingly harms or threatens to harm a public servant in retaliation of or to delay or prevent a service.

V.T.C.A., Penal Code § 22.07

(2) Prohibits anyone who threatens to commit any offense involving violence to any person with intent to place any person in fear of imminent serious bodily injury.

V.T.C.A., Penal Code § 36.03

(a)(1) Prohibits any person who influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty.

Utah

U.C.A. 1953 § 76-8-301

(1)(a) Prohibits anyone who uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing.
(1)(c) Prohibits anyone who on property that is owned, operated, or controlled by the state or a political subdivision of the state denies to a public servant lawful freedom of movement, use of the property or facilities, or entry into or exit from the facilities.

U.C.A. 1953 § 20A-1-603

(b)(ii) Prohibits anyone who interferes with the officers holding an election.
(b)(iv) Prohibits anyone who induces any election officer.

U.C.A. 1953 § 76-5-106

Prohibits anyone with intent to frighten or harass another, the actor communicates a written or recorded threat to commit a violent felony.

U.C.A. 1953 § 76-5-107

(2)(a) Prohibits anyone who threatens to commit an offense and acts with intent to commit the offense involving bodily injury, death, or substantial property damage.

U.C.A. 1953 § 76-8-104

(1) Prohibits anyone who threatens any harm to a public servant with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion.

Vermont

13 V.S.A. § 1702

(f) Prohibits anyone who knowingly threaten a public official and as a result cause reasonable apprehension of death, injury, or sexual assault.

13 V.S.A. § 1026

(a)(1) Prohibits anyone who cause public inconvenience or annoyance, or recklessly creates a risk of violent, tumultuous, or threatening behavior.

13 V.S.A. § 1026a

Prohibits anyone who engages in a course of conduct directed at a specific person with the intent to cause the person inconvenience and engages violent, tumultuous, or threatening behavior, makes unreasonable noise, uses abusive or obscene language, or threatens bodily injury or serious bodily injury.

Virginia

VA Code Ann. § 24.2-607

(b) No person shall conduct himself in a noisy or riotous manner at or about the polls to disturb the election or insult or abuse an officer of election.

VA Code Ann. § 24.2-604

(c) It is unlawful to hinder or delay any officer of election.

Washington

West's RCWA 9A.76.180

Prohibits intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant.

West's RCWA 9A.46.020

Prohibits anyone who knowingly threatens to cause bodily injury, physical damage to property, physical confinement, or maliciously do any act that is intended to substantially harm a persons physical or mental health.

West Virginia

W. Va. Code, § 3-9-10

Prohibits anyone by force, menace, fraud, or intimidation, prevent or attempt to prevent any officer whose duty it is by law to assist in holding an election or by violence, threatening gestures, speeches, force, menace, or intimidation, prevent or attempt to prevent an election being held.

W. Va. Code, § 61-2-9a

Prohibits anyone who engages in a course of conduct directed at another person with the intent to cause the other person to fear for his personal safety, the safety of others, or suffer substantial emotional distress.

W. Va. Code, § 61-5-27

(b)(1) Prohibits anyone who uses intimidation, physical force, harassment, or to threaten to do so where such threat is directed at inciting lawless action of a violent nature that could cause bodily harm and is likely to incite or produce such action with the intent to impede or obstruct a public employee from performing his or her official duties.

Wisconsin

W.S.A. 947.013

(1m) Prohibits anyone who, with intent to harass or intimidate another person, strikes, shoves, kicks, or other physical contact or attempts or threatens to do the same or repeatedly commits acts which harass or intimidate the person, and which serve no purpose.

W.S.A. 943.30

(1) Prohibits anyone who maliciously threatens to accuse or accuses another of any crime or offense or threatens or commits any injury to the person with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act.

Wyoming

W.S.1977 § 22-26-111

(1)(i) Prohibits inducing, or attempting to induce, fear in an election official by use of threats of force, violence, harm or loss, or any form of economic retaliation, for the purpose of impeding the impartial administration of the Election Code.

W.S.1977 § 22-26-114

Prohibits disturbing a polling place consists of creating any disorder or disruption at a polling place on election day or interfering with the orderly conduct of an election.

W.S.1977 § 6-2-506

Prohibits any person who, with intent to harass another person, engages in a course of conduct reasonably likely to harass that person.

W.S.1977 § 29-1-601

(c) Prohibits any person who offers to have recorded or filed a forged or groundless lien in violation of this section with the intent to threaten, harass or intimidate a public official or employee in the performance or nonperformance of his official duties.

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August 12, 2021

Report
The Elections Clause:
States' Primary Constitutional Authority Over Elections

Representative Rodney Davis (IL-13)
Ranking Member

U.S. House of Representatives
Committee on House Administration

Executive Summary

Republicans believe that every eligible voter who wants to vote must be able to do so, and all lawful votes must be counted according to state law. Through an examination of history, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself, this document explains the constitutional division of power envisioned by the Framers between the States and the federal government with respect to election administration. Article 1, Section 4 of the Constitution explains that the States have the primary authority over election administration, the "times, places, and manner of holding elections". Conversely, the Constitution grants the Congress a purely secondary role to alter or create election laws only in the extreme cases of invasion, legislative neglect, or obstinate refusal to pass election laws. As do other aspects of our federal system, this division of sovereignty continues to serve to protect one of Americans' most precious freedoms, the right to vote.

Ranking Member Rodney Davis (IL-13), Committee on House Administration

The[1] Constitution reserves to the States the primary authority to set election legislation and administer elections—the "times, places, and manner of holding of elections"—and Congress' power in this space is purely secondary to the States' power. Congress' power is to be employed only in the ***direst*** of circumstances.[2] Despite Democrats' insistence that Congress' power over elections is unfettered and permits Congress to enact sweeping legislation like H.R. 1, it is simply not true. History, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself make this exceedingly clear.

The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had *exclusive* authority over federal elections held within their territory;[3] but, given the difficulties the national government had experienced with State cooperation (*e.g.*, the failure of Rhode Island to send delegates to the Confederation Congress),[4] the Federalists, including Alexander Hamilton, were concerned with the possibility that the States, in an effort to destroy the federal government, simply might *not hold* elections or that an emergency, such as an invasion or insurrection, might prevent the operation of a State's government, leaving the Congress without Members and the federal government unable to respond. Indeed, as counsel for the Democrat Members of our Committee so keenly observed:

> For the Founders, particularly during the Federal Constitutional Convention, the primary concern was informing the discussions of federal elections in Article I was the risk of uncooperative states. For example, Alexander Hamilton noted that by providing states the authority to run congressional elections, under Article I, Section 4, "risk[ed] 'leaving the existence of the Union entirely at their mercy."' Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states. Indeed, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[,]" and that "***the Clause 'was the Framers' insurance***

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[1] A version of this Report was delievered by Ranking Member Rodney Davis as his opening remarks at the Committee on House Administration's July 12, 2021, hearing, *The Elections Clause: Constitutional Interpretation and Congressional Exercise*.

[2] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010) (describing the origins of the Elections Clause, the meaning of "manner of" versus "manner of holding" elections, the debates leading to its adoption, and the promises made and compromises reached that led the author to conclude quite plainly, "In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed." (*Id.* At 15.))

[3] ARTS. OF CONFED'N, Art. 5, Sec. 1.

[4] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010) (citing to various historical documents).

> ***against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.***"[5]

Quite plainly, Alexander Hamilton, a leading Federalist and proponent of our Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process.[6] Writing as Publius to the people of New York, Hamilton further expounds on the correct understanding of the Elections Clause: "T[he] natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, ***in the last resort***, the election of its own members."[7]

When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4:[8]

Maryland: "[C]onvention delegate James McHenry added that the risk to the federal government [without a fail-safe provision] might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election."[9]

N. Carolina: "An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war)."[10]

Pennsylvania: "Sir, let it be remembered that this power ***can only operate in a case of necessity***, after the factious or listless disposition of a particular state has rendered an interference essential to the ***salvation*** of the general government."[11]

John Jay made similar claims in New York.[12] And, as constitutional scholar Robert Natelson, notes in his invaluable article, *The Original Scope of the Congressional Power to Regulate Elections*,

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[5] Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609 (2017-2018) (internal citations omitted) (alterations in original).
[6] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 11 (Nov. 2010) (quoting *Federalist* no. 59).
[7] Alexander Hamilton (writing as Publius), *Federalist* no. 59, *Concerning the Power of Congress to Regulate the Election of Members*, N.Y. PACKET (Fri., Feb. 22, 1788), *available at* https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493435 (emphasis added).
[8] *See, generally*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010).
[9] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).
[10] *Id.*
[11] *Id.* at 13.
[12] *Id.* at 13.

> Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular, stated flatly that Congress would exercise its times, places, and manner authority ***only in cases of invasion, legislative neglect or obstinate refusal to pass election laws*** [providing for the election of Members of Congress], or if a state crafted its election laws with a 'sinister purpose' or to injure the general government."[13]

Cementing his point, Hanson goes further to decree, "The exercise of this power must at all times be so very invidious, that congress will not venture upon it without some very cogent and substantial reason."[14] In Floor debate during the 117th Congress concerning H.R. 1, the Democrats' intended nationalization of elections, Ranking Member Davis argued, as he has many other times, that:

> According to Article 1, Section 4 of the Constitution, States have the primary role in establishing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Under the Constitution, Congress has a purely secondary role in this space and must restrain itself from acting improperly and unconstitutionally. Federal election legislation should never be the first step and must never impose burdensome, unfunded federal mandates on state and local elections officials. When Congress does speak, it must devote its efforts only to resolving highly significant and substantial deficiencies. State legislatures are the primary venues to correct most issues.[15]

In fact, had the Democrats' view of the Elections Clause been accepted at the time of the Constitution's drafting—that is, that it offers Congress unfettered power over federal elections—it is likely that the Constitution would not have been ratified or that an amendment to this language would have been required. Indeed, at least seven[16] of the original 13 states—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. However, "[l]eading Federalists . . ." assured them, ". . . that, even without amendment, the [Elections] Clause should be construed as limited to emergencies."[17]

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[13] *Id.* at 12-13 (quoting in part *infra* n. 11).

[14] Alexander Contee Hanson (writing as Astrides), *Remarks on the Proposed Plan: 31 January*, reprinted in John P. Kaminski, Gaspare J. Saladino, and Richard Leffler (eds.), 3 *Commentaries on the Constitution, public and private 18 December 1787 to 31 January 1788* 522- 26 (1984), *available at* https://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=goto&id=History.DHRCv15&isize=M&submit=Go+to+page&page=522.

[15] Ranking Member Rodney Davis, U.S. H.of Reps. Comm. on H. Admin., *Republican Election Law Principles*.

[16] A record of congressional debate of August 21, 1789, as recorded in the *Annals of Congress*, suggests Maryland might also be included, which would bring the total to eight states. 1 Annals of Cong. 799 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=401.

[17] *See supra* n. 7 at 12.

Three states, New York, North Carolina, and Rhode Island, specifically made their ratification contingent on this understanding being made express:[18]

New York:

> Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and the Explanations aforesaid are consistent with the said Constitution, And in confidence that the Amendments which have been proposed to the said Constitution will receive early and mature Consideration: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises[.][19]

N. Carolina:[20]

> That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.

Rhode Island:

> Under these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments hereafter mentioned, will receive an early and mature consideration, and conformably to the fifth article of said constitution, speedily become a part thereof; We the said delegates, in the name, and in [sic] the behalf of the People, of the State of

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[18] *Id.* at 13.

[19] *Ratification of the Constitution by the State of New York* (July 26, 1788), *available at* https://avalon.law.yale.edu/18th_century/ratny.asp. *See also Id.* at 13 and n. 189.

[20] North Carolina's ratification document handled the issue slightly differently. It included a Declaration of Rights and several proposed amendments to the Constitution. The Convention "[r]esolved, That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, together with the Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before Congress, and the Convention of States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration, previous to the ratification of the Constitution aforesaid, on the part of the State of North Carolina." *Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789), *available at* https://avalon.law.yale.edu/18th_century/ratnc.asp.

> Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution. In full confidence . . . That the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators and representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that [i]n those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises[.][21]

This clearly demonstrates that the Framers designed and the ratifying States understood the Elections Clause to serve solely as a protective backstop to ensure the preservation of the Federal Government,[22] not as a font of limitless power for Congress to wrest control of federal elections from the States.

This understanding was also reinforced by debate during the first Congress that convened under the Constitution. "During the first session of the First Congress . . . . Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies."[23] But those on both sides of the Burke amendment debate ***already understood the Elections Clause to limit Federal elections power to emergencies***.

For example, the recorded description of opponent Representative Goodhue's comments notes that he believed the Elections Clause as written was intended to prevent ". . . the State Governments [from] oppos[ing] and thwart[ing] the general one to such a degree as finally to overturn it. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence."[24] With any change to the original text therefore unnecessary to achieve Burke's desired goal, Mr. Goodhue voted against the proposed amendment.[25]

Similarly, proponent Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government's power over federal elections to emergencies and so thought there would be no harm in supporting an amendment to make that language express.[26] So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over federal elections.

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[21] *Ratification of the Constitution by the State of Rhode Island* (May 29, 1790), *available at* https://avalon.law.yale.edu/18th_century/ratri.asp. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 13 and at n. 183 (Nov. 2010).

[22] *See supra* n. 5 ("EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION."). *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).

[23] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 13 (Nov. 2010) (citing 1 Annals of Cong. 797 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=400).

[24] 1 Annals of Cong. 801 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=402.

[25] *Id.*

[26] *Id.* at 799.

Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary

> . . . ***authority to provide a complete code for congressional elections***, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.[27]

This holding, of course, is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* Court also held that while Congress maintains the authority to " . . . supplement these state regulations or [to] substitute its own[]", such authority remains merely "'a general supervisory power over the whole subject.'"[28] More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that "[t]his grant of congressional power [that is, the fail-safe provision in the Elections Clause] was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."[29] The Court explained that the Elections Clause " . . . imposes [upon the States] the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators[.]"[30] And, while, as the Court noted, "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith[]",[31] the *Inter-Tribal* Court explained, quoting extensively from *The Federalist no. 59*, that it was clear that the congressional fail-safe included in the Elections Clause was intended for the sorts of governmental self-preservation discussed in this Report: "[E]very government ought to contain in itself the means of its own preservation[.]"; "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."[32]

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[27] *Smiley v. Holm*, 285 U.S. 355, 366 (1932).
[28] *Id.* (also quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).
[29] *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7-9 (2013).
[30] *Id.* at 8.
[31] *Id.* at 9 (quoting U.S. CONST., Art. 1, Sec. 4 and *Ex parte Siebold*, 100 U.S. at 392).
[32] *Inter-Tribal*, 285 U.S at 8.

Conclusion

It is clear in every respect that the congressional fail-safe described in the Elections Clause vests purely secondary authority over federal elections in the federal legislative branch and that the primary authority rests with the States. Congressional authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as invasion or other matters that might lead to a State not electing representatives to constitute the two Houses of Congress.[33] Our authority has never extended to the day-to-day authority over the "Times, Places and Manner of Election"[34] that the Constitution clearly reserves to the States. Unfortunately for Democrats, this clear restriction on congressional authority means that we do not have the power to implement the overwhelming majority—if not the entirety—of their biggest legislative priority, H.R. 1 and related legislation, which would purport to nationalize our elections and centralize their administration in Washington, D.C. Thankfully, the Framers had the foresight to write our Constitution so as to prevent those bad policies from going into effect and preserve the health of our republic.

[33] *See, e.g., supra* n. 4.
[34] U.S. CONST., Art. 1, Sec. 4.



AMERICAN CONFIDENCE IN ELECTIONS ACT

Educate. Engage. Reform.

American Confidence in Elections Act (ACE Act)

Summary: The American Confidence in Elections Act (ACE Act), the key Republican election integrity bill as we move into the Majority, focuses on the importance of strong election integrity reforms that meet the moment by bolstering voter confidence in our elections while respecting the Constitution, federalism, and conservative principles. Further, the ACE Act continues to address disappointing challenges faced by military and overseas voters and makes the biggest legislative effort in a generation to protect political speech in a climate where Democrats are doing everything in their power to determine "truth" and silence conservative voices.

General Findings

- States have the primary role in establishing election law and administering elections.
- All eligible voters must be able to vote, and all lawful votes must be counted.
- Political speech is protected speech and all voices must be protected.
- Includes the Committee's report on the constitutional role of the States and Congress in election regulation.

Title I – Election Integrity and Voter Confidence

Providing States with the Tools to Bolster Voter Confidence and Improve Election Integrity

- General findings that explain Congress' proper role under the Constitution.
- Establishes with the existing, bipartisan EAC Standards Board a federal forum for states to share best practices and discuss successes and failures so that all may benefit from innovation and lessons learned across the country. . The forum will create no binding recommendations but will release records of its conversations in the form of voluntary considerations on the following topics: the process for the administration of ballots delivered by mail, signature verification procedures, voter list maintenance, access for election observers, timely reporting of the results of ballot counting, recruiting poll workers, public education with respect to the certification and testing of voter machines prior to elections, post-election audits, and secure chain of custody procedures for ballots and election equipment. Directs the EAC to develop voluntary guidelines for the use of nonvoting election technology like electronic pollbooks.
- EAC as lead federal agency on all election administration matters and grants the agency exclusive authority to make election administration grant disbursements to States
- Requires the National Institute of Science and Technology to provide status reports to Congress on its responsibilities under HAVA, .
- Confirms that States must provide access for Congressional election observers under Congress' constitutional role to serve as the "Judge of the Elections, Returns and Qualifications of its own Members[.]"
- Requires USPS to prioritize election mail and to mark all election mail with date of receipt, and process and deliver election mail even if the election officials' account is underfunded or overdrawn. Allows the USPS to recoup any such costs in arrears. Adds criminal penalties for forging a postmark. (Massie Amendment).
- Allows national, state, and local political committees to use the non-profit rate for the purpose of cooperative mailings.
- Requires the U.S. Postal Service to coordinate with states to identify and assign a mailing address to each home in every state, including those residences on Native American land (Cole).
- Amends the IRS code by allowing certain compensation of election workers to be excluded from gross income and removes the federal requirement that elections officials issue 1099 or W-2 forms to election workers, eliminating a major administrative burden.
- Expressly allows States to use Help America Vote Act ("HAVA") dollars to conduct post-election audits.
- Encourages individuals to serve as poll workers by permanently extending the Employer Participation in Repayment Act for election works and improves tax treatment for poll worker pay. States may also provide preference to veterans and individuals with disabilities when hiring election workers.
- Disincentives "collusive" settlements by requiring SCOTUS to hear an appeal in any case that invalidates a state statute on federal constitutional grounds. (Repeals 1988 Biden law change).
- Clarifies that election materials that must be preserved for 22 months pursuant to HAVA includes ballot envelopes.
- Clarifies the federal agency involvement in voter registration by establishing that Executive Order 14019 (Biden election executive order) shall have no force (except as may otherwise be required by law)
- Prohibits the use of federal funds by states to administer elections for federal office unless the state imposes certain restrictions on ballot harvesting and on the transmission of mail ballots.

- Establishes a bipartisan panel to recommend to Congress model legislation providing for an appropriate process to resolve any vacancy created by the death of a candidate in a contingent presidential or vice-presidential elect. (*Solving an Overlooked Loophole in Votes for Executives (SOLVE) Act*, (Davis, Spanberger, A. King, Portman)

Preventing Non-Citizens from Participating in our Elections

- Clarifies that States have the authority to remove non-citizens from their federal voter registration lists under their regular voter list maintenance programs.
- Expressly restates that it is a felony for non-citizens to vote in federal elections.
- Penalizes States that allow non-citizen voting in state or local elections by reducing share of new HAVA grant funds by 30%.
- Prohibits states from maintaining a single voter registration roll for state and Federal elections if the state permits non-citizens to vote in state and local elections. Prohibits states from using federal dollars to build or maintain a state-specific roll containing non-citizens. Requires states that allow non-citizen voting to have separate ballots for local races if the election occurs during a federal election and prohibits federal dollars to create ballots for non-citizens.
- Requires federal courts to notify the chief state election official and attorney general when non-citizens are excused from jury duty so that States may update their voter rolls and requires election officials to coordinate their registration rolls with federal court jury lists.
- Prohibits foreign nationals from making financial or in-kind contributions in connection with State or local ballot initiatives or referendum and adds criminal penalties for doing so.
- Requires States to include with their existing biannual reports to the EAC the total number of inactive registrants and the number of registrants removed from the list of official voters. (Palmer).
- Allows a state's proof of citizenship requirement to be included in the state instructions on the national mail voter registration form maintained by EAC. (State Instruction Inclusion Act (Palmer)

Other List Maintenance Provisions

- Subject to privacy considerations, requires federal agencies upon state request to share relevant information with state agencies for list maintenance and voter registration purposes.

Voter Identification

- Modernizes the existing HAVA first-time mail voter ID requirement to include all first-time voter registrations made using any method other than in-person at an elections office or state voter registration agency. Also requires certain voters who request a mail ballot or vote by mail to provide HAVA ID.
- Reforms existing REAL ID Act to require "CITIZEN" to be printed on all qualifying individuals' identification documents issued or renewed after January 1, 2026.
- Recognizes REAL ID identification documents as appropriate for photographic voter identification, as recommended by the Carter-Baker Commission.

Ending Private Funding for Election Administration

- Includes the *End Zuckerbucks Act of 2022*, which would remove federal tax exemption for provision of direct or indirect private funding for election administration. (Tenney).

Requiring D.C., which Congress controls, to Implement Election Integrity and Voter Confidence Measures

- In addition to above, implements in the District of Columbia the American Confidence in Elections: D.C. Election Integrity and Voter Confidence Act, which would serve as an example to the States of effective election administration and would include:
  - a requirement all voters present photo voter ID to vote in person or to request an absentee/mail ballot and for DC to provide a free copy of the voter's ID and include photos or digital images of registered voters in the poll books with measures in place to protect privacy.
  - a requirement that voter roll list maintenance be conducted annually and a prohibition on same-day registration;
  - a prohibition on ballot harvesting (*Election Fraud Prevention Act*, Davis) and places certain restrictions on use of ballot drop boxes;
  - a prohibition on mailing ballots except upon voter's request;
  - a prohibition on non-citizen voting;
  - a requirement for meaningful observer access;
  - a requirement for a signature verification process for mail ballots and a requirement for signatures to be dated;
  - a requirement that all ballots except military/overseas ballots be received by the close of polls and that election officials report unofficial results no later than 10:00 a.m. the following day;
  - a requirement that after the closing of polls on the date of a District of Columbia election, the District make available on a publicly accessible website the total number of voted ballots in the possession of election officials in the District of Columbia as of the time of the closing of polls (Donalds) and publish the total number of UOCAVA ballots requested and received, including UOCAVA ballots

received that may have been sent pursuant to law without a request. District of Columbia officials must ensure that all election administration activities are carried out in a bipartisan manner;
- a requirement that provisional ballots only be counted when cast in the correct precinct; and
- a requirement that an audit be conducted following each election before the time to contest the election expires.

Title II – Military Voting Administration

- Directs GAO to conduct a study on voting access for absent uniformed services voters.

Title III – Protecting Political Speech and Campaign Finance Reform

- Includes the *Jonny Wade Pediatric Cancer Research Act* (Davis) to sunset public funding of presidential elections and transfers those monies deposited in the Presidential Election Campaign Fund to pediatric cancer research.
- Repeals limits on coordinated political party expenditures, allowing party committees to work directly with candidates without current restrictions that require the use of IE units, hybrid advertisements, and other methods.
- Allows two or more political committees to participate in joint fundraising activities without the hassle of establishing a joint fundraising agreement or a separate joint committee (but maintains existing formal requirements as an option).
- Raises contribution limits for State political party committees and allows the establishment of higher-limit building, legal, and convention funds as used by the national party committees and indexes limits for inflation.
- Increases qualifying threshold for political committees, candidate committees, and independent expenditure reporting requirement and indexes for inflation.
- Increases "at-home" event exemption amounts and indexes for inflation.
- Excludes certain costs related to party committee and candidate communications soliciting funds from treatment as contributions or expenditures.
- Prohibits the use of federal funds in support of Congressional campaigns (*H.R. 4261* [116th], Davis).
- Codifies existing donor disclosure protections for certain tax-exempt organizations (*NAACP v. Alabama and AFPF v. Bonta)*
- Removes statutory limits on aggregate individual contributions, which SCOTUS struck down in 2014 (*McCutcheon v. FEC*).
- Makes permanent the FEC's alternative dispute resolution process, which had been extended on a temporary basis.
- Includes H.R.149 (114th), which would permit candidates to name individuals who could disperse the funds of a federal campaign committee in accordance with law in the event of a candidate's death.
- Codifies the existing regulatory prohibition on making political contributions in the name of another person.
- Increases from $5,000 to $50,000 the gross receipts threshold used to determine the eligibility of tax-exempt organizations for the exemption from certain disclosure and reporting requirements. (Don't Weaponize the IRS Act (M. Kelly, McConnell, Braun, Cassidy).
- Directs the Department of the Treasury to not issue, revise, or finalize any regulation revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of Section 501(c)(4) of the Internal Revenue Code.
- Modernizes reporting requirements for electioneering communications.
- Modernizes threshold amount and establishes a price index adjustment for political committee threshold.
- Repeals requirement of persons making independent expenditures to report identification of certain donors.
- Increases the threshold limits for the real or personal property exemption and the travel expenses exemption and then indexes them for inflation,
- Exempts any payment for information or communication on the internet as a contribution unless it is disseminated for a fee on another person's website and expands the existing media exemption.
- Prohibits the Securities and Exchange Commission from issuing regulations regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.
- Requires unanimous consent of FEC Commissioners to decline to defend an action against the agency,
- Establishes a 5-year statute of limitations for all violations of the Federal Election Campaign Act of 1971.

Title IV – Election Security

- Directs the U.S. Department of Homeland Security (DHS) and the Director of National Intelligence to report on physical and cybersecurity threats to elections to Congress and the chief State election official of each State.
- Directs the Cybersecurity and Infrastructure Security Agency (CISA), in collaboration with the EAC, to determine if an elections-related cybersecurity advisory should be issued.
- Directs CISA, in collaboration with the Technical Guidelines Development Committee and the Standards Board of the EAC, to establish a voluntary process to test for and monitor covered voting systems for cybersecurity vulnerabilities.
- Directs any Federal entity who receives information about an election cybersecurity incident to promptly inform the Department of Homeland Security (DHS).

- Requires DHS to notify State and local officials of election cybersecurity incidents and collaborate with the EAC for the development and release of any cybersecurity advisories.

Title V – Sense of Congress with Respect to Role of State Legislatures in Congressional Redistricting

- Congress plays a very limited role in Congressional redistricting, ensuring that States carry out the process consistent with the Constitution.
- States are best situated—and constitutionally hold the power—to determine the best redistricting methods in their jurisdictions.

Title VI – Disinformation Governance Board

- Terminates the Disinformation Governance Board at DHS and prevents the use of funds to establish the Disinformation Governance Board, or any board that is similar in nature.

THE INDEPENDENT STATE LEGISLATURE DOCTRINE

Michael T. Morley[*]

The U.S. Constitution grants authority to both regulate congressional elections and determine the manner in which a state chooses its presidential electors specifically to the legislature of each state, rather than to the state as an entity. The independent state legislature doctrine teaches that, because a legislature derives its power over federal elections directly from the Constitution in this manner, that authority differs in certain important respects from the legislature's general police powers that it exercises under the state constitution. Although the doctrine was applied on several occasions in the nineteenth century, it largely fell into desuetude in the years that followed. During the 2020 presidential election cycle, however, several Justices issued opinions demonstrating an interest in recognizing and enforcing the doctrine.

This Article contends that the doctrine is best understood as a general principle that gives rise to a range of different potential corollaries, each of which is supported by somewhat differing lines of precedent, reasoning, historical practice, and prudential considerations. Each of these potential implications of the doctrine may be assessed separately from the others; the doctrine need not be accepted or repudiated wholesale. The fact that a court or commentator may accept or reject certain applications of the doctrine does not mean that other aspects, or the doctrine as a whole, must be similarly embraced or jettisoned. This Article unpacks the independent state legislature doctrine, exploring and offering a normative perspective on each of its possible corollaries.

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[*] Associate Professor, Florida State University College of Law. This Article was prepared for the Symposium entitled *Toward Our 60th Presidential Election*, hosted by the *Fordham Law Review* on February 26, 2021, at Fordham University School of Law. I am grateful for the valuable feedback I received at the Symposium. Special thanks to Mary Hornak, Tatiana Hyman, Joseph Palandrani, and the staff of the *Fordham Law Review* for their tireless help in editing this piece, and to Anna Kegelmeyer for her outstanding research assistance.

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INTRODUCTION

The 2020 presidential election was the most litigated in American history. Prior to Election Day, plaintiffs across the nation had collectively filed over 400 federal and state challenges to various election-related rules and procedures.[1] Many of these cases alleged that states had not done enough to ensure that people could vote safely despite the ongoing global COVID-19 pandemic.[2] Following the election, President Donald J. Trump and his supporters filed dozens of additional federal and state lawsuits, unsuccessfully attempting to challenge the election's results.[3]

One issue that arose in some of these cases was the viability of the "independent state legislature doctrine." This doctrine teaches that a state legislature's power to regulate federal elections does not arise from its state

1. *See COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ [https://perma.cc/EM99-9UYD] (last visited Sept. 17, 2021); *see also* Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS FRONTLINE (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/ [https://perma.cc/6B7X-L8QX].

2. *See, e.g.*, Memphis A. Phillip Randolph Inst. v. Hargett, 977 F.3d 566 (6th Cir. 2020) (declining to stay an injunction against a state law that required people who registered to vote online or by mail to cast their first ballot in person); Common Cause R.I. v. Gorbea, 970 F.3d 11 (1st Cir. 2020) (per curiam) (declining to stay a consent decree suspending witness requirements for mail-in ballots), *stay denied sub nom.* Republican Nat'l Comm. v. Common Cause R.I., 141 S. Ct. 206 (2020) (mem.), *appeal dismissed*, No. 20-1753, 2020 WL 8299593 (1st Cir. Aug. 17, 2020).

3. *See* William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/ [https://perma.cc/PT7H-VWD2]; Jim Rutenberg et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html [https://perma.cc/EL7W-HR3B].

constitution (like most of the legislature's other powers) but rather from an independent grant of authority directly from the U.S. Constitution. The doctrine is rooted in the fact that states lack inherent authority to regulate federal elections; their only power over such elections comes from the U.S. Constitution.[4]

Rather than delegating power to regulate federal elections to each state as an entity, the U.S. Constitution confers it specifically upon each state's legislature. The Article I Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," although Congress may "make or alter" such rules "at any time."[5] Likewise, the Article II Presidential Electors Clause states, "Each State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors" to select the president.[6] One might say that the Elections Clause and Presidential Electors Clause "pierce the veil" of statehood, conferring certain powers on a particular organ of state government rather than the state as an entity.

The question then arises: what, if any, significance should we attribute to this constitutional language? The independent state legislature doctrine provides that, because a legislature derives its authority over federal elections from the U.S. Constitution, such authority differs in certain important respects from the legislature's general police powers under its state constitution. Commentators strenuously disagree over the precise nature of any such differences and, indeed, whether they exist at all.[7]

It appears that the Framers neither expressly considered the independent state legislature doctrine nor addressed the potential significance of their use of the term "legislature" in the Elections Clause and Presidential Electors Clause.[8] The doctrine was nevertheless invoked on multiple occasions in the nineteenth century by the chambers of Congress, state supreme courts, and even the U.S. Supreme Court.[9] Additionally, the doctrine was endorsed by Michigan Supreme Court Justice Thomas M. Cooley in his treatise on

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4. *See* Cook v. Gralike, 531 U.S. 510, 523 (2001); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995).

5. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

6. *Id.* art. II, § 1, cl. 2 (emphasis added).

7. *See, e.g.*, Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2001) (arguing that the doctrine "does not rest on firm foundations of text, precedent, or history"); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 764–75 (2001) (arguing that the independent state legislature doctrine lacks a valid historical foundation); *see also infra* note 121 (collecting sources); *cf.* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1041, 1074 (2000) (contending that Article V allows a state's citizens to prevent agency problems by restricting or directing the institutional legislature's actions concerning federal constitutional amendments).

8. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 27–37 (2020).

9. *See id.* at 8–9, 37–69.

constitutional law[10] and emphasized by Justice Joseph Story at the Massachusetts constitutional convention of 1820.[11]

Though some courts continued to apply the doctrine into the early twentieth century,[12] it fell into desuetude, its historical background minimized or forgotten.[13] One strand of the doctrine, however, played a critical role in the ratification of the Nineteenth Amendment,[14] which extended the franchise to women.[15] A unanimous Supreme Court invoked another aspect of the doctrine in the course of resolving the 2000 presidential election,[16] while at least four Justices recognized its validity in separate opinions in *Bush v. Gore* itself.[17] In recent years, the U.S. Supreme Court has adopted inconsistent views toward the doctrine. The Court's hotly contested 5–4 ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[18] repudiated the doctrine (albeit arguably partly in dicta).[19] Several Justices subsequently issued opinions embracing it in cases arising from the 2020 presidential election.[20]

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10. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 754 n.1 (6th ed. 1890).

11. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 109–12 (Boston Daily Advertiser rev. ed. 1853) [hereinafter MASS. JOURNAL]; *see also* Morley, *supra* note 8, at 38–40 (discussing the debate at the convention).

12. *See, e.g.*, State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (holding that the court need not consider whether state laws establishing ballot access requirements for presidential candidates violated the state constitution because the state constitution did not apply to laws concerning the appointment of presidential electors); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (holding that the state constitution likely could not restrict the state legislature's power to allow members of the military to cast absentee ballots in presidential elections); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) ("We are not persuaded by the argument that the enactment of election laws, being an exercise of police power, is subject to [state] constitutional restrictions which prevent the Legislature from limiting the right of candidates to have their names on the general ballot. As has been shown, the Federal Constitution commands the state Legislature to direct the manner of choosing electors.").

13. *See* Morley, *supra* note 8, at 9 n.24.

14. U.S. CONST. amend. XIX.

15. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding that a state legislature's ratification of the Nineteenth Amendment was valid pursuant to its authority under Article V of the U.S. Constitution, despite the state constitution's purported restrictions); *cf.* Hawke v. Smith, 253 U.S. 221, 227, 230–31 (1920) (invoking the independent state legislature doctrine to uphold the validity of the ratification of the Eighteenth Amendment, which established Prohibition).

16. *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

17. 531 U.S. 98 (2000) (per curiam); *see infra* notes 112–20 and accompanying text.

18. 576 U.S. 787 (2015).

19. *Id.* at 824.

20. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari) ("The Constitution gives to each state legislature authority to determine the 'Manner' of federal elections. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead." (internal citation omitted)); *id.* at 738 (Alito, J., dissenting from denial of certiorari); Republican Party of Pa. v. Boockvar (*Boockvar II*), 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the

This Article seeks to unpack the independent state legislature doctrine, explaining the range of distinct possible implications to which courts, commentators, and advocates have claimed it gives rise. Importantly, these possible corollaries of the doctrine are largely independent of each other, supported by somewhat different lines of reasoning and authority. Although these theories arise from the same constitutional principle, each may be assessed separately from the others; the doctrine need not be accepted or repudiated wholesale. The fact that a court or commentator may reject certain potential implications of the doctrine does not mean that other possible applications, or the doctrine as a whole, must also be jettisoned. This Article also offers a normative perspective on each of these possible implications, assessing the extent to which each is historically supported, legally sound, and pragmatically desirable.

Part I focuses on the independent state legislature doctrine's potential implications for state statutes. Most basically, because the doctrine emphasizes the Constitution's grant of authority over federal elections to state legislatures, a few courts have interpreted the doctrine as requiring state and local officials to be able to point to some source of statutory authorization for the policies they adopt or restrictions they enforce for such elections. Under this approach, when election officials act without, or contrary to, statutory authorization regarding federal elections, they not only violate state law but also intrude on the legislature's prerogatives under the U.S. Constitution. This aspect of the doctrine simply adds an additional—and, critics might charge, unnecessary—federal overlay to the question of whether election officials are acting ultra vires under state law.

A more consequential potential implication is that the doctrine may impose a plain meaning canon of interpretation for state laws governing federal elections, and may allow federal courts to review state courts' interpretations of such provisions to prevent substantial unexpected departures from their text. This prong of the doctrine provides that, because the Constitution grants state legislatures the authority to regulate federal elections, election officials and courts must follow the rules the legislature establishes. Under this approach, since a legislature adopts only the text of a statute, the Constitution requires election officials and courts to apply that text, even if they ordinarily would take into account extrinsic considerations like the state constitution,

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authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."); Moore v. Circosta, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting from denial of injunction pending appeal) (opining that a state board of elections had violated the Elections Clause and Presidential Electors Clause by executing a consent decree in state court that barred enforcement of a law recently enacted by the legislature to regulate elections during the COVID-19 pandemic); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29–30 (2020) (mem.) (Gorsuch, J., concurring in denial of application to vacate stay) (declining to vacate a stay of a federal district court order extending the deadline for the receipt of absentee ballots by election officials because "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules").

substantive canons of interpretation, or their own judgments about sound policy or fairness.

At a minimum, this aspect of the doctrine would place outer bounds on the ability of state officials and courts to unexpectedly interpret a state law governing federal elections in a way that materially deviates from the apparent meaning of that law's text. In particular, a state court would be unable to effectively change the rules of an election—especially after the votes have been cast and the beneficiaries of various possible rulings are known—by interpreting and applying the election code in dubious and unpredictable ways. Although the *Erie* doctrine generally requires federal courts to accept state courts' interpretations of state statutes,[21] the Supreme Court has recognized multiple exceptions to that principle, particularly when important federal interests are involved.[22] A unanimous Supreme Court appears to have applied this aspect of the doctrine in *Bush v. Palm Beach County Canvassing Board*,[23] and at least four Justices acknowledged it, albeit to varying extents, in *Bush v. Gore*.[24]

This part concludes by explaining how a few federal courts have erroneously held that, under the political question doctrine, the Elections Clause and Presidential Electors Clause preclude them from adjudicating certain kinds of constitutional challenges to state laws regulating federal elections. Those constitutional provisions, however, do not speak to the jurisdiction of the federal courts. This potential application of the doctrine is among the most easily rejected.

Part II turns to the independent state legislature doctrine's possible implications for state constitutions. During the nineteenth century, the doctrine was invoked on multiple occasions to establish that, because a state legislature receives its authority to regulate federal elections exclusively from the U.S. Constitution, a state constitution is incapable of imposing substantive restrictions on the scope of that power.[25] When a state legislature regulates federal elections, it is bound by the implicit restrictions of the Elections Clause and Presidential Electors Clause;[26] the explicit restrictions of the U.S. Constitution's Bill of Rights (as incorporated through the Fourteenth Amendment), Reconstruction amendments,[27] and other voting

21. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

22. *See infra* notes 135–87 and accompanying text.

23. 531 U.S. 70 (2000) (per curiam); *see infra* notes 96–110 and accompanying text.

24. *See* 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring); *id.* at 129–35 (Souter, J., dissenting); *see also infra* notes 112–20 and accompanying text (discussing the Rehnquist and Souter opinions' analyses).

25. *See* Morley, *supra* note 8, at 9–10; *see also supra* note 12 (collecting cases).

26. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) (holding that the Elections Clause does not empower states to adopt laws that "dictate electoral outcomes, . . . favor or disfavor a class of candidates, or . . . evade important constitutional restraints"); *see, e.g.*, Cook v. Gralike, 531 U.S. 510, 523 (2001) (enforcing the Elections Clause's implicit limitations recognized in *Thornton*); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally applicable and evenhanded restrictions that protect the integrity and reliability of the [federal] electoral process itself").

27. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (Due Process and Equal Protection Clauses); *id.* amend. XV, § 1 (prohibiting denial or abridgement of the right to vote on account of race).

rights amendments;[28] and federal laws such as the Voting Rights Act of 1965[29] and National Voter Registration Act of 1993.[30] This prong of the independent state legislature doctrine specifies that a legislature is not similarly bound by substantive constraints in its state constitution. Since most state constitutional provisions concerning voting rights either have analogues in the U.S. Constitution or state law, or are construed substantively similarly to more general provisions in the U.S. Constitution (like the Due Process or Equal Protection Clauses),[31] this principle typically would have limited effect.[32] One important consequence would be the preclusion of voters from challenging alleged political gerrymanders for the U.S. House of Representatives under state constitutions.

Even if the doctrine precludes state constitutions from limiting the substantive content of the laws that legislatures enact to regulate federal elections, state constitutions still may regulate the *process* by which legislatures enact those measures into law. Historically, bills concerning federal elections were subject to the possibility of rejection through a gubernatorial veto[33] or public referendum.[34]

Part III focuses on the doctrine's potential impacts on the legislature itself. Historically, some legislatures exercised their authority under the Presidential Electors Clause by directly appointing presidential electors.[35] This part begins by assessing claims that legislatures may continue to assert such power, despite the transition to popular presidential elections. Strong arguments can be made under the Constitution and federal law that, once a legislature establishes a process to choose electors by popular vote, it may not supersede that process by directly appointing its own slate of electors in violation of its own laws—at least absent a major disaster such as Hurricane Katrina that prevents a popular election from being conducted or completed. Moreover, a legislature's attempt to assert such authority would be dangerously destabilizing to the electoral process.

Turning to a different potential application of the doctrine, this part then examines whether it prevents states from enacting measures governing federal elections through mechanisms outside the institutional legislature, such as a public initiative process.[36] This part goes on to assess the related

28. *See, e.g.*, *id.* amend. XIX (prohibiting sex discrimination with regard to voting rights); *id.* amend. XXIV, § 1 (abolishing poll taxes for federal elections); *id.* amend. XXVI, § 1 (prohibiting discrimination on account of age, for people at least 18 years old, with regard to voting rights); *see also id.* amend. XVII (providing for the popular election of U.S. senators).

29. Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

30. Pub. L. No. 103–31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 and in scattered sections of 39 U.S.C.).

31. *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 204 (2014).

32. *See* Morley, *supra* note 8, at 90–92.

33. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932).

34. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

35. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE 59 (2020).

36. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015).

issue of whether states may partly or completely strip their institutional legislatures of authority to regulate federal elections.[37] At a minimum, the doctrine suggests that, even if such alternate legislative methods presumptively may be used to regulate federal elections, they may not limit the institutional legislature's authority under the U.S. Constitution to adopt its own preferred policies. Finally, this part rejects the notion that the independent state legislature doctrine prevents state legislatures from delegating their constitutional authority to other entities, such as election officials.

A brief conclusion follows, explaining how standing requirements may hinder attempts by candidates, voters, and most other potential plaintiffs to invoke the independent state legislature doctrine.[38] Much of the legal and academic debate over the doctrine has been complicated by the fact that it has a range of potential applications. The doctrine's validity, however, does not hinge on any particular application. And not all of those potential corollaries are consistent with the way the doctrine has historically been implemented or pragmatically beneficial. This Article seeks to provide a descriptive taxonomy of the doctrine's possible applications, with a normative assessment of their relative merits.

I. THE DOCTRINE AND STATE STATUTES

The independent state legislature doctrine arises from the fact that the Constitution grants authority to regulate the "Manner" of conducting congressional elections[39] and appointing presidential electors[40] specifically to the "Legislature" of each state rather than to the state as a whole. Since the Constitution singles out state legislatures, it is helpful to begin by considering whether it requires any special treatment for state laws governing federal elections that a legislature enacts. This part begins by explaining how some courts have held that it is unconstitutional for state or local election officials to purport to regulate federal elections without statutory authorization. It then explores how the doctrine has been applied to impose outer bounds on courts' ability to interpret state laws governing federal elections in surprising ways that materially depart from their text. From this perspective, the greater the inconsistency between a statute's text and a court's interpretation of it, the greater the risk that the court is imposing its own preferences rather than faithfully implementing the legislature's directives and respecting the legislature's constitutional prerogatives.

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37. *Cf. id.*

38. *See* Lance v. Coffman, 549 U.S. 437, 442 (2007) (per curiam) (holding that private citizens lacked standing to bring a challenge under the Elections Clause to a state court's order concerning congressional redistricting, because they could assert only an "undifferentiated, generalized grievance").

39. U.S. CONST. art. I, § 4, cl. 1.

40. *Id.* art. II, § 1, cl. 2.

A. Requiring State Law Authorization for Other Branches' Actions

The most basic potential implication of the independent state legislature doctrine is that state and local officials must be able to point to some source of statutory authorization to impose measures regulating federal elections. Under this approach, the Constitution grants power over federal elections specifically to the state legislature. Election officials may therefore adopt rules or procedures concerning such elections only if the legislature has authorized them to do so. And officials may not take it upon themselves to suspend or ignore state law. An election official who purports to act without some delegation of authority from the legislature or attempts to adopt rules that suspend or contradict a legislative enactment is not only acting ultra vires under state law but also intruding on the legislature's sole constitutional prerogatives, as well.

For example, in *Libertarian Party v. Dardenne*,[41] the final statutory deadline for recognized political parties to file their nominees with the Louisiana secretary of state was September 5.[42] Hurricane Gustav had hit the state only a few days earlier, however, and the secretary's office "was officially closed" from September 2 through September 7.[43] When the office reopened on September 8, the secretary announced that he was extending the filing deadline until the end of that day.[44] Because the Libertarian Party was unable to submit its completed paperwork until two days later, the secretary declared that he would be excluding the party's candidate for president from the ballot.[45]

Applying the independent state legislature doctrine, the U.S. District Court for the Middle District of Louisiana held that the secretary had violated the Presidential Electors Clause by unilaterally establishing a new deadline without any statutory basis.[46] The court began by noting that "only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office."[47] Accordingly, only the legislature—and not the secretary of state—was "vested with the power to create new deadlines for federal elections."[48] The legislature had not passed a law either extending the deadline or authorizing the secretary to do so. The secretary had therefore "exceeded his authority when he extended the deadline for submission of the qualifying papers."[49]

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41. No. 08-582-JJB, 2008 WL 11351516, at *2 (M.D. La. Sept. 25, 2008), *stay granted*, 294 F. App'x 142 (5th Cir. 2008), *preliminary injunction vacated as moot*, 308 F. App'x 861 (5th Cir. 2009).

42. *Id.* State law established the initial deadline as September 2 but specified that if the central committee of a recognized state party failed to meet that deadline, the party's national chair could file the required paperwork within the next 72 hours. *Id.* at *1 & n.4.

43. *Id.* at *2.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at *3.

49. *Id.*

The court went on to hold that the First and Fourteenth Amendments barred the state from enforcing the original statutory deadline due to "[t]he hardships and the extreme circumstances faced by those seeking to file their party's qualifying papers, in the midst of a natural disaster like Hurricane Gustav and the resulting power outages and impediments in many avenues of communication."[50] It therefore ordered the secretary to accept the Libertarian Party's belated filing.[51] The Fifth Circuit stayed this ruling, however, on the grounds that the record was "devoid of any evidence" that the Libertarian Party would have been able to file its completed paperwork on time "had Hurricane Gustav not occurred."[52] It also pointed out that, despite the closure of nonessential state offices due to the hurricane, "the election filing office of the Secretary of State of Louisiana remained open."[53] The Fifth Circuit did not comment on the district court's application of the independent state legislature doctrine. The case was later dismissed as moot.[54]

One unacknowledged consequence of the district court's ruling, which purportedly enforced the legislature's prerogatives, is that the legislature did not ultimately determine the new deadline. Because the court concluded that it would have been unconstitutional to enforce the statutory deadline under the circumstances, the court imposed its own extended deadline, rather than allowing the secretary to decide how to address the emergency.[55]

Another example arose following a ruling by the Sixth Circuit that Ohio's ballot access requirements for third-party candidates were unconstitutional.[56] The Ohio General Assembly had subsequently failed to amend the invalidated statute, "leaving no lawful, statutory criteria to be followed by the Secretary of State or the various Boards of Election of each county."[57] The Ohio secretary of state attempted to fill this gap by issuing a directive specifying the number of signatures required for third-party ballot access petitions, as well as the filing deadline for such petitions.[58] The Libertarian Party failed to fulfill the directive's requirements and challenged the resulting exclusion of its candidates from the ballot.[59]

The court, as in *Dardenne*, began by noting that the Constitution grants the legislature the power to regulate federal elections.[60] The secretary's directive did not interpret or clarify any provisions of Ohio law, but rather

50. *Id.* at *4.
51. *Id.* at *5.
52. Libertarian Party v. Dardenne, 294 F. App'x 142, 145 (5th Cir. 2008), *preliminary injunction vacated as moot*, 308 F. App'x 861 (5th Cir. 2009).
53. *Id.* at 144.
54. Libertarian Party v. Dardenne, 308 F. App'x 861 (5th Cir. 2009).
55. *Dardenne*, 2008 WL 11351516, at *5.
56. Libertarian Party of Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006).
57. Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).
58. *Id.* at 1010.
59. *Id.*
60. *Id.* at 1011 ("Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office.").

"establishe[d] a new structure for minor party ballot access, a structure not approved by the Ohio legislature."[61] The legislature, however, had not delegated authority to the secretary to adopt any such rules.[62] The secretary pointed to a state law authorizing her to issue directives to boards of election and "[p]repare rules and instructions for the conduct of elections."[63] The court held that this power did not "extend to filling a void in Ohio's election law caused by the legislature ignoring a judicial pronouncement declaring a state statute unconstitutional."[64] The secretary's directive therefore violated the U.S. Constitution and was void.[65] The court directed the secretary to include the Libertarian Party's candidates on the ballot because the "'available evidence' establishe[d] that the party ha[d] 'the requisite community support.'"[66]

The Eighth Circuit invoked this aspect of the doctrine during the 2020 presidential election in *Carson v. Simon*.[67] In *Carson*, Minnesota law specified that absentee ballots were valid only if election officials received them by the close of polls on Election Day.[68] Minnesota's secretary of state entered into a consent decree in state court with a private group agreeing to refrain from enforcing this requirement due to the COVID-19 pandemic.[69] The consent decree further specified that ballots received within five business days of Election Day would be counted so long as they were either postmarked before Election Day or lacked a postmark.[70]

Two Republican candidates for presidential elector from Minnesota sued in federal court, arguing that the secretary's consent decree violated the Presidential Electors Clause.[71] The Eighth Circuit held that their claim was likely to succeed.[72] The court explained, "[O]nly the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota . . . . [I]t is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors."[73] Accordingly, the court entered a preliminary injunction ordering the secretary of state to segregate

61. *Id.* at 1012.

62. *Id.* ("[T]here is no evidence that the state legislature has specifically delegated its authority to [the secretary] to direct the manner in which the state of Ohio [conducts federal elections].").

63. *Id.* (citing OHIO REV. CODE ANN. § 3501.05(B)–(C) (West 2021)).

64. *Id.*

65. *Id.* at 1013. The court also held, in the alternative, that the ballot access requirements the secretary adopted were unconstitutionally burdensome. *Id.* at 1013–14.

66. *Id.* at 1015 (quoting McCarthy v. Briscoe, 429 U.S. 1317, 1323 (1976)).

67. 978 F.3d 1051 (8th Cir. 2020) (per curiam).

68. Id. at 1055 (citing MINN. STAT. § 203B.08, subd. 3 (2020)).

69. *See id.* at 1055–56.

70. *See id.* at 1056. The consent decree allowed election officials to reject unpostmarked ballots, however, if the preponderance of the evidence demonstrated that they were mailed after Election Day. *Id.* There was no indication of what sort of evidence would be sufficient to meet that standard. *See id.*

71. *Id.* at 1054.

72. *Id.* at 1059.

73. *Id.* at 1060.

any absentee ballots received after the statutory deadline to allow them "to be removed from vote totals" in the event a court later issued a final order to that effect.[74]

In *Moore v. Circosta*,[75] another case arising from the 2020 election, the Supreme Court, by a 5–3 vote, declined without opinion to enjoin a similar consent decree executed by the North Carolina State Board of Elections to extend the deadline for absentee ballots;[76] newly appointed Justice Barrett did not participate in the vote.[77] Justice Gorsuch, dissenting from the Court's refusal to enjoin the consent decree, suggested that it was "egregious" for "a state court and the Board [to] work[] together to override a carefully tailored legislative response to COVID."[78] He added, "[E]fforts like these . . . offend the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators . . . ."[79] Moreover, "[s]uch last-minute changes by largely unaccountable bodies . . . invite confusion, risk altering election outcomes, and in the process threaten voter confidence in the results."[80]

Cases like *Brunner*, *Dardenne*, and *Carson* are rare because most of the directives and policies that election officials promulgate are designed to implement some underlying statute.[81] Election officials seldom act ultra vires or otherwise directly contrary to state law; those who do are typically responding to unusual circumstances, such as a natural disaster.[82] Courts properly reject challenges under the doctrine when officials can point to statutory authorization for their actions.[83]

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74. *Id.* at 1062–63.

75. 141 S. Ct. 46 (2020) (mem.) (declining to grant injunction pending appeal).

76. *Id.* Justice Thomas voted to enjoin the consent decree without issuing an opinion. *Id.* Justice Gorsuch, joined by Justice Alito, issued a written dissent from the court's ruling. *Id.* (Gorsuch, J., dissenting from denial of injunctive relief pending appeal).

77. *See* 141 S. Ct. 46 (2020) (mem.).

78. *Id.* at 47 (Gorsuch, J., dissenting from denial of injunctive relief pending appeal).

79. *Id.* at 48.

80. *Id.*

81. For other examples of judges invoking the doctrine during the 2020 election, see Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring) ("Under the Constitution, it is the state legislature—not the governor *or* federal judges—that is authorized to establish the rules that govern the election of each state's Presidential electors . . . ."); Wise v. Circosta, 978 F.3d 93, 104 (4th Cir. 2020) (Wilksinson, J., dissenting) ("The Constitution does not assign these powers holistically to the state governments but rather pinpoints a particular branch of state government—'the Legislatures thereof.' Whether it is a federal court . . . or a state election board—as it is here—does not matter; both are unaccountable entities stripping power from the legislatures." (quoting U.S. CONST. art. I, § 4, cl. 1)), *injunction pending appeal denied*, 141 S. Ct. 658 (2020) (mem.).

82. Several states have election emergency laws that authorize election officials to modify the rules of the electoral process as necessary to respond to such crises, thereby alleviating potential concerns under the independent state legislature doctrine. *See* Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 610–13 (2018).

83. *See, e.g.*, Green Party v. Hargett, 700 F.3d 816, 826 (6th Cir. 2012) (rejecting challenge under the independent state legislature doctrine because the state legislature "prescribed the key substantive regulations governing minor-party nominating petitions, including the 2.5% signature provision and 119-day filing deadline, while expressly delegating

This aspect of the independent state legislature doctrine may allow plaintiffs to circumvent the *Pennhurst* doctrine, which provides that state sovereign immunity generally precludes litigants from suing in federal court to compel state officials to comply with state law requirements.[84] Typically, even when a litigant pursues a colorable federal claim in federal court against a state official, the *Pennhurst* doctrine bars them from simultaneously pursuing pendent state law claims against the official, as well.[85] This prong of the independent state legislature doctrine may allow right-holders to couch at least some alleged state law violations in terms of the Elections Clause or Presidential Electors Clause, allowing them to circumvent the *Pennhurst* bar.[86]

Since the constitutional question under this theory ultimately turns on the extent of an election official's power under state law, one might argue that a state judge would be better equipped than a federal court to adjudicate the underlying issue. A person's views on this will likely turn, in part, on their attitude toward judicial parity more broadly.[87] An unelected federal judge might be better situated to objectively assess the legal basis for a secretary of state's decisions than an elected state judge—one who might later have to run in elections overseen by the secretary. A federal judge also may be further removed from the state's political scene and therefore better able to objectively adjudicate a case that is likely to have partisan consequences.[88]

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to the coordinator of elections the administrative task of establishing the petition's form"); *see also* Iowa Voter All. v. Black Hawk County, No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020) (rejecting Elections Clause challenge to counties' acceptance of private grants to subsidize additional resources for the 2020 election because no state law "forbids counties from accepting private grants to fund an election"); *cf.* Baldwin v. Cortes, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs' Presidential Electors Clause challenge to "the Secretary [of State's] 1984 entry into the consent decrees" changing the deadline for candidates to file ballot access petitions, due to "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme").

84. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 124–25 (1984) ("[F]ederal courts lack[] jurisdiction to enjoin . . . state officials on the basis of . . . state law.").

85. *Id.* at 121 (holding that the prohibition against federal court injunctions against state officials for violating state law "applies as well to state-law claims brought into federal court under pendent jurisdiction"); *see also* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 540–42 (2002) (holding that the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, does not alter *Pennhurst*'s proscription of federal court injunctions against state officials on the basis of pendent state law claims).

86. *See, e.g.*, Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-CV-457, 2020 WL 6589362, at *2 (M.D.N.C. Oct. 2, 2020) ("[T]his court intends to address whether the North Carolina State Board of Elections, by and through its most recent Memo 2020-19, has, through Executive action, unconstitutionally modified the North Carolina legislative scheme for appointing Presidential electors. That is a constitutional question, not a question of state law."), *amended on reconsideration*, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (amending briefing requirements).

87. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts do not necessarily enforce constitutional rights as effectively as federal courts).

88. Professor Rick Pildes suggests that there may not be a single universally correct answer to questions such as this; the relative merits of federal and state courts as venues for adjudicating whether election officials have acted ultra vires may vary by state and even judge,

Even if litigants are able to challenge allegedly ultra vires actions under the Elections Clause or Presidential Electors Clause in federal court, the federal court may choose to allow the state judiciary to resolve the issue, instead, when the scope of an election official's authority under state law is unclear. A federal court may abstain under *Railroad Commission of Texas v. Pullman Co.*[89] to avoid the possibility of unnecessarily adjudicating federal constitutional claims under the Elections Clause or Presidential Electors Clause.[90] For example, invoking *Pullman*, a Pennsylvania federal district court abstained from addressing the Trump campaign's claims under those provisions that the Pennsylvania secretary of state's orders concerning absentee ballots and poll watchers were contrary to the plain text of state law.[91] Thus, even if federal courts recognize this strand of the independent state legislature doctrine, many disputes over the scope of election officials' power still may be initially channeled to state court.

As discussed further in Part I.B, once the state judiciary interprets the state laws at issue, a federal court might claim the authority to assess whether the state courts exceeded permissible bounds of interpretation.[92] That possibility implicates a different strand of the independent state legislature doctrine, however, and need not be accepted as a component of the ultra vires claims discussed here. As suggested earlier,[93] one other potential objection to this aspect of the doctrine is that it simply substitutes one surrogate decision-maker for another. When a federal court determines that an election official's policy violates the Elections Clause or Presidential Electors Clause because it is unauthorized by, or directly contrary to, state law, the court often must adopt an interim replacement policy to govern that aspect of the electoral process until the legislature steps in.[94] Thus, the matter is still not governed by the legislature. Moreover, the ostensibly expert determination of specialized election officials is displaced by the ruling of a generalist federal court that is further removed from the inner workings of the state's election administration system.

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and may change over time. *See* Richard Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 7–9; *cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 256 (1988) ("[T]he issue of parity is an empirical question for which no empirical measure is possible.").

89. 312 U.S. 496 (1941).

90. *See, e.g.*, Miller v. Campbell, No. 3:10-cv-0252-RRB, 2010 WL 5071599, at *1–2 (D. Alaska Nov. 19, 2010) (declaring, in a case alleging that the "Division of Elections has, among other things, violated the Alaska Legislature's prerogative by counting votes in a manner contrary to the legislative directive," that "prudence, propriety, principles of judicial restraint, and a desire to avoid unnecessary constitutional adjudication lead this Court to abstain from resolving the current dispute and refer the parties to the appropriate State tribunal" (citing *Pullman*, 312 U.S. 496) (footnote omitted)).

91. Donald J. Trump for President, Inc. v. Boockvar, 481 F. Supp. 3d 476, 503 (W.D. Pa. 2020), *modification denied*, No. 2:20-cv-966, 2020 WL 5407748 (W.D. Pa. Sept. 8, 2020).

92. *See infra* Section I.B.

93. *See supra* note 55 and accompanying text.

94. *See, e.g.*, Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008).

In conclusion, a few courts have held that the Constitution's grants of authority over federal elections specifically to the legislature make it unconstitutional for other state or local actors to purport to establish rules, procedures, or requirements for such elections absent statutory authorization or delegation, or otherwise contrary to state law. This potential corollary of the independent state legislature doctrine does not alter election officials' obligations or responsibilities, however, but instead simply opens up a federal forum for enforcing them. Even then, federal courts may choose to abstain from adjudicating the underlying state law issues. And they are likely to construe the doctrine narrowly in this context, to prevent transmuting every dispute over the meaning of a state election law or validity of an administrative issuance relating to federal elections into a federal constitutional issue.[95]

B. Interpreting State Laws Governing Federal Elections

A more significant question is whether the independent state legislature doctrine impacts how courts must interpret state laws governing federal elections. One of the doctrine's potential implications is that courts must construe state election laws that apply to presidential and congressional elections consistently with their plain text, avoiding unexpected interpretations that appear contrary to that text. Under this view, since the Constitution confers authority over federal elections specifically on the state legislature, courts must take special care to ensure that such elections are conducted according to the rules that the legislature establishes. Those rules are set forth in the statutes that the legislature enacts. Depending on how this approach is applied, courts may have to avoid considering the sorts of extrinsic factors, like the state constitution or substantive canons of construction, that may ordinarily guide their interpretation of state statutes.

The Supreme Court's unanimous per curiam opinion in *Bush v. Palm Beach County Canvassing Board*, which arose from the 2000 presidential election, appears to recognize this aspect of the doctrine as a constraint on statutory interpretation.[96] The Florida Supreme Court had held that the Florida secretary of state could reject the results of manual ballot recounts that counties submitted after the statutory deadline only under certain narrow

95. *See, e.g.*, West v. Wis. Elections Comm'n, No. 20-C-1348, 2020 WL 5253844, at *1–2 (E.D. Wis. Sept. 3, 2020) (refusing to exercise jurisdiction over a challenge under the Presidential Electors Clause to election officials' refusal to accept Kanye West's candidacy papers for president, where his submission was logged as received at 5:00.14 because the doors to the Commission's building had been locked, and state law required the papers to be filed "not later than 5 p.m.").

96. *See* 531 U.S. 70, 75–78 (2000) (per curiam); *see also* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 666 (2001) (arguing that *Palm Beach County Canvassing Board* "was a powerful warning to the state court that the U.S. Supreme Court . . . was prepared to intervene if it appeared that the state court were twisting or distorting state law").

circumstances.[97] The court's reasoning "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution."[98]

The U.S. Supreme Court unanimously reversed and remanded.[99] It began by acknowledging that, "[a]s a general rule, this Court defers to a state court's interpretation of a state statute."[100] The Court emphasized, however, that when a legislature passes laws regulating presidential elections, it acts pursuant to "a direct grant of authority made under [the Presidential Electors Clause]."[101] Quoting *McPherson v. Blacker*,[102] the Court explained that the Presidential Electors Clause's "insertion" of an express reference to the legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."[103] In other words, a state may not limit its legislature's authority under the U.S. Constitution to regulate federal elections.

The Court went on to express "considerable uncertainty as to the precise grounds for the [Florida Supreme Court's] decision."[104] It said it was concerned that the "Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under [the Presidential Electors Clause]."[105] The Court pointed out that the lower court's opinion alluded to various state constitutional provisions concerning voting rights.[106] The Florida Supreme Court's consideration of the state constitution apparently called into question the validity of its statutory interpretation. Consequently, the U.S. Supreme Court vacated the lower court's judgment and remanded the case for further proceedings.[107]

The Court's unanimous ruling in *Palm Beach County Canvassing Board* is an important precedent for this strand of the independent state legislature doctrine in several respects. First, rather than simply accepting the Florida Supreme Court's interpretation of state law at face value, the Court looked behind the lower court's ruling to assess its reasoning. The Court acknowledged that, although it would generally accept a state court's

97. *See Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 74–75.
98. *Id.* at 75.
99. *Id.* at 78.
100. *Id.* at 76.
101. *Id.*
102. 146 U.S. 1 (1892).
103. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76 (quoting *McPherson*, 146 U.S. at 25).
104. *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).
105. *Id.*; *see also id.* at 77 (noting that the Florida Supreme Court's opinion contained "expressions . . . that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power'" (quoting *McPherson*, 146 U.S. at 25)).
106. *See id.* at 77.
107. *See id.* at 78. On remand, the Florida Supreme Court issued essentially the same opinion, but omitted any references to the state constitution. *See generally* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000); *see also* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 644 (2001) ("[T]he Florida Supreme Court came to precisely the same ruling as it had initially, but was duly chastened from ever mentioning its own state constitution." (footnote omitted)).

interpretation of state law as dispositive, state laws enacted under the Presidential Electors Clause warranted a different approach.[108] Additionally, the primary reason for the remand was to give the Florida Supreme Court the opportunity to clarify whether the state constitution was influencing its interpretation of the election code.[109] The reasonable inference is that, when construing laws enacted under the Presidential Electors Clause, a court must focus specifically on the text, rather than on extrinsic considerations like the state constitution.[110]

A total of four Justices joined in opinions providing further support for this theory in *Bush v. Gore*.[111] Chief Justice William H. Rehnquist's three-Justice concurrence is most closely associated with it.[112] The concurrence declared that, because the Presidential Electors Clause delegates authority specifically to the legislature, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[113] It further noted that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[114] To determine whether a state court has made such an unconstitutional departure, the U.S. Supreme Court "necessarily must examine the law of the State as it existed prior to the action of the [state] court."[115] The Supreme Court must "undertake an independent, if still deferential, analysis of state law."[116]

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108. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76.

109. *Id.* at 78.

110. *See* Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 364–65 (2003) ("The implication was that if the Florida court had relied on state constitutional law, the decision would be struck down on the Article II basis."); *see also* McConnell, *supra* note 96, at 666.

Palm Beach County Canvassing Board also appears to reaffirm a separate potential aspect of the independent state legislature doctrine: the notion that a state constitution may not impose substantive constraints on the scope of a legislature's authority to regulate federal elections. *See* David A. Strauss, Bush v. Gore*: What Were They Thinking*, 68 U. CHI. L. REV. 737, 748 (2001) (explaining that *Palm Beach County Canvassing Board* "was generally viewed as resolving—not just raising—the question whether [the Presidential Electors Clause] precludes state constitutional limits on legislative action"). That is a separate issue from whether the doctrine impacts the proper interpretation of state laws governing federal elections, however, and will be discussed in a subsequent section. *See infra* Part II.A.

111. 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring); *id.* at 129–35 (Souter, J., dissenting); *see also* Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493, 502 (2002) ("Both the concurring and dissenting opinions accept[] the premise that [the Presidential Electors Clause] prohibits state courts from changing the manner in which presidential electors are selected.").

112. *See Bush*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

113. *Id.* at 113.

114. *Id.* The concurrence later elaborated that "with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate." *Id.* at 114.

115. *Id.*

116. *Id.*; *see also id.* at 115 (reiterating that, due to "the explicit requirements of Article II," the Court must assess whether a state court "has actually departed from the statutory meaning" of state laws governing presidential elections).

Justice David Souter's dissent also appears to accept the premise that the Presidential Electors Clause empowers the U.S. Supreme Court to review a state court's interpretation of a state statute governing presidential elections, albeit with great deference. In his view, "the issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions."[117] A federal court must determine whether "the law as declared by the [state] court [is] different from the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen[.]"[118] Souter concludes that the Florida Supreme Court's rulings were "within the bounds of reasonable interpretation, and the law as declared is consistent with Article II."[119] His opinion accordingly implies that, had the state court's ruling gone beyond the bounds of reasonable interpretation, it would have violated the legislature's prerogatives under Article II.[120]

Despite its lengthy array of critics,[121] several commentators have endorsed this interpretation of Article II, including Professors Michael L. Wells,[122]

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117. *Id.* at 130 (Souter, J., dissenting).

118. *Id.*

119. *Id.* at 131.

120. The other dissents, in contrast, flatly rejected this aspect of the independent state legislature doctrine. *See id.* at 124 (Stevens, J., dissenting) (declaring that Article II does not "grant[] federal judges any special authority to substitute their views for those of the state judiciary on matters of state law"); *id.* at 142 (Ginsburg, J., dissenting) ("Article II does not call for the scrutiny undertaken by this Court . . . . Federal courts defer to a state high court's interpretations of the State's own law."); *id.* at 147–48 (Breyer, J., dissenting) ("I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case is justified by reference . . . to Art. II . . . ." (internal citation omitted)). Justices Kennedy and O'Connor, who joined in the majority opinion but not Chief Justice Rehnquist's concurrence, did not discuss the issue. *Cf.* Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 513 (2002) ("Justices Souter and Breyer did not disagree with the proposition that it is possible for the state court to distort statutory interpretation to the point where it should be seen as displacing the state legislature."); Laurence H. Tribe, Erog v. Hsub *and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 191–92 (2001) ("Plainly then, Justices Ginsburg and Souter . . . and Justice Breyer . . . would have to concede that a proper function for the Supreme Court is to police a state's highest court's interpretation of state law, whether judge- or legislature-made, to ensure compliance with governing federal constitutional norms, unless the political question doctrine renders the case nonjusticiable.").

121. *See, e.g.*, Michael Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1736 (2001) (calling this interpretation of the Presidential Electors Clause "almost laughable"); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 626 (2002); Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1377 (2010); Richard Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 726–27 (2002); Schapiro, *supra* note 7, at 662; Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 97 (2002) ("[N]either the language of Article II, nor the limited cases prior to *Bush v. Gore* interpreting Article II, supports the concurrence.").

122. *See* Michael L. Wells, *Were There Adequate State Grounds in* Bush v. Gore*?*, 18 CONST. COMMENT. 403, 405 (2001) ("The existence of a federal constraint on state court authority, such as article II, is sufficient to justify [federal judicial] intervention."); *see also* Michael L. Wells & Jeffry M. Netter, *Article II and the Florida Election Case: A Public*

Michael McConnell,[123] Richard D. Friedman,[124] and several others,[125] as well as Judge Richard Posner.[126] Even Professor Laurence Tribe, who served on Vice President Al Gore's legal team before the U.S. Supreme Court and is generally a harsh critic of *Bush v. Gore*,[127] acknowledged that "Article II's explicit delegation of authority" to state legislatures "seemingly authorize[s]" a federal court to "disagree[]" with a state supreme court's interpretation of state law.[128] He declared that it is "entirely proper" for federal courts to engage in "some degree of second-guessing" of state courts' interpretations of state laws regulating presidential elections.[129] Federal courts, he explained, have "the institutional function of checking the state court's

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Choice Perspective, 61 MD. L. REV. 711, 725 (2002) ("[T]he rules-of-the-game norm demonstrates that Article II imposes on state courts an obligation to give considerable weight to the rules embodied in statutory texts and prior cases.").

123. *See* McConnell, *supra* note 96, at 661 (arguing that the Presidential Electors Clause "departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions," and "puts the federal court in the awkward and unusual posture of having to determine for itself whether a state court's 'interpretation' of state law is an authentic reading of the legislative will").

124. *See* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 839–40 (2001) (arguing that the rules for a presidential election "should not be changed during the determination process in such a way that leads to declaration of another slate as the winners . . . and this prohibition should apply whether the change in law is effected by the legislature or by the courts").

125. *See, e.g.*, Krent, *supra* note 111, at 511 ("[C]oncerns for predictability and accountability support the Supreme Court's decision to review state court interpretation of state law in the presidential elector setting."); Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 463–80, 483 (2004) (defending the application of this aspect of the independent state legislature doctrine in the *Bush v. Gore* concurrence); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 620 (2001) (arguing that if "the state courts or state executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II"); *see also* Althouse, *supra* note 120, at 574 (stating, in reference to *Bush v. Gore*, that "there must be some limit to the extremes to which a state court can go in calling things state law"); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 344, 347 (2002) (arguing that the Supreme Court's review of "purportedly state-law based decisions" in cases arising from the 2000 election "was unremarkable, given precedent," because the Court may review a state-law ruling "that itself was alleged to violate the Federal Constitution").

Professor Henry Paul Monaghan argues that, if the Presidential Electors Clause in fact limits a state court's interpretive authority over state election law, then Chief Justice Rehnquist's concurrence should have gone even further by reviewing the Florida Supreme Court's interpretation de novo. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1934 (2003).

126. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 153–56 (2001).

127. *See* Tribe, *supra* note 120, at 185.

128. *Id.*

129. *Id.* at 192; *see also id.* at 185–86 (cautioning against "reading [the Presidential Electors Clause] out of the Constitution" and declaring that federal courts may review state courts' interpretations of state election laws "in appropriate circumstances").

construction of state election legislation to ensure that federal constitutional ground rules (here, those of Article II) are followed."[130]

One of the main objections to this potential implication of the independent state legislature doctrine is that it is inconsistent with the *Erie* doctrine,[131] which generally requires federal courts to abide by state courts' interpretations of state laws.[132] Critics argue that federalism-related principles bar federal courts from second-guessing a state supreme court's contemporaneous interpretation of state law. State judges are not only better positioned than federal judges to construe state election codes[133] but also have the authority to issue dispositive rulings about their meaning.[134]

Notwithstanding the *Erie* doctrine, however, there are several contexts in which the Supreme Court will independently review or adjudicate a state law issue for itself, at least to some extent.[135]

First, the Supreme Court will review a state supreme court's interpretation of state law under the Due Process Clause to determine whether a statute's language, read in light of precedent, was enough to give a criminal defendant fair notice of what the law meant. When a state court's interpretation unexpectedly and materially deviates from statutory language and precedent, the Due Process Clause prohibits the state from retroactively applying that new interpretation to the defendant in the case pending before it. In *Bouie v. City of Columbia*,[136] for example, South Carolina's trespass law prohibited "*entry* upon the lands of another" after the owner or tenant had given a notice

130. *Id.* at 193; *see also id.* at 188 ("Plainly, the federal judiciary . . . must ensure compliance with Article II and every other provision of the federal Constitution that in some way constrains the process for choosing presidential electors.").

131. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

132. *See, e.g.*, Schapiro, *supra* note 121, at 91 ("[T]he interpretive approach of the concurrence hearkens back to the Supreme Court's attitude toward state law in the period before *Erie Railroad v. Tompkins* overruled *Swift*." (footnote omitted)); Louis Michael Seidman, *What's So Bad About* Bush v. Gore*?: An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 992–93 (2001); *cf.* Issacharoff, *supra* note 107, at 642 (asserting, in discussing *Palm Beach County Canvassing Board*, that "[p]erhaps not since *Erie v. Tompkins* overruled *Swift v. Tyson* has a decision turned so heavily on the question of the source of state law" (footnotes omitted)).

133. *See* Schapiro, *supra* note 7, at 682; *cf.* Michigan v. Long, 463 U.S. 1032, 1039–40 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . ."); Klarman, *supra* note 121, at 1735 (discussing the lack of "any functional justification for affording state legislatures federal judicial protection from their own state judiciaries").

134. *See* Fid. Union Trust Co. v. Field, 311 U.S. 169, 177 (1940); *see also* Althouse, *supra* note 120, at 517 ("The Florida Supreme Court can infuse the statutory text with values about the sanctity of the vote . . . and, because of its final interpretive authority, that is what state law is.").

135. *See* Monaghan, *supra* note 125, at 1968 (describing lines of precedent in which the Court has exercised its independent judgment when evaluating state law issues in federal cases); Krent, *supra* note 111, at 495 (same); *see also* Mitchell, *supra* note 121, at 1338 (discussing "the Supreme Court's already-established prerogative to reject state supreme court interpretations of state law in cases where the justices wish to *enforce* federal rights against the states").

136. 378 U.S. 347 (1964).

"prohibiting such entry."[137] African American civil rights protestors were convicted for violating the law by holding a sit-in at a racially segregated lunch counter.[138] The South Carolina Supreme Court affirmed their convictions, ruling that the statute prohibited people from *remaining* on another's property after being asked to leave.[139]

In reversing the defendants' convictions, the U.S. Supreme Court did not contend that the South Carolina Supreme Court's interpretation of state law was erroneous. Rather, the Court held that the state court's interpretation was such an "unforeseeable judicial enlargement" of the statute's text that the Due Process Clause barred the state from applying that understanding retroactively to the protestors.[140] The statutory text did not "give fair warning of the conduct that it makes a crime."[141]

Some commentators, echoing Justice Ruth Bader Ginsburg,[142] have objected to the use of precedents such as *Bouie* on the grounds that they were responses to pervasive racial discrimination during the civil rights era by southern court systems that twisted state laws to subordinate African Americans.[143] But these due process, fair notice protections go beyond civil rights era precedent.[144]

Second, when a state court holds that a federal claim has been waived, has been forfeited, or is otherwise procedurally barred or defaulted on state law grounds, the Supreme Court will review the "adequacy" of those grounds,[145]

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137. *Id.* at 349–50 (emphasis added).
138. *Id.* at 348–49.
139. *Id.* at 350.
140. *Id.* at 353.
141. *Id.* at 350.
142. *See* Bush v. Gore, 531 U.S. 98, 140–44 (2000) (Ginsburg, J., dissenting).
143. *See* Larry Catá Backer, *Race, the Race, and the Republic: Re-conceiving Judicial Authority After* Bush v. Gore, 51 CATH. U. L. REV. 1057, 1101–03, 1103 n.158 (2002) (arguing that *Bouie* and *Patterson* "are limited to their historical and racialized context out of which broader application is inappropriate"); Seidman, *supra* note 132, at 1006–09; *see also* Pildes, *supra* note 88, at 11; Schapiro, *supra* note 121, at 101.
144. *See, e.g.*, Douglas v. Buder, 412 U.S. 430, 432 (1973) (holding that the Due Process Clause barred the state from revoking the petitioner's probation for failing to report a traffic citation, since he had been required to report any "arrest" and "no prior Missouri decisional law . . . support[s] the contention that a traffic citation has ever before been treated as the equivalent of an arrest"); Rabe v. Washington, 405 U.S. 313, 315 (1972) (per curiam) (reversing obscenity conviction because, due to the state supreme court's interpretation of the statute, the defendant's conviction was "affirmed under a statute with a meaning quite different from the one he was charged with violating"). *But see* Krent, *supra* note 111, at 521 ("*Bouie* is best understood as a means of limiting judicial vindictiveness rather than protecting offenders' reliance interests or ensuring repose.").
145. Howlett v. Rose, 496 U.S. 356, 366 (1990) ("The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."); *see also* Mitchell, *supra* note 121, at 1356 ("It is now well settled that the Supreme Court may review and set aside a state supreme court's interpretation of state law that lacks 'fair and substantial' or 'adequate' support when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights."); *see, e.g.*, E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1213–16 (2011) (collecting cases).

both on direct appeal and in the context of a collateral challenge.[146] The Court will not allow a state court's spurious or dubious interpretation of a state law procedural requirement to preclude review of an underlying federal question. In determining the "adequacy" of state law grounds, the Court will consider several factors, including whether the procedural barrier is novel, state courts have consistently applied the barrier, and the barrier furthers valid state interests.[147] This doctrine does not necessarily require a federal court to assess whether the state court's interpretation or application of a state law procedural doctrine was correct. Rather, a federal court will determine whether the state court's ruling was generally consistent with state law and practice prior to that point.[148]

In *James v. Kentucky*,[149] for example, a criminal defendant asked a state trial judge to issue an "admonition" to the jury that the defendant's refusal to testify should not be held against him; the judge refused.[150] On appeal, the state supreme court held that the defendant had waived his underlying Fifth Amendment claim by requesting an "admonition" rather than an "instruction."[151] The U.S. Supreme Court reversed, holding that the defendant's failure to couch his request in precisely the right language was not a valid basis for refusing to consider his federal constitutional claim.[152] The Court explained that the procedural rule that the state supreme court had invoked was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights."[153] The state supreme court's insistence that defendants use the term "instruction" rather than "admonition," the Court continued, was an "arid ritual of meaningless form" that "further[ed] no perceivable state interest."[154]

146. *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) ("We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions.").

147. Ford v. Georgia, 498 U.S. 411, 423–24 (1991) ("[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." (quoting James v. Kentucky, 466 U.S. 341, 348 (1984))); *see, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233–34 (1969) (holding that the Virginia Supreme Court's precedents "do not enable us to say that the Virginia court has so consistently applied its notice requirement as to" render it an adequate basis for precluding adjudication of a federal claim); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (rejecting the state supreme court's ruling that a general objection was insufficient to preserve the defendant's federal claim because that court had recently adjudicated several issues that had been preserved through general objections).

148. *See* Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RSRV. L. REV. 823, 838 (2011).

149. 466 U.S. 341 (1984).

150. *Id.* at 348–49.

151. *Id.* at 344.

152. *Id.* at 351–52.

153. *Id.* at 348–49.

154. *Id.* at 349 (internal citations omitted); *see also* Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

Third, in a wide variety of contexts, the Court will assess substantive state law issues that are antecedent to federal questions, such as claims under the U.S. Constitution or federal treaties.[155] For example, the Contracts Clause prohibits states from "impairing the Obligation of Contracts."[156] In cases arising under the Contracts Clause, the Court is not bound by a state court's determinations as to the existence or contents of an alleged contract.[157] Rather, the Court will decide for itself "whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."[158]

The extent to which the Court would defer to a state court's antecedent rulings in this context has varied over time. In the mid-nineteenth century, the Court reviewed such issues de novo, "routinely second-guess[ing] state court findings" about whether the parties had formed a contract.[159] By the end of that century, however, its review had become more deferential.[160] Some precedents declare that the Court will uphold a state court's resolution of contract-related issues unless it is "manifestly wrong"[161] or "palpably erroneous."[162] Currently, the Court will simply "accord respectful consideration and great weight to the views of the State's highest court."[163]

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155. *See* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977) (discussing the Supreme Court's "ancillary jurisdiction to consider the state question" when a federal issue "turns on a logically antecedent finding on a matter of state law"). One commentator suggests that, when the Court claims to be determining whether a state court had "fair support" for its antecedent state law conclusions in such cases, it is instead considering whether the state court attempted to evade federal rights. Webb, *supra* note 145, at 1206, 1208. Professor Monaghan offers a different interpretation, stating that the existence of "property" or a "contract" for purposes of a federal constitutional claim is really a federal issue that the Supreme Court may assess independently of state law. *See* Monaghan, *supra* note 125, at 1941–42.

156. U.S. CONST. art. I, § 10.

157. *See* Michael G. Collins, *Reconstructing* Murdock v. Memphis, 98 VA. L. REV. 1439, 1455–56 (2012).

158. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938); *see also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992).

159. Collins, *supra* note 157, at 1456. For examples of cases that reflect this tendency, see Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443 (1862) (holding that the Court may "decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States"); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1854) (declaring that the Court is "called upon to exercise our own judgments in the case" as to whether a contract exists for purposes of the Contracts Clause).

160. *See* Collins, *supra* note 157, at 1457 n.73. For examples of cases that demonstrate the Court's more deferential approach in this period, see Given v. Wright, 117 U.S. 648, 655–57 (1886) (assessing whether the state court's ruling that the landowners had "surrendered" their contractual exemption from taxation was "well grounded"); University v. People, 99 U.S. 309, 322–23 (1879) (according "deference" to the state court's rulings on state-law issues in Contracts Clause cases).

161. Hale v. State Bd. of Assessment & Rev., 302 U.S. 95, 101 (1937).

162. Phelps v. Bd. of Educ., 300 U.S. 319, 323 (1937).

163. *Brand*, 303 U.S. at 100; *accord Romein*, 503 U.S. at 187.

Likewise, on direct review in Takings Clause cases, the Court may assess for itself whether the plaintiff's claimed property interest was valid.[164] In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[165] the plurality declined to accord any deference to the state court's determination of whether the plaintiff was challenging the deprivation of an "established property right."[166] Florida law had granted the owners of beachfront land certain property interests extending to the mean high-water line, including the rights to access the water, have an unobstructed view of the water, and retain any accretions and relictions.[167] A statute provided that, when a locality carried out a project to remediate erosion by depositing new sand onto a beach, the rights of landowners within the remediation zone were pushed back from the mean high-water line to the "erosion control line."[168] Affected landowners would lose their right to accretions and relictions between that new erosion control line and the former mean high-water line.[169]

A group of landowners who owned beachfront property within a remediation zone sued, arguing that this law authorized unconstitutional takings of their property interests.[170] The Florida Supreme Court rejected the landowners' claim on the grounds that they held only a contingent future interest in accretions and relictions rather than a vested right subject to constitutional protection.[171] The landowners appealed to the U.S. Supreme Court, arguing that the state court's ruling was itself a "judicial taking" in violation of the U.S. Constitution.[172] According to the landowners, the Florida Supreme Court's ruling reduced the nature of their interest in accretions and relictions to a mere unvested contingency.[173] The Court concluded that it had to review Florida law de novo to determine whether the Florida Supreme Court had unconstitutionally eliminated the plaintiffs' property interests.[174] "The plurality's standard of review accords no deference to state court interpretations of antecedent state property law; instead, it conducts an independent assessment of state law."[175]

The Court has applied similarly aggressive review where a state law issue is antecedent to enforcing rights under a treaty. *Fairfax's Devisee v. Hunter's*

164. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 726 n.9 (2010) (plurality opinion).

165. 560 U.S. 702, 725 (2010).

166. *Id.* at 726 n.9. The Court went on to note, however, that "[a] property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court." *Id.*

167. *Id.* at 708. "Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes." *Id.*

168. *Id.* at 711–12.

169. *Id.* at 709–11.

170. *Id.* at 711–12.

171. *Id.* at 712.

172. *See id.* at 711–12.

173. *See id.*

174. *Id.* at 726 n.9.

175. Webb, *supra* note 145, at 1231.

Lessee,[176] for example, was a suit over whether the Commonwealth of Virginia had violated treaties between the United States and Great Britain by seizing certain land in Virginia's Northern Neck that a previous owner, the late Lord Fairfax, had devised to a British subject, Denny Fairfax.[177] The Court held that it need not determine whether the seizure violated a treaty, however, because the Virginia Court of Appeals had erred in concluding that the Commonwealth had validly taken title to the land under state law.[178] In another early case alleging treaty violations, the Court similarly claimed the power to ascertain the "true construction" of state law to determine whether the plaintiff had still owned certain land at the time the peace treaty with Great Britain went into effect.[179] In these early cases, the Court appeared to review de novo the state law issues that were antecedent to the plaintiffs' claims under treaties.[180]

The U.S. Supreme Court has gone so far as to review a state supreme court's interpretation of its own state constitution in cases involving interstate compacts. In *West Virginia ex rel. Dyer v. Sims*,[181] West Virginia had joined an interstate compact establishing an interstate commission to control pollution in the Ohio River.[182] West Virginia's auditor later refused to pay the state's share of the commission's expenses.[183] In a mandamus action brought against the auditor, the West Virginia Supreme Court held that the compact was unenforceable because the West Virginia legislature had lacked authority to approve it under the state constitution.[184] The U.S. Supreme Court reversed.[185] Construing the West Virginia Constitution for itself,[186] the Court concluded that the legislature had authority to enter into the compact, despite the state supreme court's ruling to the contrary.[187]

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176. 11 U.S. (7 Cranch) 603 (1813).

177. *Id.* at 606–13.

178. *Id.* at 626–27 (holding that, because the Commonwealth's title to the land was "inchoate and imperfect," it was "wholly unnecessary" to consider whether the Commonwealth's purported seizure of the land violated the peace treaty between the United States and Great Britain); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357–58 (1816) (reiterating that the Court could not "decide whether a title [to land] be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity").

179. Smith v. Maryland, 10 U.S. (6 Cranch) 286, 305 (1810) (holding that it was "necessary . . . to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made," to determine whether the state had violated the plaintiff's rights under the treaty).

180. *See* Collins, *supra* note 157, at 1455.

181. 341 U.S. 22 (1951).

182. *Id.* at 24.

183. *Id.* at 25.

184. *Id.* at 26.

185. *Id.* at 32.

186. *Id.* at 28 ("[W]e are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.").

187. *Id.* at 32 ("[W]e conclude that the obligation of the State under the Compact is not in conflict with . . . the State Constitution."); *cf.* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206–07 (1864) (rejecting a state supreme court's interpretation of its state's constitution, before the adoption of the *Erie* doctrine).

Opponents also assert that applying the independent state legislature doctrine to state statutory interpretation issues would unnecessarily federalize virtually every aspect of federal elections.[188] When states grant their courts jurisdiction over election-related disputes, they necessarily authorize those courts—not federal courts—to act as the primary expositors of state law,[189] according to whatever tools of statutory interpretation those courts typically apply.[190] State courts have the same authority over state election law as they have in other contexts, including the "power to make a novel post-election construction of forum election law."[191]

Conversely, "[c]onstitutional grants of power to legislatures do not ordinarily give rise to special constitutional rules of statutory interpretation."[192] The Presidential Electors Clause takes the legislatures as it finds them: "as institutions embedded in a whole state government, a system that would necessarily include a constitution and a judicial system."[193] Moreover, as a practical matter, applying the independent state legislature doctrine in this respect may require courts to interpret laws governing federal elections using a different methodology than those courts apply to the rest of the election code, potentially leading to inconsistent and unpredictable results.[194]

On the other hand, allowing federal courts to enforce broad outer boundaries on how state courts interpret state election laws may contribute

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188. *See* Issacharoff, *supra* note 107, at 646–47 ("[F]ederal constitutional review of changed state election procedures would in turn require that every local and state election procedure be subject to federal judicial scrutiny."); *see also* Schapiro, *supra* note 121, at 116 ("The Article II theory federalizes any state-law challenge to such [election] procedures."); *cf.* Friedman, *supra* note 124, at 841 ("Article II should not become a tool to federalize state law concerning disputes in determining the results of the state's election for presidential electors by depriving state courts of the usual leeway to decide difficult cases."); Pildes, *supra* note 121, at 719 (emphasizing the need to "avoid turning every disputed state election law ruling into a federal constitutional question").

189. *See* Seidman, *supra* note 132, at 995–96 ("Since the legislature clearly contemplated a state judicial role in the contest procedures and was silent concerning an analogous federal role, it seems plausible to assume that it meant for state, rather than federal judges to have the final word on disputed issues of state law." (footnote omitted)); *see also* Klarman, *supra* note 121, at 1735–36.

190. *See* Schapiro, *supra* note 121, at 98 (arguing that the Presidential Electors Clause "could constitute a reference to state law, as that law commonly is made, involving the usual interplay of state statutes, the state constitution, and judicial interpretations"); Seidman, *supra* note 132, at 995 ("What counts as 'ordinary' construction is, itself, a matter for state law."). Professor Michael Klarman also points to the lack of evidence "that the Framers of Article II intended to bolster the role of state legislatures in the selection of presidential electors by constraining state courts adjudicating contests arising out of presidential elections in their ability to resolve ambiguities in the meaning of state election law." Klarman, *supra* note 121, at 1735.

191. Weinberg, *supra* note 121, at 626.

192. Wells & Netter, *supra* note 122, at 714; *see also* Weinberg, *supra* note 121, at 625 ("Nothing in the Constitution requires a state election code or its administration to be unmediated in these usual ways by courts.").

193. Althouse, *supra* note 120, at 519; *see also* Schapiro, *supra* note 7, at 663 ("Without an understanding of a particular state's system, it is impossible to comprehend the appropriate relationship between state courts and state legislatures.").

194. *See* Schapiro, *supra* note 121, at 115.

to election integrity.[195] Requiring judges to follow the plain meaning of election laws and avoid major departures from text and precedent prevents them from changing the rules of an election after the Rawlsian veil of ignorance has been lifted and the beneficiaries of different potential approaches are known.[196] In contrast, allowing state judges to make substantial, unexpected deviations from the apparent meaning of state election laws creates the inevitable "danger that a rule will be adopted because it will produce a particular result, and then rationalized on other grounds."[197] Providing an additional check on state judges—many of whom are themselves elected—can deter such departures from preexisting rules, especially in high-stakes contexts such as a hotly contested presidential election. As Professor Rick Pildes explains, "mak[ing] state law completely autonomous would give too little weight . . . to a legitimate constitutional interest in ensuring the integrity of electoral processes."[198]

Applying the independent state legislature doctrine in this manner may also bolster predictability, consistency, and stability, which are essential principles for an election.[199] Unpredictable changes in state election law—or the apparent meaning of an election-related statute—can undermine the perceived legitimacy of the electoral process.

Additionally, federal courts are responsible for enforcing the U.S. Constitution's structural grants of authority to particular governmental entities. As Professor Tribe has argued, when the Constitution specifies "how a decision otherwise internal to a state's system of governance should be made, that provision's enforcement is a matter for the federal judiciary, and ultimately the Supreme Court, subject to the political question doctrine."[200] James Madison expressly recognized during the constitutional convention that "[t]he State Judiciarys [sic] had not & he presumed wd. not be proposed as a proper source of appointment" of the presidential

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195. *See* Wells & Netter, *supra* note 122, at 712 ("Article II serves as a guarantee that election rules are put in place before the election, so as to minimize the problem of self-dealing by partisan officials (whatever posts they hold) who know how their rulings will affect the outcome."); *cf.* Issacharoff, *supra* note 107, at 639 (arguing that "the Court may well have been justified in its desire to expand constitutional scrutiny to cover on-the-run, post hoc alterations of electoral practices" but that "institutional actors" other than the Supreme Court are capable of enforcing such constraints).

196. Krent, *supra* note 111, at 496 ("State court judges might alter state law in a way that favors their own political leanings or futures."); McConnell, *supra* note 96, at 662 ("A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates . . . . Courts and executive officials making judgments after the fact operate behind no such veil of ignorance."); Wells & Netter, *supra* note 122, at 724–25. Professor Pildes makes the important point that, to the extent a federal court's goal is to prevent a state court from making unexpected changes to state election law, it might reasonably choose to consider not only "written legal texts but . . . longstanding judicial and administrative practices consistent with those texts." Pildes, *supra* note 121, at 708.

197. McConnell, *supra* note 96, at 662.

198. Pildes, *supra* note 121, at 694.

199. Krent, *supra* note 111, at 496, 508.

200. Tribe, *supra* note 120, at 188.

electors.[201] To the extent the Constitution vests authority over federal elections specifically in the state legislature, a state court cannot be free to override or nullify the legislature's prerogatives by imposing its own preferred policy or outcome under the guise of interpretation.[202]

Professor Harold J. Krent suggests that the Framers may have chosen to delegate such power to the legislature because it "is directly accountable to the electorate and arguably is less likely subject to presidential influence than a governor hoping for a cabinet position (or other influence) or than a state judge hoping for elevation to the federal bench (or other position)."[203] Professor McConnell adds that the Presidential Electors Clause's delegation of authority specifically to the legislature "ensures that the manner of selecting electors will be chosen by the most democratic branch of the state government."[204] Regardless of the reason for the Constitution's use of this term—or whether the Framers' choice of language was purposeful and deliberate—allowing some limited degree of federal review of state courts' interpretations of laws governing federal elections may be a reasonable way of enforcing that allocation of authority. From this perspective, it is entirely appropriate for federal courts to "see that all state actors stay within the original constitutional scheme" due to "the strong federal interest in the selection of the President."[205]

Any such review would have to be deferential to the state courts,[206] however, to ensure that federal courts do not simply substitute their own judgment for that of state courts concerning ambiguous language or reasonably debatable interpretations of state laws.[207] Commentators have disagreed, however, over the degree of deference required. Justice Rehnquist's *Bush v. Gore* concurrence claims that Article II requires the Court to assess whether a state court has "impermissibly distorted" state law "beyond what a fair reading required."[208] Some commentators have adopted

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201. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed., 1911).

202. Krent, *supra* note 111, at 533–34.

203. *Id.* at 509.

204. McConnell, *supra* note 96, at 661.

205. Epstein, *supra* note 125, at 620; *see also* Pildes, *supra* note 121, at 693 (explaining that the "force" of the constitutional right to vote is "at its strongest when it comes to national elections—particularly elections for the Presidency").

206. *See* Tribe, *supra* note 120, at 193 ("Some degree of deference, within an outer perimeter whose definition is, of course, a federal question, is required notwithstanding the presence of a controlling federal norm."); Friedman, *supra* note 124, at 837 ("[T]he interpretations of the state supreme court are entitled to substantial deference."). *But see* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 88–89 (2002) (arguing that the Supreme Court should overturn state courts' rulings on state law questions that are antecedent to federal claims only when there is a "concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review"); Monaghan, *supra* note 125, at 1934 (arguing that Supreme Court review of state courts' rulings concerning state law issues should be de novo).

207. *Cf.* Pildes, *supra* note 121, at 710 (noting the "real danger that federal courts will simply substitute their own judgment about the proper meaning of state law").

208. Bush v. Gore, 531 U.S. 98, 115 (2001) (Rehnquist, C.J., concurring).

a similar approach, calling on federal courts to assess whether state law offered "fair support" for the state court's interpretation of the statutes at issue.[209] This standard reflects Supreme Court precedents allowing the Court to "review and set aside a state supreme court's interpretation of state law that lacks 'fair and substantial' or 'adequate' support when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights."[210]

Professor Krent contends that the *Bush* concurrence was not sufficiently deferential to the Florida Supreme Court's interpretation of the state election code, however.[211] He suggests that a federal court may step in only when "the state court's construction is both unsupportable by reference to conventional textual analysis and relevant precedents and, in addition, threatens to gut the legislature's control of the process to select presidential electors."[212] Other commentators likewise propose that Article II is violated only when the state court's interpretation of state law is "clearly implausible,"[213] "manifestly unreasonable,"[214] or "a gross deviation from the scheme outlined in the statute."[215] Of course, however the standard is articulated, statutory interpretation unavoidably involves a degree of subjectivity and uncertainty,[216] posing challenging questions about when a state court's interpretation of state election laws is "too wrong."

Some courts have held that the Due Process Clause imposes somewhat comparable restrictions on courts' interpretations of laws governing elections.[217] In *Roe v. Alabama* (*Roe I*),[218] for example, an Alabama statute required that absentee ballots be witnessed or notarized.[219] A state court nevertheless ordered election officials to count ballots that did not meet these requirements.[220] The leading candidates in two very close races, as well as

209. *See* Webb, *supra* note 145, at 1198; Pildes, *supra* note 88, at 10.

210. Mitchell, *supra* note 121, at 1356; *see also* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (holding that the Court must consider whether a state court's "non-federal grounds" for denying a federal constitutional claim "rest[ed] upon a fair or substantial basis").

211. *See* Krent, *supra* note 111, at 496–97.

212. *Id.* at 533.

213. Friedman, *supra* note 124, at 841.

214. Tribe, *supra* note 120, at 193.

215. Epstein, *supra* note 125, at 619; *see also* Wells & Netter, *supra* note 122, at 728 (suggesting that a federal court must assess whether a state court "brought about a major change in the rules as they existed before the election").

216. *See* Epstein, *supra* note 125, at 634; *see also* Backer, *supra* note 143, at 1074 ("The difference between interpretation and legislation is merely a matter of degree.").

217. *See* Pildes, *supra* note 121, at 702–06; *cf.* Issacharoff, *supra* note 107, at 641–42 n.21 (arguing that constitutional protection against "after-the-fact alterations of electoral processes in a potentially outcome-determinative fashion" should not "be limited to presidential elections alone" under Article II but rather arise from "a more central constitutional command").

218. 43 F.3d 574 (11th Cir. 1995).

219. *See id.* at 577.

220. *Id.* at 578.

a voter who supported them, sued in federal court, claiming that this change in vote counting rules violated their due process rights.[221]

The Eleventh Circuit certified a question about the proper interpretation of the statute at issue to the Alabama Supreme Court,[222] which responded that unsigned, unnotarized ballots were valid and could be counted.[223] The Eleventh Circuit ultimately concluded that adopting and applying such an unexpected departure from both the plain text of the statute and the state's past practice after the election had already concluded was fundamentally unfair and violated due process.[224] It explained that, if Alabama candidates and voters had known before the election that absentee ballots need not be witnessed and notarized, "campaign strategies would have taken this into account and supporters of [the plaintiff candidates] who did not vote would have voted absentee."[225]

Similarly, in *Griffin v. Burns*,[226] Rhode Island election officials had permitted voters to cast absentee and shut-in ballots in primary elections for local offices.[227] After the elections were over, one of the losing candidates sued, and the Rhode Island Supreme Court ordered the invalidation of all absentee and shut-in ballots because state law did not authorize their use in primary elections.[228] The exclusion of those ballots changed the outcome of a race for the Democratic Party's nomination for Providence city council.[229]

Voters who had cast absentee and shut-in ballots sued in federal court, claiming that the retroactive application of the Rhode Island Supreme Court's unexpected new interpretation of state law violated their constitutional rights.[230] They pointed out that the state had authorized the use of absentee and shut-in ballots in primary elections over the previous seven years.[231] The First Circuit held that the plaintiffs' right to vote had been violated because election officials had "sanctioned the use of certain ballots" that the state supreme court "quashed after the results of the election were in."[232] Retroactively applying such a material change in the rules governing an election "fail[ed] on its face to afford fundamental fairness."[233]

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221. *Id.* at 578–79.
222. *Id.* at 583.
223. *See* Roe v. Alabama (*Roe II*), 68 F.3d 404, 406 (11th Cir. 1995).
224. *Id.* at 408 (stating that the evidence in favor of the plaintiffs' claim was even "stronger" than the court "could have expected"); *see also Roe I*, 43 F.3d at 581 (stating that counting absentee ballots that were neither witnessed nor notarized "implicate[s] fundamental fairness and the propriety of the two elections at issue").
225. *Roe I*, 43 F.3d at 582. The court further explained that counting votes which failed to satisfy statutory requirements "would dilute the votes of those voters who met the [statutory] requirements . . . as well as those voters who actually went to the polls on election day." *Id.* at 581.
226. 570 F.2d 1065 (1st Cir. 1978).
227. *Id.* at 1067.
228. *Id.* at 1068.
229. *Id.*
230. *Id.* at 1068–69.
231. *Id.* at 1079.
232. *Id.* at 1078–79.
233. *Id.* at 1078.

Thus, the Due Process Clause already empowers federal courts to determine whether a state court's ruling effectively changed the rules of an election by unexpectedly and materially departing from a statute's apparent meaning or a jurisdiction's past practice—at least where voters had acted (or refrained from acting) in reasonable reliance on a particular understanding of the rules.[234] The Elections Clause and Presidential Electors Clause may similarly prevent a state court from effectively changing the rules of an election in ways that can unfairly impact the outcome, even with regard to issues that do not implicate voters' reliance interests.

Miller v. Treadwell[235] provides a good example of how the independent state legislature doctrine can be applied in this manner. That case arose from U.S. Senator Lisa Murkowski's successful write-in campaign in the 2010 Alaska Senate election.[236] Alaska law specified that a write-in vote is valid only if it contains the name of a candidate "as it appears on the write-in declaration of candidacy."[237] The Alaska Supreme Court held that write-in votes in which a candidate's name had apparently been misspelled—and therefore did not match the name on any declaration of candidacy—were nevertheless valid.[238] A losing candidate challenged the results of the Senate race in federal court, arguing that counting misspelled write-in votes violated the Elections Clause because it was inconsistent with the plain text of the underlying statute.[239] The district court determined that the Alaska Supreme Court's interpretation was not "clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practice of making voter intent a priority."[240] Thus, after deferentially reviewing the state supreme court's interpretation of state law, the federal district court rejected the Elections Clause claim.[241]

Particularly for presidential elections, allowing federal courts to police the outer boundaries of state courts' interpretations of state election laws may also deter far more potentially destabilizing responses by other governmental actors. On the one hand, Congress might attempt to reject a state's electoral votes if it concludes that the electors were appointed based on a state court's material deviation from state law.[242] Or a legislature may attempt to appoint

234. *See* Schapiro, *supra* note 121, at 104–05 (emphasizing that *Roe II* and *Griffin* vindicated voters' reliance interests).

235. 736 F. Supp. 2d 1240 (D. Alaska 2010).

236. William Yardley, *Murkowski Wins Alaska Senate Race*, N.Y. TIMES (Nov. 17, 2010), https://www.nytimes.com/2010/11/18/us/politics/18alaska.html [https://perma.cc/7QMY-7H67].

237. *Miller*, 736 F. Supp. 2d at 1242 (quoting ALASKA REV. STAT. § 15.15.360(a)(11) (repealed 2011)).

238. *Id.*

239. *Id.*

240. *Id.* at 1243.

241. *Id.*; *cf.* Moore v. Hosemann, No. 3:08cv573, 2008 WL 11439423, at *1–2 (S.D. Miss. Sept. 29, 2008) (assessing whether the Mississippi secretary of state's actions were a "significant departure from, or go beyond a fair reading of, state election laws" in a challenge under the Presidential Electors Clause).

242. *See* 3 U.S.C. §§ 5, 15 (regulating Congress's process for counting electoral votes).

its own competing slate of electors based on its interpretation of state law.[243] Allowing the federal judiciary to reaffirm the reasonableness of a state supreme court's ruling—or to provide a judicial remedy for a patently unreasonable ruling—might reduce the likelihood that Congress or a legislature would attempt to resort to such extraordinary measures that seem much more likely to undermine public confidence in the electoral process.

C. Barring Federal Review Under the Political Question Doctrine

During the 2020 election cycle, a few federal courts concerningly held or suggested that the Elections Clause and Presidential Electors Clause barred them from adjudicating certain types of constitutional challenges to state election laws. Under this problematic view, the Constitution's grants of authority to legislatures to regulate federal elections preclude federal courts from reviewing at least some types of legislative action concerning such elections under the political question doctrine. This reasoning rests in large part on the U.S. Supreme Court's ruling in *Rucho v. Common Cause*,[244] which cited the Elections Clause in support of its conclusion that political gerrymandering claims are nonjusticiable.[245]

The Eleventh Circuit's ruling in *Jacobson v. Florida Secretary of State*,[246] for example, held that a challenge to Florida's seventy-year-old ballot-order statute was nonjusticiable.[247] The law specified that, for each office, the candidate belonging to the incumbent governor's political party must be listed first on the ballot, followed by the candidate of whichever party received the second-highest number of votes in the most recent gubernatorial election.[248] After holding that the plaintiffs lacked standing to challenge the statute,[249] the court went on to declare that their claims also raised nonjusticiable political questions.[250]

The Eleventh Circuit explained that the plaintiffs did not contend that the ballot-order statute prevented anyone from voting or made it unduly burdensome for them to do so.[251] Instead, they argued that the law "confers an unfair partisan advantage" on candidates of the governor's party.[252] The complaint asked the court "to pick among various conceptions of a politically 'fair' ballot order that have no basis in the Constitution."[253] The court opined that, under *Rucho*, it was constitutionally inappropriate for a federal court to determine whether an election-related rule confers an unfair advantage on

243. *See* Wells & Netter, *supra* note 122, at 715; *see also infra* Part III.A.
244. 139 S. Ct. 2484 (2019).
245. *Id.* at 2506 ("The only provision in the Constitution that specifically addresses the matter [of political gerrymandering] assigns it to the political branches." (citing U.S. CONST. art. I, § 4, cl. 1)).
246. 974 F.3d 1236 (11th Cir. 2020).
247. *Id.* at 1242.
248. *See* FLA. STAT. § 101.151 (2020).
249. *Jacobson*, 974 F.3d at 1252.
250. *Id.* at 1260–69.
251. *Id.* at 1262.
252. *Id.*
253. *Id.* at 1261.

any particular political party.[254] Citing the Elections Clause, the court later added, "Our founding charter never contemplated that federal courts would dictate the manner of conducting elections—in this lawsuit, down to the order in which candidates appear on a ballot."[255] Accordingly, the case presented "nonjusticiable political questions."[256] Some other courts have already applied *Jacobson*'s political question holding.[257]

Jacobson's conception of the political question doctrine in this context is quite narrow. *Jacobson* readily acknowledges that the doctrine is inapplicable where a plaintiff alleges that a law "make[s] it more difficult for individuals to vote . . . or to choose the candidate of their choice."[258] Rather, under *Jacobson*, courts are barred from engaging in a subjective, ad hoc analysis of whether aspects of the election that do not impose burdens or restrictions on voters are fair. As a practical matter, it seems likely that any case subject to dismissal as nonjusticiable under *Jacobson* could alternatively have been dismissed for failure to state a claim, due to the lack of an underlying constitutional restriction for the court to enforce.[259] Treating the issue as a question of justiciability has some ancillary consequences, however. For example, a court could consider a potential justiciability-related deficiency in a plaintiff's claims sua sponte—and even for the first time on appeal.

The U.S. District Court for the Northern District of Georgia's ruling in *Coalition for Good Governance v. Raffensperger*[260] adopted an even broader conception of the political question doctrine, declining jurisdiction over a sweepingly broad range of claims.[261] The plaintiffs had brought a constitutional challenge to Georgia's impending 2020 primary election.[262] They asked the district court to postpone the election, require the use of paper ballots instead of touchscreen ballot-marking devices, extend the deadline for the return of completed absentee ballots, and revise the instructions and internal processes for absentee voting.[263]

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254. *See id.* at 1262.

255. *Id.* at 1269.

256. *Id.*

257. *See, e.g.*, Mecinas v. Hobbs, 468 F. Supp. 3d 1186, 1209 (D. Ariz. 2020) (holding that a challenge to Arizona's ballot-order statute raised a "nonjusticiable political question"), *appeal docketed*, No. 20-16301 (9th Cir. July 6, 2020); S.P.S. *ex rel.* Short v. Raffensperger, 479 F. Supp. 3d 1340, 1344 (N.D. Ga. 2020) (refusing to grant a preliminary injunction against Georgia's ballot-order statute because "*Jacobson* found that Plaintiffs' alleged injury of vote dilution based on an average measure of partisan advantage is legally insufficient to establish standing to challenge the constitutionality of the ballot order statute"). *But see* Nelson v. Warner, 472 F. Supp. 3d 297, 312–13 (S.D.W. Va. 2020) (holding that a challenge to West Virginia's ballot-order statute was justiciable).

258. *Jacobson*, 974 F.3d at 1261 (citations omitted).

259. *Cf. id.* at 1264 ("One possible response to the preceding analysis is that because the voters and organizations have not alleged any burden on voting rights, their complaint fails on the merits though it remains justiciable.").

260. No. 1:20-cv-1677-TCB, 2020 WL 2509092 (N.D. Ga. May 14, 2020), *appeal dismissed*, No. 20-12362-BB, 2020 WL 5753330 (11th Cir. Aug. 17, 2020).

261. *Id.* at *1, *3.

262. *Id.* at *1.

263. *Id.*

The district court held the case was nonjusticiable and dismissed it for lack of subject matter jurisdiction.[264] It explained, "The Framers of the Constitution did not envision a primary role for the courts in managing elections, but instead reserved election management to the legislatures . . . . [C]ourts should not substitute their own judgments for state election codes."[265] The court added that no "judicially discoverable and manageable standards" existed for determining whether state officials had done enough to respond to the risks of the COVID-19 pandemic.[266] *Coalition for Good Governance* reflects a much broader understanding of the political question doctrine than *Jacobson*, invoking it even where plaintiffs challenged laws that they claimed unconstitutionally burdened their ability to vote.

Likewise, in *Mi Familia Vota v. Abbott*,[267] the plaintiffs argued that Texas's election laws were unconstitutionally burdensome due to the ongoing COVID-19 pandemic and asked the federal district court to order a panoply of more than a dozen reforms.[268] Pointing out that the Constitution grants authority to the legislature to determine the "Manner" in which federal elections are conducted, the court held that the political question doctrine barred it from exercising jurisdiction over the plaintiffs' claims.[269] The court explained that the plaintiffs were impermissibly asking it to "mandate and implement its own judgment about the proper administration of elections, thereby encroaching upon the 'constitutional commitment' of the administration of elections to the state legislatures and to Congress."[270]

The Fifth Circuit reversed in relevant part, holding that the plaintiffs' claims alleging racial discrimination in violation of the Constitution and Voting Rights Act were justiciable and did not constitute political questions.[271] It did not address the justiciability of the plaintiffs' other constitutional challenges under the First and Fourteenth Amendments because it concluded they were properly dismissed on other grounds.[272] Other courts have likewise properly rejected such political question arguments.[273]

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264. *Id.* at *3–4.

265. *Id.* at *3.

266. *Id.*; *see also id.* ("[W]hether the executive branch has done enough is a classic political question involving policy choices.").

267. 484 F. Supp. 3d 435 (W.D. Tex. 2020), *rev'd in part and remanded*, 977 F.3d 461 (5th Cir. 2020).

268. *Id.* at 440.

269. *Id.* at 448.

270. *Id.* at 444 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

271. 977 F.3d 461, 467 (5th Cir. 2020); *see also* Texas Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020) (exercising jurisdiction over a constitutional challenge alleging that Texas's rules for absentee voting were unduly burdensome as applied in the context of the COVID-19 pandemic).

272. *Mi Familia Vota*, 977 F.3d at 467.

273. *See, e.g.*, Harding v. Edwards, 484 F. Supp. 3d 299, 306–07 (M.D. La. 2020); People First of Ala. v. Merrill, 467 F. Supp. 3d 1179, 1205 (N.D. Ala.), *stay denied*, 815 F. App'x 505 (11th Cir.), *stay granted*, 141 S. Ct. 190 (2020); Middleton v. Andino, 488 F. Supp. 3d 261, 292 (D.S.C.), *stay granted*, No. 20-2022, 2020 WL 5739010 (4th Cir. Sept. 24, 2020) (order), *vacated and reh'g en banc granted*, 976 F.3d 403 (en banc) (mem.) (4th Cir.), *stay*

As *Rucho* demonstrates, certain aspects of the political question doctrine blur the line between nonjusticiability and failure to state a claim. The Elections Clause and Presidential Electors Clause, however, do not purport to limit the federal judiciary's jurisdiction. The Bill of Rights, Reconstruction Amendments, and subsequent voting rights amendments cut across those clauses, limiting the scope of power they convey.[274] When plaintiffs allege a violation of their constitutional rights or federal voting-related statutes, they raise a federal question appropriate for judicial resolution.[275] Of course, a plaintiff's allegations may not actually amount to a constitutional or statutory violation, or a plaintiff may challenge a policy decision within the legislature's constitutional discretion. But the proper response should generally be to dismiss the claim on the merits rather than to hold that the court lacks power to even consider it in the first place.

II. THE DOCTRINE AND STATE CONSTITUTIONS

One of the independent state legislature doctrine's most controversial potential applications is allowing legislatures to regulate federal elections "independently" of state constitutions. As discussed above,[276] under this claimed corollary to the doctrine, a legislature's authority to regulate federal elections remains restricted by the implicit limitations of the Elections Clause and the Presidential Electors Clause; the express limitations of the Bill of Rights, Reconstruction Amendments, and other constitutional amendments protecting voting rights; and federal statutes.[277] Legislatures are also subject to the state constitution's procedural requirements governing the lawmaking process.[278] Under this theory, however, the state constitution may not impose additional substantive limits or restrictions on the scope of the authority that the Elections Clause and Presidential Electors Clause grant specifically to the state legislature to regulate federal elections.

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denied, 990 F.3d 768 (4th Cir.) (en banc) (mem.), *stay granted*, 141 S. Ct. 9 (mem.), *appeal dismissed as moot*, No. 20-2022, 2020 WL 8922913 (4th Cir. Dec. 17, 2020); Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 192 (M.D.N.C.), *amended on reconsideration*, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (amending briefing requirements); *see also* New Ga. Proj. v. Raffensperger, 484 F. Supp. 3d 1265, 1287 n.18 (N.D. Ga.), *stay granted*, 976 F.3d 1278 (11th Cir. 2020), *appeal dismissed*, No. 20-13360-DD, 2020 WL 4128939 (11th Cir. Mar. 9, 2021).

274. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) (holding that the Elections Clause does not empower the legislature to "evade important constitutional restraints").

275. *See* 28 U.S.C. § 1331.

276. *See supra* notes 26–30 and accompanying text.

277. *See* Morley, *supra* note 8, at 16–21 (discussing in greater detail the limits to which state legislatures are subject when regulating elections).

278. *See infra* Part II.B.

A. Substantive Restrictions on Legislatures' Authority

In earlier work, I detailed the history of this aspect of the independent state legislature doctrine,[279] so this section presents only a brief summary. There does not appear to be any indication that the Framers specifically considered whether legislatures would be bound by the substantive constraints of their state constitutions, either at the Constitutional Convention or during the ratification debates.[280] The earliest known example of the doctrine's invocation appears to be the Massachusetts Constitutional Convention of 1820.[281] Justice Joseph Story successfully argued against a proposal to include a provision in the Massachusetts Constitution that would require the state to appoint members of Congress and presidential electors from individual districts rather than at-large.[282] He explained that the proposed amendment was "plainly a violation of the [U.S.] [C]onstitution," because the Convention did not "have a right to insert in our [state] constitution a provision which controls or destroys a discretion . . . which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States."[283]

On three known occasions in the nineteenth century, state supreme courts issued advisory opinions concerning conflicts, or potential conflicts, between a state statute (or piece of proposed legislation) and the state constitution with regard to federal elections. In each of those matters, the court concluded that the legislative measure would be enforceable, even if it were contrary to a state constitutional provision.[284] For example, in *In re Plurality Elections*,[285] the Rhode Island Constitution required candidates to receive a majority of votes to win an election, while a state law allowed congressional candidates to win with only a plurality.[286] The Rhode Island Supreme Court questioned whether that state constitutional provision applied to congressional elections.[287] To the extent it did apply to such races, however, that provision was "of no effect, except in so far as it may be voluntarily deferred to by the general assembly as an indication of the popular will."[288] The court went on to reiterate that, if the state constitution's majority-vote requirement were "construed to extend" to congressional elections, then it would be "in conflict

279. *See* Morley, *supra* note 8, at 27–37. For competing views that question the doctrine's historical foundation, see Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/83Y9-CPG7]; Smith, *supra* note 7.

280. *See* Morley, *supra* note 8, at 27–32.

281. MASS. JOURNAL, *supra* note 11, at 38–40.

282. *Id.* at 109–13. Congress had not yet enacted the federal statute requiring states to elect U.S. Representatives by congressional district. *See* 2 U.S.C. § 2c.

283. MASS. JOURNAL, *supra* note 11, at 109–10 (statement of Story); *see also* Morley, *supra* note 8, at 38–40.

284. *See In re* Plurality Elections, 8 A. 881, 882 (R.I. 1887); Opinion of the Justices, 45 N.H. 595, 596, 599 (1864); Opinion of the Judges, 37 Vt. 665, 677 (1864).

285. 8 A. 881 (R.I. 1887).

286. *Id.* at 882.

287. *Id.*

288. *Id.*

with" the Elections Clause because it would "impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint."[289] The court applied the same reasoning with regard to presidential elections and the Presidential Electors Clause.[290]

The doctrine was invoked during the nineteenth century by both the U.S. House and U.S. Senate in resolving multiple election contests, as well.[291] In *Baldwin v. Trowbridge*,[292] for example, the state constitution required people to cast their votes in person at their precinct, while a state law allowed military voters serving in the Union Army to cast absentee ballots.[293] The independent state legislature doctrine was repeatedly invoked throughout debates in the House concerning those absentee ballots.[294] The House concluded that the absentee ballots at issue were valid because a state constitution could not limit the legislature's power to regulate federal elections.[295]

The U.S. Supreme Court likewise discussed the doctrine approvingly. In the 1892 case *McPherson v. Blacker*,[296] in the course of upholding a Michigan law awarding presidential electors by congressional district, the Court quoted a U.S. Senate report for the proposition that the authority conferred by the Presidential Electors Clause

> cannot be taken from [state legislatures] or modified by their State constitutions any more than can [their] power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[297]

The Court went on to apply this aspect of the doctrine in cases dealing with Article V's delegation of authority specifically to state legislatures to ratify federal constitutional amendments.[298] Most notably, in *Leser v. Garnett*,[299] litigants challenged the validity of the Nineteenth Amendment's ratification on the grounds that some state constitutions barred their legislatures from

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289. *Id.*

290. *Id.*

291. *See* Morley, *supra* note 8, at 45–65; *see also* U.S. CONST. art. I, § 5, cl. 1 (specifying that each chamber of Congress is the sole judge of its members' "Elections, Returns and Qualifications").

292. H.R. REP. NO. 39-13 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

293. *Id.* at 3.

294. *See* Morley, *supra* note 8, at 50 & n.249.

295. CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

296. 146 U.S. 1 (1892).

297. *Id.* at 34–35 (quoting S. REP. NO. 43-395 (1874)).

298. *See, e.g.*, Hawke v. Smith, 253 U.S. 221, 225 (1920) (holding that a legislature's ratification of the Eighteenth Amendment was not subject to public referendum); *see also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

299. 258 U.S. 130 (1922).

ratifying such an amendment.[300] Rejecting that argument, the Court held that ratification of federal constitutional amendments "is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[301]

In 2015, however, the 5–4 majority in *Arizona State Legislature v. Arizona Independent Redistricting Commission* tersely rejected this corollary of the doctrine.[302] The Court declared, "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[303] It rejected any comparison to Article V precedents like *Leser* on the grounds that the ratification of constitutional amendments differed from redistricting and passing laws to regulate federal elections.[304] The Court likewise dismissed *Baldwin v. Trowbridge* as base partisan politics, without acknowledging the other occasions on which the doctrine was applied throughout the nineteenth century.[305]

During the 2020 election cycle, several Justices indicated their openness to this strand of the independent state legislature doctrine. The Pennsylvania legislature had enacted a statute, Act 77, to modify the rules governing the state's elections in response to the COVID-19 pandemic.[306] That law permitted the entire electorate to vote by mail, but "unambiguously required that all mailed ballots be received by 8 p.m. on election day."[307] The statute also had a nonseverability clause, specifying that if the deadline were held unconstitutional, most of the law—including the establishment of universal no-excuse absentee voting—would be void, as well.[308] The Pennsylvania Supreme Court ruled that this deadline violated the state constitution as applied during the pandemic.[309] It held that absentee ballots would be valid so long as they were postmarked by Election Day and received by election officials within the following three days.[310] Absentee ballots without postmarks were likewise deemed valid so long as they were received within three days after Election Day.[311] The court did not implement the nonseverability provision.[312]

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300. *Id.* at 135–36.
301. *Id.* at 137.
302. 576 U.S. 787, 817–18 (2015).
303. *Id.*
304. *See id.* at 807–08.
305. *See id.* at 818; *see also supra* notes 281–91 and accompanying text.
306. *See Boockvar II*, 141 S. Ct. 1, 1 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) (citing 25 PA. STAT. AND CONS. STAT. ANN. §§ 3146.6(c), 3150.16(c) (West 2020)).
307. *Id.*
308. *Id.* (citing Act 77, 2019 Pa. Laws 552).
309. *Id.*
310. *Id.*
311. *Id.*
312. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J., concurring in part and dissenting in part) (opining that the court's holding does not "trigger[] the draconian consequence" of the statute's non-severability provision).

In mid-October 2020, one week before Justice Barrett was confirmed to the U.S. Supreme Court,[313] the Court denied a motion to stay the Pennsylvania Supreme Court's ruling by a 4–4 vote, allowing that ruling to remain in effect.[314] The Pennsylvania Republican Party then asked the Court to resolve the case on an expedited basis, but the Court unanimously denied that request.[315] Justice Alito wrote a concurring opinion in which Justices Thomas and Gorsuch joined, agreeing that there was "simply not enough time at this late date to decide the question before the election."[316] The three Justices opined, however, that "there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution."[317] They explained that the Elections Clause and Presidential Electors Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[318]

About a week later, the Court ordered all Pennsylvania county boards of election to segregate any absentee ballots received within the three-day period following Election Day.[319] When there turned out to be far too few such ballots to affect the outcome of Pennsylvania's election, the Supreme Court denied certiorari in the case.[320] Justices Thomas and Alito both dissented from the denial of certiorari, reiterating their support for this aspect of the independent state legislature doctrine and emphasizing the need to resolve the issue in advance of future federal elections.[321] Thus, there is a reasonable potential basis in text, history, and precedent for the Court to conclude that state constitutions may not impose substantive restrictions on state laws regulating federal elections.

Though this strand of the independent state legislature doctrine has received some academic support,[322] numerous commentators have come out

313. Justice Barrett was confirmed on October 26, 2020. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/5ZH2-J64T].

314. *See Boockvar I*, 141 S. Ct. 643 (2020) (mem.).

315. *Boockvar II*, 141 S. Ct. at 1.

316. *Id.* at 2 (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari).

317. *Id.*

318. *Id.*

319. Republican Party of Pa. v. Boockvar (*Boockvar III*), 208 L. Ed. 2d 293 (2020) (mem.).

320. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021).

321. *Id.* at 733 (Thomas, J., dissenting from denial of certiorari) ("Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature.'" (quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring))); *id.* at 738 (Alito, J., dissenting from denial of certiorari) (reiterating earlier language denying power of state supreme courts to invalidate laws governing federal elections under state constitutions).

322. *See* Morley, *supra* note 8, at 13 n.36 (citing sources).

against it,[323] while others have expressed doubts.[324] For example, Professor Robert A. Schapiro has forcefully argued that this approach "extract[s] the state legislature from its constitutional setting . . . . [T]he relationship among state courts, state legislatures, and state constitutions can be conceived of as cooperative, rather than adversarial."[325] Professor James Gardner adds that there is "little reason . . . to think that the people of any state would be particularly inclined to trust their state legislature to perform the critical task of selecting presidential electors completely free of popular guidance and constraints applied by constitutional means."[326] He notes that "there is a long American history of popular distrust of state legislatures and of corresponding efforts to use state constitutions to curb undesirable legislative behavior."[327]

As mentioned earlier, even if the Court were to accept this potential implication of the independent state legislature doctrine, state legislatures would still be constrained in a variety of ways. For example, the Supreme Court has held that the Elections Clause implicitly prohibits a state from "dictat[ing] electoral outcomes, . . . favor[ing] or disfavor[ing] a class of candidates, or . . . evad[ing] important constitutional restraints."[328] Since the Elections Clause and Presidential Electors Clause are often construed in pari materia, these restrictions likely carry over to presidential elections, as well. Legislatures would also remain subject to the U.S. Constitution's express restrictions, such as the Bill of Rights as incorporated through the Fourteenth Amendment, the substantive restrictions of the Fourteenth Amendment itself, and subsequent voting rights amendments.[329] Many state constitutional provisions either have analogues in the U.S. Constitution or have been construed materially similarly to the U.S. Constitution, so the consequences of imposing this restriction would be limited.[330] Additionally, legislatures would remain bound by the restrictions of federal laws, such as the Voting Rights Act of 1965.[331] The Court might minimize potential disruptions by applying this aspect of the doctrine prospectively, allowing continued

323. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1414 (2001) ("The legislature only *is* the legislature because the [state] [c]onstitution creates it as such."); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 (2001) ("There is no reason to suppose that nineteenth-century state legislatures would view themselves as receiving powers from the federal government that were denied them by their own state constitutions.").

324. *See* Strauss, *supra* note 110, at 748 ("It is far from clear what the relationship is between a state's constitution and the power that a state 'legislature' may exercise under [the Presidential Electors Clause] to 'direct' the 'manner' in which electors are appointed . . . . Determining the ways in which a state constitution may and may not limit the legislature's decisions about presidential electors will, therefore, be a difficult and complex task.").

325. Schapiro, *supra* note 7, at 678–79.

326. James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 641 (2001).

327. *Id.*

328. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995).

329. *See* Issacharoff, *supra* note 107, at 643.

330. *See* Morley, *supra* note 31, at 204.

331. *See supra* notes 29–30 and accompanying text.

enforcement of existing state constitutional provisions that regulate federal elections as default sources of law, unless and until a state legislature enacts a contrary statute.

Thus, rather than dangerously unshackling legislatures, one of the main consequences of this aspect of the independent state legislature doctrine may be to promote predictability in federal elections by preventing state supreme courts from changing the rules and potentially impacting outcomes based on new, unexpected applications of broad or vague provisions of state constitutions. An accompanying drawback, however, is that such interpretations of state constitutions would remain enforceable with regard to state and local elections, leading to different sets of rules governing elections for different offices.

B. Procedural Restrictions on Legislatures' Authority

Even if state constitutions are incapable of imposing substantive restrictions on the power that the U.S. Constitution confers upon state legislatures to regulate federal elections, they still may regulate the process by which legislatures enact such laws. Conceptually, the fact that the Constitution grants a legislature the authority to enact laws regulating federal elections does not suggest that the legislature is exempt from its ordinary legislative process when exercising that power.[332]

Historically, the independent state legislature doctrine was not applied to exempt state laws governing federal elections from the ordinary legislative process.[333] To the contrary, in the years following the Constitution's adoption, the two governors that held a veto power decided whether to approve or reject state laws regulating federal elections.[334]

The Supreme Court has recognized this principle for over a century, as well. In *Smiley v. Holm*,[335] the Court held that state laws governing federal elections may be subject to gubernatorial veto.[336] It explained that, because the Elections Clause grants legislatures authority "for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the

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332. Conversely, as explained in the preceding section, one might reasonably conclude that a state constitution may not limit the scope of substantive authority and discretion that a legislature receives from the federal Constitution to determine how best to regulate elections. *See supra* Part II.A.

333. *See, e.g.*, *California Contested-Election Cases*, H.R. REP. NO. 49-2338, at 1, 4–5 (1886) (resolving an election contest among candidates for California's delegation to Congress by invoking a decision of the California Supreme Court, *People ex rel. Leverson v. Thompson*, 9 P. 833 (Cal. 1885), which held that the California legislature had not violated rules of legislative procedure imposed by the state constitution when it adopted the state's congressional districts), *resolution proposed by committee report adopted*, 17 CONG. REC. 4381 (1886).

334. *See* Smith, *supra* note 7, at 759–61.

335. 285 U.S. 355 (1932).

336. *Id.* at 367.

method which the State has prescribed for legislative enactments."[337] Likewise, the Court interprets its ruling in *Ohio ex rel. Davis v. Hildebrant*[338] as allowing state legislative bills concerning federal elections, including congressional redistricting maps, to be subject to a public referendum before taking legal effect.[339] Thus, even if the Court were to revitalize portions of the independent state legislature doctrine, it need not exempt state laws regulating federal elections from the ordinary legislative process. Regardless of whether state constitutions may limit the content of such laws, state constitutions may regulate the process through which legislatures adopt them.

III. THE DOCTRINE AND STATE LEGISLATURES

A. Direct Legislative Appointment of Presidential Electors

One of the most significant potential implications of the independent state legislature doctrine concerns the scope of a state legislature's power to directly appoint presidential electors. The Supreme Court has recognized that the Presidential Electors Clause grants a legislature "plenary" authority over the manner in which its state's electors are appointed.[340] In *Bush v. Gore*, the Court reiterated that a legislature "may, if it so chooses, select the electors itself."[341] Some legislatures directly appointed presidential electors without a popular vote during the first century of our nation's history.[342] Those precedents confirm the constitutional prerogative of a legislature to decide, well in advance of an election cycle, to directly appoint presidential electors itself instead of holding a popular election. Given the central role of popular presidential elections in American political culture, however, a legislature is unlikely to exercise this option today.

The more difficult issue is whether the Presidential Electors Clause empowers a legislature to directly appoint a slate of presidential electors when state law specifies that electors must be appointed based on the results

337. *Id.*; *see also id.* at 367–68 ("We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.").

338. 241 U.S. 565 (1916). *Davis* did not actually address the merits of the plaintiffs' Elections Clause claim, however. Rather, the Court inexplicably transmuted that claim into a challenge under the Guarantee Clause and rejected it as nonjusticiable. *Id.* at 569 (declaring that the argument that the Elections Clause forbids states from subjecting state laws governing federal elections to public referenda "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which . . . in effect annihilates representative government and causes a State where such condition exists to be not republican in form"); *see also* Morley, *supra* note 8, at 72–74.

339. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) (discussing *Davis*); *Smiley*, 285 U.S. at 371–72 (same).

340. McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the [Presidential Electors Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

341. 531 U.S. 98, 104 (2000) (per curiam).

342. *See* FOLEY, *supra* note 35, at 59 tbl. 4.3.

of a popular election and authorizes only an executive official, such as the governor or secretary of state, to certify the election results and resulting appointments. This is not a purely hypothetical question. In 2000, as disputes over the presidential election wound their way through the courts, the Florida House of Representatives voted to appoint a slate of Republican electors to support then-candidate George W. Bush.[343] The legislature did not proceed with the plan because the U.S. Supreme Court ruled in Bush's favor before the Florida Senate had the opportunity to consider the issue.[344] Following the 2020 election, President Trump's campaign sought to persuade Republican legislators in states where he had lost the popular vote to appoint competing slates of Republican electors, based on unsubstantiated allegations of voter fraud.[345] Despite such pressure, "no legislative house took steps in 2020 after Election Day to appoint electors [directly] . . . whether by purported legislative resolution or through the regular legislative process."[346]

Legislatures might attempt to directly appoint electors for a variety of reasons. The strongest normative grounds for direct legislative appointment is if a major unexpected disaster such as Hurricane Katrina strikes on, or shortly before, Election Day, making it impossible to conduct the election or determine the results.[347] The Constitution requires all presidential electors to cast their electoral votes on the same day,[348] which Congress has set in mid-December.[349] Congress meets in joint session shortly thereafter, the following January 6, to count the electoral votes,[350] and the new president's term begins on January 20.[351] If a natural disaster prevents a substantial portion—and potentially even a majority—of a state's electorate from voting on Election Day, it may be impossible for that state to simply reschedule its election or switch to an all-mail election at the last minute.[352]

As discussed below, federal law contemplates the possibility that a catastrophe might require legislatures to appoint electors at some point after

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343. Jeffrey Gettleman, *Florida House OKs Slate of Electors Beholden to Bush*, L.A. TIMES (Dec. 13, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-dec-13-mn-64909-story.html [https://perma.cc/82WD-V6Q8].

344. *Id.*

345. Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is That Possible?*, WALL ST. J. (Nov. 21, 2020, 10:48 AM), https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695 [https://perma.cc/JJ2W-QY7P].

346. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3714294 [https://perma.cc/843U-AAW7].

347. *See* Morley, *supra* note 82, at 559–63 (explaining how Hurricane Katrina required cancellation of local and parish-level elections).

348. U.S. CONST. art. II, § 1, cl. 4.

349. 3 U.S.C. § 7.

350. *Id.* § 15; *see* U.S. CONST. art. II, § 1, cl. 3, *amended by id.* amend. XII.

351. U.S. CONST. amend. XX, § 1.

352. *See* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 194–95 (2020).

Election Day.[353] Ideally, each state should enact an election emergency law to authorize its legislature to appoint electors in the unlikely event that such extreme circumstances arise, to ensure the state is able to cast its electoral votes. Such express statutory authorization would avoid unnecessary uncertainty as to the scope of the legislature's power.

A legislature might also claim authority to appoint a slate of electors in the extreme case where a state is unable to finish tallying and canvassing the results of the popular election in time to certify a slate of electors pursuant to the statutory process. This was a concern in the 2020 election cycle; states faced historically high numbers of absentee ballots due to COVID-19, yet a few swing states' laws did not allow their election officials to begin reviewing such ballots until Election Day.[354] During the primaries that summer, New York took approximately a month and a half to determine the results of two congressional races, which involved only a fraction of the ballots that would be cast in the presidential race.[355] Again, to the extent states conclude that an emergency fallback mechanism is necessary, the best alternative is to provide statutory authorization for the direct legislative appointment of electors in the rare, extreme case where the state, despite its best efforts, is unable to complete the ordinary statutory certification process. North Carolina has adopted such a law.[356] One potential concern about such a statute, however, is that it may incentivize state officials or candidates to seek to delay or derail the ballot-counting process to allow a friendly legislature to determine which electors to appoint. A possible, though highly imperfect, way of attempting to address such concerns would be for the statute to specify that the legislature's appointments must reflect its good-faith assessment of the apparent will of the state's electorate, taking into account any completed tallies, as well as reasonable estimates of uncounted votes.

More controversially, a legislature might also attempt to assert the right to appoint its own slate of electors without statutory authorization as an

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353. *See* 3 U.S.C. § 2; *see also* Morley, *supra* note 352, at 185–91 (discussing 3 U.S.C. § 2's legislative history); Levitt, *supra* note 346, at 24 ("The mandate for a single federal Election Day would not preclude the state from providing for contingencies for an alternative process, if a state held an election on that day and for some reason that election failed to yield a choice under state law.").

354. *See* Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/ [https://perma.cc/7QLJ-BBD5]; *see also* Nick Corasaniti & Denise Lu, *How Quickly Will Your Absentee Ballot Be Counted? A State-by-State Timeline*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/interactive/2020/us/politics/when-votes-counted-tonight-election.html [https://perma.cc/ANV5-DXD4] (describing absentee ballot processing procedures in each state).

355. *See* Jesse McKinley et al., *After 6 Weeks, Victors Are Declared in 2 N.Y. Congressional Primaries*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/08/04/nyregion/maloney-torres-ny-congressional-races.html [https://perma.cc/8LFC-EV4W].

356. N.C. GEN. STAT. § 163-213(a) (2021) ("[W]henever the appointment of any Presidential Elector has not been proclaimed . . . before noon on the date for settling controversies specified by 3 U.S.C. § 5 . . . the General Assembly may fill the position of any Presidential Electors whose election is not yet proclaimed.").

institutional self-defense mechanism. The Presidential Electors Clause empowers a state's legislature to determine the "Manner" in which the state's electors will be appointed.[357] A legislature might contend that, when state officials or courts depart from the apparent meaning of state laws governing presidential elections to reach unexpected, atextual results, they infringe on the legislature's constitutional prerogative to determine how such elections must be conducted.[358] In *Bush v. Palm Beach County Canvassing Board*, for example, the U.S. Supreme Court unanimously stepped in to seek clarity about whether the Florida Supreme Court was adhering to the Florida Election Code rather than implementing extrinsic authorities such as the state constitution.[359]

Certiorari is purely discretionary, however, and the Court typically does not intervene in litigation solely to correct errors.[360] A legislature might contend that the Presidential Electors Clause empowers it to appoint a slate of electors reflecting the election's results based on the plain meaning of laws it enacted, instead of having to rely on the Supreme Court to enforce those laws and prevent state officials or judges from implementing their own preferences or idiosyncratic interpretations instead. This appears to be the Florida legislature's rationale for taking steps to appoint the Republican slate of electors as litigation concerning the 2000 presidential election proceeded.[361] To the extent the federal judiciary in general or the Supreme Court in particular is available to act as a potential check against patently unreasonable interpretations of state laws governing federal elections, however, such judicial review would be far preferable to the extraordinary, disruptive, and unavoidably partisan possible alternative of a legislature's attempted direct appointment of its own slate of electors. Moreover, if the Constitution's grants of authority over federal elections to the "Legislature" do not impose any enforceable limits on how state officials or courts may interpret state laws governing such elections,[362] then a legislature would have no basis for attempting to enforce such limits by appointing its own electors. In any event, as discussed below, substantial legal obstacles exist to direct legislative appointment under such circumstances.

Finally—and most disturbingly—a legislature might attempt to claim power to simply disregard the results of a popular presidential election and appoint a slate of electors reflecting its own partisan preferences. Such a step would be historically unprecedented, fly directly in the face of our democratic traditions, and likely destabilize the entire presidential election. Once a legislature has made the decision to award presidential electors based on a popular vote and the election has been conducted, it would be both

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357. U.S. CONST. art. II, § 1, cl. 2.

358. *See supra* Part I.B.

359. 531 U.S. 70, 76–78 (2000) (per curiam).

360. *See* Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(c)(3) (9th ed. 2007)).

361. *See* Gettleman, *supra* note 343 ("Republican lawmakers have argued that the election court battles 'tainted' Florida's electoral votes . . . .").

362. *See supra* Part I.B.

unjustifiable and disastrous for the legislature to unilaterally decide to ignore the will of the people.

Whatever the rationale, several major legal impediments exist to a legislature's direct appointment of its own slate of electors pursuant to the Presidential Electors Clause. First, in nearly every state, direct appointment by the legislature would violate state law and potentially the state constitution.[363] A legislature might claim, however, that *McPherson v. Blacker* allows it to appoint its own electors regardless of the certification process set forth in state law. *McPherson* states that a legislature's "plenary" power to appoint electors "can neither be taken away nor abdicated," regardless of "[w]hatever provisions may be made by statute, or by the state constitution."[364] Under this potential view of the independent state legislature doctrine, state-level legal provisions governing a state's presidential election process cannot constrain the legislature's authority under the U.S. Constitution to appoint its own slate of electors.

McPherson need not be read, however, as granting legislatures authority to appoint their own slates of electors in the face of state laws establishing a different certification process. Most basically, the Court's sweeping assertion was dicta. *McPherson* was not addressing whether a legislature may directly appoint electors outside of the statutory process that the legislature itself has established to govern presidential elections. To the contrary, the Court was considering the constitutionality of Michigan's system of appointing electors by district rather than on a statewide basis.[365]

Furthermore, although *McPherson* acknowledged that a state legislature has inalienable plenary authority to determine the manner in which electors are appointed, it did not address how the legislature must exercise that power. *McPherson* is consistent with the notion that, once a legislature has enacted laws requiring electors to be appointed based on the outcome of the popular vote as certified by state election officials, the legislature must amend or repeal those laws—subject to the possibility of gubernatorial veto—if it wishes to directly appoint electors rather than attempt to act in contravention of those provisions pursuant to the Presidential Electors Clause.[366]

Finally, from a pragmatic perspective, a competing slate of electors selected by a state legislature would likely destabilize the presidential election—especially if it was potentially dispositive in the Electoral College.

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363. *See, e.g.*, FLA. STAT. §§ 102.111, 103.111 (2021). Michigan has a statute which appears to allow the legislature to review the results of statewide elections, including presidential elections, in certain circumstances. *See* MICH. COMP. LAWS § 168.846 (2021) ("When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected."). Additionally, as noted earlier, North Carolina authorizes direct appointment by the legislature when the state has been unable to certify its electors through the ordinary statutory process. *See supra* note 356 and accompanying text.

364. McPherson v. Blacker, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395 (1874)).

365. *Id.* at 25 ("If the legislature possesses plenary authority to direct the manner of appointment, . . . it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts.").

366. *See* Levitt, *supra* note 346, at 11–12.

Congress would have to decide which of the state's competing slates to count under 3 U.S.C. § 15.[367] If both presidential candidates could plausibly claim to have won a majority of electoral votes based on competing slates of electors from a state, the public would be far less likely to accept the election's results. The January 6, 2021, Capitol riot frightfully demonstrates how even unsubstantiated allegations about the purported invalidity of a presidential election can instigate violence.[368]

Federal law further constrains a legislature's ability to directly appoint electors outside the statutory process for certifying election results. The Presidential Election Day Act[369] specifies that electors "shall be appointed" on Election Day (that is, the first Tuesday after the first Monday in November).[370] Congress enacted this law pursuant to its constitutional authority to "determine the Time of chusing the Electors."[371] The statute cannot be taken completely at face value. Electors are not actually appointed, and many votes are not even necessarily cast, on Election Day itself.[372] Nevertheless, the statute requires each state to appoint a slate of electors based on the results of an election that culminated on Election Day.[373] A state legislature cannot simply decide that it dislikes the candidate the people elected and, after Election Day, appoint the other candidate's slate of presidential electors. Such a competing slate of electors would be divorced from, and even contrary to, the results of the election held on Election Day in compliance with federal law. A legislature's appointment of electors under such circumstances would amount to an illegal new election, held after the day specified in federal law.

The Presidential Election Day Act provides an important exception. It specifies that when a state has held an election but "failed to make a choice" on Election Day, electors "may be appointed on a subsequent day in such a manner as the legislature . . . may direct."[374] This provision was adopted in part to allow states to hold their elections at a later date if a natural disaster prevents voting on Election Day.[375] Thus, if a state were unable to hold or complete a popular vote for president due to a massive disaster, such as Hurricane Katrina, the Presidential Election Day Act would not preclude the

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367. 3 U.S.C. § 15 governs the counting of electoral votes in Congress.

368. *See* Ted Barrett et al., *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden's Win*, CNN POLITICS (Jan. 7, 2021, 3:33 AM), https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html [https://perma.cc/2JL9-AR8P].

369. Pub. L. No. 28-2, 5 Stat. 721 (1845) (codified as amended at 3 U.S.C. §§ 1–2).

370. 3 U.S.C. § 1.

371. U.S. CONST. art. II, § 1, cl. 4.

372. *See* Morley, *supra* note 352, at 208–09 ("So long as a state holds an 'authentic general election' on Election Day, it may allow voting to occur beforehand, as well." (quoting Public Citizen, Inc. v. Miller, 813 F. Supp. 821, 830 (N.D. Ga. 1993), *aff'd per curiam*, 992 F.2d 1548 (11th Cir. 1993))); *see also* Levitt, *supra* note 346, at 21.

373. *See* Foster v. Love, 522 U.S. 67, 72 & n.4 (1997).

374. 3 U.S.C. § 2.

375. *See* Morley, *supra* note 352, at 188–89 (citing CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844) (statement of Rep. Chilton)); Levitt, *supra* note 346, at 24.

legislature from directly appointing electors at a later date, so long as it is before the day when the electors cast their electoral votes.[376]

It is less clear whether the Presidential Election Day Act bars a legislature from appointing a slate of electors based on its view of the legally correct results of the election that culminated on Election Day.[377] Under such circumstances, the legislature would likely argue that it is not violating the Act by holding a belated new election, but rather attempting to enforce the results of the election held in compliance with the Act. The Presidential Election Day Act was enacted pursuant to Congress's authority to regulate the "Time" of presidential elections.[378] It is uncertain whether the Act is violated when the "wrong" entity under state law purports to determine the election's results and certify a corresponding slate of electors. Of course, as a practical matter, it may often be difficult to determine whether a legislature is actually attempting to implement the results of a presidential election based on its interpretation of state law or instead imposing its partisan preferences by appointing electors to vote for its preferred candidate. And, as noted before, one might reject the notion that the Presidential Electors Clause implicitly restricts how state courts or officials may interpret state laws governing federal elections.

A third barrier to a legislature's direct appointment of electors in violation of state law is the U.S. Constitution's Due Process Clause. In *Bush v. Gore*, the Supreme Court held that, once a state decides to award its electors based on a popular vote, the constitutional right to vote attaches.[379] As discussed earlier,[380] several circuits have held that the Fourteenth Amendment's Due Process Clause prohibits states from changing the rules of an election after voters have already acted in reliance on them.[381] A legislature's decision to appoint its own slate of electors after an election has already been held would obviously be a substantial after-the-fact change in the rules governing the election that would likely violate the constitutional right to vote.

A legislature might attempt to argue in response, however, that these due process cases apply only where voters acted in reasonable reliance on a particular interpretation of state law.[382] It may be challenging for voters to plausibly claim that they would have made different voting-related decisions if they had known that the legislature, rather than state election officials, would be determining the validity of the votes cast and deciding the

376. *See* 3 U.S.C. § 7.

377. *See supra* notes 343–44, 361 and accompanying text (discussing the steps that the Florida legislature took during the 2000 presidential election to appoint its own slate of electors).

378. *See* Morley, *supra* note 352, at 182–93 (examining the legislative history of the Presidential Election Day Act).

379. Bush v. Gore, 531 U.S. 98, 104 (2000).

380. *See supra* notes 217–34 and accompanying text.

381. *See, e.g.*, Roe v. Alabama, 43 F.3d 574, 581 (11th Cir. 1995); Griffin v. Burns, 570 F.2d 1065, 1075 (1st Cir. 1978).

382. *See supra* note 234 and accompanying text (arguing that reliance is an essential element of due process challenges to state officials' changes in the rules governing elections).

election's outcome. Moreover, a legislature might claim to be defending the right to vote, to the extent it seeks to prevent state officials or courts from changing the rules of the election after votes have been cast through unexpected interpretations of state law.

In conclusion, direct legislative appointment of presidential electors despite state laws providing for a popular election is an extreme measure that raises serious risks of undermining the public's willingness to accept the results of a presidential election. It flies in the face of the democratic tradition of popular presidential elections and creates a substantial risk that partisan manipulation will override the will of the people. Direct legislative appointment of electors is most defensible only as a response to a major disaster that would otherwise prevent a state from casting electoral votes in a presidential election.[383] To alleviate any doubts about the validity of such measures, states should enact election emergency laws that clearly specify the narrow circumstances under which the legislature may exercise such extraordinary authority.

Conversely, direct legislative appointment is patently impermissible when a legislature seeks to appoint its own preferred electors as a partisan maneuver without regard to the popular vote. A legislature's direct appointment of electors is also both legally and prudentially problematic if used as a means of allowing the legislature to override a state official's or court's unexpected, purportedly incorrect interpretations or applications of state election laws. Such a legislatively sanctioned competing slate of electors would likely exacerbate tensions over a hotly contested election. The federal judiciary, and the U.S. Supreme Court in particular, could reduce or eliminate any potential perceived need for legislatures to engage in such self-help measures by enforcing boundaries on the ability of state courts and officials to interpret state laws governing federal elections in unexpected, atextual ways.[384] And when a federal court affirms the reasonableness of the state official's or court's interpretation of a disputed state law, the legislature would no longer have a colorable basis for asserting a need to protect either its constitutional prerogatives or the voting rights of the state's citizens. At the very least, as a matter of norms and political culture, presidential candidates, legislators, and their supporters must avoid resorting to consideration of direct legislative appointment of competing slates of electors as a means of resolving electoral disputes or overcoming disappointing electoral results.

B. Regulating Federal Elections Outside of Institutional Legislatures

Another potential implication of the independent state legislature doctrine is that it may preclude states from regulating federal elections through legislative processes outside of the institutional legislature, such as a public initiative. Since the Elections Clause and Presidential Electors Clause

383. *See supra* notes 374–76 and accompanying text (discussing 3 U.S.C. § 2).

384. *See supra* Part I.B; *see, e.g.*, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

specifically delegate authority to regulate federal elections to the "Legislature" of each state, this question turns on the meaning of the term "Legislature."

The Constitution includes several vague terms that allude to broad principles, such as "due process of law" and "equal protection of the laws."[385] Other constitutional concepts appear to call for the exercise of at least some degree of judgment, such as "necessary and proper."[386] The term "Legislature," in contrast, seems definite, specific, and concrete. Based on the Constitution's references to the term "Legislature" apart from the Electors Clause and Presidential Electors Clause,[387] it appears that the term refers to a "representative body which ma[kes] the laws of the people."[388] Moreover, "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives."[389] Indeed, the Supreme Court adopted this interpretation of the term for purposes of Article V of the Constitution,[390] which empowers the "Legislature" of each state to ratify constitutional amendments.[391] Thus, from a plain meaning, original understanding, and intratextual approach,[392] a state's institutional legislature is the only state entity that may regulate federal elections without relying on a statutory delegation of authority.[393]

In *Arizona Independent Redistricting Commission*, however, a sharply divided 5–4 Court rejected this interpretation of "Legislature."[394] Drawing on precedent, the Court held that the term has a different meaning as used in the Elections Clause (and, by extension, the Presidential Electors Clause) than it does in the rest of the Constitution.[395] The Court explained that

385. *See* U.S. CONST. amend. XIV, § 1.

386. *Id.* art. I, § 8, cl. 18.

387. *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 138–40 (2015) (listing constitutional provisions).

388. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (quoting Hawke v. Smith, 253 U.S. 221, 227 (1920)) (alteration in original).

389. *Id.* at 828 (quoting Morley, *supra* note 387, at 147 & n.101 (alteration removed)).

390. U.S. CONST. art. V.

391. Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding that a legislature's authority to ratify a federal constitutional amendment "is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State"); *Hawke*, 253 U.S. at 227 (holding that a legislature's authority under Article V to ratify amendments to the U.S. Constitution cannot be subject to a public referendum, explaining that "[t]he language of the article is plain, and admits of no doubt in its interpretation"); *see also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

392. "Intratextualism counsels that the Constitution's use of 'strongly parallel language [in different places] is a strong (presumptive) argument for parallel interpretation' of that language." Morley, *supra* note 387, at 135 (quoting Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999)).

393. *Cf. infra* Part III.D (explaining that legislatures may delegate their power under the Elections Clause and Presidential Electors Clause).

394. 576 U.S. 787, 808 (2015).

395. *Id.* ("[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon

"Legislature" means any power or process that is authorized to make laws within a state.[396] Although it cited some Founding Era dictionaries, the Court primarily applied a purposivist interpretation of the Elections Clause.[397] It explained that "[t]he dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation."[398] The Framers could not have intended for the Elections Clause to prohibit states from regulating federal elections through the public initiative process, since that process had not yet been developed at the time of the Constitution's adoption.[399] Accordingly, the majority held that the Elections Clause should not be read to hinder the people's ability to govern themselves through direct democracy.[400] The Court concluded that, because the Arizona constitution allows the state's electorate to legislate through a public initiative process, that process qualifies as a "Legislature" for purposes of the Elections Clause.[401] The people of Arizona may therefore use the initiative process to enact laws regulating federal elections.

The *Arizona Independent Redistricting Commission* majority did not address the fact that, throughout their debates at the constitutional convention, the Framers consistently distinguished "between a state legislature and direct collective action by the people of a state."[402] This distinction is reflected in the Constitution's text and structure. As originally adopted, the Constitution required Representatives to be directly elected by the people, while senators were to be appointed by state legislatures.[403] Moreover, the majority provided no evidence from the Constitution's text, drafting history, or ratification history to support the implausible notion that the Framers used the term "Legislature" to mean different things at different points in the document, surreptitiously changing its meaning from clause to clause. Thus, the majority's purposivist reasoning appears to rest on shaky ground.

In short, a strong argument can be made that the only entity within a state that may adopt laws governing federal elections is the institutional legislature. The legislature may delegate rulemaking authority to election

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the character of the function which that body in each instance is called upon to exercise." (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932))).

396. *Id.* at 813 (citing several Founding Era dictionaries).

397. *See* Michael T. Morley, *The New Elections Clause*, NOTRE DAME L. REV. ONLINE 79, 87–90 (2016).

398. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814–15.

399. *Id.* at 816; *see also id.* at 824 ("[T]he Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes.").

400. *Id.* at 816 ("The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands.").

401. *Id.* at 817 ("We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process.").

402. *See* Morley, *supra* note 8, at 32.

403. *Compare* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."), *with id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . .").

officials, or even statutorily authorize an independent redistricting commission to develop nonpartisan congressional maps.[404] Under this approach, when state or local officials purport to regulate federal elections, they must be able to point to some grant of authority specifically from the institutional legislature; a state's electorate may not adopt laws regulating federal elections through a public initiative process.[405]

Importantly, if the Court were to adopt this interpretation, it need not apply its ruling retroactively to invalidate existing election laws that had been enacted via an initiative process or otherwise apart from the institutional legislature.[406] Rather, the Court may make its ruling prospectively applicable only in the case before it and as to future state statutes. And even if the ruling were retroactively applicable, a legislature would remain free to immediately readopt any provisions of state law that had been enacted through an improper channel.

Current Supreme Court doctrine, however, rejects any variation of this potential application of the independent state legislature doctrine.[407] Under *Arizona Independent Redistricting Commission*, a state may use any lawmaking process authorized by the state constitution, such as a public initiative, to regulate federal elections.[408]

C. Stripping Institutional Legislatures of Authority to Regulate Federal Elections

A closely related issue under the independent state legislature doctrine is whether a state may partly or completely strip its institutional legislature of authority to regulate federal elections and transfer that power exclusively to some other entity. Under this potential aspect of the doctrine, the term "Legislature" as used in the Elections Clause and Presidential Electors Clause must, *at the very least*, include a state's institutional legislature, regardless of whether it also includes other processes and entities.[409] Accordingly, an institutional legislature may not be excluded from regulating federal elections, or certain aspects of those elections, even if the state constitution may place side constraints on that power.[410]

Professor Derek Muller has forcefully advocated this position.[411] He points out that adoption of the Seventeenth Amendment[412] was necessary to authorize popular elections for U.S. Senators because "neither a popular initiative nor a legislative act" could stop a legislature from "exercis[ing] its

404. *See infra* Part III.D.
405. *See supra* Part I.A.
406. *See* Morley, *supra* note 8, at 90–91.
407. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015).
408. *Id.*
409. *See supra* Part III.B.
410. *See supra* Part II.A.
411. Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 718 (2016).
412. U.S. CONST. amend. XVII.

own judgment and final authority in senate elections."[413] In other words, prior to the Seventeenth Amendment, a state could neither strip an institutional legislature of its authority under the U.S. Constitution to decide who to appoint to the U.S. Senate, nor transfer such authority to the exclusive discretion of some other body—including the people themselves.[414] This history can be informative in understanding legislatures' prerogatives concerning modern federal elections.

Professor Muller further explains that the Elections Clause grants Congress the same authority to regulate congressional elections as it confers on state legislatures.[415] Congress's power under that provision cannot be irrevocably transferred to some other entity; the Constitution's grants of authority to state legislatures should be afforded the same protection.[416]

Yet again, the majority in *Arizona Independent Redistricting Commission* rejected this interpretation. The Court held that a state constitution may completely exclude the state's institutional legislature from drawing congressional district lines and instead confer that authority exclusively on an independent redistricting commission.[417] In other words, a state constitution may not only limit how an institutional legislature regulates federal elections,[418] but completely prohibit the legislature from exercising such power at all. Although *Arizona Independent Redistricting Commission* dealt solely with the power to establish congressional district boundaries, the Court's reasoning would extend equally to all other aspects of federal elections.[419] "Nothing in the opinion turned on the fact that the commission was empowered to determine congressional district boundaries, as opposed to regulating other aspects of federal elections."[420] The Court's ruling appears to allow a state constitutional amendment—including amendments adopted through the public initiative process[421]—completely transferring responsibility for determining the "Times, Places and Manner" of congressional elections, as well as the "Manner" of appointing presidential electors, from the institutional legislature to some other newly created entity.

Thus, under current law, a state constitution may partly or completely exclude the institutional state legislature from regulating federal elections. This is another aspect of *Arizona Independent Redistricting Commission* that

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413. Muller, *supra* note 411, at 724–25; *see also id.* at 722–25 (discussing authorities from before the Seventeenth Amendment's adoption).

414. *See id.*

415. *See id.* at 738.

416. *See id.*

417. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.").

418. *Cf. id.* at 817–18 ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provision of the State's constitution.").

419. *See* Morley, *supra* note 397, at 87 ("[T]he Court's ruling contains no limiting principle.").

420. *Id.*

421. *See supra* Part III.B.

is hard to square with the Constitution's delegation of authority over federal elections specifically to the "Legislature" of each state.

D. Delegation of Legislative Authority over Federal Elections

A final potential implication of the doctrine—though one without merit—is that the institutional legislature cannot choose to delegate its authority to regulate federal elections. Under this interpretation, because the Constitution grants power to regulate federal elections specifically to the legislature, the legislature itself—however that term is defined[422]—must exercise that authority, rather than granting executive officials or others the authority to establish rules for federal elections. This approach is inconsistent with how the Court has consistently construed other grants of constitutional authority.

Under the "nondelegation doctrine," when the Constitution grants legislative authority to Congress, Congress may delegate power to promulgate regulations to executive officials. The only constitutional constraint is that Congress must provide an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[423] This forgiving standard is satisfied so long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[424] Moreover, "well-defined practices" and "well-known and generally accepted standards" may implicitly guide and limit otherwise standardless grants of discretion.[425] Throughout our nation's history, the Court has invalidated only two grants of legislative authority to the executive branch, both in 1935.[426] Since then, the Court has upheld a wide range of extraordinarily vague delegations to executive agencies, including the authority to determine whether granting a broadcasting license was in the "public interest, convenience, or necessity";[427] commodity prices were "generally fair and equitable";[428] and price caps[429] or railroad leases[430] were in the "public interest."

Courts should interpret the grants of authority to state legislatures through the Elections Clause and Presidential Electors Clause the same way they interpret the Constitution's grants of legislative authority to Congress.[431]

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422. *See supra* Part III.B–C.

423. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)) (alterations in original).

424. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); *accord* Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (discussing the Court's flexible application of the intelligible principle test).

425. Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (upholding the Home Owners' Loan Act's delegation of power to promulgate standards governing savings and loan associations).

426. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (striking down § 3 of the National Industrial Recovery Act of 1933 (NIRA)); Panama Refining Co. v. Ryan, 293 U.S. 388, 406, 414–16 (1935) (striking down § 9(c) of NIRA).

427. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

428. Yakus v. United States, 321 U.S. 414, 420 (1944).

429. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940).

430. N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

431. *See* Muller, *supra* note 411, at 738.

Indeed, Congress's authority under the Elections Clause is coextensive with legislatures' power.[432] Legislatures should have the same prerogative as Congress to delegate the powers that the Constitution grants them, subject only to the outer bounds of the nondelegation doctrine. Numerous state constitutions generally apply stricter nondelegation doctrines to their legislatures.[433] The U.S. Constitution's more flexible nondelegation doctrine, rather than this stricter standard, should apply to state laws that solely govern congressional or presidential elections, since such laws are enacted under the Elections Clause and Presidential Electors Clause rather than the state constitution. State laws that broadly apply to elections for offices at all levels of government, in contrast, should have to satisfy both federal and state nondelegation standards.[434] Thus, most state election laws would have to satisfy both federal and state nondelegation standards.

In *Arizona Independent Redistricting Commission*, the Court properly recognized that state legislatures may delegate their authority over federal elections.[435] Many lower courts have likewise held that legislatures may delegate power to regulate various aspects of the electoral process, particularly when faced with emergency situations like the COVID-19 pandemic.[436] The independent state legislature doctrine should not be construed as precluding revokable delegations of legislative authority to executive officials to faithfully implement the legislature's standards and directives.

CONCLUSION

If courts were to adopt or reinvigorate certain aspects of the independent state legislature doctrine, procedural hurdles would inevitably arise. For

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432. *See* Smiley v. Holm, 285 U.S. 355, 366–67 (1932).

433. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189–90 (1999) ("[I]n the states, unlike the federal system, the nondelegation doctrine [was] alive and well in the late 1990s. Many states require the legislature to provide specific standards to guide agency discretion in the statute delegating authority to an agency . . . . The overwhelming majority of modern state constitutions contain a strict separation of powers clause."); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 585 (2000) ("A majority of state constitutions contain nondelegation doctrines, some very strict.").

434. *See* Michael T. Morley, *Dismantling the Unitary Electoral System?: Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

435. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.").

436. *See, e.g.*, Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 833–34 (D. Mont. 2020) (upholding governor's executive order issued pursuant to the state's election emergency law); Singh v. Murphy, No. A-0323-20T4, 2020 WL 6154223, at *7 (N.J. Super. Ct. Oct. 21, 2020) ("[I]n issuing Executive Order 144 while the public health crisis caused by COVID-19 escalated, the Governor lawfully acted pursuant to his legislatively-assigned responsibilities vested in him by two statutes . . . ."); Abbott v. Anti-Defamation League Austin, Sw. & Texoma Regions, 610 S.W.3d 911, 917–18 (Tex. 2020) (per curiam); *cf.* Paher v. Cegavske, 457 F. Supp. 3d 919, 932–33 (D. Nev. 2020) (holding that a general delegation of rulemaking authority to the secretary of state was sufficient to justify an order switching the primary to an all-mail election due to the risks of COVID-19).

example, the Supreme Court held in *Lance v. Coffman*[437] that individual plaintiffs generally lack standing to challenge election officials' actions on the grounds they violate the Elections Clause.[438] The ruling arose in a challenge to the Colorado Supreme Court's decision to replace a congressional redistricting plan adopted by the state legislature with one that had been previously crafted by a state court.[439] Four Colorado citizens sued in federal court, claiming that the Colorado Supreme Court's order violated the Elections Clause, which grants to the state legislature, rather than to the state judiciary, the authority to draw congressional districts.[440]

The U.S. Supreme Court, in a terse but unanimous per curiam opinion, held that the plaintiffs lacked standing to pursue their claim.[441] The Court explained that the Colorado Supreme Court's alleged violation of the Elections Clause gave rise only to an "undifferentiated, generalized grievance about the conduct of government."[442] It further noted that previous cases which it had adjudicated under the Elections Clause had been "filed by a relator on behalf of the State rather than private citizens acting on their own behalf."[443] Several lower courts invoked *Lance* to dismiss as nonjusticiable challenges concerning the 2020 election that were brought under the Elections Clause and Presidential Electors Clause.[444]

The *Lance* Court may have adopted an unduly parsimonious view of standing. In *FEC v. Akins*,[445] the Court properly recognized that an injury does not become a generalized grievance simply because it simultaneously harms numerous people in the same way.[446] Rather, a harm is relegated to the status of a generalized grievance only when it is "of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'"[447] The Elections Clause not only protects the institutional prerogatives of state legislatures, but also allocates authority for regulating federal elections. Being assigned to what a person believes is a disadvantageous congressional district or being required to follow undesirable election procedures by the act of a governmental official or entity

437. 549 U.S. 437 (2007) (per curiam).

438. *Id.* at 441–42.

439. *See id.* at 438 (citing People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003)).

440. *See id.*

441. *Id.* at 442.

442. *Id.*

443. *Id.*

444. *See, e.g.*, Bognet v. Sec'y of Pa., 980 F.3d 336, 349, 356 (3d Cir. 2020), *vacated as moot sub nom.* Bognet v. Degraffenreid, 209 L. Ed. 2d 544 (2021); Bowyer v. Ducey, 506 F. Supp. 3d 699, 708–12 (D. Ariz. 2020); King v. Whitmer, 505 F. Supp. 3d 720, 735–37 (E.D. Mich. 2020); Tex. Voters All. v. Dallas Cnty., 495 F. Supp. 3d 441, 452, 461–62, 470 (E.D. Tex. 2020); Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596, 611–12 (E.D. Wis. 2020).

445. 524 U.S. 11 (1998).

446. *Id.* at 24 ("[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.").

447. *Id.* at 23 (quoting L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295, 303 (1940)).

that lacks proper authority to adopt such measures constitutes a particularized and concrete injury sufficient to confer standing.[448]

In *Bond v. United States*,[449] the Court held that a person has standing to challenge a federal law on the grounds that, "by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States."[450] The Court explained that individuals who have suffered injury from governmental action have standing to contend that such action was taken in violation of the Constitution's structural principles like federalism[451] and separation of powers.[452] These structural concepts protect the prerogatives of certain governmental entities not for their own sake, but as a means of protecting individual rights.[453] From this perspective, the Elections Clause and Presidential Electors Clause protect not only the prerogative of state legislatures to regulate federal elections but also the right of the people to vote in federal elections structured by their duly elected representatives, whether in the state legislature or Congress.[454] The Eighth Circuit embraced this view in *Carson v. Simon*,[455] though as mentioned earlier, other courts adjudicating challenges to the 2020 presidential election disagreed.[456]

When a justiciable case arises, the Court will have to decide whether and how to recognize the independent state legislature doctrine. As this Article demonstrates, the doctrine is not a single, unitary concept but rather a basic principle that has a range of potential applications. As an initial matter, the Court should refuse to view the doctrine as imposing a jurisdictional limit on federal courts that renders certain types of constitutional challenges to election laws nonjusticiable political questions.[457] Consistent with current precedent, the Court should likewise reject claims that the doctrine prevents state constitutions from regulating the legislative process through which institutional state legislatures adopt laws governing federal elections,[458] such as by subjecting such measures to the possibility of a gubernatorial veto[459]

448. *See* Bond v. United States, 564 U.S. 211, 220–23 (2011); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021) ("[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.").

449. 564 U.S. 211 (2011).

450. *Id.* at 214.

451. *See id.* at 220 (holding that a person, "in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines"); *see also id.* at 223–24.

452. *Id.* at 223 ("[I]t is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balance constraints . . . .").

453. *Id.* at 221–22.

454. *See supra* notes 200–05 and accompanying text.

455. 978 F.3d 1051, 1058–59 (8th Cir. 2020) (per curiam) (holding that candidates for presidential elector had standing to challenge the secretary of state's use of an allegedly invalid consent decree to accept votes in violation of state law).

456. *See supra* note 444 and accompanying text.

457. *See supra* Part I.C.

458. *See supra* Part II.B.

459. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932).

or public referendum.[460] And, as *Arizona Independent Redistricting Commission* recognized,[461] a legislature may delegate its authority to other entities to assist in regulating elections.[462]

It is reasonably debatable, however, whether the Constitution's grants of power specifically to the "Legislature" to regulate federal elections refer exclusively to the institutional legislature[463] or may also include other sources of legislative power that a state constitution recognizes, like the public initiative process.[464] At a minimum, the Constitution's express grants of authority to the legislature of each state[465] should mean that a state may not completely exclude its institutional legislature from regulating federal elections, or even particular aspects of such elections like congressional redistricting.[466] Likewise, state officials must be able to point to some statutory source of authority when promulgating rules or procedures concerning federal elections.[467]

The doctrine's final potential implications are likely the most controversial. The Constitution's delegation of authority specifically to the "Legislature" may impose outer limits on the extent to which state courts can adopt unexpected, implausible interpretations of state election laws governing federal elections.[468] When a state court's interpretation of an election-related statute substantially deviates from the provision's text, particularly after votes have been cast, there is a risk that the court is effectively changing the rules of the process rather than merely interpreting them. Federal courts may have a role in reviewing—deferentially—such interpretations to ensure that state courts do not usurp the legislature's constitutional authority.

Additionally, because state legislatures receive their authority to regulate federal elections directly from the U.S. Constitution, it may be that state constitutions are incapable of imposing substantive limits on that power.[469] Under this view, state legislatures would remain subject to the implicit limitations of the Elections Clause and Presidential Electors Clause, the Constitution's express restrictions such as the Bill of Rights and voting rights amendments, and federal laws such as the Voting Rights Act.[470] Since many state constitutional provisions either have analogues in the U.S. Constitution, or have been construed materially similarly to the U.S. Constitution, the practical consequences of this doctrine would be limited.[471] The Court could

460. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).
461. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015).
462. *See supra* Part III.D.
463. *See supra* Part III.B.
464. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 808.
465. U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.
466. *See supra* Part III.C; *cf. Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 817–18.
467. *See supra* Part I.A.
468. *See supra* Part I.B.
469. *See supra* Part II.A.
470. *See supra* notes 26–30 and accompanying text.
471. *See supra* notes 31–32 and accompanying text.

further minimize any potential disruption of adopting this approach by treating state constitutional provisions as presumptively valid and enforceable with regard to federal elections unless and until a legislature chooses to adopt a conflicting statute.

Finally, the independent state legislature doctrine may impact a legislature's ability to directly appoint presidential electors. As the Supreme Court noted in *Bush v. Gore*, a legislature may decide to change state law in advance of a presidential election so that electors are appointed by the legislature itself rather than through a popular election.[472] The more problematic issue is whether a legislature may appoint its own slate of electors even without repealing state laws that provide for popular presidential elections and establish a process for certifying the results. The Presidential Electors Clause, as construed in *McPherson v. Blacker*, grants the legislature inalienable plenary power to decide how electors will be appointed.[473] Neither that clause nor *McPherson* need be read, however, as authorizing a legislature to circumvent or contravene the very laws that the legislature itself has enacted to regulate the process of appointing electors by adopting its own "competing" slate of electors in addition to the state's statutorily certified slate. Both the Presidential Election Day Act and the Constitution's Due Process Clause stand as additional barriers to a legislature's extra-statutory appointment of electors.[474] Moreover, if a legislature purported to submit a slate of electors in violation of state law, Congress could reject it under the federal law governing the counting of electoral votes.[475]

A strong normative case for direct legislative appointment of electors exists only when a major disaster, such as Hurricane Katrina, makes it impracticable or impossible to conduct, complete, or determine the results of a popular presidential election. The Presidential Election Day Act authorizes states to appoint electors after Election Day under such extreme circumstances.[476] In such rare cases, direct legislative appointment of electors may be the only alternative to the state's complete exclusion from the presidential election process.[477] Even then, states should avoid unnecessary uncertainty and legal disputes by adopting an election emergency statute—well in advance of the election—that authorizes the legislature to directly appoint electors in such emergencies.

Thus, the Constitution's reference to the state "Legislature" in the Elections Clause and Presidential Electors Clause has a range of potential implications. Some of those claimed implications are erroneous, unsupported by history, and prudentially inadvisable. Other possible applications of the independent state legislature doctrine appear reasonably

472. 531 U.S. 98, 104 (2000) (per curiam).
473. *See* 146 U.S. 1, 34–35 (1892).
474. *See supra* notes 369–73, 379–82 and accompanying text.
475. *See* 3 U.S.C. § 15.
476. *See supra* notes 374–76 and accompanying text.
477. *See* Levitt, *supra* note 346, at 24.

debatable, while still others may be a persuasive interpretation of the Constitution's text, consistent with historical practice, and normatively desirable. Rather than viewing the doctrine as a unitary whole, courts and commentators should separately assess the validity of each potential individual strand.

THE INDEPENDENT STATE LEGISLATURE DOCTRINE, FEDERAL ELECTIONS, AND STATE CONSTITUTIONS

Michael T. Morley[*]

The U.S. Constitution does not confer authority to regulate federal elections on states as entities. Rather, it grants that authority specifically to the "Legislature" of each state. The "independent state legislature doctrine" teaches that a state constitution is legally incapable of imposing substantive restrictions on the authority over federal elections that the U.S. Constitution confers directly upon a state's legislature. Over the past 130 years, the U.S. Supreme Court has repeatedly adopted conflicting positions on this doctrine without recognizing its deep historical roots or normative justifications.

The independent state legislature doctrine reflects the prevailing understanding of states, Congress, and other actors in the nineteenth century. Throughout that period, the doctrine was consistently applied across a broad range of circumstances. It protects important structural considerations and is consistent with the political theory underlying the U.S. Constitution's election-related provisions. The U.S. Supreme Court could reincorporate the doctrine into modern American law with minimal disruption to either its precedents or state

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election systems. Moreover, the doctrine may present a potentially substantial obstacle to the use of state constitutions to combat partisan gerrymandering in congressional elections.

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I. INTRODUCTION

After decades of acknowledging the possibility that the U.S. Constitution may prohibit partisan gerrymandering,[1] the U.S. Supreme Court closed the door on such claims in *Rucho v. Common Cause*.[2] The *Rucho* Court held that partisan gerrymandering claims are nonjusticiable political questions under the U.S. Constitution.[3] In the wake of *Rucho*, many commentators have advocated turning to state constitutions to prevent states from engaging in partisan gerrymandering.[4]

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[1] *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018) (vacating the district court's judgment in a partisan gerrymandering case for lack of standing, while noting that the "contours and justiciability" of partisan gerrymandering claims "are unresolved"); *cf.* Davis v. Bandemer, 478 U.S. 109, 124 (1986) ("[W]e decline to hold that [partisan gerrymandering] claims are never justiciable."), *abrogated by* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). Partisan gerrymandering is the adoption of congressional or legislative districts that have been intentionally drawn to achieve political goals, usually by increasing the number of a particular political party's candidates who are likely to be elected. *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 301–02 (1991) ("Gerrymandering, broadly speaking, is any manipulation of district lines for partisan purposes."). Some definitions require that the districts be irregularly or unusually shaped in order to qualify as a political gerrymander. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) ("[G]errymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.").

[2] 139 S. Ct. 2484 (2019).

[3] *Id.* at 2506–07 ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.").

[4] *See, e.g.*, Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 213 (2019) ("[R]eformers should instead follow the examples of Pennsylvania and North Carolina and turn to state courts and state constitutions to achieve their goals."); Charlie Stewart, *State Court Litigation: The New Front in the War Against Partisan Gerrymandering*, 116 MICH. L. REV. ONLINE 152, 158 (2018) (arguing that state court litigation under state constitutions is "an effective new strategy in the war against partisan gerrymandering due to the potentially positive results, the speed with which it takes place, broad applicability, and its insulation from Supreme Court review" (footnote omitted)); *see also* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887 (2006) ("In seeking solutions to the problems of gerrymandering, an examination of state constitutions has much to recommend it."); Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan*

As Justice Brennan and others have explained, state constitutions often provide greater protection for individual rights than the U.S. Constitution.[5] Many commentators view state constitutions as fertile sources of new voting-related rights because they typically contain election-related provisions that lack analogues in the U.S. Constitution.[6] For example, most state constitutions include clauses affirmatively establishing a right to

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Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 ELECTION L.J. 264, 270 (2018) (predicting that "more challenges to partisan gerrymanders" will be "brought in state court" under state constitutional provisions); *cf.* G. Michael Parsons, *Partisan Gerrymandering Under Federal and State Law*, *in* AMERICA VOTES! CHALLENGES TO MODERN ELECTION LAW AND VOTING RIGHTS 277, 283 (Benjamin E. Griffith & John Hardin Young eds., 4th ed. 2020) (arguing that federal district court precedents concerning partisan gerrymandering "provide a rich and valuable resource for voters to leverage as they seek to vindicate their rights under state constitutional law").

[5] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 178 (2018) (arguing that state constitutional law claims should not be "second thought[s]" or "argument[s] of last . . . resort").

[6] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014) (outlining various voting protections and provisions found in state constitutions that are absent from the U.S. Constitution); Gardner, *supra* note 4, at 969 n.319 (noting that "many state constitutions have provisions requiring elections to be 'free,'" which are "potentially promising sources of political rights" (citations omitted)); Wang, *supra* note 4, at 236 (discussing various provisions in state constitutions that "may be used to regulate extreme partisan gerrymanders").

vote[7] or requiring that elections be "free and equal."[8] Many state constitutions also impose some general restrictions on congressional redistricting by requiring districts to be contiguous and compact, and political subdivisions to each be included within a single district, where possible.[9]

Dicta in *Rucho* mentions state constitutions as potential tools for combatting partisan gerrymandering,[10] though the opinion does not consider possible objections under the U.S. Constitution. A few state constitutions specifically prohibit partisan gerrymandering in congressional elections.[11] The Florida Supreme Court invoked one such provision to conclude that a partisan gerrymander violated the Florida Constitution.[12] Some state constitutions transfer authority over congressional redistricting from the institutional legislature to

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[7] The U.S. Constitution contains many amendments prohibiting the federal and state governments from denying people the right to vote on certain specified grounds, including race, sex, inability to pay a poll tax, and age for those eighteen or older. *See* U.S. CONST. amend. XV, § 1; *id.* amend. XIX; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (holding that poll taxes for state and local elections violate the Equal Protection Clause). Three other provisions affirmatively guarantee voting rights. Article I and the Seventeenth Amendment specify that anyone eligible to vote for the larger house of a state legislature is also entitled to vote for the U.S. House of Representatives and Senate, respectively. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. And Section 2 of the Fourteenth Amendment provides that a state will suffer reduction in its representation in the U.S. House of Representatives and, by extension, the Electoral College, if it deprives adult citizens of the right to vote for reasons other than felony convictions. *Id.* amend. XIV, § 2; *see also* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 282 (discussing Section 2's "express recognition of a right to vote" (footnote omitted)).

[8] *See* Douglas, *supra* note 6, at 144–49 (listing election-related provisions in state constitutions).

[9] *See* Gardner, *supra* note 4, at 889–90 (concluding that such state constitutional provisions "are not adequate to the task of restricting *partisan* gerrymandering because they do not speak to gerrymandering undertaken for partisan gain").

[10] Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019) (explaining how states "are actively addressing the issue" of partisan gerrymandering "on a number of fronts," including through state constitutional provisions).

[11] *See, e.g.*, FLA. CONST. art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . ."). The Eleventh Circuit upheld this provision's validity against a challenge under the U.S. Constitution. *See* Brown v. Sec'y of State, 668 F.3d 1271, 1285 (11th Cir. 2012).

[12] League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015) (affirming the trial court's finding that the redistricting plan was motivated "by unconstitutional intent to favor the Republican Party and incumbents").

independent redistricting commissions.[13] In other states, such as Pennsylvania[14] and North Carolina,[15] courts have re-interpreted longstanding provisions of their state constitutions to prohibit partisan gerrymandering.

This Article contends that, although state constitutions may validly restrict states' power to politically gerrymander state and local legislative districts, they cannot limit a legislature's power to regulate most aspects of federal elections—including the legislature's authority to draw congressional district boundaries. The U.S. Constitution confers power to regulate congressional elections and select presidential electors specifically upon the "Legislature" of each state, not the state as an entity. The Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," although Congress may "make or alter" such rules "at any time."[16] Similarly, the Presidential Electors Clause states, "Each State shall appoint, in such manner as the *Legislature* thereof may direct, a Number of Electors" to select the President.[17]

States lack inherent power to regulate federal elections, since the U.S. Constitution creates all federal offices.[18] Accordingly, the

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[13] *E.g.*, ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI, § 2; HAW. CONST. art. IV, §§ 2, 9; IDAHO CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; WASH. CONST. art. II, § 43; VA. CONST. art. II, §§ 6, 6-A; *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (upholding the constitutionality of Arizona's independent redistricting commission).

[14] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 801–02 (Pa. 2018) (holding that the state's redistricting plan violated the state constitution's "Free and Equal Elections Clause").

[15] *See* Harper v. Lewis, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at *8–9, 25 (N.C. Super. Ct. Oct. 28, 2019) (enforcing the North Carolina Constitution's Free Elections Clause by enjoining the defendants from administering the 2020 congressional elections using gerrymandered districts).

[16] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[17] *Id.* art. II, § 1, cl. 2 (emphasis added); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (noting that the Elections Clause and Presidential Electors Clause are both "express delegations of power to the States to act with respect to federal elections").

[18] *See* Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections, including balloting, only within the exclusive delegation of power under the Elections Clause."); *Thornton*, 514 U.S. at 805 ("[T]he power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

Elections Clause and Presidential Electors Clause are the only sources of states' authority to conduct and regulate nearly all aspects of federal elections.[19] Because these provisions confer power over federal elections specifically upon state legislatures, state constitutions cannot restrict the scope of that authority.

This reading of the Constitution, known as the "Independent State Legislature Doctrine" (the doctrine),[20] has a long and largely overlooked history. The U.S. Supreme Court, several state supreme courts, and both chambers of Congress employed this doctrine during the nineteenth century.[21] The 1890 edition of Thomas Cooley's *Constitutional Limitations* treatise reflects this understanding, too.[22] The treatise explained, "So far as the election of representatives in Congress and electors of president and vice-president is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution."[23]

Starting in the early twentieth century, however, state courts largely rejected the doctrine,[24] and the U.S. Supreme Court's

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[19] The Elections Clause and Presidential Electors Clause do not empower states to establish candidate qualifications for federal offices and give states very little direct control over voter qualifications for such offices, since those matters are governed by separate provisions of the Constitution. *See infra* Section II.A.

[20] Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 764–75 (2001) (discussing the doctrine's role in facilitating absentee voting in federal elections during the Civil War).

[21] *See infra* Parts III–V.

[22] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 754 n.1 (6th ed. 1890) (discussing the Elections Clause and Presidential Electors Clause).

[23] *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1). The doctrine was likewise discussed in the "influential election law treatise," *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1160 (2006), by George Washington McCrary, who had served as chair of the U.S. House Committee on Elections and as a judge on the U.S. Court of Appeals for the Eighth Circuit. *See* GEORGE WASHINGTON MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 109–12, at 81–84 (1875) (discussing authorities supporting the independent state legislature doctrine).

[24] *See, e.g.*, Brown v. Saunders, 166 S.E. 105, 107 (Va. 1932) (invalidating congressional districts adopted by the state legislature because they violated the state constitution's requirements concerning equality of population); Moran v. Bowley, 179 N.E. 526, 531–32 (Ill. 1932) (same); *In re* Opinion of the Justices, 107 A. 705, 706 (Me. 1919) (holding that the state constitution limits the state legislature's authority under the Presidential Electors Clause); *see also* Chase v. Lujan, 149 P.2d 1003, 1010–11 (N.M. 1944) (holding that the state

attitude toward it began to vacillate[25]—all without recognizing or grappling with the doctrine's history throughout the previous century. Some opinions issued in the course of resolving the dispute over the 2000 presidential election suggested that the Court might have been revitalizing the doctrine.[26] And lower federal courts in recent years have interpreted the Elections Clause and the Presidential Electors Clause as prohibiting state executive officials, as a matter of federal constitutional law, from regulating federal elections without authorization from the state legislature.[27] But the

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constitution prevented the legislature from allowing absentee voting, including for federal offices); State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932) (holding that the legislature must act pursuant to the lawmaking process set forth in the state constitution, including the Governor's veto, when enacting statutes under the Elections Clause); State *ex rel.* Schrader v. Polley, 127 N.W. 848, 851 (S.D. 1910) (holding that a state law establishing congressional districts could be suspended by a public referendum); *cf. In re* Opinion to the Governor, 103 A. 513, 516 (R.I. 1918) (noting changing judicial views of the doctrine).

A few courts, however, continued to apply the doctrine. *See, e.g.*, State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (holding that the court need not consider whether state statutes establishing ballot-access requirements for presidential candidates violated the state constitution, because the state constitution does not apply to laws concerning the appointment of presidential electors); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (holding that the state constitution likely could not restrict the state legislature's power to allow absentee military voting in presidential elections); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) ("We are not persuaded by the argument that the enactment of election laws, being an exercise of police power, is subject to [state] constitutional restrictions which prevent the Legislature from limiting the right of candidates to have their names on the general ballot. As has been shown, the Federal Constitution commands the state Legislature to direct the manner of choosing electors.").

[25] *See infra* Sections V.A–V.B.

[26] *See* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 77 (2000) (per curiam) (questioning "the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power'" over presidential elections (citation omitted)); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (noting that a legislature's power over the appointment of presidential electors "can neither be taken away nor abdicated" (quoting S. REP. NO. 43-395, at 9 (1874))); *id.* at 112–13 (Rehnquist, C.J., concurring) (explaining that, because state legislatures enact laws governing presidential elections under the Presidential Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance").

[27] *See* Libertarian Party v. Dardenne, No. 08-582-JJB, 2008 U.S. Dist. LEXIS 137402, at *7–9 (M.D. La. Sept. 25, 2008) (holding that, where Hurricane Norman forced the Secretary of State's office to be closed on the statutory deadline for political parties to file their presidential candidates' ballot-access petitions, the Secretary violated the Presidential Electors Clause by unilaterally establishing a new deadline and excluding parties that did not meet it), *vacated as moot*, 308 F. App'x 861 (5th Cir. 2009) (per curiam); Libertarian Party

Court's 5–4 opinion in the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Commission* brusquely rejected the doctrine.[28]

The independent state legislature doctrine has likewise received scant academic attention. Attorney Hayward Smith published an article following the 2000 election largely disputing the doctrine's historical underpinnings.[29] His analysis led several commentators to reject the doctrine.[30] Professor Vikram David Amar, based on his own survey of the relevant history, agreed that federal constitutional provisions conferring power on state legislatures

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of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1011–13 (S.D. Ohio 2008) (holding that a directive concerning ballot-access requirements for minor parties issued by the Ohio's Secretary of State after a federal court invalidated the state's statutory requirements violated the Elections Clause and Presidential Electors Clause, because the legislature had not delegated its authority to promulgate such rules); *cf.* Moore v. Hosemann, No. 3:08cv573 TSL-JCS, 2008 U.S. Dist. LEXIS 141865, at *4 (S.D. Miss. Sept. 29, 2008) (holding that, although "federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws[,] . . . the [Mississippi] Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes"); Baldwin v. Cortes, No. 1:08-cv-01626, 2008 U.S. Dist. LEXIS 72035, at *7–12 (M.D. Pa. Sept. 12, 2008) (rejecting Presidential Electors Clause challenge because the Pennsylvania Secretary of State had statutory authority to execute a consent decree changing the deadline for candidates to file ballot-access petitions), *aff'd*, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs' constitutional challenge to "the Secretary's 1984 entry into the consent decrees" due to "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme"). *But see* Largess v. Supreme Judicial Court, 373 F.3d 219, 227 (1st Cir. 2004) (noting the disagreement among the Justices in *Bush v. Gore* over whether the Presidential Electors Clause limits "the internal allocations of power in a state government").

[28] 576 U.S. 787, 816–19 (2015).

[29] *See generally* Smith, *supra* note 20; *see also* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 726–28 (2016) (discussing congressional election contests in which the doctrine was invoked); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 355–67 (2003) (reviewing episodes in the doctrine's history).

[30] *See, e.g.*, Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) ("[A]s a matter of historical practice, state legislatures were not understood at the time to be more 'independent' by virtue of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source of authority."); *see also* Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1194 n.135 (2007) ("[T]here is no historical support for the significance of the language in Article II." (citing Smith, *supra* note 20, at 783–84)).

were "not designed to interfere with the preexisting control that people enjoyed over their state legislatures" through their state constitutions.[31] After conducting their own analysis of the doctrine and its history, Professor Nathaniel Persily and his co-authors concluded that the doctrine's "consequences would be both bizarre and disastrous."[32] Others have similarly expressed skepticism[33] or outright rejected the doctrine.[34]

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[31] Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1041, 1074 (2000) [hereinafter, Amar, *The People Made Me Do It*] (contending that Article V allows a state's citizens to prevent agency problems by restricting or directing the institutional legislature's actions concerning federal constitutional amendments); *see also* Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008) (presenting a condensed version of the argument that a state's citizens may use the initiative process to change a winner-take-all system for allocating presidential electors among presidential candidates to a district-based system).

[32] Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016).

[33] *See* David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) ("Determining the ways in which a state constitution may and may not limit the legislature's decisions about presidential electors will . . . be a difficult and complex task."); *cf.* Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 626 (2008) (noting that "there are reasonable policy arguments to be made on both sides of th[e] question" of whether the term "Legislature" in the Presidential Electors Clause includes the initiative process).

[34] *See, e.g.*, Larry D. Kramer, *The Supreme Court in Politics*, *in* THE UNFINISHED ELECTION OF 2000, at 105, 122 (Jack N. Rakove ed., 2001) (commenting on the dearth of historical evidence that the Framers intended to adopt the independent state legislature doctrine); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2001) (arguing that the independent state legislature doctrine "does not rest on firm foundations of text, precedent, or history"); Zipkin, *supra* note 29, at 354 (arguing, based on U.S. Supreme Court precedent, that state constitutions limit state legislatures' exercise of the power they receive from the U.S. Constitution when they are not acting as agents of the federal government). As discussed later, *see infra* notes 422–423, 533–534 and accompanying text, the Court and some commentators have gone so far as to conclude that a state constitution may redefine what constitutes a state "Legislature," so that laws or state constitutional amendments regulating federal elections may be enacted through public initiatives without the institutional legislature's involvement. *See, e.g.*, David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG.

This Article makes three contributions to the literature. First, it presents a competing, comprehensive historical analysis of the independent state legislature doctrine as applied throughout the nineteenth century, including several examples of the doctrine that have never before been identified in the literature or caselaw. Second, building on my previous work,[35] this Article offers an in-depth defense of the doctrine.[36] It demonstrates that the

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575, 599 (2006) ("[T]he better answer is to regard ballot initiatives as a constitutional exercise of a state's legislative power under Article II, Section 1.").

[35] *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 868 (2015) [hereinafter Morley, *Intratextual Independent "Legislature"*] ("The legislature, as referenced in [the Elections Clause and Presidential Electors Clause], is the state's general lawmaking body, and its power under the federal Constitution to regulate federal elections may not be reduced or withdrawn by state constitutions."); Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 204 (2014) [hereinafter Morley, *State Constitutions*] (concluding that "state constitutional provisions may not be used as the basis for invalidating state laws as they apply to federal elections").

[36] James C. Kirby, former Chief Counsel to the U.S. Senate Judiciary Committee's Subcommittee on Constitutional Amendments, published a brief defense of the independent state legislature doctrine over a half-century ago. *See* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 501 (1962) (concluding that "it appears . . . the legislature is free of state constitutional limitations" when regulating presidential elections). Several commentators have adopted Kirby's analysis. *See, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 834 (2001) ("The state constitution may make the ordinary procedures for the enactment of legislation applicable to the legislature's determination of the manner in which members of Congress are chosen or electors are appointed, but it may not restrict the manner of appointment that the legislature selects."); *Voting Rights—Residence Requirements for Voting in Presidential Elections*, 18 VAND. L. REV. 337, 342 (1964) ("It seems safe to conclude that the choosing of presidential electors is within the power of the state legislatures, in whatever manner they deem proper, and that this power is not limited by state constitutional provisions . . . ."); *Recent Statute*, 77 HARV. L. REV. 574, 578 (1964) ("[I]t seems safe to conclude that article II, section 1, grants to state legislatures plenary power to set suffrage qualifications."). Other pieces have affirmed the doctrine in passing while focusing on other topics. *See* Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 740 (1917) ("[T]he power and discretion . . . to provide the manner in which the presidential electors shall be chosen is derived solely from the Constitution of the United States, and no state constitution can restrict the execution of such power."); Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 (1951) (stating that the Elections Clause and Presidential Electors Clause "serve[] to protect absent voters statutes from restrictive regulations in state constitutions" (citing Commonwealth v. O'Connell, 181 S.W.2d 691 (Ky. 1944))); Joseph R. Wyatt II, *The Lessons of the Hayes-Tilden Election Controversy: Some Suggestions for Electoral College Reform*, 8 RUTGERS-CAMDEN

independent state legislature doctrine is consistent not only with historical practice, but the structure and political theory underlying the Constitution, as well.[37] Finally, this piece identifies various ways in which the U.S. Supreme Court may resuscitate the doctrine while preserving many precedents that appear to be in tension with it.

Part II of this Article begins by introducing the independent state legislature doctrine in greater depth. It then explores the development of the constitutional provisions that give rise to the doctrine: the Elections Clause and the Presidential Electors Clause. After tracing the evolution of these provisions during the Constitutional Convention, this Part examines the normative justifications for their delegations of authority specifically to state legislatures.

The following two Parts discuss how the doctrine was applied throughout the nineteenth century. Part III analyzes the doctrine's impact at the state level. Justice Joseph Story and Daniel Webster invoked the doctrine at the Massachusetts Constitutional Convention of 1820, convincing delegates that including restrictions on congressional redistricting in the Massachusetts Constitution would violate the U.S. Constitution.[38] State supreme courts also applied the doctrine when enforcing state laws governing congressional elections that violated state constitutional provisions.[39] Part IV turns to Congress, exploring how both the U.S. House and Senate embraced the doctrine when resolving election contests and crafting legislation.

Part V contrasts this nineteenth century history with the U.S. Supreme Court's vacillating attitude toward the independent state

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L.J. 617, 624 n.30 (1977) ("[A] state constitution may not circumscribe the legislature's range of choice."). One student note purportedly embraces the doctrine, but then suggests that state constitutions may impose various restrictions on federal elections. *See* Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 87, 89–90 (1937) (stating that "not even the provisions of the state constitutions can limit the state legislatures," but then concluding that state constitutional provisions creating voting rights prevent state legislatures from enacting unreasonable election regulations).

[37] This piece complements Professor Muller's work, which concluded that "the historical understanding of the power of the 'Legislature' precluded a delegation of its power to another entity." Muller, *supra* note 29, at 718.

[38] *See infra* Section III.A.

[39] *See infra* Sections III.B–III.D.

legislature doctrine. The Court endorsed the doctrine in 1892 in *McPherson v. Blacker*,[40] as well as in decisions regarding the disputed 2000 presidential election.[41] A contrasting line of precedents, culminating in the Court's 2015 ruling in *Arizona Independent Redistricting Commission*, rejects the doctrine.[42] This Part analyzes how the modern Court could implement the doctrine, even without overruling most of its contrary precedents. Part VI briefly concludes.

II. THE INDEPENDENT STATE LEGISLATURE DOCTRINE

A. THE DOCTRINE AND ITS LIMITS

States lack inherent power to regulate federal elections.[43] The only authority they have over such elections comes from the U.S. Constitution, which created federal offices and specifies how they are to be filled.[44] But the Constitution does not grant authority over federal elections to states as entities. Rather, the Elections Clause and Presidential Electors Clause confer the power to regulate the "[m]anner" in which Representatives, Senators, and presidential electors are chosen specifically upon the "Legislature" of each state.[45]

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[40] 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the [Presidential Electoral Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

[41] *See supra* note 26.

[42] 576 U.S. 787, 813–23 (2015).

[43] *See supra* notes 18–19 and accompanying text.

[44] *See id.*

[45] U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. The Elections Clause expressly allows Congress to "make or alter" rules concerning congressional elections "at any time . . . except as to the Places of [choosing] Senators." *Id.* art. I, § 4, cl. 1. The Presidential Electors Clause lacks such language. *See* McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes . . . but otherwise the power and jurisdiction of the State is exclusive . . . ."). The Court has held, however, that Congress's authority over presidential and congressional elections is coextensive. *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) (explaining that Congress has "very broad authority to prevent corruption in national Presidential elections"); Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1970) (plurality opinion) ("[T]his Court . . . [has] upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, § 1,

The U.S. Supreme Court has held that these provisions delegate sweepingly broad authority. The "comprehensive words" of the Elections Clause, for example:

> embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[46]

Likewise, the Presidential Electors Clause grants state legislatures "plenary" power over the selection of presidential electors.[47]

Together, these provisions give state legislatures far-reaching authority to regulate federal elections. The independent state legislature doctrine provides that a state constitution cannot legally limit that authority or prohibit the state legislature from exercising it in certain ways. Commentators such as Professor Nate Persily object that recognizing the doctrine today would be tremendously destabilizing, freeing legislatures from a wide range of state constitutional constraints.[48] Even under the independent state legislature doctrine, however, legislatures' authority to regulate federal elections would remain subject to numerous important constraints.

First, the Court has held that the Elections Clause contains implicit limitations on the power it conveys. It does not empower states to adopt laws that "dictate electoral outcomes, . . . favor or

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that would have curtailed the power of Congress, to regulate such elections." (citation omitted)); Burroughs v. United States, 290 U.S. 534, 545 (1934) (holding that Congress has power to "safeguard" the election of presidential electors "from the improper use of money to influence the result").

[46] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[47] Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

[48] Persily et al., *supra* note 32, at 708 (stating that the doctrine would roll back "all state laws or constitutional provisions regulating federal elections that were passed by initiative or by a state constitutional convention").

disfavor a class of candidates, or . . . evade important constitutional restraints."[49] The Court applied this principle in *Cook v. Gralike*, holding that states may not "disadvantage" certain congressional candidates by specifying on the ballot whether they complied, or promised to comply, with voter instructions regarding congressional term limits.[50]

Second, other constitutional provisions impose express restrictions on the scope of the Elections Clause and Presidential Electors Clause. The legislature's power to regulate the "manner" of federal elections does not enable it to establish qualifications for candidates in either congressional or presidential elections, or for voters in congressional elections, since those matters are expressly governed by other constitutional provisions. Article I specifies the age, citizenship, and residency requirements for Representatives and Senators.[51] Similarly, Article II provides that a person must be a "natural born citizen," at least thirty-five years old, and a resident of the United States for at least fourteen years to be eligible to serve as President.[52] The U.S. Supreme Court has held that neither

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[49] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995); *see also* Cook v. Gralike, 531 U.S. 510, 523 (2001) (reaffirming the existence of implicit limitations on the Elections Clause's grant of authority to state legislatures); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally applicable and evenhanded restrictions that protect the integrity and reliability of the [federal] electoral process itself").

[50] *Cook*, 531 U.S. at 525; *see also id.* at 526 (concluding that the Elections Clause did not permit the state's use of ballot notations to "attempt to 'dictate electoral outcomes'" (quoting *Thornton*, 514 U.S. at 833–34)).

[51] A member of the House of Representatives must be at least twenty-five years old, have been a U.S. citizen for at least seven years, and "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Similar requirements apply to Senators, except they must be at least thirty years old and have been a U.S. citizen for at least nine years. *Id.* art. I, § 3, cl. 3.

[52] *Id.* art. II, § 1, cl. 5.

Congress[53] nor states[54] may impose additional qualifications for federal candidates.

Likewise, the Voter Qualifications Clause and Seventeenth Amendment specify that, to be qualified to vote for Representatives and Senators, a person "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[55] These provisions guarantee that anyone entitled to vote for the larger chamber of the state legislature may also vote for Congress.[56] Neither the Elections Clause nor any other provision of the U.S. Constitution authorizes state legislatures to directly alter these requirements.[57] An initial draft of the U.S. Constitution would have granted state legislatures the authority to establish voter qualifications for House elections, but the Framers rejected that proposal.[58]

Each state as an entity (i.e., not just the legislature) has inherent sovereign power to determine who is qualified to vote for state legislators and other state officials,[59] subject to federal

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[53] *See Thornton*, 514 U.S. at 832 ("[T]he Framers were particularly concerned that a grant to Congress of the authority to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance."); Powell v. McCormack, 395 U.S. 486, 522 (1969) (holding that a chamber of Congress's authority as the sole judge of its members' elections, qualifications, and returns does not allow it to adopt additional qualifications for membership).

[54] *See Thornton*, 514 U.S. at 836 ("[I]f the qualifications for Congress are fixed in the Constitution, then a state-passed measure with the avowed purpose of imposing indirectly such an additional qualification violates the Constitution.").

[55] U.S. CONST. art. I, § 2, cl. 1; *accord id.* amend. XVII.

[56] *See Ex parte* Yarbrough, 110 U.S. 651, 663 (1884) (holding that states "define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State").

[57] *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause . . . ." (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

[58] *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS] (reprinting a proposed constitutional provision stating, "The Qualifications of the Electors shall be . . . prescribed by the Legislatures of the several States; but their provisions . . . concerning them may at any Time be altered and superseded by the Legislature of the United States").

[59] *See* Taylor v. Beckham, 178 U.S. 548, 570–71 (1900) ("It is obviously essential to the independence of the States . . . that their power to prescribe . . . the manner of [state officials'] election . . . should be exclusive, and free from external interference, except so far as plainly

constitutional restraints.[60] States typically list the voter eligibility requirements for state offices in their constitutions.[61] Any power that a state legislature possesses over voter qualifications for state offices stems from the state constitution—not the U.S. Constitution—and is therefore subject to any constraints the state constitution may impose. By virtue of the Voter Qualifications Clause and the Seventeenth Amendment, state constitutional provisions establishing voter qualifications for state legislatures indirectly establish voter qualifications for Congress, too. Recognizing this limit on the independent state legislature doctrine, the chambers of Congress consistently enforced state constitutional restrictions concerning voter qualifications throughout the nineteenth century.[62] In short, the U.S. Constitution does not

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provided by the Constitution of the United States."); *see also* Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (recognizing the states' inherent authority, reflected in the Tenth Amendment, over the selection of their officials).

[60] *See infra* notes 63–68 and accompanying text.

[61] *See, e.g.*, FLA. CONST. art. VI, § 2 ("Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.").

[62] *See* DELANO VS. MORGAN, H.R. REP. NO. 40-42, at 1–2 (1868) (concluding that a state may enforce a state constitutional provision establishing U.S. citizenship as a "qualification[] for an elector"), *resolution proposed by committee report adopted*, CONG. GLOBE, 40th Cong., 2d Sess. 2809–10 (1868); JAMES H. BURCH, H.R. REP. NO. 40-4, at 5 (1867) (concluding that the U.S. Constitution did not prohibit a state constitutional provision that deemed "all persons who could not take the prescribed [loyalty] oath" ineligible to vote), *resolutions proposed by committee report adopted*, CONG. GLOBE, 40th Cong., 2d Sess. 403 (1868); Letcher v. Moore, 23rd Cong. (1833), *in* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE § 54, at 41 (1907) [hereinafter HINDS' PRECEDENTS] (noting that "[t]he State constitution . . . allowed every male over the age of 21 to vote in the county where he was actually residing, provided he had resided in the State two years"); *see also* JOSHUA E. WILSON V. JOHN MCLAURIN, H.R. REP. NO. 54-1566, at 2, 4 (1896) (relying on a state constitutional provision to determine who qualified as eligible voters), *resolutions proposed by committee report adopted without debate*, 28 CONG. REC. 4673 (1896); THRASHER V. ENLOE, H.R. REP. NO. 53-842, at 5–6 (1894) (enforcing both a state constitutional provision making payment of a poll tax a voter qualification, as well as a state statute requiring voters to prove in a particular manner that they paid the tax), *resolutions proposed by committee report adopted without debate*, 26 CONG. REC. 7255 (1894); JOHN CESSNA V. BENJAMIN F. MEYERS, H.R. REP. NO. 42-11, at 1–2 (1872) (discussing a provision of the Pennsylvania Constitution concerning the qualifications of voters, particularly residency inside the election district), *resolution proposed by committee report adopted*, CONG. GLOBE, 42d Cong., 2d Sess. 1610–11 (1872).

empower legislatures to impose either candidate qualifications for any federal office or voter qualifications for congressional elections.

Third, laws enacted by state legislatures pursuant to either the Elections Clause or Presidential Electors Clause are subject to the restrictions of both the U.S. Constitution[63] and federal statutes. For example, the Fifteenth,[64] Nineteenth,[65] and Twenty-Sixth[66] Amendments prohibit the federal and state governments from discriminating based on race, sex, or age (for those over eighteen years old) with regard to the right to vote. The Twenty-Fourth Amendment prohibits poll taxes for federal elections.[67] Legislatures are also subject to due process and equal protection constraints when regulating federal elections.[68] Additionally, Congress itself retains plenary authority to directly regulate federal elections or to "alter"[69] any rules that a legislature adopts.[70] Thus, while the Elections Clause and Presidential Electors Clause permit state legislatures to regulate federal elections without state

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[63] *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968) (rejecting the notion that the Presidential Electors Clause "gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions").

[64] U.S. CONST. amend. XV, § 1.

[65] *Id.* amend. XIX.

[66] *Id.* amend. XXVI, § 1.

[67] *Id.* amend. XXIV, § 1; *cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (holding that the Equal Protection Clause prohibits poll taxes for state and local elections).

[68] It is debatable whether these constraints arise from the Fourteenth Amendment, which typically governs states, U.S. CONST. amend. XIV, § 1, or the parallel restrictions in the Fifth Amendment, *id.* amend. V, which generally constrains powers granted by the U.S. Constitution. Since the U.S. Supreme Court has interpreted the Fifth Amendment's Due Process Clause as providing the same protections as the Fourteenth Amendment, despite the provisions' linguistic differences, the analysis and outcome are substantively the same either way. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

[69] U.S. CONST. art. I, § 4, cl. 1.

[70] Even though the Presidential Electors Clause lacks comparable language, the U.S. Supreme Court has read it *in pari materia* with the Elections Clause, concluding that the scope of Congress's power over congressional and presidential elections is identical. *See* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 109 (2017) (noting that the Court has not "recognize[d] any difference between Congress's power over congressional elections and its power over presidential elections"); *see also supra* note 45 and accompanying text.

constitutional constraints, state legislatures remain bound by a wide range of explicit and implicit limitations stemming from both the U.S. Constitution and Congress.

B. THE DOCTRINE'S NUANCES

The independent state legislature doctrine raises three conceptually distinct questions about the relationship among the U.S. Constitution, state constitutions, and federal elections—though the doctrine does not require any particular resolution of these issues.

First, is the meaning of the U.S. Constitution's references to the state "legislature" a matter of federal or state constitutional law? The term might be defined under federal constitutional law, based on its plain meaning, as referring exclusively to institutions conventionally and historically understood as legislatures: multi-member bodies comprised of elected members that possess general lawmaking authority over a state and periodically convene and recess.[71] Under this approach, a state-level entity or process that does not satisfy these minimum requirements would not qualify as a "legislature" and therefore could not regulate federal elections. This interpretation would preclude the people of a state from adopting election-related rules or redistricting requirements through public initiatives and referenda.[72] It would likewise

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[71] *See* Morley, *Intratextual Independent "Legislature," supra* note 35, at 856 ("[E]very [constitutional] clause that gives some insight into the nature of a legislature uses the term to refer to a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess.").

[72] *See, e.g.*, Nicholas P. Stabile, Comment, *An End Run around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors*, 103 NW. U. L. REV. 1495, 1496–97 (2009) ("[T]he use of a ballot initiative is an unconstitutional means by which to alter the method of selecting electors." (footnote omitted)); Michael McLaughlin, Note, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 2947 (2008) ("Article II should be read to exclude a state from directing the manner of appointment by popular initiative.").

prohibit states from granting final authority over such matters to entities such as independent redistricting commissions.[73]

Alternatively, one may read the Elections Clause and Presidential Electors Clause as referring to any entity or lawmaking process that a state constitution recognizes or designates as the state "legislature."[74] The U.S. Supreme Court has applied this interpretation throughout much of the twentieth century, and most recently reaffirmed it in the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[75] That case allows states to grant independent commissions created through a public initiative process sole responsibility for drawing congressional districts, completely stripping the institutional state legislature of any authority over the matter.[76]

The text of the U.S. Constitution, the history of the Elections Clause and Presidential Electors Clause,[77] and the logic of the independent state legislature doctrine all strongly support the plain-meaning interpretation of "Legislature." Under that interpretation, only a state's institutional legislature may regulate federal elections. The Elections Clause allows state legislatures to regulate the "Times, Places and Manner" of federal elections, while allowing Congress to "make or alter" such rules, "except as to the Places of chusing Senators."[78] The Constitutional Convention

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[73] *See* Morley, *Intratextual Independent "Legislature," supra* note 35, at 863 ("[T]he best reading of the word legislature as it appears throughout the Constitution . . . is that it . . . cannot extend to other entities such as independent redistricting commissions.").

[74] *See, e.g.*, Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (holding that a state's voters may use a public referendum to reject a congressional redistricting plan adopted by the state legislature, because a state may "include the referendum in the scope of the legislative power"); *cf.* Smiley v. Holm, 285 U.S. 355, 368 (1932) (holding that the Elections Clause does not "endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted").

[75] 576 U.S. 787 (2015).

[76] *Id.* at 813 (holding that the Elections Clause does not "preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts"). For an analysis of *Arizona Independent Redistricting Commission*'s impact on Elections Clause jurisprudence, see generally Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016).

[77] *See infra* Section II.C.

[78] U.S. CONST. art. I, § 4, cl. 1.

included that exception to ensure that state legislatures could convene at "the seats of Govt [government] in the States" to choose Senators.[79] This proviso in the Elections Clause suggests that its reference to the "Legislature" refers to the institutional state legislature, which typically conducts its business in the state capitol.

Perhaps more importantly, most other mentions of the term "legislature" throughout the Constitution expressly refer to a state's institutional legislature.[80] The Constitution contemplates that a legislature is an entity comprised of multiple[81] elected[82] members[83] that may periodically meet[84] and recess.[85] And Article I, § 3 unquestionably empowered each state's institutional "legislature," as distinct from the people of the state, to choose its U.S. Senators.[86]

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[79] 2 FARRAND'S RECORDS, *supra* note 58, at 613; *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 826, at 292 (1833) ("The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit."). During the Virginia ratifying convention, James Madison explained, "[T]he reason of the exception was, that, if Congress could fix the place of choosing the senators, it might compel the state legislatures to elect them in a different place from that of their usual sessions, which would produce some inconvenience, and was not necessary for the object of regulating the elections." *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution* (June 14, 1788) (statement of Madison), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 366 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

[80] Morley, *Intratextual Independent "Legislature," supra* note 35, at 855–56; *see* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (referencing the Constitution's "seventeen provisions referring to a State's 'Legislature'").

[81] U.S. CONST. art. I, § 2, cl. 1 (discussing "the most *numerous* Branch of the State Legislature" (emphasis added)); *accord id.* amend. XVII.

[82] *Id.* art. I, § 2, cl. 1 (discussing "Electors" for state legislatures); *accord id.* amend. XVII.

[83] *Id.* art. VI, cl. 3 ("[T]he members of the several State Legislatures . . . shall be bound by Oath or Affirmation . . . .").

[84] *Id.* art. I, § 3, cl. 2 (specifying that a temporary appointment to the U.S. Senate shall last "until the next Meeting of the Legislature"); *id.* art. IV, § 4 (allowing a state Executive to request federal assistance against "domestic Violence" when "the Legislature cannot be convened").

[85] *Id.* art. I, § 3, cl. 2 (discussing the state Executive's power to fill U.S. Senate vacancies that "happen . . . during the Recess of the Legislature").

[86] *Id.* art. I, § 3, cl. 1 (specifying that a state's U.S. Senators shall be "chosen by the Legislature thereof"); *see also* Morley, *Intratextual Independent "Legislature," supra* note 35,

This was also how every Founding Era state constitution that used the term "legislature" employed it.[87]

Necessity might require us to interpret the term "legislature" in the Elections Clause and Presidential Electors Clause more broadly if a state engaged in radical experimentation—for example, by abolishing its institutional legislature and moving to a system of pure direct democracy.[88] Within the realm of realistic possibilities, however, a plain-meaning interpretation of those clauses would not allow a state that retains its traditional institutional legislature to assign ultimate authority over the regulation of federal elections to some other entity.[89] Having said that, the independent state legislature doctrine would technically be compatible with the broader interpretation of the term "legislature," too. Under this alternate possible reading, the state constitution could designate a particular entity or process as the "legislature" for the purpose of regulating federal elections, but the state constitution would be unable to impose substantive restrictions on the scope of its power under the Elections Clause and Presidential Electors Clause.

Second, may a state constitution regulate the process or procedure that the "legislature"—however that term is defined—must use to enact laws governing federal elections? For example, may a state constitution allow the state's governor to veto legislation concerning federal elections? On one hand, because the U.S. Constitution confers power to regulate federal elections

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at 858–59 (discussing evidence from the Constitutional Convention that the Framers empowered a state's institutional legislature to appoint its U.S. Senators).

[87] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 828 (2015) (Roberts, C.J., dissenting) ("[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." (alteration in original) (quoting Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 147 & n.101 (2015))).

[88] *See* Amar, *The People Made Me Do It*, *supra* note 31, at 1065 (discussing this hypothetical). Abolishing an institutional legislature would raise serious questions under the Guarantee Clause. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."); *cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916) (holding that a state constitutional provision allowing the state's electorate to reject a state law through a public referendum does not violate the Guarantee Clause).

[89] *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 842 (Roberts, C.J., dissenting) ("The majority's contrary understanding requires it to accept a definition of 'the Legislature' that contradicts the term's plain meaning . . . .").

exclusively upon the state legislature, other organs of state government, like the governor, arguably may not participate in that process. Alternatively, the U.S. Constitution may allow state legislatures to regulate federal elections without displacing the ordinary lawmaking processes set forth in state constitutions.

The U.S. Supreme Court has long adopted this latter conception, recognizing the authority of state governors to veto laws governing federal elections to the same extent the state constitution allows them to veto other enactments.[90] The independent state legislature doctrine appears largely agnostic on this issue. Indeed, a nineteenth century precedent in which the U.S. House embraced the doctrine concluded that an institutional legislature must adhere to the ordinary lawmaking procedure set forth in the state constitution.[91]

Third, must courts apply a super-strong plain meaning approach when construing state laws regulating federal elections, or may they interpret such measures the same way they would any other state law, potentially taking into account state constitutional principles and the court's own precedents? In the cases concerning the 2000 presidential election, the U.S. Supreme Court suggested that courts must place special emphasis on the text of state laws that a legislature enacts under the Presidential Electors Clause to regulate presidential elections.[92]

Some commentators agree with the approach set forth in *Bush v. Palm Beach County Canvassing Board*[93] and the three-Justice concurrence in *Bush v. Gore*.[94] Others maintain that federal courts

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[90] Smiley v. Holm, 285 U.S. 355, 372–73 (1932) ("[T]here is nothing in [the Elections Clause] which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.").

[91] *See infra* note 226 and accompanying text.

[92] *See* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) (suggesting that, because state legislatures act "by virtue of a direct grant of authority" from the U.S. Constitution when regulating "the selection of Presidential electors," the "general rule" requiring the U.S. Supreme Court to "defer[] to a state court's interpretation of a state statute" is inapplicable to such laws); *see also* Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (stating that, for a statute that a legislature enacts under the Presidential Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance").

[93] 531 U.S. at 76.

[94] *Bush*, 531 U.S. at 111–12 (Rehnquist, C.J., concurring); *see* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1262 (2002) ("Whatever authority there

may overrule a state court's construction of a state law governing presidential elections only in the most extreme cases,[95] while yet other scholars contend that courts should construe laws governing federal elections the same way they would any other state statute.[96] Professor Rick Hasen suggested that "reasonable jurists will differ" over this issue.[97] He has also argued, however, that federal and state courts may apply a "Democracy Canon," requiring them to construe laws governing federal elections in favor of allowing candidates to appear on the ballot, people to cast votes, and disputed ballots to be counted, even when such outcomes are contrary to the plain meaning of a statute.[98]

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might be for a state court to ignore the legislature's directions in other contexts, Article II of the Constitution appears on its face to forbid such judicial reshaping of the law in connection with the appointment of presidential electors."); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U. CHI. L. REV. 657, 663 (2001) ("[T]here is a constitutionally-based federal interest in ensuring that state executive and judicial branches adhere to the rules for selecting electors established by the legislature, and do not use their interpretive and enforcement powers to change the rules after the fact."); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 30 ("Article II may reasonably be interpreted as federalizing disputes over whether the authority thus granted to state legislatures has been usurped by another branch of state government."); *see also* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 155–56 (2001) (concluding that, because Article II designates the legislature as "the site within state government of the power to appoint electors," courts may not use their "power to fill statutory gaps and resolve statutory ambiguities" to instead re-write state laws governing presidential elections).

[95] *See, e.g.*, Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*, 68 U. CHI. L. REV. 613, 620 (2001) (opining that a federal court may review a state court's "gross deviation from the legislature's directives" in a state statute governing federal elections); Friedman, *supra* note 36, at 841 (arguing that Article II allows a federal court to reject state courts' constructions of state laws governing presidential elections only if they are "clearly implausible," determined relative to how "the law stood on Election Day").

[96] *See, e.g.*, Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 98 (2002) (arguing that the Presidential Electors Clause might not require special deference to state legislatures, but instead could require state courts to interpret state law based on "the usual interplay of state statutes, the state constitution, and judicial interpretations"); Schapiro, *supra* note 34, at 678 (arguing that "no federal interests justify the . . . intrusive federal intervention" of U.S. Supreme Court review of state courts' interpretations of election statutes).

[97] Hasen, *supra* note 33, at 601.

[98] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 113–14 (2009) ("[C]ourts should reject arguments that reliance on the Democracy Canon raises Article I or Article II concerns."). The U.S. Supreme Court has rejected invitations to specifically address this issue.

Regardless of how one resolves these ancillary issues, the core of the independent state legislature doctrine remains: a state legislature may regulate the manner in which federal elections are held, except for issues relating to candidate qualifications and, for congressional elections, voter qualifications. When exercising this authority, the legislature is subject to the implied internal restrictions of the Elections Clause and Presidential Electors Clause themselves, as well as explicit federal constitutional restrictions such as due process, equal protection, and the voting rights amendments. State constitutions, however, may not impose additional substantive restrictions on the scope of legislatures' authority over federal elections.

C. DEVELOPMENT OF THE ELECTIONS CLAUSE AND PRESIDENTIAL ELECTORS CLAUSE

The history of the Elections Clause and Presidential Electors Clause is silent on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections. The only definite conclusion that can be drawn is that the Framers specifically chose to vest power over federal elections with institutional state legislatures, rather than directly with the people themselves. The drafting history of these provisions is therefore inconsistent with the U.S. Supreme Court's interpretation of the term "legislature" as including public referenda or initiatives.[99] Otherwise, it neither bolsters nor undermines the case for the independent state legislature doctrine. The fact that the Framers may not have expressly discussed a particular application or consequence of the U.S. Constitution's language, however, does not change either the original public meaning of that language or the reasonable implications that may be drawn from it.

See, e.g., Marks v. Union Cty. Democratic Comm., 541 U.S. 937 (2004) (mem.) (denying certiorari); Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002) (mem.) (denying certiorari).

[99] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) (holding that congressional "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum"); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (holding that the Elections Clause does not prevent a state's voters from using the public referendum process to reject congressional redistricting plans adopted by the state legislature).

1. The Elections Clause. At the Constitutional Convention, Edmund Randolph's initial resolutions concerning Congress specified that members of the first chamber would be elected by the people.[100] An early draft of the Constitution compiled by the Committee on Detail stated that elections for the first house of the national legislature "shall be *biennially* held on the same day through the *same* state(s): except in case of accidents, and where an adjournment to the succeeding day may be necessary."[101] The places for such elections "shall be fixed by the (national) legislatures from time to time, or on their default by the national legislature."[102] The Committee considered including a provision that votes be given "by ballot, unless 2/3 of the national legislature shall choose to vary the mode," but deleted it.[103] Finally, the draft provided that "*the legislature of* Each state shall (send) *appoint* two (members) senators using their discretion as to the time and manner of choosing them."[104] This precursor treats the "legislature" that appoints U.S. Senators as the same entity that may determine the time and manner for such appointments. It supports the notion that the term "Legislature" means the same thing in both Article I, § 3, which allows the state legislature to appoint the state's U.S. Senators,[105] and the Elections Clause, which grants the legislature authority over the time, place, and manner of Senate elections.

The Convention did not debate any of these provisions. The next draft condensed them together, stating, "The Times and Places and the Manner of holding the Elections (for) *of* the Members of each House shall be prescribed by the Legislatures of each State; but their Provisions concerning them may, at any Time, be altered and

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[100] *See* 1 FARRAND'S RECORDS, *supra* note 58, at 20 (quoting Randolph's proposed resolution "that the members of the first branch of the National Legislature ought to be elected by the people of the several States").

[101] 2 FARRAND'S RECORDS, *supra* note 58, at 139. The original document was "in the handwriting of Edmund Randolph." *Id.* at 137 n.6. Text that appears "in parentheses [was] crossed out in the original," and text in "italics represent[s] changes made in Randolph's handwriting." *Id.*

[102] *Id.* at 139.

[103] *Id.*

[104] *Id.* at 141.

[105] U.S. CONST. art. I, § 3, cl. 1 (stating that U.S. Senators "shall be . . . chosen by the Legislature" of each state).

superseded by the Legislature of the United States."[106] After minor amendments,[107] the Elections Clause assumed its current form.

The *Letters from a Federal Farmer*, published during the ratification debates, interpreted the Elections Clause as referring to institutional state legislatures.[108] The *Letters* refer to legislatures as being elected on a yearly basis, and discuss whether the chambers of a legislature comprised of "two branches" would vote separately when appointing a U.S. Senator, or instead meet together in joint session and hold a single vote.[109] Chancellor James Kent's *Commentaries on American Law* similarly explains that the Elections Clause refers to the state legislature "in the true technical sense, being the two houses acting in their separate and organized capacities."[110]

The *Federalist Papers* and Justice Joseph Story's *Commentaries on the Constitution* set forth the Framers' rationale for the Elections Clause. They explain that the Constitution could have allocated power to regulate federal elections in three ways: "wholly in the national legislature; or wholly in the state legislatures; or primarily in the latter, and ultimately in the former."[111] The third option was best because it left primary responsibility with state legislatures, yet allowed Congress to prevent abuse that would "hazard the safety and permanence of the Union."[112] Expanding upon this

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[106] 2 FARRAND'S RECORDS, *supra* note 58, at 155; *accord id.* at 165.

[107] *See id.* at 229, 567, 613.

[108] Letter XII from the Federal Farmer to the Republican (Jan. 12, 1788), *in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 100, 110 (Quadrangle Books, Inc. 1962) (1788) (arguing that election regulation "ought to be left to the state legislatures," which are "far nearest to the people").

[109] *Id.* at 109–10.

[110] 1 CHANCELLOR JAMES KENT, COMMENTARIES ON AMERICAN LAW 261–62 (John M. Gould ed., 14th ed. 1896); *see also id.* at 261 ("[Senators] were to be *chosen by the legislatures*, and the legislature was to prescribe the times, places, and manner of holding elections for senators . . . .").

[111] 2 STORY, *supra* note 79, § 814, at 281; *accord* THE FEDERALIST NO. 59, at 326 (Alexander Hamilton) (E.H. Scott ed., 1898).

[112] 2 STORY, *supra* note 79, § 814, at 282; THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (arguing that leaving "an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy").

sentiment, *Federalist No. 59* declared, "[E]very Government ought to contain in itself the means of its own preservation."[113]

2. The Presidential Electors Clause. Throughout debates over the development of the Presidential Electors Clause, delegates repeatedly distinguished between granting power to state legislatures and to the people.[114] In one of the earliest discussions at the Convention concerning the Presidency, James Wilson argued that the President should be directly elected by the people "without the intervention of the State Legislatures . . . in order to make [the office] as independent as possible . . . of the States."[115] Elbridge Gerry worried, however, that denying states a role in the process would cause "alarm," and instead suggested "letting the Legislatures nominate, and the [presidential] electors appoint," the President.[116] He questioned whether the people should be permitted to "act directly even in (the) choice of electors."[117] The Convention rejected Wilson's proposal and instead initially voted to have Congress—the "national legislature"—appoint the Executive.[118]

Later, Gouverneur Morris proposed an amendment that the people be permitted to elect the President.[119] He noted other delegates' concern that this would enable the "populous" states to

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[113] THE FEDERALIST NO. 59, *supra* note 111, at 325 (Alexander Hamilton) (emphasis removed); *accord* 2 STORY, *supra* note 79, § 814, at 281; *see also* 2 FARRAND'S RECORDS, *supra* note 58, at 240 (statement of Ghorum) ("It would be as improper [to] take this power from the Natl. Legislature, as to Restrain the British Parliament from regulating the circumstances of elections, leaving this business to the Counties themselves."); *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution* (Oct. 28, 1787) (statement of Wilson) ("This clause is not only a proper, but necessary one. . . . [W]ithout this clause, [the federal government] would not possess self-preserving power."), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 415, 440.

[114] *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 58, at 109–10 (statement of Madison) (distinguishing between "the people themselves" and "some existing authority under the [National] or State Constitutions," including the "Legislatures of the States," which "had betrayed a strong propensity to a variety of pernicious measures"); *id.* at 114–15 (statement of Dickenson) (same).

[115] 1 FARRAND'S RECORDS, *supra* note 58, at 69 (statement of Wilson).

[116] *Id.* at 80 (statement of Gerry); *see also id.* at 176 (pointing out that the first branch of the national legislature would be "chosen by the *people* of the States" and the second branch "by the Legislatures of the States").

[117] *Id.* at 80.

[118] *Id.* at 81.

[119] *See* 2 FARRAND'S RECORDS, *supra* note 58, at 29 (statement of Morris) ("[The President] ought to be elected by the people at large . . . .").

conspire together to control the presidency. He responded, "The people of such States cannot combine. If [there] be any combination it must be among their representatives in the Legislature."[120] Hugh Williamson opposed the measure, arguing that the difference between election "by the people and by the legislature" is the same "as between an appt. by lot, and by choice."[121] The Convention rejected Morris' proposal.[122]

The Convention then summarily rejected a suggestion that the Executive "be chosen by Electors to be appointed by the several Legislatures of the individual States" (i.e., the Electoral College),[123] changed course by adopting that proposal without debate two days later,[124] and then switched back to having Congress select the President.[125] Further debate on the issue was postponed,[126] and the matter was referred to a committee comprised of one representative from each state (the "Committee of eleven").[127] The committee proposed the language that appears in the Constitution: "Each State shall appoint in such manner as its Legislature may direct, a number of electors . . . ."[128] Morris explained that the committee made this change because the delegates were both dissatisfied with allowing Congress to appoint the President and "anxious" about letting the people do so.[129]

During the Pennsylvania ratifying convention, James Wilson's discussions of the Presidential Electors Clause continued to

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[120] *Id.*

[121] *Id.* at 32 (statement of Williamson).

[122] *Id.*

[123] *Id.* at 22.

[124] *Id.* at 57–58 (statement of Ellsworth).

[125] *Id.* at 99.

[126] *Id.* at 404.

[127] *Id.* at 473. The committee was comprised of one delegate from each of the eleven states represented at the Convention at the time; Rhode Island never sent delegates, while New Hampshire's did not arrive until late July. *Id.*; *see also* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 476, 480 (discussing the absence of the two delegations).

[128] 2 FARRAND'S RECORDS, *supra* note 58, at 497.

[129] *Id.* at 500 (statement of Morris).

distinguish between the legislature and the people.[130] He explained that the Clause allows the people to vote directly on presidential electors "[w]ith the approbation of the state legislatures."[131] Kent's *Commentaries* drew the same distinction, explaining, "The Constitution . . . has not thought it safe or prudent to refer the election of a President directly and immediately to the people; but it has confided the power to a small body of electors, appointed in each state, under the direction of the legislature . . . ."[132]

Thus, the drafting and ratification histories of the Elections Clause and Presidential Electors Clause emphasize the Framers' repeated distinction between a state legislature and direct collective action by the people of a state. Those histories do not shed light, however, on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine.

D. NORMATIVE JUSTIFICATIONS

Beyond the text of the Elections Clause and Presidential Electors Clause, as well as the prevailing understanding of those provisions throughout the nineteenth century,[133] four normative rationales support the independent state legislature doctrine. First, Story's *Commentaries* explain that the Constitution delegated the power to regulate federal elections to state legislatures in order to give them flexibility in responding to local needs and exigencies.[134] He extolled legislatures' ability "to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states," even in the absence of "an extreme necessity, or a very urgent exigency."[135] Allowing state constitutions to shackle legislatures' discretion would limit the flexibility that the Convention sought to guarantee.

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[130] *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution* (Dec. 11, 1787) (statement of James Wilson), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 511–12.

[131] *Id.* at 512.

[132] KENT, *supra* note 110, at 334–35.

[133] *See infra* Parts III–V.

[134] *See* 2 STORY, *supra* note 79, § 820, at 287–88.

[135] *Id.*

Second, the Framers deliberately structured the Constitution to place ultimate responsibility for elections in the political branches of government.[136] Political entities—state legislatures and Congress—are responsible for determining most of the rules for congressional elections;[137] state legislatures are similarly responsible for deciding how to select presidential electors.[138] Each chamber of Congress is the sole judge of its members' elections and returns.[139] Congress is likewise responsible for determining the outcomes of presidential elections.[140] The Constitution grants the House and Senate authority to count electoral votes[141] and reject any they deem invalid.[142] If no candidate for President or Vice President receives a majority of electoral votes, then the House and Senate, respectively, determine who will serve.[143]

These provisions collectively reflect a fundamental structural decision to treat elections as essentially political matters,[144] under the ultimate control of political—and politically accountable—entities. Even Section 2 of the Fourteenth Amendment left enforcement of voting rights to Congress.[145] Subsequent

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[136] *See* Morley, *supra* note 76, at 90–92 (explaining how the Constitution's structure treats federal elections as primarily political matters under the principal control of political entities).

[137] U.S. CONST. art. I, § 4, cl. 1 (granting Congress and state legislatures power over the "Times, Places and Manner of holding Elections" for Congress).

[138] *Id.* art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of electors . . . .").

[139] *Id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[140] *Id.* art. II, § 1, cl. 3 (detailing Congress's role in counting electoral votes in presidential elections); *see also id.* amend. XII.

[141] *Id.* art. II, § 1, cl. 3 ("The President of the Senate shall . . . open all the Certificates, and the Votes shall then be counted."); *accord id.* amend. XII.

[142] *See* 3 U.S.C. § 15 (2018) (outlining the procedure for Congress to review and determine the validity of electoral votes).

[143] U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

[144] *Cf.* Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) ("Courts ought not to enter this political thicket."), *abrogated by* Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that an equal protection challenge to legislative redistricting was justiciable).

[145] U.S. CONST. amend. XIV, § 2 (specifying that a state that denies or abridges the right to vote will have its representation in the U.S. House reduced proportionately). For contrasting views of the modern implications of Section 2 of the Fourteenth Amendment, compare Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 385 (2014), arguing that Section 2's extreme remedy of reduction in representation for states

constitutional amendments prohibiting discrimination regarding voting rights based on certain specified characteristics[146] do not disturb this fundamental allocation of power. It was not until the mid-twentieth century that the U.S. Supreme Court reinterpreted the Fourteenth Amendment as creating a broader, judicially enforceable right to vote.[147] Even while asserting constitutional authority to enforce voting rights, however, the Court has recognized the Constitution's delegations of authority in this area to Congress.[148]

The independent state legislature doctrine bolsters the Constitution's structural allocation of primary authority over federal elections to the political branches—specifically, to representative legislative assemblies. The doctrine is not an anomaly stemming from an ill-considered word in an isolated constitutional provision or two, but rather a component of a consistent, pervasive, institutional choice concerning the entities to be entrusted with ultimate authority over federal elections. If state constitutions could limit their respective state legislatures' authority over federal elections, then the courts—particularly state courts[149]—would have a larger role in overseeing such elections. Though the U.S. Supreme Court has expressed skepticism about the

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that violate voting rights suggests that Congress has power to adopt less extreme measures such as the Voting Rights Act, with Morley, *supra* note 7, at 285, contending that Section 2's extreme remedy for voting rights violations suggests that the Constitution implicitly sets a high threshold for what qualifies as a denial or abridgement of voting rights.

[146] *See supra* notes 64–67 and accompanying text.

[147] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating a poll tax for state elections on the grounds it violated "the right to vote" protected by the Equal Protection Clause); Carrington v. Rash, 380 U.S. 89, 96 (1965) (holding that a state law prohibiting soldiers stationed in Texas from registering to vote there violated "a right secured by the Equal Protection Clause"); Gray v. Sanders, 372 U.S. 368, 379–80 (1963) (holding that the Equal Protection Clause requires "all who participate in [an] election . . . to have an equal vote"); *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2088–2112 (2018) (analyzing the development of the Court's Equal Protection jurisprudence regarding voting rights).

[148] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) ("[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.").

[149] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106–07 (1984) (holding that federal courts may not entertain suits for injunctive relief against state officials for violations of state law, including state constitutional provisions).

Framers' allocation of power over federal elections[150] and taken steps to supersede this allocation,[151] the independent state legislature doctrine is most faithful to the Constitution's underlying logic and structure.[152]

Third, as earlier drafts of the Elections Clause make clear,[153] the power of state legislatures to regulate federal elections was understood to be co-extensive with Congress' power to do so.[154] The

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[150] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818–19 (2015) (discounting a precedent arising from the U.S. House of Representatives' resolution of an election contest due to partisanship concerns).

[151] *See supra* notes 147 and accompanying text.

[152] *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–8 (1969) (discussing a structuralist approach to constitutional interpretation).

[153] *See supra* note 106 and accompanying text.

[154] *See Debates of the North Carolina Ratifying Convention* (July 25, 1788) (statement of Davis), *in* 4 ELLIOT'S DEBATES, *supra* note 79, at 61 ("Congress has ultimately no power over elections, but what is primarily given to the state legislatures."); THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (explaining that the Constitution vests power to regulate federal elections "primarily" with state legislatures and "ultimately" in Congress); *see also* 1 KENT, *supra* note 110, at 273 (treating the scope of a state legislature's power and Congress's power over federal elections as equivalent); 2 STORY, *supra* note 79, § 814, at 281–82 (explaining that the Constitution vests "[t]he regulation of elections" with "the local governments," and allows the national government to exercise that authority "in extraordinary circumstances").

Indeed, if anything, the Election Clause's history could be read as suggesting that state legislatures would have broader power than Congress over federal elections. Some argued that the Elections Clause allows Congress to step in only if a state either attempts to undermine the federal government by refusing to hold federal elections or adopts patently improper or unfair rules. *See, e.g.*, THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (explaining that the Elections Clause grants Congress power to regulate federal elections "whenever extraordinary circumstances might render that interposition necessary to its safety"); 3 FARRAND'S RECORDS, *supra* note 58, at 148 (statement of McHenry) (explaining that the Constitution grants Congress the power to regulate federal elections in case of "particular exigencies" such as "Insurrection, Invasion, and even to provide against any disposition that might occur hereafter in any particular State to thwart the measures of the General Government"); 1 KENT, *supra* note 110, at 273 (explaining that the Elections Clause grants Congress power to make or alter rules concerning congressional elections "for the sake of [its] own preservation," and "it is to be presumed, [that Congress] will not be disposed to exercise [such power], except when any state shall neglect or refuse to make adequate provision for the purpose"); 2 STORY, *supra* note 79, § 814, at 282 ("[I]n extraordinary circumstances, the power is reserved to the national government; so that it may not be abused, and thus hazard the safety and permanence of the union."); *see also The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal*

U.S. Supreme Court has repeatedly recognized this symmetry between state legislatures' power and congressional power.[155] Any substantive limits that a particular state's constitution imposes on the scope of a legislature's authority, however, would be inapplicable to Congress. Neither the text nor the history of the Elections Clause suggests that state legislatures would have narrower power than Congress over federal elections. Allowing state constitutions to impose substantive limits on state legislatures' authority concerning federal elections would destroy this symmetry between the power of the legislature and the power of Congress.

Finally, the Constitution's delegations of authority to state legislatures concern important federal interests: the election of federal officials,[156] the ratification of constitutional amendments,[157] and requests for federal military intervention.[158] As Professor Vikram Amar recognizes, these are all issues for which the Framers wanted to establish "smooth, orderly, and uncontroversial" ways to determine the "validity and legitimacy" of states' actions.[159] James Iredell, for example, expressed the importance of having "little

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Constitution (Nov. 20, 1787) (statement of Wilson), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 440–41 (describing scenarios when Congress may intervene in election regulation).

After the Constitution was ratified, however, a constitutional amendment was introduced in the First Congress to amend the Elections Clause to state that Congress may not "alter, modify, or interfere in" state laws governing congressional elections unless a state "shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." 1 ANNALS OF CONG. 768 (1789) (Joseph Gales ed., 1834) (statement of Rep. Burke). The House rejected the amendment by a vote of twenty-three to twenty-eight. *Id.* at 772–73.

[155] *See* Smiley v. Holm, 285 U.S. 355, 367 (1932) (holding that the Elections Clause allows Congress to make "regulations of the sort which . . . may be provided by the legislature of the State upon the same subject"); *Ex Parte* Siebold, 100 U.S. 371, 386 (1879) ("The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made."); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832 (1995) (holding that, if state legislatures were permitted to exercise certain authority under the Elections Clause, then Congress would be able to exercise the same power).

[156] U.S. CONST. art. I, § 3, cl. 1 (appointment of U.S. Senators); *id.* art. I, § 4, cl. 1 (Elections Clause); *id.* art. II, § 1, cl. 2 (Presidential Electors Clause); *id.* amend. XVII (allowing the legislature to authorize a governor to make temporary appointments to fill U.S. Senate vacancies).

[157] *Id.* art. V.

[158] *Id.* art. IV, § 4.

[159] Amar, *The People Made Me Do It*, *supra* note 31, at 1073.

confusion"[160] over whether amendments to the U.S. Constitution have been validly adopted, while George Mason emphasized the need to avoid "chance and violence."[161]

The independent state legislature doctrine makes it far easier to determine the validity of a state's exercise of the authority it received from the U.S. Constitution. When a legislature structures a congressional election, ratifies a federal constitutional amendment, or requests federal intervention, its acts may be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions.[162] It is far easier for the federal government—and other states—to accept legislatures' actions impacting the federal government at face value when they do not need to consider those acts' substantive validity under state constitutions. Thus, to the extent the Elections Clause and Presidential Electors Clause were adopted to promote certainty and minimize unnecessary confusion and conflict, the independent state legislature doctrine furthers those critical goals.

III. STATE PRECEDENTS

Both the U.S. Supreme Court and commentators have largely overlooked the extent to which various federal and state authorities applied the independent state legislature doctrine throughout the

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[160] *Id.* (quoting 4 ELLIOT'S DEBATES, *supra* note 79, at 177 (statement of Iredell)).

[161] *Id.* (quoting 1 FARRAND'S RECORDS, *supra* note 58, at 203 (statement of Mason)).

[162] *See* SUTTON, *supra* note 5, at 17 ("State courts . . . have a freer hand in . . . allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee. . . . State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.").

The possibility of circuit splits undermines the uniformity of federal standards, but the U.S. Supreme Court may resolve such conflicts. Moreover, even when differences among circuits exist, the range of potential federal constitutional defects with a legislature's actions is typically far better recognizable than potential state-specific problems under state constitutions. *See* Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 539 (1988) ("Courts and commentators . . . widely accept the proposition that federal constitutional norms should be uniform . . . . Diversity should be expected, perhaps even encouraged, in matters of state law, both statutory and constitutional.").

nineteenth century. As early as the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections.[163] Throughout the rest of the century, the admittedly few state courts to consider the issue generally enforced state laws governing congressional elections, even when they violated state constitutional provisions.[164]

A. THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1820 AND CONGRESSIONAL DISTRICTS

Neither the state constitutions adopted immediately after the U.S. Constitution's ratification, nor those of new states that joined the Union in the 1790s, contained provisions relating to federal elections.[165] Consistent with the Elections Clause and Presidential Electors Clause, they left the matter to the plenary discretion of state legislatures. Some later state constitutions specified procedures for legislatures to follow to take certain actions relating to federal elections, such as requiring legislatures to appoint U.S. Senators in joint session.[166] Likewise, state governors that had a general veto power applied it to state laws regulating federal elections.[167] In general, however, "post-Founding state constitutions did not explicitly regulate" federal elections or limit legislatures' power to adopt "'manner' legislation."[168]

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[163] *See infra* Section III.A.

[164] *See infra* Section III.B–III.D.

[165] Smith, *supra* note 20, at 757–58.

[166] *See id.* at 759–64.

[167] *Id.* at 759–61 (discussing examples from Massachusetts and New York).

[168] *Id.* at 759. Smith identifies a few exceptions: Delaware's Constitution specified that voters shall elect federal representatives "at the same places" and "in the same manner" as state representatives, DEL. CONST. OF 1792, art. VIII, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 213 (William F. Swindler ed., 1973–79) [hereinafter SOURCES AND DOCUMENTS]; and the Kentucky Constitution required all elections to be held by voice vote, KY. CONST. OF 1799, art. VI, § 16, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* at 160. Whether the framers of these state constitutions took into account the Elections Clause, the Presidential Electors Clause, or the independent state legislature doctrine is unclear.

Smith also notes that the Maryland Constitution guaranteed free white male citizens the right to vote for all elected officials, including Representatives and presidential electors. *See* Smith, *supra* note 20, at 758 (citing MD. CONST. OF 1776, art. XIV (1810), *reprinted in* 4

The Massachusetts Constitutional Convention of 1820 is among the earliest examples of the independent state legislature doctrine being expressly applied. The Convention was called to replace the constitution that the state had adopted in 1780, during the Revolutionary War.[169] Attorney James T. Austin, future Attorney General of Massachusetts, proposed an amendment under which representatives in the U.S. House and presidential electors would have been chosen "in such convenient districts as the Legislature shall *by law provide*."[170] The amendment would have required the legislature to draw new districts after every congressional reapportionment, with no more than two representatives or electors in each district.[171] It barred the legislature from altering those districts until the next reapportionment.[172] The Convention's Committee of the Whole rejected the proposed amendment without much debate.[173]

The next day, Austin presented essentially the same proposal on the convention floor.[174] He explained that the amendment would "direct the Legislature in the exercise of the power which is given them by the [C]onstitution of the United States."[175] It would "limit" the legislature "in the exercise of their discretion" in redistricting.[176] He argued that the people had the right to impose this restriction because the legislature was "bound to exercise all [its] powers under the direction of the [state] constitution."[177]

SOURCES AND DOCUMENTS, *supra* at 387). Such voter qualification issues, however, were outside the scope of both the Elections Clause and the independent state legislature doctrine. *See supra* notes 55–62 and accompanying text.

[169] JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 3 (Boston Daily Advertiser, rev. ed. 1853) [hereinafter JOURNAL OF THE 1820 MASSACHUSETTS CONSTITUTIONAL CONVENTION] (explaining that a convention of delegates had been convened to revise the Massachusetts Constitution).

[170] *Id.* at 104 (Nov. 27, 1820) (statement of Austin).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 106 (Nov. 28, 1820) (statement of Austin).

[175] *Id.* at 107.

[176] *Id.*

[177] *Id.*; *see also id.* (discussing "the right of the people to instruct the Legislature in the manner of exercising their discretion").

Justice Joseph Story, a delegate to the Convention, responded that the proposed amendment was "plainly a violation of the [U.S.] [C]onstitution."[178] He explained that the Convention did not "have a right to insert in our [state] constitution a provision which controls or destroys a discretion . . . which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States."[179] The Elections Clause of the U.S. Constitution grants legislatures "unlimited discretion" over the manner in which representatives are elected.[180] Likewise, the Presidential Electors Clause affords them the same "unlimited" discretion over the selection of presidential electors.[181] The proposed amendment "destroy[s] this freedom of choice" and "assumes a control over the Legislature which the constitution of the United States does not justify."[182] The legislature is "bound to exercise [the] authority" it receives from the U.S. Constitution "according to its own views of public policy and principle," without substantive limitations.[183]

Daniel Webster, also serving as a delegate, agreed.[184] He explained that "it would not be well by a provision of [the state] constitution, to regulate the *mode* in which the Legislature should exercise a power conferred on it by *another* Constitution."[185] Following these speeches, the Convention rejected Austin's motion.[186] Thus, the Massachusetts Constitutional Convention of 1820 provides a stark example of how the independent state legislature doctrine was regarded when the issue was affirmatively raised and debated.

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[178] *Id.* at 110 (statement of J. Story).

[179] *Id.* at 109; *see also id.* (declaring that the state constitutional convention cannot "narrow[] or contract[] the powers delegated" by the U.S. Constitution to the state legislature).

[180] *Id.* at 110.

[181] *Id.*

[182] *Id.*; *see also id.* (arguing that the proposed amendment "affect[s] to control the Legislature in the exercise of its legitimate powers" under the U.S. Constitution).

[183] *Id.*

[184] *Id.* at 112 (statement of Webster) ("He would wish that the constitution of the State should have as little connection with the constitution of the United States as possible.").

[185] *Id.*

[186] *Id.* at 113.

B. NEW HAMPSHIRE AND ABSENTEE MILITARY VOTING

Litigation involving the independent state legislature doctrine arose periodically during the Civil War as state legislatures enacted laws allowing soldiers serving away from home to vote.[187] Several state constitutions required voters to cast their ballots in person in the precincts in which they were registered.[188] Absentee voting laws, even for members of the military, violated these provisions. Consequently, "in States where the place of voting was fixed by the [state] Constitution, an amendment to the [state] Constitution was necessary before a law could be passed authorizing soldiers to vote in the field *for State officers*."[189] Due to the independent state legislature doctrine, however, "no amendment was necessary to enable the Legislature to prescribe for voting in the field for presidential electors and representatives."[190]

In 1864, for example, the New Hampshire Supreme Court issued an advisory opinion affirming that military voters could cast absentee ballots for federal offices.[191] It declared that the election of members of Congress and presidential electors "is governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States."[192] The court held that no "valid legal objections" existed to the legislature's exercise of its "unlimited authority" and

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[187] *See* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 314–15 (1915) (providing a state-by-state examination of Civil-War-era absentee voting laws for military voters).

[188] John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 498 (2003).

[189] BENTON, *supra* note 187, at 11–12.

[190] *Id.* at 12.

[191] Opinion of the Justices, 45 N.H. 595, 596, 599 (1864); *see also* Opinion of the Judges, 37 Vt. 665, 677 (1864) (noting, in the course of upholding an absentee military voting law for federal offices, that the power to prescribe the time and place of federal elections "rests wholly in the discretion of the legislature to establish . . . by law," and that "[t]he whole subject is entrusted [by the Elections Clause] to the state legislature, subject to the control of [C]ongress").

[192] *Opinion of the Justices*, 45 N.H. at 599; *see also id.* at 600 (stating that the U.S. Constitution leaves the appointment of electors "wholly to the discretion of the State legislature").

"unqualified discretion" under the Presidential Electors Clause.[193] It likewise concluded that the Elections Clause allowed the legislature to determine the time, place, and manner of voting for the U.S. House of Representatives, "untrammeled" by potentially contrary provisions of the state constitution.[194]

The New Hampshire Supreme Court's opinion stands as one of the nineteenth century's clearest, most emphatic endorsements of the independent state legislature doctrine.[195] When the court considered another absentee voting law in the early twentieth century, however, it expressed doubt about this conclusion, exemplifying the shift in attitude toward the doctrine that occurred at the turn of the century.[196]

C. RHODE ISLAND AND PLURALITY ELECTIONS

The Rhode Island Supreme Court similarly applied the independent state legislature doctrine in 1887 when resolving a dispute over a contested congressional election.[197] The state constitution's Majority Vote Clause provided, "[I]n all elections held by the people under this constitution, a majority of all the electors voting shall be necessary to the election of the person voted for."[198] The court stated that this clause might apply to congressional elections, since another provision within the same article of the state constitution specified that the method of voting for various offices, including "representatives to [C]ongress[,] shall be by ballot."[199] A state statute, however, provided that only a plurality

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[193] *Id.* at 600; *see also id.* ("The whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature.").

[194] *Id.* at 605.

[195] *Cf. Opinion of the Judges*, 37 Vt. at 677 (discussing the legislature's complete discretion to regulate congressional elections under the Elections Clause, without expressly addressing whether the state constitution may constrain it).

[196] *In re* Opinion of the Justices, 113 A. 293, 298, 299 (N.H. 1921) (reaffirming the Court's earlier conclusion with regard to presidential electors but adding that the Court was "unable to say the [state statutory] provisions would be held valid [under the state constitution] as to the election of Senators and Representatives in Congress").

[197] *In re* Plurality Elections, 8 A. 881 (R.I. 1887) (responding to a certified question from the state's house of representatives).

[198] *Id.* at 882 (quoting R.I. CONST. art. VIII, § 10).

[199] *Id.* (quoting R.I. CONST. art. VIII, § 2).

was necessary to win special elections, including U.S. House races.[200]

The Rhode Island Supreme Court held that, assuming the Majority Vote Clause applied to congressional elections, it was "of no effect," except insofar as the state legislature "voluntarily deferred" to it "as an indication of the popular will."[201] The court explained that the provision violated the U.S. Constitution's Elections Clause.[202] The Majority Vote Clause could not validly "impose a restraint upon the power of prescribing the manner of holding [congressional] elections which is given to the legislature by the [C]onstitution of the United States without restraint."[203] Thus, a state law concerning congressional elections that violated the state constitution was nevertheless valid and enforceable.[204]

The court reached the same conclusion regarding the Presidential Electors Clause.[205] After quoting that provision, the court declared, "The manner of appointment is left entirely to the legislatures."[206] Again, however, when the Rhode Island Supreme Court considered the validity of a proposed military absentee voting law in the early twentieth century, it expressed much more uncertainty about the independent state legislature doctrine's validity.[207] Like the New Hampshire Supreme Court,[208] the Rhode Island court recognized that a contrasting view of the issue had arisen.[209]

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[200] *See id.*

[201] *Id.*

[202] *Id.* (holding that the Majority Vote Clause "is manifestly in conflict with [the Elections Clause]").

[203] *Id.*

[204] *Id.* (holding the state statute "lawful and constitutional, and that any representative elected under [the statute] will be allowed to have his seat regardless of [the state constitution's Majority Vote Clause]").

[205] *Id.*

[206] *Id.*

[207] *In re* Opinion to the Governor, 103 A. 513, 516 (R.I. 1918) (stating that "in carrying out this direction of the federal Constitution the [state] Legislature should not act independently and in disregard of the provisions of the state Constitution").

[208] *See supra* note 196 and accompanying text.

[209] *Opinion to the Governor*, 103 A. at 515–16 (citing a South Dakota case and two Congressional election contests).

D. MISSISSIPPI AND THE TIMING OF CONGRESSIONAL ELECTIONS

The Mississippi Supreme Court also applied the doctrine in 1873 in resolving a dispute over the timing of state and federal elections.[210] The Mississippi Constitution required the state to hold a "general election" every two years in November.[211] It did not specify either the years in which elections were to be held, or the year in which the first such election was to be held.[212] Nor did the state constitution expressly identify the offices to be elected at general elections.[213] The Mississippi legislature enacted a law requiring state legislators, as well as other state and county officials, to be elected starting in 1871 and every two or four years thereafter, depending on the length of the office's term.[214] The law further specified that a congressional election would be held in 1872 and every two years thereafter.[215]

The Mississippi Supreme Court recognized that the state constitution required general elections to be held biennially, but the law passed by the legislature required annual elections (albeit for different offices).[216] The court pointed out that the Elections Clause allowed Congress to schedule congressional elections for whenever it wished, regardless of what any state's constitution said or the timing of state and county elections.[217] The power that the Elections Clause granted to state legislatures to determine the timing of their states' congressional elections, the court reasoned, was just as broad.[218] Thus, the state constitution's requirement for biennial general elections did not limit the state legislature's discretion

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[210] State v. Williams, 49 Miss. 640 (1873).

[211] *Id.* at 665 (citing MISS. CONST. of 1868, art. IV, § 7).

[212] *Id.* (acknowledging that "the constitution is silent as to the year in which the election is to be held").

[213] *See id.* at 665–66.

[214] *Id.* at 666.

[215] *Id.*

[216] *Id.*

[217] *See id.*

[218] *Id.* at 666–67 (holding that, since the state constitution could not limit Congress's power to schedule Mississippi's congressional elections, the state constitution should not "have that effect, when the legislature has supplied the omission of Congress to prescribe the time for the election of members to the national legislature"); *id.* at 681 (Simrall, J., concurring) (recognizing that a state constitutional convention "could not fix absolutely and permanently the time of electing representatives in Congress").

under the Elections Clause to determine when congressional elections would be held.

Thus, in the few examples throughout the nineteenth century where state supreme courts squarely confronted the independent state legislature doctrine, they invariably accepted it. Different states applied the doctrine at different times throughout the century to a wide variety of issues. The next Part demonstrates that, throughout that same period, Congress generally was just as accepting of the doctrine.

IV. CONGRESSIONAL PRECEDENTS

During the nineteenth century, both chambers of Congress endorsed and applied the independent state legislature doctrine.[219] Most examples arose in the context of the House's or Senate's exercise of its authority under Article I, § 5 of the Constitution to resolve election contests concerning its members.[220] The Senate also embraced the doctrine when considering potential reforms to the electoral college.[221]

As this Part demonstrates, when Congress applied the doctrine, it faithfully distinguished between regulation of the "Manner" in which congressional elections were held, which was subject to the legislature's plenary power under the Elections Clause[222] (and not subject to review under state constitutions[223]), and voter qualifications for congressional elections, which were within the power of the state as an entity under the Voter Qualifications Clause[224] (and therefore could be controlled by state

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[219] Despite this history, Congress, too, largely abandoned the doctrine by the early twentieth century. *See, e.g.*, DAVISON VS. GILBERT, H.R. REP. NO. 56-3000, at 1 (1901) (reporting that a state law creating congressional districts "was not in contravention of the Kentucky constitution, and . . . was, as far as we have authority to inquire, properly passed by the legislature"), *no subsequent House action.*

[220] U.S. CONST. art. I, § 5 (providing that each chamber of Congress may determine the "Elections, Returns and Qualifications" of its members).

[221] *See infra* Section IV.D.

[222] U.S. CONST. art. I, § 4, cl. 1.

[223] *See infra* Sections IV.A–IV.D.

[224] U.S. CONST. art. I, § 2, cl. 1 (stating that voters for members of Congress "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

constitutions[225]). Consistent with the doctrine, the chambers of Congress generally declined to enforce state constitutions' substantive restrictions on the scope of legislatures' authority over federal elections. The chambers nevertheless typically enforced state constitutions' procedural requirements concerning the legislative process that legislatures had to follow to exercise that power. Thus, the House enforced procedural provisions of state constitutions requiring bills to be read a certain number of times or over a certain number of days,[226] while the Senate Committee on Privileges and Elections recommended enforcing state constitutions' procedures governing legislatures' appointments of U.S. Senators.[227]

There were several contests in which the House acknowledged that one of the parties had invoked the doctrine, but found it unnecessary to address the issue because the contest could be resolved on other grounds.[228] There were also a few cases in which, rather than invoking the doctrine, the chamber simply rejected a state constitutional challenge on the merits, especially when the challenge was insubstantial and could be summarily rejected.[229] It

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[225] *See infra* Section IV.E.

[226] CALIFORNIA CONTESTED-ELECTION CASES, H.R. REP. NO. 49-2338, at 1, 4–5 (1886) (deferring to a decision of the California Supreme Court upholding the state's new congressional districts, because a state constitutional provision requiring bills to be read before the legislature three times did not apply to amendments to pending bills), *resolutions proposed by committee report adopted without debate*, 17 CONG. REC. 4381 (1886).

[227] DAVID T. CORBIN AND M.C. BUTLER, S. REP. NO. 45-707, at 12, 21 (1879) (majority report) (concluding that the South Carolina House of Representatives had satisfied the South Carolina constitution's quorum requirements at the time it appointed a U.S. Senator), *election contest withdrawn*, 8 CONG. REC. 2028 (1879).

[228] *See, e.g.*, F.M. DAVIS V. T.W. SIMS, H.R. REP. NO. 58-1382, at 10 (1904) (stating that it was unnecessary to decide "whether the Federal Constitution can confer upon a State legislature a power to act in conflict with the State constitution"), *resolution proposed by committee report adopted*, 38 CONG. REC. 2809 (1904); *see also* 38 CONG. REC. 2805 (1904) (statement of Rep. Olmsted) ("We have not . . . found it necessary . . . to pass upon the proposition . . . that . . . the legislature derives its power to fix the time, place, and manner of holding elections for Senators and Representatives from the Federal Constitution and can not be controlled by the State constitution in the exercise of that power.").

[229] *See* DAVISON VS. GILBERT, H.R. REP. NO. 56-3000, at 1 (1901) (finding "no difficulty in arriving at the conclusion that [the relevant state election law], was not in contravention of the Kentucky constitution"), *no subsequent House action*; NATHAN FRANK AGAINST JOHN M. GLOVER, H.R. REP. NO. 50-1887, at 2 (1888) (stating that the committee was "united in the opinion that the [state] law [was] constitutional"), *resolutions proposed by committee report*

appears that the House Committees on Elections preferred demonstrating that congressional elections were held in compliance with both the state constitution and state statute, when possible. Where unavoidable conflicts arose concerning the time, place, or manner of congressional elections, however, state statutes controlled over state constitutions.

In the twentieth century, the chambers of Congress did not expressly repudiate the doctrine, but instead reformulated it into a discretionary refusal to consider state constitutional challenges to the validity of state laws regulating federal elections.[230] For example, in *Gerling v. Dunn*, the contestant challenged the election on the grounds that New York's use of voting machines violated the state constitution.[231] The House Committee on Elections declined to consider the issue, declaring, "It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution."[232] In extreme cases of pervasive, structural

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adopted without debate, 19 CONG. REC. 5182–83 (1888); MCLEAN VS. BROADHEAD, H.R. REP. NO. 48-2613, at 4 (1885) ("The [state] constitution commands the general assembly to enact a registry law, and in order to compel obedience to the law the legislature clearly had the right to say that the failure to register should be conclusive evidence that such person was not a legal voter."), *no subsequent House action*.

[230] *See, e.g.*, ELECTION CONTEST CASE OF WALTER B. HUBER, CONTESTANT, AGAINST WILLIAM H. AYRES, CONTESTEE, FOURTEENTH CONGRESSIONAL DISTRICT OF OHIO, H.R. REP. NO. 82-906, at 2 (1951) (majority report) (dismissing an election challenge for failure to exhaust state-law remedies, where the contestant alleged that the ballot order of congressional candidates' names had not been rotated as required by the state constitution), *resolution proposed by committee report adopted without debate*, 97 CONG. REC. 10,479 (1951).

[231] CONTESTED ELECTION CASE, GERLING V. DUNN, H.R. REP. NO. 65-1074, at 2 (1919), *resolution proposed by committee report adopted without debate*, 57 CONG. REC. 3578 (1919).

[232] *Id.* at 2; *see also* CONTESTED ELECTION CASE OF JAMES D. SALTS V. SAM C. MAJOR, H.R. REP. NO. 66-961, at 4 (1920) (declining to consider the contestant's argument that a state law requiring ballots to be numbered in a manner that allowed the voters who cast them to be identified violated the state constitution), *resolutions proposed by committee report adopted*, 59 CONG. REC. 7231 (1920). Less notably, the House would also decline to consider state constitutional violations when the party raising the issue could not show they were sufficient to affect the election's outcome. *See, e.g.*, CONTESTED ELECTION CASE OF CAMPBELL V. DOUGHTON, H.R. REP. NO. 67-882, at 7 (1922) ("[W]hen acts alleged to have violated the provisions of a State constitution do not appear to have changed the result, either by themselves or in combination with statutory misdemeanor, the House is not justified in declaring a seat vacant."), *debated without a vote*, 62 CONG. REC. 7808–18 (1922).

unfairness, however, the twentieth century House nevertheless enforced state constitutional restrictions.[233] Thus, Congress—like state courts—has substantially changed its approach to the independent state legislature doctrine since the nineteenth century.

A. THE PLACE AND MANNER OF ELECTIONS

The best-known example of a chamber of Congress applying the independent state legislature doctrine is *Baldwin v. Trowbridge*[234]—the election contest that the majority and dissenting opinions in *Arizona Independent Redistricting Commission* debated.[235] The Michigan Constitution provided that a person must "offer[] to vote" in the "township or ward" of his residence.[236] In 1864, because many Michigan residents were fighting outside of the state in the Civil War, the legislature passed a law allowing any qualified voter serving in the military to vote, "whether at the time of voting he shall be within the limits of this State or not."[237] Many soldiers cast absentee ballots from other states.[238]

The House Committee on Elections explained that, if the absentee votes were counted, Trowbridge would prevail; if they were excluded, Baldwin would win.[239] The Committee recognized the conflict between the state constitution, which required people to vote in person, and the state statute, which permitted absentee

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[233] *See, e.g.*, CONTESTED-ELECTION CASE OF PAUL V. HARRISON, H.R. REP. NO. 67-1101, at 9 (1922) ("[T]here was such an utter, complete and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia involving the essentials of a valid election, that . . . there was no legal election in those precincts."), *resolutions proposed by committee report adopted*, 64 CONG. REC. 545–47 (1922).

[234] H.R. REP. NO. 39-13, at 3 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[235] *Compare* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818–19 (2015) (rejecting *Baldwin*'s relevance), *with id.* at 838 (Roberts, C.J., dissenting) (citing *Baldwin* to demonstrate the independent state legislature doctrine's historical pedigree).

[236] H.R. REP. NO. 39-13, at 1 (quoting MICH. CONST. art. VII, § 1).

[237] *Id.* (quoting Act of Feb. 5, 1864).

[238] *Id.* ("Under this act . . . a large number of votes were cast by soldiers outside the limits of the State.").

[239] *Id.* at 1–2.

voting.[240] It then observed that the Elections Clause grants power to regulate congressional elections specifically to the state's legislature.[241] It declared that the term "legislature" does not refer broadly to the "legislative power of the State," but rather specifically to "the legislature *eo nomine*, as known in the political history of the country."[242] The Committee added that the Constitution's other mentions of a "legislature" refer exclusively to institutional state legislatures.[243] The term does not include a state's constitutional convention.[244]

Moreover, even if state constitutional provisions governing federal elections were presumptively enforceable in the absence of legislation on an issue, they could not limit the institutional legislature's authority under the Elections Clause to enact its own contrary laws.[245] At most, a state constitutional provision specifying the place where voters must cast their ballots was enforceable as a default rule until superseded by a statute from the legislature. The Committee also noted that rules concerning the location of polling places concerned the "place" of elections, rather than voter qualifications which the Elections Clause does not empower the legislature to regulate.[246] Accordingly, because the state constitution could not circumscribe the institutional legislature's authority under the Elections Clause to regulate the place of elections, the state law authorizing absentee voting was valid. Accordingly, the Committee recommended that the House seat Trowbridge.[247] The Committee's dissenting members also issued a

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[240] *Id.* at 2 (noting that the state constitution "plainly prohibits what the legislature as plainly permits").

[241] *Id.* (noting that "power is conferred upon the *legislature*" under the Elections Clause).

[242] *Id.*

[243] *Id.* at 2–3.

[244] *See id.* at 2 (explaining that the "framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law," and that "the words 'legislature' and 'convention' are both used to denote different legislative bodies").

[245] *Id.* at 3 ("[T]he people of Michigan had no power to enlarge or restrict the language of the constitution of the United States.").

[246] *Id.* (acknowledging that states may exercise "the power to prescribe the qualifications of electors . . . by an organic convention," but rejecting the premise that "the place of holding the election for a representative in Congress may be prescribed as one of the electoral qualifications").

[247] *Id.*

minority report that rejected the independent state legislature doctrine and contended that the Michigan Constitution precluded counting the absentee votes.[248]

During floor debates, several representatives defended Trowbridge's right to be seated, expressly endorsing and applying the independent state legislature doctrine.[249] Representative Beaman, for example, declared that the absentee voting law was valid as applied to federal elections, regardless of whether it violated the state constitution and even if it was unenforceable in state and local races.[250] "Michigan cannot control nor limit an express provision of the [U.S.] Constitution," he added.[251] The House voted overwhelmingly against the minority report's recommendations by a vote of 30–108, with forty-four members not voting.[252] The House then seated Trowbridge in accordance with the majority report by voice vote.[253]

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[248] BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-14, at 5 (1866) (dissenting report).

[249] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 816 (1866) (statement of Rep. Beaman) ("The Legislature, in providing the times, places, and manner of elections of Representatives, does not derive its authority from the people of the State through their constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the constitution of the State, but it is conferred directly upon the Legislature."); *id.* (reiterating that a legislature's power to regulate federal elections is "placed beyond the control of State constitutions"); *id.* at 845 (statement of Rep. Shellabarger) (contending that, because the legislature receives its power to regulate federal elections from the Elections Clause, allowing the legislature to change election details set forth in the state constitution "do[es] not override the constitution of any State"); *see also id.* at 841 (statement of Trowbridge) (contending that a state constitution may not "obtain a control" over the authority to determine the time, place, and manner of federal elections that "it is expressly restrained and prohibited from exercising" under the Elections Clause); *id.* at 844 (statement of Rep. Scofield) ("[T]he Constitution of the United States is supreme, and that . . . of Michigan must yield."); *id.* (statement of Rep. Davis) (explaining that the U.S. Constitution "took away from every State constitution any power which conflicted [with it]").

[250] *Id.* at 816 (statement of Rep. Beaman) (arguing that a state constitutional provision "in conflict with the act of the Legislature, which had the authority, sanction, and command even of the Federal Constitution . . . was absolutely null and void").

[251] *Id.* Beaman also recognized the distinction between voter qualifications for congressional elections, which were subject to state constitutional restrictions, and "times, places, and manner" regulations, which were not. *Id.* at 817; *see also id.* at 843 (statement of Rep. Scofield) ("The *Legislature*, by the Constitution of the United States, fixes the place where the ballot-box shall be kept; that is, where the election shall be held. The *State* fixes the qualification of voters . . . ." (emphasis added)).

[252] *Id.* at 845.

[253] *Id.*

Despite the U.S. Supreme Court's skepticism about the validity of *Baldwin*,[254] the precedent powerfully supports the independent state legislature doctrine. The doctrine's applicability was the only issue in the election contest: it was the focus of both the majority and minority reports of the House Committee on Elections, and the House held extensive floor debates over the doctrine for more than two days.[255] The contest involved a direct and dispositive conflict between a state constitutional provision and a state statute regulating a federal election. A decisive majority of the House concluded that the Elections Clause required it to follow the state statute rather than the contrary state constitutional provision.

Baldwin distinguished a precedent that the minority report claimed had rejected the independent state legislature doctrine: *Shiel v. Thayer*.[256] In *Shiel*, the Oregon state constitution had required general elections, including for U.S. Representative, to be held biennially, on the first Monday of June, starting in 1858.[257] Shiel received a majority of votes at a congressional election held in June 1860.[258] Thayer had won a majority of votes at another congressional election held the following November.[259] The latter election had been conducted simultaneously with Oregon's presidential election without any apparent statutory or constitutional authorization.[260] The majority of the House Committee on Elections held that the June election was the only congressional election authorized by any state legal provisions.[261] It went further, however, declaring that the state constitution placed

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[254] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818 (2015) ("[I]t was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision.").

[255] *See supra* notes 236–253 and accompanying text.

[256] *See* BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-13, at 3 (1866) (majority report) (citing GEORGE K. SHIEL VS. ANDREW J. THAYER, H.R. REP. NO. 37-4 (1861), *resolutions proposed by committee report adopted*, CONG. GLOBE, 37th Cong., 1st Sess. 357 (1861)), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[257] SHIEL, H.R. REP. NO. 37-4, at 2.

[258] *Id.* at 1.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 1–2 ("[T]he election held for representative in Congress on the first Monday in June, 1860, was held in pursuance of, and in conformity with, the constitution and laws of Oregon . . . .").

the time for holding congressional elections "beyond the control of the legislature."[262] Accordingly, it concluded that Shiel was entitled to be seated.[263]

Neither the Committee nor the floor debate in *Shiel* mentioned the Elections Clause, discussed the Constitution's delegation of power to state legislatures, or considered the independent state legislature doctrine.[264] Moreover, the Committee's assertion about state constitutions was dicta because the election contest did not involve a conflict between a state constitution and state statute.[265] *Baldwin* partly endorsed *Shiel* by recognizing that a state constitutional convention could be considered a legislature, thereby making the state constitution a default source of law regulating congressional elections.[266] But, contrary to *Shiel*, *Baldwin* concluded that a state constitutional convention would have no authority to preclude the institutional legislature from exercising its power under the Elections Clause to change the rules governing congressional elections.[267] Thus, *Baldwin* interprets *Shiel* to mean that state constitutional provisions may govern federal elections in the absence of contrary statutes, but they cannot limit the scope of an institutional legislature's power.

Shiel is the strongest piece of evidence against the notion that the independent state legislature doctrine embodied the prevailing understanding of the Elections Clause in the nineteenth century. The fact that the Elections Committee did not consider the issue in *Shiel* cuts both ways, however. On the one hand, the House's apparent willingness to accept the Committee's reasoning suggests

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[262] *Id.* at 3.

[263] *Id.*

[264] *See id.* at 1–3.

[265] *Id.* at 3 (noting that a bill to reschedule congressional elections during presidential election years "never became a law"); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that *Shiel* "did not involve a conflict between a state legislative act and a state constitutional provision").

[266] BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-13, at 3 (1866) (stating that Michigan's state constitutional convention might "be considered a *legislature by construction*"), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[267] *Id.* (concluding that, even if the Elections Clause allowed a state constitutional convention to include rules governing congressional elections in the state constitution, such provisions could not "tie the hands of [the convention's] successors" by restricting the institutional legislature's authority to adopt different rules).

that the doctrine may not have been universally accepted. On the other hand, the fact that the Elections Clause was not even discussed undermines *Shiel*'s persuasiveness as a precedent for construing that provision. Had the Clause been raised, the House would have had to explicitly grapple with its language and meaning.

A final precedent that offers far less insight into the independent state legislature doctrine's vitality is *Donnelly v. Washburn*.[268] In that contest, the House Committee on Elections concluded that the contestant was not entitled to the seat at issue, but could not reach a consensus on whether the prevailing candidate was entitled to retain his seat.[269] Moreover, the Committee could not coalesce around a majority report, but rather issued two reports, each signed by five members.[270] The House ultimately did not take any action in the matter.[271]

In *Donnelly*, the congressional election in Minnesota's third congressional district had been infested with bribery, intimidation, and voter fraud.[272] State law required Minneapolis and St. Paul to number their ballots.[273] Prior to the election, a state trial court had held that this law violated the Minnesota Constitution's requirement that elections be conducted by ballot.[274] The court inferred that the state constitution implicitly required ballots to be secret, unmarked, and untraceable to particular voters.[275] Pursuant to that ruling, election judges in both cities met and decided not to number ballots.[276] Election judges in seven precincts in Minneapolis, however, nevertheless wrote voters' registration numbers on their ballots.[277] This decision raised concerns about

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[268] H.R. REP. NO. 46-1791 (1880), *recommitted to committee*, 10 CONG. REC. 4622 (1880).

[269] 2 HINDS' PRECEDENTS, *supra* note 62, § 945, at 231.

[270] *Compare* H.R. REP. NO. 46-1791, at 1–32 (report submitted by Rep. Manning), *with id.* at 33–79 (minority report submitted by Rep. Keifer); *see also* 10 CONG. REC. 4621 (1880) (statement of Rep. Manning) (calling the initial report the "views of certain members of the committee"); *id.* (statement of Rep. Keifer) (emphasizing that neither report was "signed by a majority of the committee").

[271] *See* 10 CONG. REC. 4622 (1880) (recommitting the report to the committee).

[272] H.R. REP. NO. 46-1791, at 13–14 (report submitted by Rep. Manning) (discussing bribery); *id.* at 16, 21–23 (discussing intimidation); *id.* at 24–31 (discussing fraud).

[273] *Id.* at 17.

[274] *Id.* at 18.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 19.

voter intimidation, due to the possibility that votes could be traced back to the people who had cast them.[278]

One of the reports issued by the Committee on Elections, submitted by Representative Manning, agreed that numbering ballots violated the state constitution, but nevertheless rested its analysis on the "broader foundation[]" that the numbered ballots were "incompatible with an honest, fair, and free election" because they had been numbered "for a corrupt and dishonest purpose."[279] That report concluded that certain judges had decided to number ballots to intimidate workers by making their votes identifiable.[280]

The other report—misleadingly labeled "Views of a Minority,"[281] even though it was signed by the same number of members—argued that the statute's validity under the state constitution was irrelevant.[282] This report, signed by Representative Keifer, explained that a state legislature receives its authority to regulate congressional elections from the Elections Clause, not the state constitution.[283] The report elaborated:

> The State legislature is not . . . controlled by the State constitution, in its action in regard to the manner of holding Federal elections. In case of a conflict between the act of a legislature and the constitution of the State in matters purely of a Federal character, the act of the legislature will prevail, provided it is not in conflict with the Constitution of the United States.[284]

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[278] *Id.* at 20 ("[The ballot numbering] was done to prevent a fair election, and to give the employers of workingmen an opportunity to still further intimidate them by preserving a record of how the men voted whose means of life depended upon the good-will of those who employed them . . . .").

[279] *Id.* at 18.

[280] *Id.* at 20.

[281] *Id.* at 33 (minority report submitted by Rep. Keifer).

[282] *Id.* at 58 ("Your committee need not . . . consider whether this law is unconstitutional or not . . . .").

[283] *Id.* ("The legislature of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from . . . the constitution of the State, but this right and power is derived exclusively from [the Elections Clause].").

[284] *Id.*

The House recommitted the matter to the Committee without voting on the competing reports' resolutions.[285] This precedent is of little value in determining the House's attitude toward the independent state legislature doctrine for several reasons. First, the Committee on Elections issued two reports. The Keifer report, which embraced the doctrine, was signed by as many members as the Manning report, which did not discuss it.[286] Second, the Manning report rested its conclusion on concerns about voter intimidation, rather than the unconstitutionality of the state ballot-marking law.[287] It neither considered nor rejected the independent state legislature doctrine, but rather ignored it. Finally—and most importantly—since the House apparently never voted on the matter, it is impossible to know which report it would have adopted.

B. THE TIMING OF ELECTIONS

1. West Virginia (1872). The House expressly relied upon the independent state legislature doctrine in resolving a dispute over the timing of the 1872 elections for West Virginia's first and second congressional districts.[288] State law specified that the "general election" for all state and local offices "shall be held on the fourth Thursday of October" each year.[289] Representatives to Congress were to be chosen "[a]t the said elections" every other year.[290] A state constitutional convention proposed a new constitution specifying that any state laws in force that were "not repugnant" to it would remain in effect upon ratification, unless the legislature amended or repealed them.[291] The convention also adopted a schedule requiring that an election be held in late August 1872 to allow voters to ratify both the new constitution and the schedule itself.[292] The

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[285] 10 CONG. REC. 4622 (1880).

[286] *Compare* H.R. REP. NO. 46-1791, at 32 (Manning report), *with id.* at 79 (Keifer report).

[287] *Id.* at 19–20 (Manning report).

[288] *See* WEST VIRGINIA CONTESTED ELECTIONS, H.R. REP. NO. 43-7, at 1 (1874) (majority report), *resolutions proposed by committee report rejected*, 2 CONG. REC. 962–63 (1874); *see also id.* at 19–20 (minority report of Rep. Hazelton), *resolutions proposed by minority report adopted*, 2 CONG. REC. 963–64 (1874).

[289] H.R. REP. NO. 43-7, at 1 (majority report) (citing W. VA. CODE § 3(1)).

[290] *Id.* (citing W. VA. CODE § 3(2)).

[291] *Id.* at 2 (citing W. VA. CONST. art. VIII, § 36).

[292] *Id.* at 1–2.

schedule further specified that elections would also be held at that time for state and local offices under the new constitution.[293]

The proposed schedule's effect on congressional elections was unclear, so the state held two elections: one in August, concurrently with the ratification vote, and another in October, consistent with state law.[294] The voters ratified the new state constitution in the August election.[295] In addition, a total of approximately 26,300 votes were cast in the congressional election in the first district, with John J. Davis prevailing, and over 4,000 in the second district, with J.M. Hagans prevailing.[296] In the October congressional election, only 4,100 votes were cast in the first district, with Benjamin Wilson prevailing, but nearly 6,000 votes were cast in the second district, with B.F. Martin prevailing.[297] The governor issued certificates of election to all four men,[298] and an election contest was filed with the House to decide which results were valid.[299]

The House referred the matter to the Committee on Elections.[300] The majority on the Committee concluded that neither the state constitution nor the accompanying schedule addressed the timing of congressional elections.[301] The legislature, however, had "implicitly obeyed the requirement" of the Elections Clause by enacting a statute "prescrib[ing]" a "day certain" for electing Representatives to the House: the fourth Thursday in October.[302] Since that law remained in effect under the new constitution, the majority recommended that Congress seat Wilson and Martin based on the results of the October election.[303]

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[293] *Id.* at 1.

[294] *Id.* at 1–2.

[295] *Id.* at 1.

[296] *Id.* at 2.

[297] *Id.*

[298] *Id.*

[299] *Id.* at 1.

[300] *Id.*

[301] *Id.* at 4 (describing how "[t]he new constitution did not in terms . . . [or] *by implication*, remove the election of Representatives in Congress . . . from the day fixed" by state law, which was in October); *id.* at 8 (noting that the Committee did not "think that [the schedule] authorized or undertook to authorize the election of Representatives in Congress" during the August ratification election).

[302] *Id.* at 3.

[303] *Id.* at 9.

Representative Speer drafted a minority report on behalf of two other committee members, concurring in the majority's conclusions.[304] Centered around the independent state legislature doctrine, the concurring report began by recognizing that a state legislature derives its power to hold and regulate congressional elections "not from the constitution of the State, but from the Constitution of the United States."[305] The Elections Clause "expressly committed to the legislature of each State the power to prescribe the time of holding congressional elections, subject only in its exercise to the higher power of Congress."[306] Consequently, "there was no power in the State, or out of it, competent to change the time" set by the legislature for congressional elections, "except Congress and the legislature itself."[307] Speer went on to emphasize that the state constitutional convention "had no authority at all to name a day for congressional elections," much less one that differed from that set by the legislature.[308]

Speer agreed with the majority that the draft constitution did not purport to change the time for holding congressional elections.[309] He went on to declare that any attempt to set a new date for congressional elections in the state constitution would have been "unauthorized and void."[310] He explained:

> The State constitution had not given to the legislature the power to say when Congressmen shall be elected, (for it did not have [such power] to give,) [*sic*] and neither State constitution nor State convention could take it away. The legislature derived it from *the*

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[304] *Id.* at 11 (minority report of Rep. Speer).

[305] *Id.* at 13.

[306] *Id.* at 11; *see also id.* at 13 ("The legislature alone, under the Constitution of the United States, was competent to prescribe the time [of congressional elections] . . . .").

[307] *Id.* at 12.

[308] *Id.*; *see also id.* at 13 (arguing that, because the legislature's authority to schedule congressional elections came from the U.S. Constitution, "it was beyond the reach of the State convention . . . to limit, modify, or control in any way the exercise of this power").

[309] *Id.* at 16 ("The convention did not touch the subject of congressional elections, but left it just where the legislature had placed it.").

[310] *Id.*

> *supreme law of the land*, the Constitution of the United States, and in its exercise it knew but one master.[311]

Speer concluded that state law required congressional elections to be held on the fourth Tuesday in October.[312]

Representative Hazelton issued another minority report which was more in the nature of a dissent, concluding that only the August election was legitimate.[313] It interpreted state law to require that congressional elections be held simultaneously with the general election for state and local offices.[314] Hazelton's minority report reasoned that, since no general election had been held in late October, state law did not allow congressional elections to occur at that time.[315] Conversely, since a general election for state and local offices had been held in August simultaneously with the ratification vote, state law required congressional elections to be held then, as well.[316] The report emphasized that, even under this approach, it was still the institutional legislature itself that had "prescribed" the time of the congressional election, as required by the Elections Clause under the independent state legislature doctrine.[317]

When the House debated the conflicting reports, numerous representatives—supporting candidates on both sides of the election contest—expressly embraced the independent state legislature doctrine.[318] For example, Representative Lamar

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[311] *Id.* at 17.

[312] *Id.* at 12–13.

[313] *Id.* at 19–20 (minority report of Rep. Hazelton), *resolutions proposed by minority report adopted*, 2 CONG. REC. 963–64 (1874).

[314] *Id.* at 20 (concluding that, under state law, "[t]he election of Representatives in Congress was hinged on to the State election. It was a mere incident of the State election.").

[315] *Id.*

[316] *Id.* at 21 ("It being, we think, clearly the purpose of the legislature that Representatives in Congress should be elected at the general election, it follows that when the occasion was changed, transplanted, the election of Representatives in Congress went with it.").

[317] *Id.* at 23 ("Even if we concede that the word 'prescribe' [in the Elections Clause] shall have here its narrowest and most technical signification, there seems to us to have been a sufficient prescription of the time [by the legislature].").

[318] *See, e.g.*, 2 CONG. REC. 878 (1874) (statement of Rep. Todd) (explaining that, while the state constitution's provisions concerning the timing of elections for state and local offices were binding on the legislature, the Elections Clause designated the legislature "as the one competent authority, specifically to fix and prescribe a time, place, and manner for the election of Representatives in Congress"); *id.* at 887 (statement of Rep. Thomas) (arguing that

declared that, "in requiring the Legislature to prescribe the time of holding the congressional election[,] [the Elections Clause] meant to exclude the idea that a [state constitutional] convention should be invested with that important power."[319] Representative Todd elaborated:

> The law providing for and regulating the election of State officers has its source in the State constitution; that for the election of congressional Representatives in the Constitution of the United States. Each is imperative and absolute within its own sphere, and may and do have entire freedom of action, without jostling or infringing on each other . . . .[320]

These representatives argued that only the institutional legislature itself—rather than the state's constitutional convention or even the state constitution—could set the "time" of congressional elections.[321]

Due to the general consensus that the Elections Clause allowed only the legislature—rather than the state constitutional convention or the state constitution—to set a date for congressional elections, the contest turned on a question of statutory

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a state constitutional convention lacks authority to "repeal or alter . . . a statute of this kind providing, in obedience to the national Constitution, for the election of Representatives in Congress"); *id.* at 934 (statement of Rep. Wilson) (arguing that, if the state constitutional convention had intended to move congressional elections to August, it "would not be a compliance with the mandate of the Federal Constitution, that the legislative power shall prescribe the time for such election"); *see also id.* at 884 (statement of Rep. Hyde) (explaining that "a constitutional convention, with its powers limited by a former constitution and by the act creating it, . . . is not a Legislature within the meaning of [the Elections Clause]," and therefore cannot regulate congressional elections); *id.* at 958 (statement of Rep. Butler) (noting that determining when congressional elections would be held was within the "constitutional province" of the legislature, rather than a constitutional convention).

[319] *Id.* at 846 (statement of Rep. Lamar).

[320] *Id.* at 878 (statement of Rep. Todd).

[321] *Id.* at 844 (statement of Rep. Lamar); *see also id.* at 889 (statement of Rep. Harrison) (explaining that, to find the August congressional election valid, the House must "find some warrant for it in an act of the Legislature," because of the Elections Clause); *id.* at 848 (statement of Rep. Danford) (emphasizing that the state legislature complied with the Elections Clause by enacting statutes governing the time and manner of congressional elections); *id.* at 932 (statement of Rep. Crossland) ("The Legislature of the State is the only body in the State that is authorized by the Constitution to prescribe the times and places for holding congressional elections . . . ."); *accord id.* at 933–34 (statement of Rep. Wilson).

interpretation. The House, adopting Hazelton's minority view, ultimately concluded that the August election was valid and voted 134–82–70 to seat Davis and 115–75–97 to seat Hagans.[322]

2. Iowa (1878). The House relied on the independent state legislature doctrine again only a few years later to resolve a similar dispute concerning two districts' results in Iowa's 1878 congressional elections.[323] A federal law that Congress enacted in 1872, which entered into effect in 1876, generally required states to hold congressional elections in November.[324] The Governor of Iowa, however, believed the state fell within an exception in the statute and held the election in October instead.[325] Approximately 30,000 votes were cast in each of the two contested districts, with Cyrus C. Carpenter and William F. Sapp receiving the most votes in their respective races.[326] Residents of several towns within those districts disagreed with the governor's interpretation of federal law and believed that congressional elections had to be held in November.[327] They held their own private elections, with no involvement from any "regularly-appointed" governmental officials besides one town clerk.[328] A few hundred votes were cast between the two districts, and J.C. Holmes and John J. Wilson prevailed.[329]

The majority of the House Committee on Elections began by determining when Iowa law required elections be held.[330] It relied solely on state law, expressly ignoring state constitutional provisions governing the timing of congressional elections.[331] The Committee explained that the Elections Clause gives state legislatures the power to determine the "time" of congressional elections, and a state constitution "cannot take this power from the

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[322] *Id.* at 963–64.

[323] IOWA CONTESTED ELECTIONS CASES, H.R. REP. NO. 46-19, at 1–18 (1880) (majority report), *resolutions proposed by committee report adopted*, 11 CONG. REC. 1074 (1881).

[324] Act of Feb. 2, 1872, ch. 11, §§ 3–4, 17 Stat. 28, 28–29; *see also* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 198–203 (2020) (discussing the statute's legislative history).

[325] H.R. REP. NO. 46-19, at 8.

[326] *Id.* at 1–2, 4, 7.

[327] *Id.* at 3–5.

[328] *Id.* at 4–6.

[329] *Id.* at 5–7.

[330] *Id.* at 17–18.

[331] *Id.* at 18.

legislature of a State . . . ."[332] Consequently, the Committee "disregard[ed] altogether the provision for the election of members of Congress found in . . . the constitution of Iowa."[333] Regardless of the intent underlying the state constitution, "the time of electing members of Congress cannot be prescribed by the *constitution* of a State."[334] The Committee agreed with the governor's conclusion that state law required congressional elections to be held in October and that federal law did not mandate a different date.[335] The House seated Sapp and Carpenter in accordance with the Committee's recommendation by voice vote without debate.[336]

C. SELECTING U.S. SENATORS

During the nineteenth century, the U.S. Senate similarly applied the independent state legislature doctrine to the other type of congressional "election" mandated by the Constitution at the time: direct appointment of U.S. Senators by state legislatures.[337] The Elections Clause's grant of authority to state legislatures to determine the time, place, and manner of congressional elections extended to a legislature's own selection of U.S. Senators.[338] Thus, the Constitution specifically empowered the legislature itself—rather than the state as a whole—to both elect the state's U.S. Senators and determine the manner in which it would go about such elections. The state constitution could not limit the substantive scope of that authority.

In 1887, one of West Virginia's seats in the U.S. Senate became vacant because the legislature had not agreed upon a new senator by the time the sitting senator's term expired.[339] The governor appointed Daniel B. Lucas to serve as senator until the legislature

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[332] *Id.* at 9.

[333] *Id.* at 18.

[334] *Id.*

[335] *Id.* at 17–18.

[336] 11 CONG. REC. 1074 (1881).

[337] U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment, allowing the people to elect U.S. Senators, was not adopted until the early twentieth century. *Id.* amend. XVII.

[338] *Id.* art. I, § 4, cl. 1.

[339] S. REP. NO. 50-1, at 2 (1887), *resolutions proposed by committee report adopted without debate*, 19 CONG. REC. 54 (1887).

appointed a replacement.[340] The governor separately called a special session of the legislature to deal with eleven specified issues, none of which included filling the U.S. Senate seat.[341] The West Virginia Constitution specified that, when the governor convenes a special session of the legislature, "it shall enter upon no business, except that stated in the proclamation by which it was called together."[342] During the special session, the legislature nevertheless voted to elect Charles J. Faulkner to the seat.[343]

Even though the West Virginia legislature's election of Faulkner during a special session violated the state constitution, the Senate Committee on Privileges and Elections sided with him.[344] The Committee concluded the state constitution's requirement that special legislative sessions adhere to the issues identified in the governor's proclamation applied only to "business to be transacted under authority of the State constitution."[345] State constitutional restrictions did not apply to the legislature's "performance of duties imposed upon it by the supreme authority of the Constitution of the United States."[346] The Senate unanimously adopted the resolutions proposed by the Committee without debate.[347]

New Jersey's attempted appointment of John Stockton to the U.S. Senate in 1865 provides even stronger support for the independent state legislature doctrine because senators on both

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[340] 19 CONG. REC. 1 (1887) (statement of President Pro Tempore).

[341] *Id.*

[342] W. VA. CONST. of 1872, art. VII, § 7.

[343] 19 CONG. REC. 1 (1887).

[344] S. REP. NO. 50-1, at 3–4.

[345] *Id.* at 3.

[346] *Id.* at 3–4.

[347] 19 CONG. REC. 54 (1887). Oregon's attempts to elect U.S. Senators by popular vote prior to the Seventeenth Amendment suggest that states were similarly unable to limit the authority that the U.S. Constitution granted to legislatures over senatorial appointments. The Oregon legislature enacted a law in 1908 requiring its members to pledge to vote to appoint whichever U.S. Senate candidate won the state's senate preference primary. Muller, *supra* note 29, at 723 (quoting ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 169 n.22 (1912)). Contemporaneous commentary called the measure "unconstitutional." *Id.* (quoting EATON, *supra* at 96). Although no lawsuit was ever brought, some legislators simply ignored the law in 1913 by voting for a U.S. Senate candidate who did not win the popular vote. *Id.* at 724.

sides of the dispute relied upon it.[348] Both the New Jersey Constitution and a New Jersey statute required the two chambers of the state's legislature to meet together in joint session to appoint U.S. Senators.[349] While sitting in joint session, the legislature adopted a rule providing that a plurality of votes would be sufficient to select a senator.[350] John P. Stockton won a plurality with forty out of eighty-one votes cast; the next highest candidate had only thirty-seven votes.[351] An election contest was filed, contesting the validity of Stockton's election on the grounds that he had not received a majority of votes in the joint session.[352]

The Senate Judiciary Committee's report began by expressly endorsing the independent state legislature doctrine. It declared, "The constitution of New Jersey does not prescribe the manner of choosing United States senators; as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature . . . ."[353] The Committee then explained that, while the legislature had enacted a law requiring it to select senators in joint session, that statute did "not prescribe any rules for the government of [that] joint meeting."[354] The Committee concluded that, because the "laws of New Jersey . . . authorize a joint meeting of the two houses of the legislature to appoint a senator," the legislature had implicitly authorized that joint meeting to decide for itself whether to elect senators by a plurality vote.[355] Consequently, the Committee recommended seating Stockton.[356]

At the end of the report, the Committee noted an alternate "plausib[le]" basis for its ruling: the joint session had power to determine its own rules because the New Jersey constitution

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[348] *See generally* S. REP. NO. 39-4 (1866), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 1601–02 (1866), *reconsideration granted and resolution rejected*, *id.* at 1677, 1679.

[349] *Id.* at 1; *accord id.* at 5–7 (reprinting Letter from N.J. Sen. W.W. Ware et al., to the U.S. Senate (Mar. 20, 1865)).

[350] *Id.* at 2.

[351] *Id.*

[352] *Id.* at 1.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 3.

[356] *Id.* at 4.

recognized it as the "legislature" for purposes of the Elections Clause.[357] The Committee expressly declined to accept that rationale, however.[358] Moreover, this reasoning does not imply that a state constitution may designate some entity outside of, and unrelated to, the institutional legislature as the "Legislature" for purposes of the Elections Clause. Elsewhere, the report emphasizes, "The right to choose United States senators in a joint meeting of the two houses which compose the legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning . . . ."[359] Thus, this proposed alternate rationale—which the Committee itself did not even adopt—may be construed as recognizing that a state constitution has some latitude in specifying which configuration of an institutional state legislature's chambers qualifies as the "legislature" for purposes of the U.S. Constitution. Regardless, the Committee recognized that a state constitution cannot impose substantive constraints upon whatever entity qualifies as the legislature concerning the manner of selecting U.S. Senators.[360]

The precedential value of the *Stockton* report is muddied by its subsequent history. Initially, the Senate voted twenty-two to twenty-one to adopt the report and seat Stockton.[361] A few days later, though, a senator objected that the vote was invalid because Stockton himself had participated.[362] The Senate voted again on the matter, rejecting Stockton by a vote of twenty to twenty-three.[363] Even Stockton's opponents, however, framed their arguments in terms of the independent state legislature doctrine. Senator Sherman, for example, declared that while the Elections Clause allows a legislature to "prescribe a plurality rule in the election of a Senator, a joint convention of the Legislature in the exercise of the law cannot do it."[364] Most senators who participated in the debates

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[357] *Id.*

[358] *Id.*

[359] *Id.* at 3.

[360] *See supra* note 353 and accompanying text.

[361] CONG. GLOBE, 39th Cong., 1st Sess. 1602 (1866).

[362] *Id.* at 1635 (statement of Sen. Sumner).

[363] *Id.* at 1677, 1679.

[364] *Id.* at 1677 (statement of Sen. Sherman); *see also id.* at 1668 (statement of Sen. Howard) (emphasizing that the Elections Clause delegates power to determine the manner of Senate

generally agreed that the Elections Clause allowed only the "Legislature" to determine the manner in which Senators would be appointed; they differed primarily on whether a joint session of the New Jersey Legislature could qualify as such.[365]

D. REFORMING THE ELECTORAL COLLEGE

The nineteenth century Senate also expressed support for the independent state legislature doctrine outside the context of election contests. In 1874, the U.S. Senate Committee on Privileges and Elections considered a potential constitutional amendment to require states to elect their presidential electors from electoral districts.[366] The report explained that state legislatures already could adopt this system, despite any restrictions in their state constitutions.[367] It stated that, under the Presidential Electors Clause, "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states."[368] This authority "cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States."[369] The Committee further emphasized, "Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."[370] The U.S. Supreme Court quoted the report approvingly in support of the independent state legislature doctrine in its 1892 ruling in *McPherson v. Blacker*.[371]

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elections to the institutional legislature, which is a different entity from the chambers of the legislature sitting in joint session).

[365] *See id.* at 1668–79.

[366] S. REP. NO. 43-395, at 2 (1874) (outlining the proposed amendment).

[367] *See id.* at 9.

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] 146 U.S. 1, 34–35 (1892).

E. LIMITS OF THE DOCTRINE: DISPUTES OVER VOTER QUALIFICATIONS

Congressional election contests throughout the nineteenth century also confirm one of the major limitations of the independent state legislature doctrine: state constitutions *may* limit a legislature's authority over voter qualifications for congressional elections.[372] As explained earlier, the independent state legislature doctrine arises for congressional elections from the Elections Clause,[373] which allows the "Legislature" of each state to determine their "Times, Places and Manner."[374] Separate constitutional provisions—the Voter Qualifications Clause[375] and the Seventeenth Amendment[376]—specify that anyone entitled to vote for the more populous branch of the state legislature is also eligible to vote in congressional elections.

Thus, the Elections Clause does not empower either Congress or state legislatures to directly set the qualifications that voters must possess to be eligible to vote in congressional elections.[377] Rather, the U.S. Constitution ties eligibility to vote in congressional elections to voting eligibility for state legislative races.[378] Because the U.S. Constitution does not grant the legislature exclusive authority to set voter qualifications in state legislative elections, the matter is left to the inherent control of the states themselves, as entities.[379] Consequently, state constitutions may establish voter qualifications for state legislative elections (and, by extension,

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[372] *See supra* note 62.

[373] *See supra* notes 43–47 and accompanying text.

[374] U.S. CONST. art. I, § 4, cl. 1.

[375] *Id.* art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[376] *Id.* amend. XVII.

[377] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013) (holding that authority to "[p]rescrib[e] voter qualifications" is neither "'conferred upon the national government' by the Elections Clause," nor "plac[ed] . . . within the unfettered discretion of state legislatures" (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton)); *see also* Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) (declaring that the Constitution does not "lend[] itself to the view that voting qualifications in federal elections are to be set by Congress").

[378] *See supra* notes 375–376 and accompanying text.

[379] *See Inter Tribal Council*, 570 U.S. at 17 (stating that neither the federal nor state franchise are "within the unfettered discretion of state legislatures").

congressional elections), and any state laws that conflict with such provisions are invalid and unenforceable.[380]

During the nineteenth century, the chambers of Congress observed this limitation on the independent state legislature doctrine. For example, in *Johnston v. Stokes*, the House Elections Committee concluded that South Carolina's voter registration statute violated the state constitution by impermissibly adding new voter qualifications.[381] Agreeing with this conclusion, the House concluded that the election was invalid and refused to seat any of the candidates.[382]

Curtin v. Yocum was a contest in which the House ultimately adopted the Election Committee's minority report, which recognized and enforced this restriction on the independent state legislature doctrine.[383] The Pennsylvania Constitution authorized the legislature to enact voter registration laws, but provided that "no elector shall be deprived of the privilege of voting by reason of his *name not being registered.*"[384] Pennsylvania law provided that an unregistered person could still vote if he presented affidavits from both the voter himself and another registered voter attesting to his eligibility.[385] A person who neither registered nor provided the required affidavits could not vote.

Despite this statute, election officials allowed several hundred people who neither registered nor provided the statutorily required affidavits to vote.[386] The Election Committee's majority report concluded that, because election officials had accepted votes that were invalid under the state constitution and state law, the election

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[380] *See supra* note 62.

[381] THOMAS B. JOHNSTON V. J. WILLIAM STOKES, H.R. REP. NO. 54-1229, at 14 (1896) (majority report) ("[T]he committee agree[s] that a part of the law is unconstitutional, being in violation of the constitution of the State of South Carolina."), *resolution proposed by committee report amended and adopted*, 28 CONG. REC. 5952 (1896); *id.* at 14 (statement of Rep. McCall, concurring) ("This provision is clearly repugnant to the constitution of South Carolina, which under the pretense of regulating suffrage imposes a new qualification upon it, and is therefore unconstitutional.").

[382] 28 CONG. REC. 5952 (1896).

[383] *See* CURTIN VS. YOCUM, H.R. REP. NO. 46-345, at 11–19 (1880) (submitting views of the minority), *resolution proposed by minority report adopted*, 10 CONG. REC. 3250–51 (1880).

[384] *Id.* at 2 (majority report).

[385] *Id.* at 4.

[386] *Id.* at 2.

results had to be discarded.[387] During floor debates, the majority report's primary proponent, Representative Beltzhoover, explained that the majority did not seek to act contrary to the state constitution by disenfranchising voters for failing to register.[388] Rather, the majority had concluded that the challenged votes were invalid because the unregistered voters had failed to provide the affidavits that state law permitted as an alternative to registration.[389]

The minority, in contrast, argued that the state constitution imposed "a limitation on the power of the legislature of the State."[390] Prohibiting people from voting because they were unregistered would violate the state constitution, even though state law allowed such voters to establish their eligibility through other means.[391] To avoid this constitutional infirmity, the minority construed state law as requiring election officials to count all votes except those from people who had been specifically asked to provide the required proof of eligibility and failed to do so.[392]

The minority report's author, Representative Calkins, explained during the floor debate that refusing to count the votes of people who had neither registered nor provided affidavits confirming their eligibility treated those requirements as voter qualifications.[393] The state legislature was prohibited, however, from adopting new voter qualifications beyond those set forth in the state constitution.[394] Calkins explained, "[W]herever a constitution declares the qualifications of electors, and a registry law add[s] additional tests to those qualifications, the registry law [is] null and void . . . ."[395]

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[387] *Id.* at 10 (concluding that "the true result of the election" was unknown and recommending "that the election be declared void").

[388] 10 CONG. REC. 3145–46 (1880) (statement of Rep. Beltzhoover).

[389] *Id.*

[390] H.R. REP. NO. 46-345, at 13 (views of the minority).

[391] *Id.* at 14 (explaining that, so far as state law "restricts [a person's] right to vote, if he is otherwise qualified, [it] is an additional test of his right to vote, [and] is repugnant to that sacred privilege reserved to each citizen . . . in the very words of the constitution").

[392] *Id.* at 15 ("[I]f he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one.").

[393] 10 CONG. REC. 3184 (1880) (statement of Rep. Calkins).

[394] *Id.* ("[T]he very purpose of this constitutional provision . . . was to prevent the Legislature . . . [from] making a registry law that would be an additional test to the qualifications of the voter.").

[395] *Id.*

Representative Stevenson echoed these sentiments.[396] He reaffirmed "that it is the province of the Legislature to indicate the manner in which the voter is to exercise his privilege. The time, manner, and place fall within the legislative prerogative."[397] Voter qualifications fell outside the scope of that power, however, and Stevenson wished to ensure that "the rights of the legally qualified elector[s] shall not be imperiled."[398] Following extensive debates, the House ultimately adopted the minority report.[399] Thus, the distinction between a state's authority over voter qualifications and the legislature's power over the time, place, and manner of congressional elections was recognized and enforced.

In short, throughout the nineteenth century, whenever the independent state legislature doctrine was raised in an election contest before a chamber of Congress, it was consistently embraced and applied.

V. THE DOCTRINE IN THE U.S. SUPREME COURT

The U.S. Supreme Court's attitude toward the independent state legislature doctrine has vacillated over the past century and a quarter. For every case embracing the doctrine throughout that time, another has questioned or even rejected it. This Part traces the doctrine's history before the Court. Though some tension exists among the Court's early cases, they can reasonably be read together as concluding that a state constitution cannot impose *substantive* limits on the scope of the state legislature's authority to regulate the time, place, and manner of federal elections, but the legislature must follow the lawmaking *process* set forth in the state constitution when doing so. In 2015, however, a bare majority of the Court flatly rejected all aspects of the doctrine, albeit arguably in *dicta*, with almost no attention to its rich history of application throughout the nineteenth century. This Part concludes by analyzing various ways in which the doctrine could be reincorporated into modern constitutional law.

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[396] *Id.* at 3179–81 (statement of Rep. Stevenson).

[397] *Id.* at 3180.

[398] *Id.*

[399] *Id.* at 3250–51.

A. DEVELOPING A PROCEDURE/SUBSTANCE DICHOTOMY: THE EARLY YEARS

The Court first discussed the independent state legislature doctrine in its 1892 ruling in *McPherson v. Blacker*, which enthusiastically endorsed it, although primarily in dicta.[400] The plaintiffs in *McPherson* challenged the constitutionality of a Michigan law requiring presidential electors to be elected by district.[401] The opinion begins by recognizing that the U.S. Constitution "frequently refers to the State as a political community."[402] When acting under such provisions, the state must exercise its "legislative power under state constitutions as they exist."[403] The Presidential Electors Clause, in contrast, provides that a state shall select its presidential electors "in such manner as the legislature thereof may direct."[404] That express delegation of authority specifically to the legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power . . . ."[405] In other words, a state may not restrict the authority that its legislature receives from the Presidential Electors Clause.

The Court went on to emphasize that the Presidential Electors Clause grants the legislature "plenary authority to direct the manner of [its electors'] appointment."[406] A legislature is not required to use any particular method of appointing electors "in the absence of an amendment to the [U.S.] Constitution."[407] It may therefore choose to appoint electors based on the results of separate elections held within each congressional district.[408]

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[400] 146 U.S. 1, 34–35 (1892).

[401] *Id.* at 24–25.

[402] *Id.* at 25.

[403] *Id.*

[404] *Id.* (quoting U.S. CONST. art. II, § 1, cl. 2); *see also id.* at 27 (declaring that the Constitution "leaves it to the legislature exclusively to define the method" of choosing electors).

[405] *Id.* at 25.

[406] *Id.*; *see also id.* at 35 ("[T]he practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

[407] *Id.* at 29.

[408] *See id.* at 25–26 ("[I]t is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts.

The Court also quoted approvingly from a report that the Senate Committee on Privileges and Elections issued in 1874.[409] The report accompanied a proposed amendment to the U.S. Constitution that would have required states to create electoral districts and appoint presidential electors based on whichever candidate won a majority of the popular vote in each district.[410] As discussed earlier,[411] the Committee report stated that, under the Presidential Electors Clause:

> [t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. . . . This power is conferred upon the legislatures of the States by the Constitution of the United States, *and cannot be taken from them or modified by their State constitutions* any more than can their power to elect Senators of the United States. *Whatever provisions may be made* by statute, or *by the state constitution*, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[412]

Thus, the Court endorsed the notion that a state constitution could not limit the scope of a legislature's authority to regulate presidential elections under the Presidential Electors Clause. It concluded that the Michigan legislature was free to choose presidential electors based on the popular vote within each district.[413]

The Court's next major rulings touching on the doctrine, issued in the early twentieth century, suggest that the Court may have harbored some degree of skepticism towards it; nevertheless, they remain fully consistent with the doctrine. In the 1916 case *Ohio* ex

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In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts . . . .").

[409] *Id.* at 34–35 (citing S. REP. NO. 43-395 (1874)).

[410] *Id.* at 34.

[411] *See supra* Section IV.D.

[412] *McPherson*, 146 U.S. at 34–35 (emphasis added) (quoting S. REP. NO. 43-395 (1874)).

[413] *See id.* at 42.

rel. *Davis v. Hildebrant*, the Ohio Constitution allowed the public to vote to nullify any law enacted by the institutional state legislature.[414] Using this referendum process, the people rejected a state law adopting new congressional districts.[415] A group of voters had sought a writ of mandamus from the state supreme court to compel election officials to hold elections based on those rejected maps.[416] They argued that, since the Elections Clause granted power to regulate congressional elections specifically to the institutional state legislature, a referendum could not be used to reject or displace state election laws.[417]

The U.S. Supreme Court rejected this argument.[418] It began by noting that a recently enacted federal statute allowed states to incorporate a public referendum into the process for creating congressional districts if the state constitution or state law treated the referendum procedure "as part of the [state's] legislative power."[419] The Court then mentioned the plaintiffs' argument that, under the Elections Clause, the term "legislature" cannot include a referendum.[420] The Court did not address the merits of the plaintiffs' Elections Clause claim, however, but rather transmuted it into an argument under the Guarantee Clause.[421] The Court declared:

> [The plaintiffs' argument] must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where

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[414] 241 U.S. 565, 566 (1916) (noting that the state constitution granted the people "a right . . . by way of referendum to approve or disapprove" of any state statute).

[415] *Id.*

[416] *Id.* at 566–67.

[417] *Id.* at 567.

[418] *Id.* at 569.

[419] *Id.* at 568.

[420] *Id.* at 569.

[421] U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

> such condition exists to be not republican in form in violation of the guarantee of the Constitution.[422]

Thus, the Court never addressed the meaning of the term "legislature" as used in the Elections Clause. Rather, it replaced that term with the phrase "legislative power," and then considered whether including a referendum process as part of a state's "legislative power" deprives that state of a republican form of government. The Court declined to reach the merits of that alternate constitutional issue on the grounds that Guarantee Clause claims are non-justiciable.[423]

Subsequent cases and commentators have read *Davis* much more broadly than its actual holding warrants.[424] First, although *Davis* is often characterized as an Elections Clause case, the Court did not address the Elections Clause question, but rather recharacterized it as a nonjusticiable Guarantee Clause issue.[425] Second, the Court simply held that a state could incorporate a public referendum into its legislative process to allow voters to disapprove a redistricting scheme enacted by the institutional legislature.[426] The referendum process that *Davis* upheld was comparable to a gubernatorial veto. *Davis* does not state, however, that a referendum or other such process may be used to affirmatively adopt congressional districts or other rules for congressional elections.[427]

Third, *Davis* does not suggest that a state may completely exclude its institutional legislature from either participating in the congressional redistricting process or regulating congressional elections more broadly. Finally, although *Davis* allows a state to determine the entities or processes that comprise its "legislative power,"[428] the ruling is silent on the separate issue of whether the state constitution may impose substantive limits on the ability to

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[422] *Davis*, 241 U.S. at 569 (citing U.S. CONST. art. IV, § 4).

[423] *Id.* ("[T]he question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy . . . .").

[424] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) (stating that *Davis* established that the term "'the Legislature' . . . encompassed a veto power lodged in the people").

[425] *See Davis*, 241 U.S. at 569.

[426] *See id.*

[427] *Id.* at 569–70.

[428] *Id.* at 568.

regulate federal elections of whatever entities or processes are included within the state's "legislative power." In other words, *Davis* allows a state constitution to specify what entity or processes count as the "Legislature" for purposes of the Elections Clause. It does not suggest, however, that a state constitution may limit the scope of the power that the Elections Clause confers upon that legislature. Thus, *Davis* is generally consistent with the independent state legislature doctrine.

Over the next decade, a pair of rulings fully applied the doctrine in construing Article V's delegation of power to state legislatures to ratify proposed constitutional amendments.[429] The Court's 1920 ruling in *Hawke v. Smith* held—notwithstanding *Davis*—that a state constitution could not make a state legislature's ratification of a federal constitutional amendment contingent upon a public referendum.[430] In 1917, Congress proposed the Eighteenth Amendment, establishing Prohibition, and transmitted it to the states for ratification.[431] The Ohio legislature enacted a resolution ratifying the amendment.[432] The state constitution, however, allowed the people to hold referenda on the legislature's ratification of amendments to the U.S. Constitution.[433] Some Ohio citizens sued to enjoin the Ohio Secretary of State from holding a referendum on the legislature's ratification of the Eighteenth Amendment.[434] They argued that Article V of the U.S. Constitution granted the power to ratify federal constitutional amendments solely to the legislature.[435]

The Court agreed with their argument.[436] Invoking the independent state legislature doctrine, it declared that "the power

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[429] U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which, . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states . . . .").

[430] 253 U.S. 221 (1920).

[431] S.J. Res. 17, 65th Cong., 40 Stat. 1050 (1917) (proposing the Eighteenth Amendment to the U.S. Constitution).

[432] *Hawke*, 253 U.S. at 225. For further details concerning *Hawke*'s procedural history, see Amar, *The People Made Me Do It*, *supra* note 31, at 1076–80.

[433] *Hawke*, 253 U.S. at 225 (discussing a state constitutional provision granting the people "the legislative power of the referendum" over amendments to the U.S. Constitution).

[434] *Id.* at 224.

[435] *Id.*

[436] *Id.* at 230–31.

to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution."[437] *Hawke* emphasized that the term "Legislature" as used in Article V is "not a term of uncertain meaning when incorporated into the Constitution."[438] It refers to "the representative body which made the laws of the people."[439] The Court observed, "The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."[440]

The Court went on to note that the term "Legislature" appears to carry the same meaning wherever it appears in the Constitution.[441] Moreover, as originally adopted, the Constitution empowered the "Legislature" of each state to appoint U.S. Senators.[442] If the term could include referenda by the general public, there would have been no need to adopt the Seventeenth Amendment[443] to allow popular election of Senators.[444]

Hawke concluded by distinguishing *Davis* on the grounds that ratification of a constitutional amendment is distinct from enactment of a state law.[445] Although the Elections Clause empowers the state legislature to enact laws regulating federal elections, *Hawke* explained, it does not excuse the legislature from following the legislative procedure set forth in the state constitution.[446] When a state constitution includes a public referendum "as part of the legislative authority of the state," as in *Davis*, state laws governing federal elections are subject to public

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[437] *Id.* at 230.

[438] *Id.* at 227.

[439] *Id.*; *see also id.* (defining "legislature" as a "deliberative assemblage[] representative of the people").

[440] *Id.*

[441] *Id.* ("The term is often used in the Constitution with this evident meaning."); *see also id.* at 228 ("There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States.").

[442] *Id.* at 227–28 (citing U.S. CONST. art. I, § 3).

[443] U.S. CONST. amend. XVII.

[444] *Hawke*, 253 U.S. at 228 ("The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.").

[445] *Id.* at 230–31 (stating that *Davis*'s holding is "inapposite").

[446] *Id.* at 231.

referenda.[447] Ratification of a federal constitutional amendment, however, is not an exercise of the ordinary state lawmaking process.[448] A state constitution therefore may not impose such procedural constraints on a legislature's ability to "express[] . . . assent or dissent to a proposed amendment to the Constitution."[449]

Although *Hawke*'s ultimate conclusion was correct, it over-read *Davis* and endorsed that Court's erroneous conflation of the term "Legislature" in the Elections Clause with the broader phrase "legislative authority of the state."[450] *Hawke*'s reasoning has also contributed to the remarkable notion that the term "Legislature" might mean something different under the Elections Clause (and, by extension, the Presidential Electors Clause) than throughout the rest of the Constitution. Nevertheless, *Hawke* applied the independent state legislature doctrine, enforcing the constitutional prerogatives of institutional legislatures under the Article V Amendments Clause.[451]

A few years later, in *Leser v. Garnett*, the Court went even further in applying the doctrine to the Amendments Clause.[452] It held that the Nineteenth Amendment,[453] prohibiting gender discrimination in voting, had been validly ratified.[454] The plaintiffs argued that several states' ratifications were invalid because their state constitutions prohibited their legislatures from ratifying federal constitutional amendments extending voting rights to women.[455] Rejecting that claim, the Court held that ratification of amendments to the U.S. Constitution "is a federal function derived from the Federal Constitution; and it transcends any limitations

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[447] *Id.* at 230–31.

[448] *Id.* at 229 ("[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word.").

[449] *Id.* at 231.

[450] *Id.* at 230.

[451] *See also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

[452] 258 U.S. 130 (1922).

[453] U.S. CONST. amend. XIX.

[454] *Leser*, 258 U.S. at 137.

[455] *Id.* at 136–37 (discussing the plaintiffs' argument that the constitutions of several states that had ratified the Nineteenth Amendment contain "provisions which render inoperative the alleged ratifications by their legislatures," and "by reason of these specific provisions the legislatures were without power to ratify").

sought to be imposed by the people of a State."[456] Thus, *Leser* squarely held that a state constitution may not impose substantive restrictions on the scope of authority that Article V confers directly on state legislatures to ratify amendments to the U.S. Constitution.

Though the Court's subsequent rulings focus much more heavily on *Hawke*, *Leser* is actually the more important holding. *Hawke* dealt with the definition of "Legislature" in Article V and the inability of state constitutions to add procedural requirements to the ratification process.[457] *Leser* confirms that a state constitution cannot prohibit state legislatures from ratifying certain types of federal constitutional amendments based on their substantive content.[458] Such reasoning would seem to apply with full force to the Elections Clause and Presidential Electors Clause. *Leser* strongly suggests that state constitutions are incapable of imposing substantive limits or restrictions on the power that the U.S. Constitution grants state legislatures to pass laws regulating congressional and presidential elections.

The Court's ruling a decade later in *Smiley v. Holm* was largely agnostic on the independent state legislature doctrine.[459] *Smiley* explained that, although the Elections Clause grants the legislature power to enact laws governing federal elections, the legislature's "exercise of th[at] authority must be in accordance with the method which the State has prescribed for legislative enactments."[460] When a state constitution incorporates a gubernatorial veto into the lawmaking process, it can be applied to bills concerning

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[456] *Id.* at 137. Professor Amar rejects this conclusion. Amar, *The People Made Me Do It*, *supra* note 31, at 1054. He argues that the people of a state should be free to restrict the legislature's ability to ratify amendments to the U.S. Constitution, in order to prevent legislators from engaging in self-dealing by either enlarging their powers or entrenching their authority at the expense of the people. *Id.*

[457] Hawke v. Smith, 253 U.S. 221, 227, 230–31 (1920).

[458] *Leser*, 258 U.S. at 137.

[459] 285 U.S. 355 (1932); *accord* Koenig v. Flynn, 285 U.S. 375, 379 (1932) (affirming "[f]or the reasons stated in the opinion in *Smiley v. Holm*"); *see also* State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932) (refusing to recognize congressional districts enacted by the legislature but vetoed by the governor).

[460] *Smiley*, 285 U.S. at 367; *see also id.* at 368 (holding that the Elections Clause does not grant the legislature "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted").

congressional elections.[461] *Smiley* distinguished *Hawke* on the grounds that ratifying a constitutional amendment is not a traditional act of lawmaking, and therefore is not subject to the ordinary legislative process set forth in the state constitution.[462]

Thus, *Smiley* reaffirms a legislature's obligation to follow the legislative process set forth in its state constitution when regulating federal elections. The opinion does not address, however, whether a state constitution may impose substantive limits on the content of measures the legislature may adopt. Moreover, *Smiley* hews closely to the text of the Elections Clause, acknowledging that there is no doubt as to the "body" to which the term "Legislature" refers,[463] rather than more broadly considering the nature or locus of the state's "legislative power," as in *Davis*.[464] In other words, *Smiley*'s reasoning does not allow state constitutions to redefine the meaning of the term "Legislature."

B. FROM DISPUTED PRESIDENTIAL ELECTIONS TO CONGRESSIONAL REDISTRICTING: THE MODERN CASES

Despite a few allusions to the Elections Clause and Presidential Electors Clause over the decades that followed,[465] the Court did not revisit the independent state legislature doctrine until seemingly endorsing it during the dispute over the 2000 presidential election. The Court's rulings focused on whether the Presidential Electors Clause's delegation of power specifically to state legislatures

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[461] *Id.* at 372–73 ("[T]here is nothing in Article I, section 4, which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.").

[462] *Id.* at 365–66.

[463] *Id.* at 365.

[464] *Cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567–68 (1916) (holding that the state constitution made the referendum "part of the legislative power").

[465] *See, e.g.*, Ray v. Blair, 343 U.S. 214, 225 (1952) ("Neither the language of [the Presidential Electors Clause], nor that of the Twelfth Amendment forbids a [political] party to require from candidates in its primary a pledge of political conformity with the aims of the party."); *see also* Grills v. Branigin, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (three-judge court) (per curiam) (holding that the Elections Clause "clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts"), *aff'd sub nom.* Branigin v. Duddleston, 391 U.S. 364 (1968) (mem.).

precludes state courts from considering state constitutions when determining the rules governing presidential elections.

In mid-November 2000, the Florida Supreme Court ruled that state law allowed certain counties to conduct complete manual recounts of ballots cast in the presidential election, because their "sample manual recount[s]" revealed that their automatic tabulation machines had failed to count some ballots.[466] The court reached this conclusion based on the "plain language" of the relevant statute, as well as various other state laws governing recounts.[467]

It further held that the Secretary of State was required to accept the results from such manual recounts, even if they were not available until after the statutory deadline for submitting them, unless allowing such late updates would preclude either "a candidate from contesting the certification" or "Florida's voters from participating fully in the federal electoral process."[468] The court based this conclusion on various canons of statutory construction, numerous state constitutional provisions concerning the right to vote, and the court's own precedents.[469] It later emphasized that its interpretation of the Election Code rested at least partly on the fact that "the right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution."[470]

The U.S. Supreme Court granted certiorari on two questions: (i) whether the Florida Supreme Court's ruling violated the Due Process Clause or 3 U.S.C. § 5 by "changing the State's elector appointment procedures after election day," and (ii) whether that decision violated the Presidential Electors Clause by "chang[ing] the manner in which the State's electors are to be selected."[471]

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[466] Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225, 1229–30 (Fla. 2000) (holding that "the plain language of [the statute]" allows county canvassing boards "to order countywide manual recounts"), *rev'd sub nom.* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam).

[467] *Id.* at 1229–30.

[468] *Id.* at 1239. Applying that holding, the court directed the Secretary to accept any updated vote tallies filed by Sunday, November 26, 2000. *Id.* at 1240.

[469] *Id.* at 1235–37.

[470] *Id.* at 1239.

[471] Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 73 (2000) (per curiam).

In *Bush v. Palm Beach County Canvassing Board*, the U.S. Supreme Court unanimously reversed and remanded the matter.[472] It recognized that, in general, it must "defer[] to a state court's interpretation of a state statute."[473] When a legislature enacts a law that applies to both elections for state office and presidential elections, however, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [the Presidential Electors Clause]."[474] Quoting *McPherson v. Blacker*, the Court stated that the Clause's delegation of authority specifically to the legislature prohibits any attempts by states to "circumscribe the legislative power."[475]

Certain parts of the Florida Supreme Court's opinion, the Court observed, suggested that the Florida Constitution might limit the legislature's authority to regulate presidential elections.[476] It appeared that the Florida Supreme Court had not considered "the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power.'"[477] The Court also expressed concern that Congress might construe the state supreme court's ruling as a "change in the law" that would prevent Florida from invoking the Electoral Count Act's "safe harbor" to ensure that Congress counts its electoral votes.[478] Because the Court had "considerable uncertainty" about the Florida Supreme Court's reasoning, it "decline[d] at [that] time to review the federal questions" on which it had granted certiorari.[479] Instead, the Court remanded the case to give the Florida Supreme Court an opportunity to clarify its analysis.[480] In doing so, the Court reiterated, "[W]e are unclear as to the extent to which the Florida

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[472] *Id.* at 78.

[473] *Id.* at 76.

[474] *Id.*

[475] *Id.* (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

[476] *Id.* at 77; *see also id.* at 78 (providing examples from the Florida Supreme Court's opinion).

[477] *Id.* (citation omitted).

[478] *Id.* at 77–78 (quoting 3 U.S.C. § 5).

[479] *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).

[480] *Id.* On remand, the state supreme court reached the same conclusion as in its earlier ruling, with essentially the same reasoning, except its opinion omitted references to the state constitution. *See generally* Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under [the Presidential Electors Clause]."[481]

Palm Beach County Canvassing Board appears to be an endorsement of the independent state legislature doctrine for several reasons. First, the Court uncritically quoted the language from *McPherson*—which had likely been dicta in that opinion—asserting that states may not "circumscribe" a legislature's authority under the Presidential Electors Clause.[482] Second, the Court strongly implied that, since the case involved a state law enacted under the Presidential Electors Clause, the "general rule" requiring federal courts to defer to state courts' interpretations of state law may not fully apply.[483]

Third, and perhaps most persuasively, the Court's decision to remand the case seems to implicitly assume the validity of the independent state legislature doctrine. The Florida Supreme Court's conclusions about state law were clear. The U.S. Supreme Court repeatedly emphasized that it was uncertain about whether, in reaching those conclusions, the Florida Supreme Court had assumed that a state constitution could limit the state legislature's authority over federal elections.[484] If the U.S. Supreme Court were simply bound to accept the Florida Supreme Court's interpretation of state law, the precise basis for the lower court's reasoning would seem to be of limited relevance—particularly in the time-sensitive context of litigation concerning the outcome of a presidential election. The most natural implication of the Court's decision to remand the case was that it may have been problematic for the state supreme court to allow its interpretation of state laws concerning presidential elections to be influenced by the state constitution. That explanation appears to be most consistent with the Court's quotation from *McPherson*, its suggestion that state laws enacted under the Presidential Electors Clause differ from state laws enacted under state constitutions,[485] and its repeated emphasis on

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[481] *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 78 (citation omitted).

[482] *See supra* note 475 and accompanying text.

[483] *See supra* note 473–474 and accompanying text.

[484] *See supra* notes 477 & 481 and accompanying text.

[485] The Court distinguished laws enacted under the Presidential Electors Clause from laws passed "solely under the authority given [to the legislature] by the people of the State." *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 76.

whether the Florida Supreme Court had allowed the state constitution to influence its interpretation of the state laws at issue. To be sure, the U.S. Supreme Court expressly declined to rule on the constitutional and statutory issues on which it had granted certiorari.[486] But its decision to remand still seems to have been based on its interpretation of the Presidential Electors Clause.

In a separate ruling, the Florida Supreme Court ordered a statewide manual recount of all ballots that had been rejected by automated tallying machines.[487] In *Bush v. Gore*, a divided U.S. Supreme Court again reversed.[488] It noted that the Presidential Electors Clause gives the state legislature "plenary" power "to select the manner for appointing electors."[489] It continued, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . ."[490] Accordingly, the Equal Protection Clause requires states to "avoid arbitrary and disparate treatment" of voters.[491] A statewide manual recount would violate the Equal Protection Clause because no standards existed for determining which of the incorrectly marked ballots that automated tallying machines had rejected should be counted as valid votes.[492] Since there was insufficient time to create uniform standards and conduct a statewide manual recount by the federal safe-harbor deadline for selecting electors, the Court ended the recount.[493]

A three-Justice concurring opinion, authored by Chief Justice Rehnquist and joined by Justices Scalia and Thomas, placed much greater emphasis on the independent state legislature doctrine.[494] The concurrence noted that, "in ordinary cases, the distribution of powers among the branches of a State's government raises no

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[486] *See supra* note 479 and accompanying text.

[487] Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[488] 531 U.S. at 110–11.

[489] *Id.* at 104.

[490] *Id.*

[491] *Id.* at 105.

[492] *Id.* at 106–07 (contrasting the various methods that counties used to determine whether particular markings on a ballot should count as a valid vote).

[493] *Id.* at 110–11.

[494] *Id.* at 111 (Rehnquist, C.J., concurring).

questions of federal constitutional law."[495] The Presidential Electors Clause, however, is an "exceptional case[] in which the Constitution . . . confers a power on a particular branch of a State's government": the state legislature.[496] Under the clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[497] The Presidential Electors Clause prohibits a state court, under the guise of statutory interpretation, from "significant[ly] depart[ing]" from the plain text of the laws enacted by the legislature.[498] The Florida Supreme Court's order for a statewide recount that would extend past the federal safe harbor deadline substantially departed from both past practice as well as the plain meaning of the state election code, and was therefore invalid.[499]

Justice Stevens's dissent largely rejected the doctrine. When the Presidential Electors Clause confers power on state legislatures, he reasoned, it "takes them as they come—as creatures born of, and constrained by, their state constitutions."[500] Justice Stevens quoted language from *McPherson* stating that "[w]hat is forbidden or required to be done by a State . . . is forbidden or required of the legislative power under state constitutions as they exist."[501] He concluded that, because the Presidential Electors Clause does not "free[] the state legislature from the constraints in the State Constitution that created it," state courts may interpret state laws governing presidential elections the same way they would any other state statutes.[502]

Justice Stevens's dissent flatly misreads *McPherson*. As Justice Stevens contends, *McPherson* recognizes that a state constitution generally may limit the authority that a state's citizens confer on their legislature.[503] *McPherson* goes on to note that the U.S. Constitution frequently imposes powers and duties on "the State as

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[495] *Id.* at 112.

[496] *Id.*

[497] *Id.* at 113.

[498] *Id.* (citing McPherson v. Blacker, 146 U.S. 1, 27 (1892)).

[499] *Id.* at 122.

[500] *Id.* at 123 (Stevens, J., dissenting).

[501] *Id.* (alteration in original) (quoting *McPherson*, 146 U.S. at 25).

[502] *Id.* at 124.

[503] *McPherson*, 146 U.S. at 25.

a political community."[504] When the U.S. Constitution forbids or requires "a State" as an entity to do something, the state's legislative power must be exercised "under state constitutions as they exist."[505] In such cases, the legislature is constrained by the state constitution's substantive restrictions. Stevens's analysis of *McPherson* ends there.

Crucially, however, *McPherson* emphasizes that the "insertion of those words"—specifically referring to the Presidential Electors Clause's use of the term "legislature"—changes this analysis.[506] The clause's grant of federal constitutional power specifically to the state legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power," including through the state constitution.[507] *McPherson* explained that the analysis would be different if the Presidential Electors Clause had instead granted power to the "States," rather than conferring authority specifically on state legislatures.[508] Had the Constitution been drafted differently, state constitutions would have been able to constrain legislatures' power over the appointment of electors. Thus, Justice Stevens's *Bush v. Gore* dissent rips a single sentence from *McPherson* out of context, overlooks the parts of the paragraph in *McPherson* that explicitly reaffirm the independent state legislature doctrine, and ignores the key distinction that *McPherson* draws between the state as an entity and the legislature.

Justice Stevens's dissent is all the more remarkable because he had issued another dissenting opinion just six months prior in *California Democratic Party v. Jones*, questioning whether a state's citizens could amend state laws concerning federal elections through an initiative process.[509] His *Jones* dissent pointed out that the Elections Clause confers power to regulate congressional elections specifically on the state legislature, rather than the state as an entity.[510] He added that, under the independent state legislature doctrine, "California's classification of voter-approved

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[504] *Id.*

[505] *Id.*

[506] *Id.*

[507] *Id.*

[508] *Id.*

[509] 530 U.S. 567, 590 (2000) (Stevens, J., dissenting).

[510] *Id.* at 603.

initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause."[511] Thus, even Justice Stevens was willing to attribute at least some significance to the U.S. Constitution's delegations of authority specifically to state legislatures.

Justice Breyer's separate dissent in *Bush v. Gore* rejected the independent state legislature doctrine in a conclusory fashion, without providing any reasoning or analysis.[512] Justice Ginsburg's dissent likewise summarily rejects the doctrine, emphasizing that federal courts are bound by state courts' interpretations of state laws, including those governing federal elections.[513] Justice Souter's dissent, in contrast, was somewhat more sympathetic to the doctrine. Recognizing that the Presidential Electors Clause grants authority specifically to the legislature, Justice Souter wrote, "The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature . . . ?"[514]

Justice Souter opined that state courts were entitled to broad deference when construing state laws, including those enacted under the Presidential Electors Clause.[515] The Clause required the U.S. Supreme Court to determine whether the Florida Supreme Court's interpretation of state law "was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question."[516] Thus, unlike the other dissenting Justices, Justice Souter was willing to recognize that the Presidential Electors Clause imposes at least some outer limit on a

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[511] *Id.* His dissent did not mention *McPherson* or any other U.S. Supreme Court cases discussing the doctrine.

[512] Bush v. Gore, 531 U.S. 98, 148 (2000) (Breyer, J., dissenting) ("[N]either the text of Article II itself nor [*McPherson*] leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.").

[513] *Id.* at 141 (Ginsburg, J., dissenting) ("Article II can hardly be read to invite this Court to disrupt a State's republican regime.").

[514] *Id.* at 130 (Souter, J., dissenting).

[515] *Cf. id.* at 131 ("None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment . . . . [T]he law as declared is consistent with Article II.").

[516] *Id.*

state court's power to interpret state laws governing federal elections.

Bush v. Palm Beach County Canvassing Board is perhaps the most important ruling stemming from the 2000 election concerning the independent state legislature doctrine. The Court in that case unanimously remanded the Florida Supreme Court's ruling to clarify its reasoning—apparently, to confirm that the court was applying *only* state statutes and not the state constitution.[517] *Palm Beach County Canvassing Board*'s seeming refusal to allow courts to consider the state constitution when interpreting state laws governing federal elections strongly suggests that state constitutions may not limit legislatures' authority regarding such elections.

The dissenting opinions in *Bush v. Gore* a few days later detract from the power of that unanimous opinion. Justice Stevens's rejection of the doctrine was based primarily on a misreading of *McPherson*;[518] moreover, he had embraced the doctrine six months earlier in *Jones*.[519] Furthermore, both the concurring opinion in *Bush* and, to a much lesser extent, the Court's per curiam opinion in that case reaffirmed the doctrine. And Justice Souter's dissent was not entirely hostile to the doctrine either.

A few years later, the Court denied certiorari in another Elections Clause case, *Colorado General Assembly v. Salazar*, over a strong three-Justice dissent.[520] In 2003, the Colorado legislature had adopted a new congressional district map to replace a court-drawn plan.[521] The Colorado Supreme Court invalidated the new map on the grounds that it violated the state constitution's prohibition on redistricting more than once per decade.[522] The court further held that the Elections Clause did not allow the state legislature to evade that restriction from the state constitution.[523]

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[517] 531 U.S. 70, 78 (2000) (per curiam).

[518] *See supra* notes 501–508 and accompanying text.

[519] *See supra* notes 509–511 and accompanying text.

[520] 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of certiorari).

[521] *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1224 (Colo. 2003), *cert. denied sub nom.* Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004).

[522] *Id.* at 1237–40.

[523] *Id.* at 1232.

The U.S. Supreme Court denied certiorari.[524] Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—the authors of the concurrence in *Bush v. Gore* which embraced the independent state legislature doctrine[525]—dissented, arguing that the Court should have heard the Elections Clause issue.[526] The dissenters reasoned that, by preventing the institutional legislature from replacing the state court's congressional map, the Colorado Supreme Court impermissibly treated the state court as part of the "Legislature" for purposes of the Elections Clause.[527] They declared, "[T]here must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts."[528]

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[524] *Salazar*, 541 U.S. at 1093.

[525] 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring).

[526] *Salazar*, 541 U.S. at 1093 (Rehnquist, C.J., dissenting from denial of certiorari).

[527] *Id.* at 1094–95.

[528] *Id.* at 1095. That ruling did not end the matter, however. Following the Court's denial of certiorari, a group of Colorado voters filed a new federal lawsuit, contending that the Elections Clause entitled them to vote in the districts adopted by the institutional legislature. *See* Lance v. Davidson, 379 F. Supp. 2d 1117, 1122 (D. Colo. 2005) (three-judge court), *vacated and remanded sub nom.* Lance v. Dennis, 546 U.S. 459 (2006) (per curiam). A three-judge district court initially denied relief under the *Rooker-Feldman* doctrine, holding that the lawsuit was an impermissible attempt to contest the Colorado Supreme Court's ruling in *Salazar*. *Id.* at 1127, 1132; *see* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983) (holding that a state court's final judgment may be challenged only in the U.S. Supreme Court, not in lower federal courts); Rooker v. Fidelity Tr. Co., 263 U.S. 413, 416 (1923) (noting that, following a final state court adjudication, "[u]nder the legislation of Congress, no court of the United States other than [the U.S. Supreme Court] could entertain a proceeding to reverse or modify the judgment"). The U.S. Supreme Court vacated the three-judge district court ruling and remanded for further proceedings, because the voter plaintiffs had not been involved in the earlier *Salazar* litigation. *See Dennis*, 546 U.S. at 466.

On remand, the district court concluded that the plaintiffs were collaterally estopped from maintaining their Elections Clause claims because they were "in privity" with the plaintiffs in *Salazar*. Lance v. Dennis, 444 F. Supp. 2d 1149, 1161 (D. Colo. 2006) (three-judge court), *vacated in part and remanded sub nom.* Lance v. Coffman, 549 U.S. 437 (2007) (per curiam). The Court again heard the case but, in a unanimous per curiam ruling, determined that the plaintiffs lacked standing to pursue their Elections Clause claims under the generalized grievance doctrine. *Coffman*, 549 U.S. at 441–42.

The other case in which the Court touched on the Elections Clause during this interregnum did not implicate the independent state legislature doctrine. *See* Branch v. Smith, 538 U.S. 254, 280 (2003) (plurality opinion) (suggesting that the anti-commandeering doctrine does not apply in the context of federal elections, because "the state legislature's obligation to prescribe the 'Times, Places and Manner' of holding congressional elections is grounded in [the Elections Clause] of the Constitution itself and not any mere statutory requirement").

Most recently, in 2015, the Court's 5–4 ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*) summarily rejected the doctrine, albeit arguably in dicta.[529] The citizens of Arizona had passed an initiative that amended their state constitution to strip the institutional legislature of authority over congressional redistricting and reassign it to an independent commission.[530] The Legislature argued that this violated the Elections Clause, which confers authority to regulate congressional elections—including the power to draw districts—specifically on the "Legislature."[531] The majority rejected the legislature's claim and upheld the constitutionality of the independent commission.[532]

The majority began by reiterating that a legislature must exercise its power under the Elections Clause "in accordance with the State's prescriptions for lawmaking . . . ."[533] Thus, there was no procedural problem with the fact that the state's independent commission had been created through an initiative rather than by the institutional legislature.[534] Prior cases supported the principle that an institutional legislature's enactments concerning federal elections are subject to the legislative process set forth in the state constitution, potentially including a veto either by the Governor[535] or through a public referendum process.[536] *AIRC* transmutes that principle into the dubious notion that a state constitution may redefine the term "Legislature" to allow federal elections to be regulated through a distinct lawmaking process, such as a public initiative, that completely excludes the institutional legislature.[537] The Court did not acknowledge that its conclusion was a dramatic expansion of *Davis* in particular, which had avoided the Elections Clause issue and, at most, allowed a public referendum to be

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[529] 576 U.S. 787, 824 (2015).

[530] *Id.* at 792.

[531] *Id.*

[532] *Id.* at 824.

[533] *Id.* at 808.

[534] *Id.* 808–09 ("[W]e see no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking.").

[535] *See supra* notes 459–462 and accompanying text.

[536] *See supra* notes 414–428 and accompanying text.

[537] *AIRC*, 576 U.S. at 808–09.

included as a step in the institutional legislature's own lawmaking process.[538]

Moving past the manner in which the commission was created, the Court further held that there was no substantive problem with prohibiting the institutional legislature from drawing congressional district lines and transferring such authority to a different entity.[539] It held that the purpose of the Elections Clause "was to empower Congress to override state election rules, not to restrict the way States enact legislation."[540] The Court later summarily declared that the Elections Clause does not permit a state legislature to "prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[541] The Court ignored its statements to the contrary in *McPherson* and *Leser*. It noted that the House of Representatives had reached the opposite conclusion in resolving the election contest in *Baldwin v. Trowbridge*,[542] but dismissed that precedent as politically motivated.[543] It did not consider any other congressional or state supreme court precedents applying the independent state legislature doctrine. Chief Justice Roberts wrote a four-Justice dissent, contending that the majority's ruling "erase[s] the words 'by the Legislature thereof' from the Elections Clause."[544]

Thus, the Court has gone from enthusiastically embracing the independent state legislature doctrine to rejecting it in a hotly contested 5–4 ruling. The *AIRC* majority treated the doctrine as anomalous dicta from a century-old U.S. Supreme Court ruling, bolstered only by a single, politically motivated House precedent. To the contrary, the doctrine not only is solidly grounded in the Constitution's plain text, but also reflects the predominant

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[538] *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

[539] *AIRC*, 576 U.S. at 813 ("[T]he Elections Clause permits the people of Arizona to provide for redistricting by independent commission."); *id.* at 814 ("[T]he people may delegate their legislative authority over redistricting to an independent commission . . . .").

[540] *Id.* at 814–15.

[541] *Id.* at 817–18.

[542] H.R. REP. NO. 39-13 (1866), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[543] *AIRC*, 576 U.S. at 818 ("[I]t was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision.").

[544] *Id.* at 842 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. I, § 4, cl. 1).

interpretation of the Elections Clause and Presidential Electors Clause in the state courts as well as both chambers of Congress throughout the nineteenth century.

C. IMPLEMENTING THE DOCTRINE IN THE TWENTY-FIRST CENTURY

A U.S. Supreme Court committed to textualism, historical practice, or structuralism has at least three different options for integrating the independent state legislature doctrine into modern law. The most extreme approach would be to construe the term "Legislature" in the Elections Clause and Presidential Electors Clause literally, thereby implementing the independent state legislature doctrine to the fullest possible extent. Under such an approach, *only* a state's institutional legislature may regulate federal elections—no other entities or processes (e.g., public initiatives or referenda) may be involved—and the state constitution may not impose substantive restrictions on the scope of the legislature's authority. That is how the Court approached the Article V Amendments Clause in *Hawke* and *Leser*.[545] This extreme approach would require overturning *Davis* (the referendum case), *Smiley* (the gubernatorial veto case), and *AIRC* (the independent redistricting commission case). It would also invalidate the independent redistricting commissions that states have created to draw congressional district lines,[546] as well as the substantive prohibitions that a few other state constitutions impose against political gerrymanders in congressional redistricting.[547]

Professor Persily identifies numerous state laws regulating federal elections that were enacted via public referendum or initiative that he cautions could also be challenged if the Court adopted this extreme approach to the independent state legislature doctrine.[548] Such potential consequences are less concerning, however, because state legislatures remain free to immediately reenact such provisions. Additionally, should the Court adopt this version of the doctrine, it could apply its holding prospectively,

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[545] *See supra* Section V.A.

[546] *See supra* note 13.

[547] *See supra* note 11.

[548] *See* Persily et al., *supra* note 32, at 715–18.

refusing to invalidate existing laws solely on the grounds they were enacted through an incorrect procedure.

Professor Persily also notes that many state constitutions contain various rules governing the electoral process, including requirements that elections be conducted by ballot, voters be registered, candidates receive a plurality of votes to win, and absentee voting be permitted.[549] Invalidating these generally uncontroversial provisions would be largely inconsequential, however, since most states invariably have separate statutes implementing identical rules, and legislatures would be free to enact them as necessary. Moreover, many state constitutions' election-related provisions simply reiterate protections already established under the U.S. Constitution that would remain in force. Thus, Professor Persily's prudential argument against the independent state legislature doctrine is drastically overstated. The primary immediate consequence of implementing this doctrine would be to invalidate independent congressional redistricting commissions and state constitutional limits on political gerrymandering in congressional elections. Even then, both state legislatures and Congress remain free to enact laws prohibiting political gerrymanders or requiring that independent commissions draw district lines.

Other methods of implementing the independent state legislature doctrine would require fewer adjustments. The least radical alternative would be for the Court to conclude that the doctrine allows the state constitution to define what processes and entities constitute the state "Legislature" for purposes of the Elections Clause and Presidential Electors Clause, while preventing the state constitution from imposing substantive restrictions on that legislature's authority to regulate federal elections. This interpretation would be consistent with the holdings of *Davis*, *Smiley*, *Leser*, and *AIRC*; leave *Hawke* limited to the context of the Article V Amendments Clause; and require rejection only of some language in *AIRC* that likely amounts to dicta.[550]

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[549] *Id.* at 720–22.

[550] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817–18 (2015) ("Nothing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

Under this approach, the institutional legislature could be completely excluded from regulating federal elections, but *some* entity within the state would retain plenary power over the field, free of any substantive restrictions in the state constitution.

Perhaps the best compromise approach—which is consistent with nineteenth century precedent—would be for the Court to conclude: (i) the term "Legislature" in the Elections Clause and Presidential Electors Clause refers only to the institutional state legislature, (ii) state constitutions and statutes cannot impose *substantive* limits on the scope of the institutional legislature's authority over federal elections, and (iii) when the institutional legislature exercises that authority by passing laws that apply to presidential or congressional elections, it remains subject to whatever *procedures* the state constitution contains for the enactment of legislation. This approach is consistent with *Davis*, *Smiley*, and *Leser*, and would leave *Hawke*'s holding limited to the Article V Amendments Clause. The only ruling that would require reversal is the Court's recent 5–4 decision in *AIRC*, which was partially premised on an erroneous understanding of the independent state legislature doctrine's history.[551]

Under this approach, state constitutions or statutes may establish independent redistricting commissions to promulgate congressional district maps. Those maps would be binding unless the legislature exercised its inalienable authority granted by the U.S. Constitution to adopt its own congressional districts, instead. Congress, of course, could go even further by requiring independent commissions to draw all congressional district maps, completely excluding the institutional legislature.

This compromise interpretation has much to recommend it. First, it respects precedent, requiring reversal of only one recent, incorrectly reasoned 5–4 case that has not yet generated substantial

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[551] *See supra* Section V.B. The Court could even adopt *Baldwin v. Trowbridge*'s concession that a state constitutional convention might qualify as a legislature. *See supra* note 266 and accompanying text. Under *Baldwin*, state constitutional provisions may presumptively govern federal elections unless and until the institutional state legislature decides to displace or act contrary to them. *See id.*

reliance.[552] Second, it coheres with the normative justifications for the independent state legislature doctrine,[553] the text and structure of the Elections Clause and Presidential Electors Clause, and the prevailing understanding of those provisions throughout the nineteenth century. Finally, this compromise interpretation does not completely eliminate the possibility of using independent redistricting commissions to combat political gerrymandering. In short, this modern variation of the independent state legislature doctrine provides the best overall "fit" with the fabric of constitutional law.

VI. CONCLUSION

The independent state legislature doctrine provides that a state constitution may not impose substantive restrictions on an institutional state legislature's authority to regulate federal elections. State constitutional provisions that specifically regulate redistricting, including prohibitions on partisan gerrymandering, are unenforceable in the context of congressional elections, though they are enforceable with regard to state legislative elections. Even under the doctrine, however, both the U.S. Constitution and federal law limit a state legislature's authority over federal elections. The independent state legislature doctrine is faithful to both the text and structure of the U.S. Constitution, furthers many of the Framers' goals concerning federal elections, and reflects the prevailing understanding of states, Congress, and other authorities throughout the nineteenth century.

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[552] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018) ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent.").

[553] *See supra* Section II.D.

Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote

*Michael T. Morley**

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Introduction

The American electoral system has traditionally been highly decentralized, administered primarily at the county and local levels by officials vested with substantial discretion.[1] Such local control, Professor Richard Briffault explains, "curbs abuses of power by the upper level government; builds democracy; increases the satisfaction of citizen preferences; and facilitates innovation, experimentation and political learning."[2]

Bush v. Gore[3] heralded the beginning of a new era in election law[4]—an era permeated by what Professor Rick Hasen colorfully calls the "Voting Wars."[5] The *Bush* Court expanded equal protection principles beyond their traditional historical contexts of eliminating barriers to voter eligibility,[6] preventing unduly burdensome election-related requirements,[7] and equalizing the weight of people's votes.[8] In *Bush*, the Court applied equal protection requirements to "nuts-and-bolts" election administration issues such as vote-counting.[9] The *Bush* Court's insistence on uniform

[1] HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 20 (2009); Nathaniel Persily, *"Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 IND. L. REV. 85, 85 (2010) (emphasizing "the extreme decentralization of administrative responsibilities and policymaking" within the American electoral system). For an overview of states' different systems for administering elections, see KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK 1–3, 33–43 (2015). *See generally* JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES (1934).

[2] Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 351 (2001). *But see* Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2327–28 (2005) (arguing that decentralized control of elections is unwarranted).

[3] 531 U.S. 98 (2000) (per curiam).

[4] Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1431 (2016); *see also* Samuel Isaacharoff, Opinion, *The Court in the Crossfire*, N.Y. TIMES (Dec. 14, 2000), https://perma.cc/NR8K-QUMY.

[5] RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN, at ix–xii, 3–8 (2012).

[6] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 332 n.1, 335, 342–43 (1972) (invaliding three- and twelve-month residency requirements to vote); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668, 670 (1966) (invalidating poll tax for state and local elections).

[7] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983) (invalidating early filing deadlines for independent presidential candidates).

[8] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) (invalidating state legislative districts with substantially different populations).

[9] Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001); *see also* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 485 (2019). The Supreme Court's opinions concerning the 2000 presidential election also lent some support to the "independent state legislature doctrine": the notion that state constitutions cannot limit or constrain the Presidential Electors Clause's delegation of authority specifically to the legislature of each

treatment of voters[10]—call it *Bush*'s Uniformity Principle—raises challenging questions for the traditional structure of election administration.

The Court's holding complements roughly contemporaneous federal laws requiring states to centralize authority over many aspects of federal elections. The National Voter Registration Act of 1993 required each state to appoint a chief election official.[11] The Help America Vote Act of 2002, enacted in the aftermath of *Bush v. Gore*, expanded those officials' authority over voter registration and certain other aspects of federal elections.[12] States typically apply federal requirements concerning federal elections to state and local elections, as well, to avoid the cost, administrative burdens, and potential for public confusion of maintaining completely different electoral systems for offices at different levels of government.[13] Thus, as a matter of both constitutional and statutory law, the federal government is requiring states to assert more centralized control over their elections and establish more uniform standards for conducting them.

While *Bush v. Gore* kicked off the "Voting Wars" era, its famous limiting language caused many scholars to question whether the ruling would have any precedential effect.[14] The Court declared, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[15] Pointing to that language shortly after the ruling was issued, Professor Hasen expressed doubt that the case would "have much precedential effect."[16] He

state. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, GA. L. REV. (forthcoming 2020) (manuscript at 5–8, 17–25, 79–84), https://perma.cc/XLX9-YGDW. The doctrine has also been interpreted as requiring courts to avoid infringing on the legislature's authority by applying a rigorous plain-meaning approach when construing state laws regulating federal elections. *See id.* (manuscript at 64) (citing Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76, 78 (2000) (per curiam)).

[10] Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

[11] Pub. L. No. 103-31, § 10, 107 Stat. 77, 87 (1993) ("Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.") (codified at 52 U.S.C. § 20509 (2018)).

[12] Pub. L. No. 107-252, § 303(a)(1)(A), 116 Stat. 1666, 1708–09 (2002) (codified at 52 U.S.C. § 21083(a)(1)(A)).

[13] *See* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

[14] For a brief discussion of the issue, see Chad Flanders, Commentary, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141, 144 (2006) (claiming that *Bush v. Gore* is "contradictory," because it both "set[] down a rule and den[ied] that any rule had been set down").

[15] *Bush*, 531 U.S. at 109.

[16] Hasen, *supra* note 9, at 381.

declared years later that "*Bush v. Gore* is dead"[17] and, as late as 2013, reaffirmed that his conclusion remained true, except within the Sixth Circuit.[18] Pointing to what he termed "the Court's disingenuous limiting instruction," Professor Samuel Issacharoff echoed these sentiments, cautioning that the case risked becoming a "classic 'good for this train, and this train only' offer."[19] Professor Laurence Tribe reached a similar prognosis, declaring, "*Bush v. Gore* belongs to no constitutional tradition and grows out of no constitutional doctrine, principle, or clause. Lacking roots, it is a plant anyone would be hard pressed to grow."[20]

Not all commentators believed that the case would be inert. Professors Ned Foley and Daniel H. Lowenstein each predicted that courts would require states to apply *Bush v. Gore*'s uniformity requirements more strictly in quasi-judicial proceedings involving evidence about particular ballots or voters than to more systematic issues like resource allocation decisions.[21] They likewise agreed that *Bush*'s uniformity requirement would likely apply more strictly to decisions concerning voters or ballots made by a single, centralized official or entity than to decisions made by various local officials.[22] Professor Foley further suggested that the Court would be more likely to tolerate disparate treatment of voters in different localities that arises from an express state policy of delegating authority to local decisionmakers, than when such disparities arise unexpectedly as a result of vague, statewide standards.[23] This Article assesses *Bush*'s Uniformity Principle as the case turns two decades old. It is based on a personal review of each of the 471 federal and state court rulings that cite the case as of June 30, 2020.[24] It offers four main conclusions.

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17 Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 3 (2007).

18 Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1899 (2013) ("In the rest of the country, *Bush v. Gore* is still basically dead.").

19 Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001).

20 Laurence H. Tribe, Comment, eroG .v hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 269 (2001) (emphasis omitted); *see also* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 830–31 (2001).

21 Edward B. Foley, *Refining the* Bush v. Gore *Taxonomy*, 68 OHIO ST. L.J. 1035, 1036–37 (2007) [hereinafter Foley, *Refining the Taxonomy*]; *see also* Edward B. Foley, *The Future of* Bush v. Gore?, 68 OHIO ST. L.J. 925, 933–46 (2007); Daniel H. Lowenstein, *The Meaning of* Bush v. Gore, 68 OHIO ST. L.J. 1007, 1029–30 (2007).

22 Foley, *Refining the Taxonomy*, *supra* note 21, at 1039; Lowenstein, *supra* note 21, at 1030–32.

23 Foley, *Refining the Taxonomy*, *supra* note 21, at 1041–43; *cf.* Helen Norton, *What* Bush v. Gore *Means for Elections in the 21st Century*, 2 WYO. L. REV. 419, 427–30 (2002) (discussing possible applications of *Bush v. Gore*'s Uniformity Principle).

24 Some commentators previously considered the applicability of *Bush*'s Uniformity Principle in the years after the ruling was handed down but before a substantial body of precedent had time to develop. *See, e.g.*, Edmund S. Sauer, Note, *"Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of* Bush v. Gore *on Election Administration*, 19 J.L. & POL. 299, 301 (2003) ("[T]he

First, despite the Supreme Court's attempt to cabin its ruling in *Bush v. Gore*, as well as the reticence of some lower courts,[25] *Bush*'s Uniformity Principle has evolved into a fully enforceable, generally applicable election-law doctrine.[26] Courts have applied the principle in three main sets of circumstances: (1) laws and other legal directives that expressly or intentionally afford substantially different opportunities to vote to different groups of voters; (2) laws that delegate authority to local officials to determine important election-related policies; and (3) vague laws that implicitly leave room for potentially inconsistent interpretations or applications by local officials.

Second, the Uniformity Principle requires states to centralize some election-related policies and decisions that they historically had left to the discretion of county or municipal officials.[27] This imperative toward centralization is likely to only increase over time as courts continue to apply the Principle in new contexts and states amend their election laws to avoid potential constitutional challenges.

Third, attempts to invoke *Bush*'s Uniformity Principle have been least successful in challenges to disparities in the availability of absentee or early voting; administrative "matching" provisions, such as those requiring election officials to compare a voter's name, address, or signature to information in her official records; and disputes involving voting rights for felons.[28]

Finally, *Bush*'s Uniformity Principle is in direct tension with the Supreme Court's prior approach to applying the Equal Protection Clause in election cases, embodied in the Civil Rights Era case *Katzenbach v. Morgan*.[29] *Katzenbach* held that laws which selectively expand voting rights or opportunities exclusively for members of certain groups are subject only to rational basis review and generally valid.[30] Allowing states to selectively make voting easier only for some members of the public seems inconsistent with the *Bush* Court's insistence that all voters participating in an election be treated equally.[31]

Supreme Court's equal protection holding in *Bush v. Gore* . . . can be applied in other contexts, rendering some local government practices vulnerable to constitutional challenge.").

25 *See infra* notes 61–64, 67–78.

26 *See infra* Part II.

27 *See infra* Section II.B.

28 *See infra* Sections II.A, II.C.

29 384 U.S. 641 (1966); *see infra* Part IV.

30 384 U.S. at 657.

31 This Article focuses solely on the Equal Protection Clause's uniformity requirement as articulated in *Bush v. Gore*. It does not address the other major component of equal protection jurisprudence concerning voting rights, which prohibits undue burdens on voting. Such challenges are usually brought under the Supreme Court's rulings in *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983), and

Part I of this Article briefly introduces *Bush*'s Uniformity Principle. Part II explores how lower courts have applied that holding over the past two decades in a variety of contexts, including to state laws that expressly distinguish between different groups of voters, delegate discretion to local officials, or establish vague standards subject to a range of interpretations. This discussion demonstrates that courts have been most resistant to applying the Uniformity Principle to absentee and early voting, administrative "matching" requirements, and challenges involving felons' voting rights.

Part III examines how court rulings in election cases may raise similar equal protection concerns when granting relief only to particular voters or within certain political subdivisions in a state. Over the past few years, academics and courts have debated the validity of nationwide injunctions—or, more accurately, defendant-oriented injunctions—in which a court prohibits a government agency or official from applying a challenged legal provision to anyone, anywhere in the relevant jurisdiction, including third-party non-litigants.[32] Some courts have suggested that such sweeping relief may be necessary in election cases, however, because enjoining an unconstitutional election-related law as it applies only to the plaintiffs in a lawsuit may violate *Bush*'s Uniformity Principle. The issue remains unresolved with no consensus in sight.

Part IV then explores the tension between *Bush*'s Uniformity Principle and the Supreme Court's longstanding holding in *Katzenbach* that the Equal Protection Clause allows the government to selectively expand or protect voting rights only for certain groups. The Article then briefly concludes.

Burdick v. Takushi, 504 U.S. 428, 434 (1992). They are not conventional equal protection claims because they do not contend that the challenged legal provision impermissibly applies different standards to different groups of voters. Rather, these claims assert that a uniform standard which applies to all voters within a jurisdiction is nevertheless invalid because the burdens it imposes on some people do not sufficiently further the state's interests, or those state interests are not sufficiently important. These disparate impact arguments often seem more like substantive due process challenges than true equal protection claims.

[32] *See* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 489–90, 492–93 (2016) [hereinafter Morley, *De Facto Class Actions?*]; Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 6–7 (2019) [hereinafter Morley, *Disaggregating Nationwide Injunctions*].

I. *Bush v. Gore*'s Uniformity Principle

Numerous authors have recounted the story of *Bush v. Gore* at length,[33] so this Part will touch briefly upon only a few essential highlights. In Florida's 2000 presidential election, following an automatic machine recount, George W. Bush led Al Gore by only a few hundred votes out of nearly six million cast.[34] Gore sought manual recounts in four counties; after the deadline elapsed for those recounts, Bush retained his lead.[35] Gore then filed an election contest in state court, challenging among other things the state's refusal to include certain ballots in his tally.[36]

The Florida Supreme Court ordered election officials to accept hundreds of additional votes from Palm Beach and Miami-Dade Counties, a judicial recount of 9,000 additional ballots from Miami-Dade County, and a manual recount throughout the state's other counties of all "undervotes" in the presidential election.[37] The US Supreme Court issued an emergency stay of this order[38] and reversed the judgment a few days later.[39]

The Court began by emphasizing that the Constitution does not guarantee anyone the right to vote for President, since state legislatures have plenary authority to decide how to appoint their presidential electors.[40] Once a state decides to appoint electors based on the outcome of a popular election, however, the election is subject to constitutional restrictions, including equal protection principles.[41] The Court emphasized that equal protection restrictions apply not only to the "initial allocation of the franchise," but "to the manner of its exercise" as well.[42] The state may not subject voters to "arbitrary and disparate treatment" that "value[s] one

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[33] *See, e.g.*, Briffault, *supra* note 2, at 330–45; Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. 105 (2002).

[34] Rambo, *supra* note 33, at 156.

[35] *Id.* at 156, 172.

[36] *Id.* at 217.

[37] Gore v. Harris, 772 So. 2d 1243, 1260–62 (Fla. 2000) (per curiam), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[38] Bush v. Gore, 531 U.S. 1046, 1046 (2000) (mem.).

[39] *Bush*, 531 U.S. at 111.

[40] *Id.* at 104 (citing U.S. CONST. art. II, § 1). The Constitution's delegation of authority specifically to the state legislature, rather than to the state as a whole, may have other important implications as well. *See supra* note 9 (discussing the independent state legislature doctrine).

[41] *Bush*, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

[42] *Id.*

person's vote over that of another."[43] This equal protection prohibition on "arbitrary and disparate treatment" of different voters participating in the same election is *Bush*'s Uniformity Principle.

The Court concluded that the Florida Supreme Court's ruling violated this Uniformity Principle in three distinct ways.[44] First, the Court held that Florida's standard for determining whether a ballot counted as a valid vote was too vague, and that various election officials applied it inconsistently.[45] Florida law required ballots to be counted if election officials could ascertain "the intent of the voter."[46] The Court noted that the state had not adopted "specific rules" to guide officials on "how to interpret the marks or holes or scratches" on ballots to ensure "equal application" of this vague, subjective standard.[47] "The formulation of uniform rules to determine intent," the Court concluded, "is practicable and . . . necessary."[48]

The Court pointed out that the absence of specific, uniform rules "led to unequal evaluation of ballots in various respects."[49] It explained that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[50] Palm Beach County had repeatedly changed its standards over the course of the recount.[51] The Court concluded, "This is not a process with sufficient guarantees of equal treatment."[52] Thus, a law that allowed various election officials to treat similarly marked ballots inconsistently when deciding whether to accept them as valid votes violated the Equal Protection Clause.

Second, counties also differed in the universe of ballots that they manually recounted. Miami-Dade, Palm Beach, and Broward Counties performed manual recounts of all ballots for which their automatic tallying machines did not record a vote for President, including ballots that the machines had classified as undervotes (i.e., those not registering any votes for president) and overvotes (i.e., those registering multiple votes for

43 *Id.* at 104–05.

44 *See id.* at 105–08 (concluding that the Florida Supreme Court's ruling "d[id] not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right").

45 *Id.* at 106.

46 *Id.* at 105–06 (quoting Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam)).

47 *Bush*, 531 U.S. at 106.

48 *Id.*

49 *Id.*

50 *Id.* at 106; *see also id.* at 107 ("[E]ach of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County . . . .").

51 *Id.* at 106.

52 *Id.* at 107.

president).[53] The Florida Supreme Court ordered all other counties in the state, in contrast, to perform a manual recount only of undervotes.[54] Thus, voters whose ballots had been classified as overvotes by automatic tallying machines were treated differently depending on the county in which they lived. Again, inconsistent treatment of similarly marked ballots in different counties—this time, whether they were included within the manual recount at all—violated the Equal Protection Clause.[55]

Finally, the Florida Supreme Court required the Secretary of State to include partial results from Miami-Dade County's incomplete recount within the final tally.[56] The county had failed to complete its recount by the deadline. By including such partial recount results, the Florida Supreme Court afforded Miami-Dade voters whose ballots had been manually recounted an extra opportunity to have their votes recognized as valid that other voters within the county were denied. The Equal Protection Clause prohibited the state from treating similarly marked ballots within the same county differently from each other.[57]

The Court attempted to cabin the scope of its ruling by declaring that it applied only "in the special instance of a statewide recount under the authority of a single state judicial officer."[58] It emphasized, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[59] True to its word, the Supreme Court has never cited *Bush v. Gore* in a majority opinion. Indeed, as of June 30, 2020, a Supreme Court justice has cited the case only once: Justice Thomas quoted *Bush* in a footnote in a dissent to support the proposition that states have plenary authority over the appointment of presidential electors.[60]

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[53] *Bush*, 531 U.S. at 107–08.

[54] *Id.* at 102 (quoting Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam)).

[55] *See id.* at 108.

[56] *See id.*

[57] *See id.* at 109 ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . . .").

[58] *Id.*

[59] *Bush*, 531 U.S. at 109.

[60] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting) (quoting *Bush*, 531 U.S. at 104). Justice Thomas stated that the Constitution gives Congress "no authority whatsoever" to "regulate Presidential elections." *Id.*

Based on *Bush*'s limiting language, courts have consistently refused to extend the Uniformity Principle to criminal cases,[61]

[61] *See* United States v. Nosal, 844 F.3d 1024, 1053 n.8 (9th Cir. 2016) (Reinhardt, J., dissenting) (characterizing *Bush* as "a ticket for one train only" (quoting Linda Greenhouse, *Thinking About the Supreme Court After* Bush v. Gore, 35 IND. L. REV. 435, 436 (2002))); Majors v. Warden, No. 99-cv-00493, 2016 U.S. Dist. LEXIS 70099, at *381 (E.D. Cal. May 26, 2016) (holding that *Bush* "considered specific problems stemming from the 2000 presidential election. The Court explicitly limited its holding to those election process issues"); Reay v. Scribner, No. CIV S-02-2067, 2008 U.S. Dist. LEXIS 3590, at *84–86 (E.D. Cal. Jan. 16, 2008) (rejecting an equal protection challenge to the allegedly different standards that various jurisdictions within the state used in deciding whether to appoint post-conviction counsel, declaring, "The Supreme Court expressly limited its analysis to the unique circumstances relating to the 2000 presidential election process in Florida and the various recount procedures developed to address those circumstances"), *recommendations adopted*, No. 02-cv-2067, 2008 U.S. Dist. LEXIS 16234 (E.D. Cal. Mar. 3, 2008), *aff'd*, 369 F. App'x 847 (9th Cir. 2010); Austin v. Wilkinson, 502 F. Supp. 2d 660, 671 & n.6 (N.D. Ohio 2006) (noting that, in an "exception" to the rule that the Supreme Court's opinions "guide the future actions of those before and not before the Court" by creating precedent, the *Bush* Court "limited the holding's authority to the facts in that case"); People v. Pena, No. B148324, 2002 Cal. App. Unpub. LEXIS 4373, at *33 n.10 (Cal. Ct. App. Jan. 30, 2002) (reaffirming that *Bush v. Gore* did not affect prosecutors' broad discretion over criminal charging decisions); State v. Scherner, 225 P.3d 248, 260–62 (Wash. Ct. App. 2009) (rejecting equal protection challenge to law allowing the state to introduce evidence of the defendant's prior sexual offenses in sex crime prosecutions and holding that, because of "the self-limiting language of the [*Bush*] opinion . . . [e]xcept in the rare circumstances where the facts at issue show some resemblance to the contested 2000 presidential election, the precedential value of *Bush v. Gore* is ambiguous at best and the opinion should not be cited to support other equal protection claims" (footnote omitted)), *aff'd sub nom.* State v. Gresham, 269 P.3d 207 (Wash. 2012); State v. Gallion, 2002 WI App 265, ¶ 10 (rejecting equal protection challenge to truth-in-sentencing provisions); State v. Smart, 2002 WI App 240, ¶¶ 6–8 (rejecting equal protection challenge to sentencing guidelines); *see also infra* notes 62–63 (citing additional sources). *But see* Weatherspoon v. Oldham, No. 17-cv-2535-SHM-cgc, 2018 U.S. Dist. LEXIS 30386, at *6 (W.D. Tenn. Feb. 26, 2018) (granting writ of habeas corpus to prisoner challenging constitutionality of cash bail system), *reconsideration denied*, 2018 U.S. Dist. LEXIS 65983 (W.D. Tenn. Apr. 19, 2018).

particularly in challenges to prosecutorial discretion over the death penalty[62] or the validity of reasonable doubt instructions.[63] They have likewise

[62] For cases setting the precedents within their respective jurisdictions rejecting challenges to the death penalty based on *Bush*, see Moon v. Davis, No. LA CV08-08327, 2018 U.S. Dist. LEXIS 227935, at *209–10 (C.D. Cal. May 1, 2018) (refusing to apply *Bush v. Gore* in the criminal context because the Court "expressly limited its analysis to the circumstances of the 2000 presidential election and the Florida recount procedures"); Hoyos v Davis, No. 09cv0388 L, 2017 U.S. Dist. LEXIS 165592, at *430–31 (S.D. Cal. Oct. 4, 2017) ("Petitioner's reliance upon *Bush v. Gore* is misplaced, as that decision involved legal challenges arising from the 2000 presidential election . . . ."); Sonner v. Filson, No. 00-cv-01101, 2017 U.S. Dist. LEXIS 139462, at *62–64 (D. Nev. Aug. 25, 2017) ("[T]he holding in *Bush v. Gore* does not apply in the criminal procedure context."); Roybal v. Davis, 148 F. Supp. 3d 958, 1105–06 (S.D. Cal. 2015) ("Given the expressly limited nature of the Supreme Court's holding, the Court remains unpersuaded that *Bush v. Gore* is relevant to [a death penalty case]."); Rundle v. Warden, No. 08-cv-01879, 2013 U.S. Dist. LEXIS 167445, at *524–26 (E.D. Cal. Nov. 21, 2013), *aff'd*, 782 F. App'x 581 (9th Cir. 2019), *petition for cert. filed*; No. 20-5617 (2020); Crowe v. Terry, 426 F. Supp. 2d 1310, 1354–56 (N.D. Ga. 2005), *aff'd*, 490 F.3d 840 (11th Cir. 2007); Black v. Bell, 181 F. Supp. 2d 832, 879 (M.D. Tenn. 2001), *remanded*, No. 02-5032, 2007 U.S. App. LEXIS 30798 (6th Cir. May 30, 2007); Lewis v. State, 24 So. 3d 480, 536 (Ala. Crim. App. 2006), *aff'd sub nom. Ex parte* Lewis, 24 So. 3d 540 (Ala. 2009); People v. Vines, 251 P.3d 943, 987 (Cal. 2011), *modified by* No. S065720, 2011 Cal. LEXIS 8084 (Cal. 2011), *overruled in part on other grounds by* People v. Hardy, 418 P.3d 309 (Cal. 2018); People v. Bennett, 199 P.3d 535, 571 n.19 (Cal. 2009); State v. Nichols, No. 05SC29988, 2006 Ga. Super. LEXIS 116 (Super. Ct. Dec. 21, 2006); St. Clair v. Commonwealth, 451 S.W.3d 597, 658 (Ky. 2014); State v. Clark, 220 So. 3d 583, 691–92 (La. 2016), *vacated*, Clark v. Louisiana, 138 S. Ct. 2671 (2018) (mem.); Galloway v. State, 122 So. 3d 614, ¶¶ 242–45 (Miss. 2013) (en banc); People v. Owens, No. 547/99, 2001 N.Y. Misc. LEXIS 463, at *7–8 (N.Y. Sup. Ct. Apr. 2, 2001); State v. Longo, 148 P.3d 892, 904–05 (Or. 2006); Cunningham v. Thompson, 62 P.3d 823, 845–46 (Or. Ct. App. 2003); State v. Cross, 132 P.3d 80, 101 (Wash. 2006) (en banc) ("[W]e decline to apply the principles annunciated in *Bush* outside of election law. The Supreme Court clearly indicated it did not intend application outside of that narrow realm."); Burns v. State, No. W2004-00914-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1282, at *201–05 (Crim. App. Dec. 21, 2005); Threadgill v. State, 146 S.W.3d 654, 672 (Tex. Crim. App. 2004) (en banc); *see also* Jurado v. Davis, No. 08cv1400, 2018 U.S. Dist. LEXIS 158379, at *488–90 (S.D. Cal. Sept. 17, 2018) (rejecting challenge to death penalty based on *Bush* because it "was a narrow holding that specifically dealt with legal challenges arising from a presidential election"); Cornwell v. Warden, No. 06-cv-00705, 2018 U.S. Dist. LEXIS 25346, at *376–77 (E.D. Cal. Feb. 14, 2018) ("In *Bush v. Gore*, the Court considered specific problems stemming from the 2000 presidential election. The Court explicitly limited its holding to those election process issues."), *recommendations adopted*, 2019 U.S. Dist. LEXIS 45206 (E.D. Cal. Mar. 18, 2019); Chinn v. Warden, No. 02-cv-512, 2013 U.S. Dist. LEXIS 91248, at *54 n.6 (S.D. Ohio June 28, 2013) ("*Bush v. Gore* was decisive, but has never again been cited by the Supreme Court, and drawing any 'instruction' from it is extremely hazardous."), *adopted*, 2020 U.S. Dist. LEXIS 94062 (S.D. Ohio May 29, 2020); Ripkowski v. Thaler, No. 07-4097, 2010 U.S. Dist. LEXIS 36102, at *65 (S.D. Tex. Mar. 31, 2010) ("The opinion in *Bush v. Gore* expressly states that it is limited to the specific facts of that case."), *aff'd*, 438 F. App'x 296 (5th Cir. 2011); Anderson v. Dretke, No. 03cv171, 2006 U.S. Dist. LEXIS 3379, at *25 n.2 (E.D. Tex. Jan. 18, 2006) ("The Court notes that the Supreme Court [in *Bush*] accepted a somewhat similar argument . . . but that Court stated in its opinion that the reasoning in the case could not be used in other cases." (citation omitted)); Hughes v. Dretke, No. H-01-4073, 2004 U.S. Dist. LEXIS 33589, at *72 (S.D. Tex. Apr. 30, 2004) ("[T]he holding in *Bush v. Gore* is expressly limited only to the unique circumstances relating to the 2000 election . . . There is no indication that this limited holding was intended to apply in any other context.").

generally refused to apply *Bush* in civil cases outside the context of election law.[64] A handful of courts have cited *Bush* to underscore the fact that their rulings in particular cases should not be applied as precedent in future cases.[65] Conversely, some dissenters have invoked *Bush* to critique majority opinions for attempting to unduly limit the scope of their holdings.[66]

[63] Pratt v. Evans, No. 02-CV-0872-MCE (HC), 2010 U.S. Dist. LEXIS 16382, at *5–7 (E.D. Cal. Feb. 23, 2010) (emphasizing the narrowness of *Bush*'s holding), *aff'd sub nom.* Pratt v. Hedgpeth, 519 F. App'x 509 (9th Cir. 2013); Baca v. Scribner, No. CIV. S-05-0506, 2008 U.S. Dist. LEXIS 26665, at *24 (E.D. Cal. Mar. 28, 2008) (rejecting equal protection challenge to reasonable doubt instruction because *Bush* "was not a criminal case and did not consider the equal protection problems, if any, arising from the use of California's reasonable doubt instruction"), *recommendation adopted*, 2008 U.S. Dist. LEXIS 74290 (E.D. Cal. Aug. 22, 2008); Nguyen v. Runnels, No. C 04-1124, 2007 U.S. Dist. LEXIS 24908, at *51–54 (N.D. Cal. Mar. 21, 2007) ("[T]he United States Supreme Court limited its holding in *Bush v. Gore* to the circumstances relating to the 2000 election."); People v. Tatmon, No. A109381, 2007 Cal. App. Unpub. LEXIS 5546, at *56–57 (Cal. Ct. App. July 9, 2007); People v. Warren, No. C039112, 2002 Cal. App. Unpub. LEXIS 3600, at *4–5 (Cal. Ct. App. Feb. 27, 2002); *see also cf.* Roberts v. Harrison, No. CV F 05-01006, 2008 U.S. Dist. LEXIS 104178, at *41–43 (E.D. Cal. Dec. 15, 2008) (rejecting defendant's equal protection challenge under *Bush* to reasonable doubt instructions because juries in all criminal cases are given the same instructions on the issue).

[64] *See, e.g.*, Ellis v. Chao, No. 01 Civ. 0280, 2001 U.S. Dist. LEXIS 19988, at *12–13 (S.D.N.Y. Dec. 3, 2001) ("[I]t is highly doubtful that the holding of *Bush v. Gore* applies to internal union elections. The Supreme Court cautioned that its consideration in that case was 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd in part, vacated in part on other grounds, and remanded,* 336 F.3d 114 (2d Cir. 2003); Regante v. Dir., Div. of Tax'n, 19 N.J. Tax 296, 301 (Super. Ct. App. Div. 2001) (rejecting equal protection challenge to state's calculation of out-of-state income); *In re* Town of Verona v. Cuomo, 997 N.Y.S.2d 670 (Sup. Ct. 2014) (declining to apply *Bush* to allow a constitutional challenge to a settlement agreement that required an Indian tribe to support a proposed state constitutional amendment). *But see* Vallien v. State *ex rel.* Dep't of Transp. & Dev., 812 So. 2d 894, 904 (La. Ct. App. 2002) (Thibodeaux, J., concurring in part and dissenting in part) (opining that a state damages cap violated equal protection by arbitrarily discriminating among tort victims (citing *Bush*, 531 U.S. at 106)); Harrison Cnty. Bd. of Supervisors v. Carlo Corp., 833 So. 2d 582, ¶¶ 8–10 (Miss. 2002) (en banc) (applying *Bush*'s Uniformity Principle to a county's exercise of discretion to determine the amount of attorney's fees to charge a delinquent taxpayer).

[65] *See, e.g.*, Sorchini v. City of Covina, 250 F.3d 706, 709 n.2 (9th Cir. 2001) (per curiam) ("This excuse is valid only in this case." (citing *Bush*, 531 U.S. at 98)); *see also* Port Arthur Indep. Sch. Dist. v. Klein & Assocs. Pol. Rels., 70 S.W.3d 349, 353 & n.1 (Tex. App. 2002) (Burgess, J., concurring) (emphasizing that the majority's holding should be "restrict[ed] . . . to these specific parties and facts" (citing *Bush*, 531 U.S. at 109, 121)).

[66] *See, e.g.*, Spears v. Stewart, 283 F.3d 992, 996 (9th Cir. 2001) (Reinhardt, J., dissenting from denial of rehearing en banc) ("The decision in this case is similar to that in *Bush v. Gore*—good for this case and this case only—except that here the decision is not even good for this case." (footnote omitted)); Morgan v. Bank of N.Y. Mellon, 200 So. 3d 792, 797 (Fla. Dist. Ct. App. 2016) (Makar, J., dissenting from denial of rehearing en banc) ("[T]he majority opinion has been revised to ensure that it is constrained to its facts, so much so that it falls into a category of cases that are 'limited to the present circumstances' and ought never be cited as precedent." (quoting *Bush*, 531 U.S. at 109)).

Bush's limiting language has also made some courts hesitant to rely on its Uniformity Principle in the context of election cases.[67] In one especially clear example, the district court rejected the notion that *Bush v. Gore*'s "sweeping language" authorized the plaintiff's equal protection claim, since the *Bush* Court had been "cautious to limit its ruling . . . to the circumstances before it, which involved a statewide election for the President of the United States."[68] The court continued, "[T]herefore, its applicability to this or any other case involving concerns over voting rights and equal protection is dubious."[69] Courts have likewise resisted litigants' efforts to invoke the Uniformity Principle in challenges to ranked-choice

[67] Paralyzed Veterans of Am. v. McPherson, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *12, *55–56 (N.D. Cal. Sept. 8, 2008) (rejecting disabled voters' equal protection challenge under *Bush* to the use of certain voting machines because, "by its own language, and universal agreement, *Bush* does not apply outside its own facts and circumstances: a court-ordered statewide recount, by a body charged with ensuring uniformity among counties, which failed to do so"); Green Party v. Weiner, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) ("'The Supreme Court explicitly warned that *Bush*, if not entirely a one-day ticket, was decided on extraordinary facts, such that its holding 'is limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)); Cobb v. Thurman, 957 So. 2d 638, 640–41, 646 n.5 (Fla. Dist. Ct. App. 2006) (noting that *Bush* was "limited to [its] facts" and "declin[ing] to extend [its] holdings," in the course of rejecting an equal protection challenge to a directive requiring county election officials to post notices at polling places that votes for a withdrawn candidate whose name still appeared on the ballot would be counted as votes for a replacement candidate, even though a lower court had enjoined officials from posting the sign and people who had already voted had no opportunity to see it); *see also* Young v. Hosemann, 598 F.3d 184, 185, 189, 192 (5th Cir. 2010) (exercising subject-matter jurisdiction over a challenge to a state prohibition on felon voting in presidential elections, but rejecting the challenge on the merits); Barber v. Bennett, No. CV-14-02489, 2014 U.S. Dist. LEXIS 165748, at *11–12, *15 (D. Ariz. Nov. 27, 2014) (rejecting a challenge to allegedly vague requirements for confirming signature matches on ballots and stating that *Bush* "did not invalidate different county systems regarding implementation of election procedures"); Jagla v. Ill. St. Bd. of Elections, No. 10-C-7324, 2011 U.S. Dist. LEXIS 60146, at *4–5 (N.D. Ill. June 6, 2011) (refusing to apply *Bush*'s Uniformity Principle in a challenge to the exclusion of a minor party candidate's name from the ballot); Ostrom v. O'Hare, 160 F. Supp. 2d 486, 497 (E.D.N.Y. 2001) (rejecting plaintiffs' argument that "[i]t is black-letter law that money equals votes" and holding that their reliance on *Bush* "simply does not make sense"); *infra* notes 70–78. *But see* State *ex rel.* League of Women Voters v. Herrera, 203 P.3d 94, 98 (N.M. 2009) ("In part because of the opinion's unusual self-limiting phrase, the precedential weight of *Bush v. Gore* is ambiguous, but the case nevertheless appears to have continuing life.").

[68] Walker v. Exeter Region Coop. Sch. Dist., 157 F. Supp. 2d 156, 159 n.6 (D.N.H. 2001), *aff'd*, 284 F.3d 42 (1st Cir. 2002).

[69] *Id.* The district court in *Walker* need not have gone so far because the Uniformity Principle, on its own terms, would not have applied in that case. The plaintiffs had challenged the fact that school districts which held town meetings to vote on bond issuances needed to approve the bonds by a two-thirds supermajority, while districts that voted on the same matters at traditional elections required only a sixty percent vote. *Id.* at 157–58. Because the law held voters participating in different local elections to different standards, *Bush*'s requirement of uniform treatment for voters within the same electorate was inapplicable.

voting (also called instant-runoff voting);[70] the Electoral College;[71] states' winner-take-all systems for appointing presidential electors;[72] laws binding presidential electors;[73] voter identification requirements;[74] the exclusion of candidates from the ballot for technical violations of petition requirements;[75] redistricting standards;[76] the Democratic Party's

[70] Baber v. Dunlap, 349 F. Supp. 3d 68, 77, 80 (D. Me.) (denying temporary restraining order), *preliminary injunction denied*, 376 F. Supp. 3d 125 (D. Me.), *appeal dismissed*, No. 18-2250, 2018 U.S. App. LEXIS 37137 (1st Cir. Dec. 28, 2018); Dudum v. City & Cnty. of San Francisco, No. C 10-00504, 2010 U.S. Dist. LEXIS 47020, at *19 (N.D. Cal. Apr. 16, 2010), *aff'd sub. nom.* Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011); Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683, 698 (Minn. 2009).

[71] Trinsey v. United States, No. 00-5700, 2000 U.S. Dist. LEXIS 18387, at *7–8 (E.D. Pa. Dec. 21, 2000); *see also* Liu v. Ryan, 724 F. App'x 92, 93 (2d Cir. 2018).

[72] Baten v. McMaster, 374 F. Supp. 3d 563, 569 (D.S.C. 2019), *aff'd*, 967 F.3d 345 (4th Cir. 2020); League of United Latin Am. Citizens v. Abbott, 369 F. Supp. 3d 768, 779–80 (W.D. Tex. 2019) ("*Bush*'s precedential value is unclear. Its primary opinion is expressly 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd*, 951 F.3d 311 (5th Cir. 2020); Lyman v. Baker, 352 F. Supp. 3d 81, 87–88 (D. Mass. 2018) ("[T]he precedential value of *Bush* is unclear, as the main opinion expressly states that it is 'limited to the present circumstances.'" (quoting *Bush*, 531 U.S. at 109)), *aff'd*, 954 F.3d 351 (1st Cir. 2020); Rodriguez v. Brown, No. 18-cv-001422, 2018 U.S. Dist. LEXIS 221795, at *8 (C.D. Cal. Sept. 21, 2018); Conant v. Brown, 248 F. Supp. 3d 1014, 1025, 1028 (D. Or. 2017), *aff'd*, 726 F. App'x 611 (9th Cir. 2018); *see also* Strunk v. U.S. House of Reps., 24 F. App'x 21, 23 (2d Cir. 2001); Williams v. North Carolina, No. 17-CV-265, 2017 U.S. Dist. LEXIS 181115, at *2, *11 (W.D.N.C. Oct. 2, 2017), *recommendations adopted sub nom.* Williams v. N.C. State Bd. of Elections, 2017 U.S. Dist. LEXIS 179833 (W.D.N.C. Oct. 31, 2017), *aff'd*, 719 F. App'x 256 (4th Cir. 2018) (per curiam); Schweikert v. Herring, No. 16-CV-00072, 2016 U.S. Dist. LEXIS 166854, at *7 (W.D. Va. Dec. 2, 2016).

[73] Abdurrahman v. Dayton, No. 16-cv-4279, 2016 U.S. Dist. LEXIS 178222, at *8, *11 (D. Minn. Dec. 23, 2016), *aff'd*, 903 F.3d 813 (8th Cir. 2018), *reh'g denied*, No. 16-4551, 2018 U.S. App. LEXIS 31567 (8th Cir. Nov. 7, 2018); Baca v. Hickenlooper, No. 16-cv-02986, 2016 U.S. Dist. LEXIS 177991, at *7 (D. Colo. Dec. 21, 2016), *overruled in part by* Chiafolo v. Washington, 140 S. Ct. 2316 (2020); Chiafalo v. Inslee, 224 F. Supp. 3d 1140, 1145 (W.D. Wash. 2016), *injunction denied*, No. 16-36034, 2016 U.S. App. LEXIS 23392 (9th Cir. Dec. 16, 2016). *But see* Baca v. Colo. Dep't of State, 935 F.3d 887, 951–52 (10th Cir. 2019) (invalidating state law requiring presidential electors to cast their electoral votes for the presidential candidate who received a plurality of the popular vote within the state), *rev'd sub. nom.* Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (per curiam).

[74] ACLU v. Santillanes, 546 F.3d 1313, 1324–25 (10th Cir. 2008), *rev'g* 506 F. Supp. 2d 598 (D.N.M. 2007).

[75] Minnus v. Bd. of Elections, No. 10-CV-3918, 2010 U.S. Dist. LEXIS 91969, at *12 (E.D.N.Y. Sept. 3, 2010); Ramratan v. N.Y. City Bd. of Elections, No. 06-CV-04770, 2006 U.S. Dist. LEXIS 63831, at *14–15 (E.D.N.Y. Sept. 7, 2006).

[76] *See, e.g.*, Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 284 F. Supp. 2d 1240, 1247–48 (D. Ariz. 2003) (refusing to apply *Bush*'s "principles in a different context" and rejecting the argument that *Bush* requires states to "apply consistent standards in redistricting"); Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 857–58 (Ariz. Ct. App. 2005) (per curiam) (holding that the Equal Protection Clause does not require an independent redistricting commission to promulgate regulations to better define the state constitution's requirement that the districts it draws be "competitive"); *In re* Constitutionality of House Joint Resol. 1987, 817 So. 2d 819, 831 n.17 (Fla. 2002) (holding that *Bush* did not require the legislature to

superdelegate rules;[77] and the absence of voting rights in presidential elections for citizens of US territories and possessions.[78]

Many more courts have been willing to cite various parts of *Bush v. Gore* for uncontroversial principles for which they could have just as easily cited other authorities.[79] These principles include the facts that the Equal

promulgate detailed "extraconstitutional standards" to govern redistricting), *superseded by constitutional amendment*, FLA. CONST. art. III, § 21 (2020). A few courts have invoked *Bush* in redistricting cases, but it does not appear to have affected the applicable rules or analysis. *See, e.g.*, Wright v. North Carolina, 787 F.3d 256, 259, 263 (4th Cir. 2015). Some have expressly emphasized that the case did not affect traditional redistricting doctrine. *See, e.g.*, Hall v. Louisiana, Civ. Act. No. 12-00657, 2015 U.S. Dist. LEXIS 43231, at *9 (M.D. La. Mar. 31, 2015), *judgment entered*, 108 F. Supp. 3d 419 (M.D. La. 2015).

[77] Kurzon v. Democratic Nat'l Comm., 197 F. Supp. 3d 638, 643 (S.D.N.Y. 2016).

[78] Goodwin v. Fawkes, 67 V.I. 104, 137 (Super. Ct. 2016) (holding that citizens of the US Virgin Islands have no constitutional right to vote for federal office); *accord* Ballentine v. United States, Civ. No. 1999-130, 2001 U.S. Dist. LEXIS 16856, at *53–54 (D.V.I. Oct. 15, 2001) (requesting supplemental briefing), *dismissed*, 2006 U.S. Dist. LEXIS 96631, at *1 (D.V.I. Sept. 21, 2006), *aff'd*, 486 F.3d 806 (3d Cir. 2007); *see also* Romeu v. Cohen, 265 F.3d 118, 123 (2d Cir. 2001) (holding that citizens of Puerto Rico have no constitutional right to vote for president); Segovia v. Bd. of Election Comm'rs, 201 F. Supp. 3d 924, 944–45 (N.D. Ill. 2016) (holding that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") was constitutionally valid even though it allowed former residents of the United States to continue voting in federal elections if they move to the Northern Mariana Islands, but not if they move to other territories), *aff'd in relevant part and rev'd in part sub nom.* Segovia v. United States, 880 F.3d 384 (7th Cir. 2018); Charles v. U.S. FEC, No. 11-110, 2012 U.S. Dist. LEXIS 118428, at *9–10 (D.V.I. Aug. 16, 2012) (holding that citizens of US Virgin Islands have no constitutional right to vote for president); Goodwin v. U.S. FEC, No. 11-106, 2012 U.S. Dist. LEXIS 125926, at *9–10 (D.V.I. Aug. 16, 2012); Igartúa de la Rosa v. United States, 331 F. Supp. 2d 76, 79 (D.P.R.) (holding that citizens of Puerto Rico have no constitutional right to vote for president), *aff'd sub nom.* Igartúa-de la Rosa v. United States, 386 F.3d 313 (1st Cir. 2004) (per curiam), *vacated by* No. 04-2186, 2005 U.S. App. LEXIS 6269 (1st Cir. Apr. 15, 2005), *aff'd en banc*, 417 F.3d 145 (1st Cir.).

[79] *See, e.g.*, Buffin v. City & Cnty. of San Francisco, No. 15-cv-04959, 2018 U.S. Dist. LEXIS 6853, at *19–20, *19 n.18 (N.D. Cal. Jan. 16, 2018) (holding that discrimination regarding fundamental rights triggers strict scrutiny under the Equal Protection Clause); Logan v. Pub. Emps. Ret. Ass'n, 163 F. Supp. 3d 1007, 1033–34 (D.N.M. 2016) ("In general, federal courts must use great caution when interfering with state elections."); Sadhu v. Gonzales, No. 06-2664, 2006 U.S. Dist. LEXIS 86540, at *8 (D.N.J. Nov. 29, 2006) ("[C]ourts assume Congress knows about other statutes already in effect and drafts new statutes with the existing statutes in mind."); Bay Cnty. Democratic Party v. Land, 347 F. Supp. 2d 404, 435–38 (E.D. Mich. 2004) (holding that failure to have one's ballot counted constitutes irreparable injury and issuing a preliminary injunction requiring election officials to count provisional ballots cast at the wrong precinct anywhere within the correct municipality); United States v. Bobo, 323 F. Supp. 2d 1238, 1243 (N.D. Ala. 2004) (discussing the importance of public confidence in judges in the context of judicial recusal); Welker v. Cicerone, 174 F. Supp. 2d 1055, 1067 (C.D. Cal. 2001) ("[E]nsuring that a duly elected official has the opportunity to represent her constituents is unquestionably in the public interest."); People v. Pelegrin, 959 N.Y.S.2d 401, 405 n.3 (N.Y. Crim. Ct. 2013) (noting that a fundamental rights analysis is the same under the Due Process and Equal Protection Clauses); McFarland v. Pemberton, 530 S.W.3d 76, 92 n.20 (Tenn. 2016) ("[E]ven duties which appear on their face to be ministerial, such as counting votes, may in some circumstances require the exercise of judgment and discretion."); Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 416 & n.21 (Tex. 2009)

Protection Clause protects the fundamental right to vote,[80] particularly the right of eligible voters to have their validly cast ballots counted;[81] the Equal Protection Clause limits the state's ability to regulate the manner in which people exercise their voting rights;[82] candidates have third-party standing to assert voters' constitutional right to vote;[83] state legislatures

(Willett, J., concurring) ("An appellate court can issue a mandate earlier than the rules ordinarily prescribe if it has good cause for making its judgment more immediately final and enforceable."); Walker v. Doe, 558 S.E.2d 290, 294 (W. Va. 2001) (discussing propriety of per curiam rulings), *overruled on other grounds*, State v. McKinley, 764 S.E.2d 303 (W. Va. 2014).

[80] *See* Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 337, 340 (4th Cir. 2016) (affirming district court's dismissal of racial gerrymandering claims, but reversing its rejection of a one-person, one-vote claim); Stein v. Cortés, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016) (rejecting challenge to the use of electronic voting machines and holding that voters had no constitutional right to a recount); Stein v. Thomas, 222 F. Supp. 3d 539, 542, 545 (E.D. Mich.) (issuing a temporary restraining order requiring a state to commence recounting ballots in a presidential election immediately, before the expiration of a statutorily required waiting period which the court held was likely unconstitutional as applied), *aff'd*, 672 F. App'x 565 (6th Cir. 2016); Citizens for a Pub. Train Trench Vote v. City of Reno, 53 P.3d 387, 394–95 (Nev. 2002) (en banc) (per curiam) (Young, J., dissenting) (concluding that an initiative should have been placed on the ballot); *see also* City of Greensboro v. Guilford Cnty. Bd. of Elections, 251 F. Supp. 3d 935, 939–40, 940 n.25, 947 (M.D.N.C. 2017) (invalidating municipal redistricting plan with population deviations exceeding eight percent that was enacted for partisan purposes).

[81] *See, e.g.*, Hoblock v. Albany Cnty. Bd. of Elections, 341 F. Supp. 2d 169, 176, 178 (N.D.N.Y. 2004) (granting preliminary injunction to enjoin the state from certifying election results while a dispute over whether to count certain absentee ballots remained pending), *remanded*, 422 F.3d 77 (2d Cir. 2005), *aff'd*, 487 F. Supp. 2d 90 (N.D.N.Y. 2006) (ordering state to count absentee ballots that election officials had erroneously issued).

[82] Brakebill v. Jaeger, 932 F.3d 671, 681, 687 (8th Cir. 2019) (Kelly, J., dissenting) (arguing that the majority erred in upholding the state's voter identification law); Ivey v. Johnston, No. 18-cv-1429, 2019 U.S. Dist. LEXIS 126989, at *7 n.5 (D. Minn. July 24, 2019) (rejecting the argument that banning civilly committed sex offenders from using the Internet violates the First Amendment "right to an informed electorate"), *recommendation adopted*, 2019 U.S. Dist. LEXIS 143713 (D. Minn. Aug. 23, 2019); Mich. State A. Philip Randolph Inst. v. Johnson, 209 F. Supp. 3d 935, 940, 946 (E.D. Mich.) (entering preliminary injunction against state law eliminating straight-ticket voting in Michigan), *stay denied*, No. 16-cv-11844, 2016 U.S. Dist. LEXIS 107429 (E.D. Mich. Aug. 15, 2016), *stay denied*, 833 F.3d 656 (6th Cir.), *stay denied*, 137 S. Ct. 28 (2016), *vacated*, 2019 U.S. Dist. LEXIS 181173 (E.D. Mich. Feb. 7, 2019); Veasey v. Perry, 71 F. Supp. 3d 627, 690 (S.D. Tex. 2014), *aff'd in part and vacated in part sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), *vacated and reh'g en banc granted*, 815 F.3d 958 (5th Cir.), *on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016); Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001) (holding that Maine's system for disenfranchising mentally ill people under guardianship violated equal protection); State *ex rel.* Brown v. Ashtabula Cnty. Bd. of Elections, 142 Ohio St. 3d 370, ¶¶ 28, 34–35 (per curiam) (O'Connor, C.J., concurring in the judgment) (applying *Anderson-Burdick* balancing to hold that a sore loser law which allowed candidates who lost primary elections to run only for certain local and specialized offices was unconstitutional).

[83] *See, e.g.*, Hawkins v. Wayne Twp. Bd., 183 F. Supp. 2d 1099, 1101, 1103 (S.D. Ind. 2002) (allowing candidate to challenge election results on the grounds that voters from certain districts had erroneously been given the wrong ballots).

have plenary power over the selection of presidential electors,[84] because the Constitution does not affirmatively guarantee the right to vote,[85] including for the office of President;[86] and a federal court must generally defer to a state supreme court's interpretation of state law.[87] Citing the

[84] *See, e.g.*, Ariz. Libertarian Party v. Schmeral, 28 P.3d 948, 953 & n.5 (Ariz. Ct. App. 2001) (rejecting constitutional challenge to state laws governing the selection of minor political parties' leaders); *see also* Gelineau v. Johnson, 904 F. Supp. 2d 742, 744, 747–48 (W.D. Mich. 2012) (holding that a minor political party lacked the right to have a vice-presidential candidate appear on the ballot without a properly nominated and statutorily eligible presidential candidate); Project Vote v. Kelly, 805 F. Supp. 2d 152, 175 (W.D. Pa. 2011) (rejecting an equal protection challenge to restrictions on canvassers gathering signatures for petitions).

[85] *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 26, 31 (1st Cir. 2009) (upholding disenfranchisement of incarcerated inmates); Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1299–1300, 1325–26 (N.D. Fla. 2016) (holding that the Constitution forbade a county from counting disenfranchised state prisoners as part of the population count when apportioning school board districts); Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth, 100 N.E.3d 326, 327, 331 n.19 (Mass. 2018) (upholding voter registration deadline against a state constitutional challenge); *cf.* Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784, 814 & n.27 (Del. Ch. 2015) (contending that the Constitution protects an implied right to vote).

[86] *See, e.g.*, Taitz v. Democrat Party of Miss., No. 12-CV-280, 2015 U.S. Dist. LEXIS 178819, at *11–13 (S.D. Miss. Mar. 31, 2015) (dismissing challenge to President Obama's eligibility to run for president).

[87] *See* Pinho v. Gonzales, 432 F.3d 193, 212–13 (3d Cir. 2005); Ramos-Becerra v. Hatfield, No. 14-cv-0917, 2017 U.S. Dist. LEXIS 9370, at *6–7 (M.D. Pa. Jan. 24, 2017) (quoting Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring)); United States v. Nieves-Galarza, No. 11-CR-057, 2017 U.S. Dist. LEXIS 3579, at *3–4 (M.D. Pa. Jan. 10, 2017) (quoting *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)), *aff'd*, 718 F. App'x 159 (3d Cir. 2017); Jacobs v. City of Chicago, No. 14-CV-5335, 2015 U.S. Dist. LEXIS 5385, at *4 (N.D. Ill. Jan. 16, 2015) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); Kuri v. City of Chicago, No. 13-C-1653, 2014 U.S. Dist. LEXIS 180669, at *4 (N.D. Ill. June 11, 2014) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); Weigel v. Maryland, 950 F. Supp. 2d 811, 836 n.59 (D. Md. 2013) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); Ismail v. Cnty. of Orange, 917 F. Supp. 2d 1060, 1070 n.7 (C.D. Cal. 2012) (citing *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)), *aff'd*, 676 F. App'x 690 (9th Cir. 2017); Shallal v. Stovall, No. 08-10308, 2009 U.S. Dist. LEXIS 54025, at *7–8 (E.D. Mich. June 25, 2009) (citing *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring)); Phillips v. Lafler, No. 06-15192, 2009 U.S. Dist. LEXIS 45417, at *22 (E.D. Mich. May 28, 2009) (citing *Bush*, 531 U.S. at 112, 114 (Rehnquist, C.J., concurring)); Filson v. Langman, No. 99-30021-FHF, 2002 U.S. Dist. LEXIS 22036, at *17 (D. Mass. Nov. 13, 2002) (quoting *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring)); *see also* Rutherford v. Columbia Gas, 575 F.3d 616, 625–26 (6th Cir. 2009) (Clay, J., concurring in part and dissenting in part); Sec. Ins. Co. v. Trustmark Ins. Co., 283 F. Supp. 2d 602, 606, 607 n.4 (D. Conn. 2003), *aff'd sub nom.* Sec. Ins. Co. v. TIG Ins. Co., 360 F.3d 322 (2d Cir. 2004). Likewise, in habeas cases, a federal court generally must even defer to a state court's interpretation of the US Constitution. Evans v. Thompson, 465 F. Supp. 2d 62, 73 (D. Mass. 2006) (quoting *Bush*, 531 U.S. at 136–37 (Ginsburg, J., dissenting)), *aff'd*, 518 F.3d 1 (1st Cir. 2008); Common Cause v. Pennsylvania, 447 F. Supp. 2d. 415, 435–36 (M.D. Pa. 2006) (citing *Bush*, 531 U.S. at 142 (Ginsburg, J., dissenting)), *aff'd*, 558 F.3d 249 (3d Cir. 2009).

A few courts, in contrast, have held that *Bush* allows federal courts to reject state courts' interpretations of state law under certain narrow circumstances. *See, e.g.*, Republican Party v. Kelly, 247 F.3d 854, 891 (8th Cir. 2001) (Beam, J., dissenting) (noting that federal courts defer to state courts on

concurrence in *Bush v. Gore*,[88] several courts have recognized that the Presidential Electors Clause specifically empowers the legislature of each state, rather than state executive officials[89] or state courts,[90] to regulate

questions of state law except "where an error of state law works a singular national impact"), *rev'd on other grounds sub nom.* Republican Party v. White, 536 U.S. 765 (2002); Besser v. Walsh, No. 02 Civ. 6775, 2003 U.S. Dist. LEXIS 21474, at *123 n.59 (S.D.N.Y. Nov. 26, 2003) ("[A] federal court may 're-examine[] a state-court interpretation of state law' on 'rare occasions' when it 'appears to be an obvious subterfuge to evade consideration of a federal issue.'" (quoting Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975) (internal quotation marks omitted), and citing *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring))), *aff'd*, 601 F.3d 163 (2d Cir. 2010).

[88] 531 U.S. at 111–22 (Rehnquist, C.J., concurring).

[89] *See* Libertarian Party v. Dardenne, No. 08-582-JJB, 2008 U.S. Dist. LEXIS 137402, at *2–3, *8–9 (M.D. La. Sept. 24, 2008) (holding that, where Hurricane Gustav forced the Secretary of State's office to be closed on the statutory deadline for political parties to file their presidential candidates' ballot-access petitions, the Secretary violated the Presidential Electors Clause by unilaterally establishing a new deadline and excluding parties that did not meet it); Libertarian Party v. Brunner, 567 F. Supp. 2d 1006, 1011–12 (S.D. Ohio 2008) (holding that the Secretary of State violated the Elections Clause and Presidential Electors Clause by establishing ballot access requirements for minor parties after a federal court invalidated the state's statutory requirements, because the legislature had not delegated its authority to promulgate such rules); *cf.* Baldwin v. Cortés, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs' Presidential Electors Clause challenge to "the Secretary [of State's] 1984 entry into the consent decrees" changing the deadline for candidates to file ballot-access petitions, due to "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme"), *aff'g* No. 08-CV-01626, 2008 U.S. Dist. LEXIS 72035, at *7–12 (M.D. Pa. Sept. 12, 2008); Largess v. Sup. Jud. Ct., 373 F.3d 219, 227 (1st Cir. 2004) (per curiam) (noting the disagreement among the Justices in *Bush* over whether the Presidential Electors Clause limits "the internal allocation of power in a state government"); Moore v. Hosemann, No. 08-cv-573, 2008 U.S. Dist. LEXIS 141865, at *4 (S.D. Miss. Sept. 29, 2008) ("[Although] federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws . . . the Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes.").

[90] *See* Republican Party of Arkansas v. Kilgore, 98 S.W.3d 798, 799–801 (Ark. 2002) (per curiam) (holding that, outside the context of a constitutional challenge, state courts could not extend polling place hours due to election irregularities where state law did not authorize them to do so, because "[t]he legislative branch of our state government has spoken on this issue, and there is no provision in our Election Code authorizing an extension of voting times by the judiciary"); *see also* Stein v. Thomas, No. 16-14233, 2016 U.S. Dist. LEXIS 186038, at *9 (E.D. Mich. Dec. 7, 2016) (applying a state court's interpretation of a state law governing recounts in presidential elections, because the court "neither ignored a statutory term, nor is there even a hint that it was basing its decision on something other than the statute," and the court "made an arguable interpretation of the statute before it"); Miller v. Treadwell, 736 F. Supp. 2d 1240, 1243 (D. Alaska 2010) (applying a state supreme court's interpretation of a state law governing the counting of write-in votes in a US Senate race, because that court "did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practice of making voter intent a priority"); *cf.* Lance v. Davidson, 379 F. Supp. 2d 1117, 1123, 1126 n.12 (D. Colo. 2005) (holding that the *Rooker-Feldman* doctrine precluded the federal district court from exercising jurisdiction over the plaintiffs' Elections Clause claim), *vacated and remanded*

presidential elections. Lower courts have also alluded to the *Bush* Court's willingness to adjudicate the case's merits as evidence that the political question doctrine is narrow.[91] Others appear to have cited *Bush* primarily to criticize it, though such rulings seem to be issued far less frequently.[92]

sub nom. Lance v. Dennis, 546 U.S. 459 (2006) (per curiam) (holding that the lower court erred in dismissing the plaintiffs' Elections Clause claim under the *Rooker-Feldman* doctrine), *remanded to* 444 F. Supp. 2d 1149 (D. Colo.) (holding that plaintiffs were collaterally estopped from litigating their Elections Clause claim), *aff'd in part and vacated in part sub nom.* Lance v. Coffman, 549 U.S. 437 (2007) (holding that the generalized grievance doctrine precluded the plaintiff voters from asserting standing to challenge a congressional redistricting scheme imposed by a state court for violating the legislature's prerogatives under the Elections Clause); *see generally* Morley, *De Facto Class Actions?*, *supra* note 32 (discussing the independent state legislature doctrine).

[91] *See* Doe v. Bush, 323 F.3d 133, 141 (1st Cir. 2003) (noting that the majority in *Bush* did not expressly address the political question doctrine); Bissonette v. Podlaski, No. 15-cv-00334-SLC, 2018 U.S. Dist. LEXIS 94198, at *51 (N.D. Ind. June 5, 2018); McMahon v. Pres. Airways, Inc. 460 F. Supp. 2d 1315, 1319 (M.D. Fla. 2006), *aff'd*, 502 F.3d 1331 (11th Cir. 2007); El-Shifa Pharm. Indus. Co. v. United States, 402 F. Supp. 2d 267, 273 & n.3 (D.D.C. 2005), *aff'd*, 559 F.3d 578 (D.C. Cir. 2009), *aff'd en banc*, 607 F.3d 836 (D.C. Cir. 2010); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 779–80 (Tex. 2005); *see also In re* Methyl Tertiary Butyl Ether Prods. ("MTBE") Liab. Litig., 438 F. Supp. 2d 291, 297 n.29 (S.D.N.Y. 2006); Nguyen Thang Loi v. Dow Chem. Co. (In re *Agent Orange Prod. Liab. Litig.*), 373 F. Supp. 2d 7, 68 (E.D.N.Y. 2005); McInnish v. Bennett, 150 So. 3d 1045, 1065 n.19 (Ala. 2014) (Moore, C.J., dissenting); Att'y Gen. v. Bd. of State Canvassers, 888 N.W.2d 57, 58 (Mich. 2016) (mem.) (Young, C.J.) (recusing himself from a case concerning the presidential election while recognizing that, "[a]fter the disintegration of the political question doctrine and such cases as *Bush v. Gore*, courts are increasingly called upon to settle frank political questions" (footnote omitted)); Alexander v. Taylor, 51 P.3d 1204, ¶ 18 (Okla. 2002). One district court suggested that Justice Rehnquist's concurrence in *Bush* allows federal courts to adjudicate cases relating to presidential elections rather than abstaining in favor of state courts. *See* Nader v. Keith, No. 04-C-4913, 2004 U.S. Dist. LEXIS 16660, at *1–2, *14 (N.D. Ill. Aug. 23, 2004) (exercising jurisdiction over a challenge to ballot-access requirements by an independent candidate for president), *aff'd*, 385 F.3d 729 (7th Cir. 2004).

[92] *See* Walker v. Exeter Region Coop. Sch. Dist., 157 F. Supp. 2d 156, 159 n.6 (D.N.H. 2001) (asserting gratuitously that "numerous commentators and law professors have criticized the decision for its usurpation of state court power and its unjustifiable expansion of the Equal Protection Clause . . . Whether the court was in fact guided more by personal preferences than by sound legal principles need not be addressed . . . ."), *aff'd*, 284 F.3d 42 (1st Cir. 2002); Gonzalez v. United States, 135 F. Supp. 2d 112, 115 n.5 (D. Mass.) ("[T]he fallout from *Bush v. Gore* makes it likely that resort to [jurisdiction stripping] will become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect." (citation omitted)), *aff'd sub nom.* Brackett v. United States, 270 F.3d 60 (1st Cir. 2001); *see also* Igartúa-de la Rosa v. United States, 417 F.3d 145, 181 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (noting that courts must "respect and comply with" decisions such as *Bush* "irrespective of how disputed they may be"); Rosselló-Gonzalez v. Calderón-Serra, 398 F.3d 1, 19 (1st Cir. 2004) (Torruella, J., concurring) (discussing "individual or collective disagreement" with *Bush*'s outcome); Mhanna v. U.S. Dep't of Homeland Sec., Citizenship & Immig. Servs., No. 10-292, 2010 U.S. Dist. LEXIS 13139, at *30 n.6 (D. Minn. Feb. 16, 2010) (quoting *Gonzalez*, 135 F. Supp. 2d at 115 n.5); Stephenson v. Woodward, 182 S.W.3d 162, 176 (Ky. 2005) (Lambert, C.J., concurring) ("[There was a] widely held view that the Supreme Court of the United States had exceeded its jurisdiction in halting the recounting of votes in Florida, thus assuring the election of President Bush . . . ."); *cf. In re*

The next two Parts explore the wide range of circumstances in which courts have invoked *Bush*'s Uniformity Principle in resolving election-related cases.

II. Applying the Uniformity Principle

Courts have construed *Bush v. Gore*'s Uniformity Principle as requiring election officials to treat voters within an electorate in a substantively similar manner in many, though not necessarily all, respects. These courts have implemented the principle in three main ways. Section A explains that a jurisdiction or election official may not intentionally apply different rules to similarly situated groups of voters or ballots that result in substantially different opportunities to either cast a vote or have it accepted as valid. This requirement flows directly from *Bush*'s holding that election officials across a state must apply the same specific standards when recounting ballots in the same election.[93] Section B shows that a state may not formally delegate broad discretion to county or local officials that results in substantial disparities in the ability of various political subdivisions' voters to cast their ballots and have them be counted.

Section C discusses equal protection challenges arising from allegedly vague state laws. *Bush v. Gore* suggests that a state may not promulgate broad, vague, and subjective standards that different election officials (either within the same political subdivision or across different subdivisions) may construe or apply differently, resulting in substantial disparities among voters' chances of being able to cast ballots or have them be counted. This requirement stems from *Bush v. Gore*'s rejection of Florida's "intent of the voter" standard as too indeterminate to cabin election officials' discretion.[94] Unlike the other categories of equal protection challenges, such vagueness claims often fail. Finally, Section D concludes by summarizing the principles that may be discerned from these Uniformity Principle rulings.

Before delving into this analysis, it is helpful to outline the generally accepted contours of the Uniformity Principle. Courts have recognized three main restrictions on its scope. First, the principle applies only to voters participating in the same election. Distinctions in rules among separate, parallel elections do not raise constitutional concerns. For example, different municipalities may adopt varying voting rules and procedures

Charges of Jud. Misconduct, 404 F.3d 688, 699 (2d Cir. 2005) ("[R]easonable people disagree over the soundness of the opinions in [*Bush v. Gore*].").

[93] *See* 531 U.S. at 105–06.

[94] *Id.* at 105.

for purely local proceedings, like bond issuances[95] or municipal elections,[96] which each jurisdiction's residents vote upon separately. Similarly, a state may use different voting mechanisms for major and minor parties' primary elections, since each primary is a distinct election involving a different electorate.[97] In *Save Palisade Fruitlands v. Todd*,[98] the Court of Appeals for the Tenth Circuit held that a state may allow voters in home-rule counties to enact county-level ordinances through a public initiative process, while prohibiting voters in statutory counties from doing so.[99]

Second, the Uniformity Principle is obviously not violated when all voters within a jurisdiction are subject to the same rules and procedures.[100]

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[95] *See, e.g.*, *Walker*, 284 F.3d at 46 (rejecting equal protection challenge to a state law establishing different super-majority requirements by which different municipalities were required to approve bond measures, because "the votes are on local bond issues and each vote within the district is counted equally. There is no issue here of a state-wide vote tabulated differently in constituent districts" (emphasis omitted)); *cf.* Ways v. City of Lincoln, No. 00CV3216, 2002 U.S. Dist. LEXIS 14919, at *73–74 (D. Neb. July 29, 2002) (holding that equal protection is not violated where local ordinances from various municipalities differ from each other), *aff'd*, 331 F.3d 596 (8th Cir. 2003).

[96] *See, e.g.*, Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 242 (6th Cir. 2011) ("Because voters in other counties may not cast votes for a local judgeship, remedying poll-worker error with respect to votes in this race does not result in unequal treatment of voters outside Hamilton County."); Clark v. McCann, 196 Cal. Rptr. 3d 547, 555 (Ct. App. 2015) ("Even if the Orange County Registrar of Voters adopted a different procedure for counting provisional ballots, Orange County voters did not vote in the Chula Vista City Council election."). *But see* State *ex rel.* Painter v. Brunner, 941 N.E.2d 782, ¶ 41 (per curiam) (holding that applying special procedures to investigate the validity of certain provisional ballots cast in an election for county juvenile court judge "may have caused . . . equal protection concerns," because provisional ballots cast elsewhere throughout the state were not similarly investigated).

[97] *See* Green Party v. Weiner, 216 F. Supp. 2d 176, 192, 198 (S.D.N.Y. 2002) (rejecting equal protection challenge to the use of different voting mechanisms for major and minor parties' primary elections, because "the different technologies for casting and counting votes are in effect utilized in completely distinct, separate elections, and cannot advantage one candidate over another in head-to-head competition").

[98] 279 F.3d 1204 (10th Cir. 2002).

[99] *Id.* at 1208, 1212–13 (holding that the Equal Protection Clause permits the state to grant different rights concerning county-level initiatives to voters in different types of counties, because "voters in statutory and home rule counties never have their votes weighed differently on the same question").

[100] George v. Hargett, 879 F.3d 711, 728, 730 (6th Cir. 2018) (rejecting equal protection challenge to requirements for ratification of state constitutional amendments); Rosselló-Gonzalez v. Calderón-Serra, 398 F.3d 1, 16 n.29 (1st Cir. 2004) (noting that the plaintiffs' "vote dilution" claim under *Bush* would have presented "stronger" grounds for "federal intervention," if it had not been "rendered moot by the fact that all ballots will be adjudicated in the same uniform manner during the recount"); Baber v. Dunlap, 376 F. Supp. 3d 125, 139 n.20 (D. Me. 2018) (rejecting plaintiff's equal protection challenge under *Bush* to ranked-choice voting because "[t]he record in this case does not reveal the application of inconsistent standards" to different ballots); Davis v. Detroit Downtown Dev. Auth., No. 17-cv-11742, 2017 U.S. Dist. LEXIS 225010, at *6 (E.D. Mich. June 19, 2017) (rejecting equal protection

For this reason, vague standards typically do not raise uniformity concerns when ultimate responsibility for applying them rests with a single centralized decisionmaker.[101]

Third, despite the Uniformity Principle, courts (except for the US Court of Appeals for the Sixth Circuit) have held that unintentional mistakes by election officials, including those which prevent certain people from being able to vote, generally do not rise to the level of equal protection violations.[102] Federal courts have generally declined to set aside

challenge to municipal entity's alleged diversion of property tax funds that voters had approved for educational purposes to subsidize an arena instead, in part because all voters were affected equally); Greene v. Huff, No. C15-1881-JCC, 2016 U.S. Dist. LEXIS 80129, at *8–9 (W.D. Wash. June 20, 2016) (rejecting equal protection challenge to a municipality's decision to hold a single election to determine who would fill both the unexpired five-week portion of a previous term, as well as the upcoming full term, of a seat on the city council, even though the elections for other council seats held at the same time were only for the upcoming full terms); Samuel v. V.I. Bd. of Elections, No. 2012-0094, 2013 U.S. Dist. LEXIS 3689, at *18–19 (D.V.I. Jan. 6, 2013) (rejecting equal protection challenge to the use of voting machines that were not certified by the US Election Assistance Commission, because the decision affected all voters equally); Dudum v. City & Cnty. of San Francisco, No. C 10-00504 RS, 2010 U.S. Dist. LEXIS 47020, at *19 (N.D. Cal. Apr. 16, 2010) (rejecting equal protection challenge to ranked-choice voting because "election officials tabulate every vote and conduct each round in an identical manner"), *aff'd sub nom.* Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011); Marion Cnty. Democratic Party v. Marion Cnty. Election Bd., No. IP 01-1963-C-T/K, 2002 U.S. Dist. LEXIS 11330, at *42–44 (S.D. Ind. May 9, 2002) (rejecting equal protection challenge to election board's decision to require all voters, including those who cast straight-ticket ballots, to vote separately on races for judgeships, because all voters were being treated the same); *In re* Election for Sch. Comm. Rep. for Dist. 3, No. CV-04-695, 2004 Me. Super. LEXIS 257, at *5 (Super. Ct. Dec. 3, 2004) (rejecting equal protection challenge to a municipal school board election under *Bush* because "a standard citywide policy prevailed" concerning voters who attempted to vote at the incorrect polling place near closing time, while recognizing that a claim might have existed "if some polling places had accepted ballots from late voters who presented themselves at the wrong precincts while other polling places had refused such ballots"); *cf.* Paher v. Cegavkse, No. 20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *20 n.16 (D. Nev. May 27, 2020) (rejecting equal protection challenge to statewide COVID-19 response plan for the primary elections, because there was no claim that "votes will be counted differently, or what constitutes a valid vote would differ as among the counties").

101 *See* Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 241 (6th Cir. 2011) (rejecting equal protection challenge to a district court order requiring a county board of elections to "review all deficient provisional ballots within the county under the same standard, and not just those cast at one particular location"); Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010) (rejecting equal protection challenge to Alaska's vague standards for counting write-in votes in a US Senate race, because "the write-in ballots in this case were counted and tabulated by a single state-wide election board and the determination of challenged ballots was made by a single individual, the Director"); Miller v. Treadwell, 245 P.3d 867, 873 (Alaska 2010) (per curiam) ("We fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard.").

102 *See, e.g.*, Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 912–13, 920–21 (E.D. Va. 2018) (holding that plaintiffs were unlikely to succeed in their equal protection challenge concerning an election for state legislature in which the winning candidate prevailed by only seventy-three votes,

elections on constitutional grounds where poll workers erroneously gave a potentially dispositive number of people ballots for an election in which they were ineligible to vote. Courts have likewise rejected equal protection challenges to the results of elections where poll workers gave a potentially dispositive number of voters the wrong ballots, preventing them from voting in the races at issue.[103] Even though these cases resulted in similarly situated voters being treated differently, the courts held that the disparities did not cause equal protection problems because they were unintentional and arose from "individual and infrequent polling-place irregularities and verification procedures."[104] And election officials may cease or otherwise fix any such unintentional errors that have occurred, even when such corrections would result in later voters being treated differently from earlier ones.[105] As discussed later, however, the Sixth Circuit has rejected this limitation.[106] The remainder of this Part explains the various contexts in which, consistent with these constraints, courts have applied *Bush*'s Uniformity Principle.

election officials gave eighty-six eligible voters the wrong ballots, and an additional sixty-one ineligible voters cast ballots in it); Feehan v. Marcone, 204 A.3d 666, 691, 695–97, 696 n.39 (Conn.) (rejecting equal protection claim where election officials at a polling place mistakenly distributed the wrong stack of ballots, thereby denying the voters who used those ballots the opportunity to vote for the correct candidates), *cert. denied*, 140 S. Ct. 144 (2019).

103 *See infra* note 139. One exception to this principle is where election officials inadvertently excluded a candidate's name from the ballot in violation of a federal court order that directed them to ensure that the candidate was included. *See* Dascola v. City of Ann Arbor, No. 14-cv-11296-LPZ, 2014 U.S. Dist. LEXIS 99040, at *1–2, *14–15 (E.D. Mich. July 22, 2014) (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972)). In *Dascola*, election officials distributed corrected absentee ballots to the affected voters with a warning that the original ballots, which had improperly omitted the candidate's name, would be disregarded. *Id.* at *6–7. The district court held that the Equal Protection Clause prohibited election officials from counting the original ballots which had excluded the candidate; it permitted them to count only the replacement ballots containing the candidate's name. *Id.*

104 Barber v. Bennett, No. CV-14-02489-TUC-CKJ, 2014 U.S. Dist. LEXIS 165748, at *11–12, *15, *19 (D. Ariz. Nov. 27, 2014) (rejecting equal protection challenge to allegedly vague guidance for implementing signature-matching requirements for ballots).

105 Bennett v. Mollis, 590 F. Supp. 2d 273, 281 (D.R.I. 2008); *see also* Cobb v. Thurman, 957 So. 2d 638, 646 & n.5 (Fla. Dist. Ct. App. 2006) (upholding state directive requiring county election officials to post notices at polling places informing voters that votes for a withdrawn candidate would be instead counted for a replacement candidate whose name did not appear on the ballot, even though a lower court had enjoined the sign from being posted and, as a result, people who had already voted did not have the opportunity to see it); *cf.* Save Palisade FruitLands v. Todd, 279 F.3d 1204, 1214 (10th Cir. 2002) ("One isolated, unchallenged incident in which the electors of one statutory county enacted legislation by an initiative does not give rise to an equal protection violation.").

106 *See infra* notes 127–128 and accompanying text.

A. *Intentionally Treating Voters Differently*

At its core, the Uniformity Principle prohibits election officials from intentionally providing materially different opportunities to voters participating in the same election to either cast ballots or have their ballots be counted.[107] Importantly, however, many courts have refused to apply the principle to absentee or early voting.[108] Most obviously, the Uniformity Principle generally requires a jurisdiction to apply the same procedures and requirements to all voters to confirm their eligibility to vote.[109] States also must weigh all votes[110] or petition signatures equally.[111] Typically they must likewise allow all voters participating in a general election for a public entity that exercises substantial governmental authority to cast the

107 *See, e.g.*, Davis v. Kester, No. 17-0021, 2018 U.S. Dist. LEXIS 165022, at *3 (E.D. Pa. Sept. 26, 2018) (affirming that "[w]ithin the context of voting, the Equal Protection Clause is implicated when a state classifies voters in disparate ways," but rejecting a prisoner's claim that the warden of his jail violated his constitutional rights by failing to warn him about the deadline for requesting an absentee ballot).

108 *See infra* notes 170–187, 358–375 and accompanying text.

109 *See* Charfauros v. Bd. of Elections, No. 99-15789, 2001 U.S. App. LEXIS 15083, at *25–26, *37 (9th Cir. May 10, 2001) (holding that discriminatory treatment of Republican voters whose residency was challenged violated equal protection), *as amended* 2001 U.S. App. LEXIS 15090 (9th Cir. July 6, 2001).

110 This aspect of the Uniformity Principle traces back to the Supreme Court's one-person, one-vote ruling in *Reynolds v. Sims*, 377 U.S. 533, 562–63, 568 (1964).

111 *See* Idaho Coal. United for Bears v. Cenarrussa, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003) (striking down requirement that at least five percent of voters from each of at least half of the state's counties sign a petition to have an initiative placed on the ballot); Bernbeck v. Gale, 58 F. Supp. 3d 949, 957–58 (D. Neb. 2014) (striking down state constitutional provisions requiring an initiative petition to contain signatures from five percent of registered voters in each of two-fifths of the state's counties, because those provisions accorded greater weight to signatures from voters in sparsely populated counties than to signatures from voters in heavily populated counties), *vacated on other grounds*, 829 F.3d 643 (8th Cir. 2016) (holding that the plaintiff lacked standing); Gallivan v. Walker, 2002 UT 89, ¶¶ 5–8, 11, 67–68, 74 n.12 (invalidating state law requiring a petition for a ballot initiative to contain, "from each of at least 20 counties, legal signatures equal to 10% of the total of all votes cast in that county for all candidates for governor at the last regular general election" (quoting UTAH CODE ANN. § 20A-7-201(2)(a)(ii) (LexisNexis 2001)).

same number of votes[112] and choose from among the same range of candidates.[113]

Day v. Robinwood West Community Improvement District,[114] for example, concerned elections for the board of directors of a local improvement district in Missouri.[115] The district granted one vote to each registered voter who lived within its boundaries, as well as one vote for each parcel of property a person owned.[116] The US District Court for the Eastern District of Missouri struck down this scheme.[117] Citing *Bush*'s Uniformity Principle, the court declared, "By giving some individuals more votes than others, Defendants have diluted the voting power of some qualified voters."[118] Laws allowing only freeholders (i.e., landowners) to sign certain petitions or participate in certain elections are likewise generally infirm.[119]

Several courts have also applied the Uniformity Principle in the context of ballot-counting disputes. In those cases, like *Bush* itself, election officials violated equal protection principles by treating similar ballots differently.[120] One of the best examples of a court applying the Uniformity

112 *See, e.g.*, Nageak v. Mallott, 426 P.3d 930, 944 & n.58 (Alaska 2018) (suggesting that equal protection concerns arose when voters in one municipality were erroneously permitted to participate in both the Republican and third-party primaries, while voters in other municipalities could participate in only a single primary). Certain special-purpose districts with narrow responsibilities are exempt from these equal-voting requirements. *See* Ball v. James, 451 U.S. 355, 371 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–30 (1973).

113 *See, e.g.*, Erlandson v. Kilffmeyer, 659 N.W.2d 724, 735–36 (Minn. 2003) (en banc) (Page, J., concurring in part and dissenting in part) (joining in majority opinion holding that, where a US Senate candidate died and his party nominated a replacement, the Equal Protection Clause prohibited the state from providing updated ballots at polling places to voters who had previously received absentee ballots with the deceased candidate's name, while declining to mail updated absentee ballots to such voters who requested them).

114 No. 08-CV-01888 ERW, 2009 U.S. Dist. LEXIS 36586 (E.D. Mo. Apr. 29, 2009), *judgment entered*, 693 F. Supp. 2d 996, 996–97 (E.D. Mo. 2010).

115 *Id.* at *1–3.

116 *Id.* at *2 ("If an individual owns property in the district and is a registered voter, they would receive two ballots. Someone who is a registered voter and the owner of two pieces of property in the district would receive three ballots, and so forth.").

117 *Id.* at *8 (granting motion for preliminary injunction); *see also Day*, 693 F. Supp. 2d at 1003.

118 *Day*, 2009 U.S. Dist. LEXIS 36586, at *5; *Day*, 693 F. Supp. 2d at 1003–04.

119 *See* Bd. of Lucas Cnty. Comm'rs v. Waterville Twp. Bd. of Trs., 171 Ohio App. 3d 354, 2007-Ohio-2141, 870 N.E.2d 791, 799 (striking down a law allowing only freehold voters to sign a petition to create a new township).

120 *See* State *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 826 (S.D. Ohio) (declining to remand case because a substantial equal protection issue existed where election officials in one county within a congressional district rejected provisional ballots that lacked the voter's name, while officials in the other two counties within that district counted them), *judgment entered*, 588 F. Supp. 2d 828, 838 (S.D. Ohio), *vacated*, 549 F.3d 468, 471–72 (6th Cir. 2008) (per curiam) (ordering case remanded because the plaintiffs had alleged only state-law claims, rather than a federal equal protection claim), *remanded to*

Principle to the ballot-counting process is the Sixth Circuit's ruling in *Hunter v. Hamilton County Board of Elections*.[121] *Hunter* held that election officials must apply consistent, "specific standards" when deciding whether to count provisional ballots, "apply[ing] similar treatment to equivalent ballots."[122]

State law provided that a provisional ballot could be counted only if it was from the precinct in which a voter was registered.[123] The law further required election workers to assist voters in casting their ballots.[124] Following the 2010 elections, the Hamilton County Board of Elections decided to count provisional ballots that had been cast at the board's central office, even if they were from the wrong precinct. The board presumed that such errors could have occurred only if poll workers at the office gave voters the wrong ballots.[125] The board refused to apply the same approach, however, to provisional ballots from the wrong precincts that were cast within multi-precinct voting centers.[126] In those cases, the board declined to presume that poll workers' errors had caused voters to cast provisional ballots from the wrong precincts.

The US Court of Appeals for the Sixth Circuit held that this disparity violated equal protection.[127] It explained that the

> intrajurisdiction unequal treatment undertaken by the Hamilton County Board is constitutionally impermissible. The Board arbitrarily treated one set of provisional ballots

No. 08-cv-1077, 2009 U.S. Dist. LEXIS 92890, at *10–11, *11 n.1 (S.D. Ohio Sept. 18, 2009) (denying attorneys' fees for improper removal of election litigation to federal court, while reiterating that "if Franklin County used a different standard to evaluate provisional ballots than Union and Madison Counties used in the same race, that could present a *Bush v. Gore* problem"), *aff'd*, 629 F.3d 527 (6th Cir. 2010); *see also* Common Cause Georgia v. Kemp, 347 F. Supp. 3d 1270, 1297, 1299–1300 (N.D. Ga. 2018) (holding that "serious provisional balloting count issues" must be "consistently and properly handled," and granting a temporary restraining order requiring election officials to review the eligibility of anyone who cast a provisional ballot and did not appear on the statewide voter registration list).

121 635 F.3d 219 (6th Cir. 2011), *aff'g* No. 10CV820, 2010 U.S. Dist. LEXIS 128434 (S.D. Ohio Nov. 22, 2010) (issuing preliminary injunction requiring election officials to determine which provisional ballots were cast in the correct polling place but the wrong precinct as the result of poll worker error); Hunter v. Hamilton Cnty. Bd. of Elections, 850 F. Supp. 2d 795, 839 (S.D. Ohio 2012) (issuing a permanent injunction on an equal protection claim, which required election officials to apply the same approach to provisional ballots from the wrong precincts that had been cast at polling places as they applied to similarly improper provisional ballots from the wrong precincts that had been cast at the central election office).

122 635 F.3d at 235.

123 *Id.* at 223.

124 *Id.*

125 *Id.* at 224–25.

126 *Id.* at 236–37.

127 *Id.*

> differently from others, and that unequal treatment violates the Equal Protection Clause . . . [I]t chose to consider evidence of poll-worker error for some ballots, but not others, thereby treating voters' ballots arbitrarily, in violation of the Equal Protection Clause.[128]

Importantly, the Sixth Circuit's equal protection analysis did not hinge on the notion that voters had a constitutional or statutory right to have election officials count provisional ballots from the wrong precinct that the voters had received due to poll worker error. Rather, the court concluded that, because the county board had decided to count some provisional ballots from the wrong precincts without an individualized showing of poll worker error (i.e., ballots cast at the central election office), the Equal Protection Clause required the board to count all of them.

Keyes v. Gunn[129] involved a ballot-counting dispute even closer to the facts of *Bush*.[130] State election officials had concluded that a Mississippi state House of Representatives race was a tie.[131] Pursuant to state law, the candidates drew straws to resolve the election and the Democratic candidate won.[132] The Republican candidate filed an election contest under the state constitution with the state House.[133] The House voted to reject five of the nine provisional ("affidavit") ballots that state officials had counted.[134] Under the House's tally, the Republican candidate prevailed and the Democrat was unseated.[135]

Five voters who had cast provisional ballots sued various legislative officials, alleging that the legislature's actions violated the Equal Protection Clause.[136] Citing *Bush*, they claimed that the "defendants intentionally treated plaintiffs differently from others voting by affidavit ballot, and there was no rational basis for the disparate treatment beyond an impermissible desire to alter the outcome of the election."[137] The district court held the plaintiffs had stated a valid equal protection claim under 42 U.S.C. § 1983.[138] It reasoned that *Bush* bars states from counting certain ballots while refusing to count other, materially indistinguishable ballots. The Fifth Circuit, however, reversed, holding that a rarely used federal law

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128 *Hunter*, 635 F.3d at 242–43.

129 230 F. Supp. 3d 588 (S.D. Miss. 2017), *rev'd*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018).

130 *Id.* at 591.

131 *Id.*

132 *Id.*

133 *Id.* at 592.

134 *Id.*

135 *Keyes*, 230 F. Supp. 3d at 592.

136 *Id.*

137 *Id.* at 598.

138 *Id.*

barred the district court from exercising subject-matter jurisdiction over the claim.[139]

The Ohio Supreme Court adopted a similar approach in *State ex rel. Skaggs v. Brunner*,[140] which involved a congressional election that spanned multiple counties within the state.[141] Prior to the election, the Secretary of State's office notified county boards of election that provisional ballots could not be counted unless they contained both the voter's printed name and signature.[142] Following the election, however, at the behest of the Democratic congressional candidate, the Secretary of State instructed one county board of election to count provisional ballots so long as they contained *either* a voter's printed name *or* the voter's signature.[143] The Ohio Supreme Court ruled that this selective post-election change in ballot-counting rules violated *Bush*'s Uniformity Principle. The court held, "By changing her instructions for one county but not for others after the election at the request of a candidate, the secretary of state failed to ensure that the same rules would be applied to each provisional voter of every county in the state."[144]

At times, courts have applied the Uniformity Principle to intentional discrimination among voters concerning voting opportunities, as well. For example, in *Obama for America v. Husted*,[145] the Sixth Circuit held that it was unconstitutional for the state of Ohio to allow only domestic military voters to cast ballots in person over the weekend before Election Day.[146] The court noted that, although military voters can face unexpected emergencies that prevent them from voting in person on Election Day, other voters may face similar contingencies.[147] The court concluded that the Equal Protection Clause therefore prohibited the state from making special accommodations only for military voters.[148] The court added that it

139 Keyes v. Gunn, 890 F.3d 232, 239–40 (5th Cir. 2018) (citing 28 U.S.C. § 1344 (2018)). For a critique of the Fifth Circuit's jurisdictional ruling, see Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction Over Election Contests, and the Political Question Doctrine*, FLA. L. REV. (forthcoming 2020), https://perma.cc/27KZ-8RLK.

140 900 N.E.2d 982 (per curiam).

141 *Id.* ¶ 1.

142 *Id.* ¶ 6 (citing OHIO REV. CODE ANN. § 3505.183(B)(1)(a) (LexisNexis 2020)).

143 *Id.* ¶¶ 20, 23.

144 *Id.* ¶ 58.

145 697 F.3d 423 (6th Cir. 2012).

146 *Id.* at 437.

147 *Id.* at 435 ("At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters . . . .").

148 *Id.* at 436.

would be "worrisome . . . if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges."[149]

One federal district court went so far as to conclude that the Uniformity Principle prohibits states from treating people who register to vote online differently from those who register in person or by mail.[150] As required by the National Voter Registration Act,[151] the State of Texas automatically updated voter registration records of people who renewed or updated their driver's license information in person or by mail.[152] When people did so online, however, the Department of Public Safety's website sent them a link to the Secretary of State's office to manually update their voter registration information.[153] The district court held, among other things, that this disparity violated the Equal Protection Clause because the state lacked a rational basis for distinguishing between hard-copy and online registrants in this manner.[154]

Notwithstanding the Uniformity Principle, courts have upheld differential treatment of voters within the same electorate under a variety of circumstances. Most basically, the differences among various groups of voters can sometimes be sufficient to warrant differential treatment. In *Taft v. Cuyahoga County Board of Elections*,[155] a city council election initially ended in a tie between two candidates; following a coin flip, candidate Frederick Taft was declared the winner.[156] When the ballots were recounted, Taft lost a vote from a certain precinct and his opponent was declared the winner instead.[157] The county board of elections then investigated all of the ballots from that precinct and determined that the ballot at issue had a hanging chad.[158] During a subsequent election contest, the

149 *Id.* at 435. For further discussion of *Obama for America* and its tensions with Supreme Court precedent, see *infra* Part IV.

150 Stringer v. Pablos (*Stringer I*), 320 F. Supp. 3d 862, 897–900 (W.D. Tex. 2018), *rev'd sub nom.* Stringer v. Whitley (*Stringer II*), 942 F.3d 715, 725 (5th Cir. 2019) (holding that the plaintiffs lacked standing to challenge the online registration system), *preliminary injunction renewed sub nom.* Stringer v. Pablos (*Stringer III*), No. SA-16-CV-257-OG, 2020 U.S. Dist. LEXIS 16686, at *24–25 (W.D. Tex. Jan. 30, 2020) (holding that the plaintiffs had established standing and remained likely to succeed on their equal protection claim).

151 52 U.S.C. § 20504(a).

152 *Stringer I*, 320 F. Supp. 3d at 872.

153 *Id.* at 869.

154 *Id.* at 899–900; *see also Stringer III*, 2020 U.S. Dist. LEXIS 16686, at *23–24.

155 854 N.E.2d 472 (per curiam).

156 *Id.* ¶ 2.

157 *Id.* ¶¶ 3–4.

158 *Id.* ¶ 5.

court determined that the contested ballot should have been counted and reinstated Taft as the victor.[159]

Taft's opponent then challenged the recount, contending that the county board had violated *Bush*'s Uniformity Principle by reviewing ballots only from one particular precinct.[160] The Ohio Supreme Court rejected that claim, pointing out that "there was no evidence that any other precincts had experienced the same counting problems as Precinct D's."[161] Thus, it was not "arbitrary" for election officials to limit the recount to that precinct.[162]

Moreover, intentional differences in the treatment of different voters or ballots violate the Uniformity Principle only when they affect a person's ability to vote or the secrecy of their ballots. In *Jones v. Samora*,[163] the ballots for a municipal election had numbered stubs attached to them, which could be cross-referenced against a list to determine which voters cast them.[164] Election officials removed the stubs for ballots cast in person before counting them but left the stubs attached for absentee ballots.[165] There was no evidence, however, that the election judges had attempted to identify any voters who had cast absentee ballots.[166] The Colorado Court of Appeals concluded, "[A]lthough the counting method that the Town used *risked* a deprivation of constitutional rights, that risk never flowered into an actual deprivation of constitutional rights."[167] Thus, not all distinctions in the treatment of ballots during the counting process violate the Uniformity Principle. Some further, substantive impact on voting rights must also be established.

Courts have also generally refused to apply the Uniformity Principle—and allowed jurisdictions to intentionally treat various voters differently—in certain discrete contexts. Most commonly, courts have typically held—contrary to the Sixth Circuit's ruling in *Obama for America v. Husted*[168]—that the Uniformity Principle does not fully apply to absentee

159 *Id.* ¶¶ 6, 9.

160 *Id.* ¶ 28.

161 *Taft*, 854 N.E.2d at 478, ¶ 31; *see also* Hawkins v. Blunt, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512, at *36–37 (W.D. Mo. Oct. 12, 2004) (rejecting an equal protection challenge to a state law allowing provisional ballots to be counted only if they were cast in the correct precinct, because the state had legitimate interests in ensuring that voters had the opportunity to vote in all applicable races and requiring voters to cast their ballots at a particular place).

162 *Taft*, 854 N.E.2d at 478, ¶ 31.

163 395 P.3d 1165 (Colo. App. 2016).

164 *Id.* ¶ 9.

165 *Id.* ¶ 12.

166 *Id.* ¶ 35.

167 *Id.* ¶ 84 (emphasis in original).

168 *See supra* notes 145–49 and accompanying text.

and early voting. As discussed later,[169] the Supreme Court has held that the fundamental right to vote does not extend to absentee ballots.[170] Building on that holding, many courts have concluded that states may limit eligibility to cast absentee ballots to only certain groups of voters. For example, in *Griffin v. Roupas*,[171] several working mothers challenged Illinois's absentee voter law.[172] The state allowed voters to cast absentee ballots only if they were going to be absent from their home county on Election Day, or could not vote in person due to physical disability, religious observance, or the need to perform certain governmental duties.[173] The plaintiffs contended that the Equal Protection Clause required the state to allow them to cast absentee ballots, as well, since their jobs and childcare responsibilities made in-person voting unreasonably burdensome for them.[174]

The Seventh Circuit unanimously rejected this argument. It recognized that virtually any election restriction will "exclude, either de jure or de facto, some people from voting."[175] The court also noted that Illinois's limits on absentee voting made it difficult for many groups of people other than the plaintiffs to vote, as well, "such as emergency-room and other medical personnel, persons who work at the other end of a large county from their precinct, persons who work at two jobs, and those who are caring for a sick or disabled family member."[176] By attacking Illinois's restrictions on absentee voting, "the plaintiffs [were] claiming a blanket right of registered voters to vote by absentee ballot."[177] Rejecting that conclusion, the court declared that it was up to each state to balance the benefits and drawbacks of absentee voting and decide how broadly to allow it.[178] Other courts, adopting similar reasoning, have reached the same conclusion.[179]

Likewise, in *Fair Elections Ohio v. Husted*,[180] the district court denied the plaintiffs' motion to expand access to absentee voting for pretrial

169 *See infra* Part IV.

170 McDonald v. Bd. of Election Comm'rs, 394 U.S 802, 807 (1969).

171 385 F.3d 1128 (7th Cir. 2004).

172 *Id.* at 1129.

173 *Id.* (citing 10 ILL. COMP. STAT. § 5/19-1 (2009)).

174 *Id.* at 1132.

175 *Id.* at 1130.

176 *Id.*

177 *Griffin*, 385 F.3d at 1130.

178 *Id.* at 1131.

179 *See, e.g.*, Suydam v. Town of Rumford, No. 15-cv-00203-NT, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2015); *see also* Gustafson v. Ill. State Bd. of Elections, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209, at *36–39 (N.D. Ill. Sept. 30, 2007) (upholding state law that allowed different localities to offer different opportunities for early voting, even in the context of statewide elections).

180 No. 12CV797, 2012 U.S. Dist. LEXIS 161614 (S.D. Ohio Nov. 1, 2012).

detainees who were arrested the weekend before Election Day.[181] Ohio law required voters to submit requests for absentee ballots by noon on the Saturday before Election Day.[182] The law created an exception that applied when a voter, or the child of a voter, became unexpectedly hospitalized between that deadline and Election Day.[183] Such voters could request an absentee ballot until 3:00 p.m. on Election Day, which could be delivered to the voter in the hospital by either a family member or a bipartisan team of election officials.[184] The plaintiff organization sued, claiming that the state violated *Bush*'s Uniformity Principle by failing to provide a comparable opportunity to request and receive absentee ballots to prisoners who were unexpectedly arrested over the weekend before Election Day.[185] The district court refused to issue a temporary restraining order.[186] It found that requiring election boards to extend the deadline either for all voters who were "prevented from voting on Election Day due to unforeseen circumstances," or instead specifically for arrestees, would be "too onerous."[187]

Courts have likewise declined to apply *Bush*'s Uniformity Principle to discretionary decisions concerning restoration of felons' voting rights. In *Hand v. Scott*,[188] the US District Court for the Northern District of Florida aggressively applied a sweeping view of the Uniformity Principle to conclude that Florida's system for restoring voting rights to felons violated the Equal Protection Clause.[189] Disregarding a binding summary affirmance of the Supreme Court on the grounds that it purportedly "has not aged well,"[190] the district court held that Florida's system unconstitutionally granted "unfettered discretion" over felon re-enfranchisement to the Governor and his Executive Clemency Board.[191]

The US Court of Appeals for the Eleventh Circuit stayed this ruling.[192] It began by recognizing that section 2 of the Fourteenth Amendment

181 *Id.* at *3–4.

182 *Id.* at *6 (citing OHIO REV. CODE ANN. §§ 3509.03, 3509.08(A) (LexisNexis 2020)).

183 *Id.* at *10 (citing § 3509.08(B)).

184 *Id.* at *10–12.

185 *Id.* at *13.

186 *Fair Elections Ohio*, 2012 U.S. Dist. LEXIS 161614, at *68.

187 *Id.* at *58.

188 285 F. Supp. 3d 1289 (N.D. Fla.), *permanent injunction entered*, 315 F. Supp. 3d 1244 (N.D. Fla.), *stayed*, 888 F.3d 1206 (11th Cir. 2018), *vacated and dismissed as moot sub nom.* Hand v. DeSantis, 946 F.3d 1272 (11th Cir. 2020).

189 *Id.* at 1306–08 (granting summary judgment to plaintiffs).

190 *Id.* at 1306–07 (citing Beacham v. Braterman, 300 F. Supp. 182, 183 (S.D. Fla. (three-judge court), *aff'd*, 396 U.S. 12 (1969)).

191 *Id.* at 1304.

192 *Hand*, 888 F.3d at 1215.

"expressly empowers the states to abridge a convicted felon's right to vote."[193] Since felons lack the constitutional right to vote, restrictions on the re-enfranchisement process do not trigger any form of heightened scrutiny. And binding Supreme Court precedent "confirm[s] the broad discretion of the executive to grant and deny clemency."[194] Clemency is an intrinsically equitable process through which the Executive grants mercy—the absence of uniform standards and sweeping discretion are inherent, pervasive attributes.[195] Since Florida's felon re-enfranchisement system had not been adopted for racially discriminatory purposes, it was constitutionally valid.[196] Thus, the Eleventh Circuit concluded, the Uniformity Principle is categorically inapplicable to discretion-based re-enfranchisement procedures for felons.

In conclusion, the Uniformity Principle generally forbids states or election officials from providing materially different treatment to similarly situated groups of voters participating in the same election. In particular, they must accord equal weight to all voters' petition signatures and ballots, and apply the same standards when determining the validity of, or counting, voters' ballots. The Uniformity Principle does not apply, however, where differences among various groups of voters warrant different treatment, or the differential treatment does not impact a person's opportunity to vote or to have their vote be counted and given full effect. Finally, courts generally refuse to apply the Uniformity Principle in certain contexts such as restrictions on absentee and early voting, or discretionary aspects of the process for re-enfranchising felons.

B. *Delegating Discretion to Local Officials*

The Uniformity Principle also generally prohibits states from delegating discretion to county or local officials over policies concerning statewide elections when differences among various political subdivisions' rules or procedures would lead to materially different voting opportunities for their respective citizens.[197] Courts have most frequently applied the

193 *Id.* at 1209 (quoting U.S. CONST. amend. XIV, § 2); *see also* Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (upholding the constitutionality of felon disenfranchisement).

194 *Hand*, 888 F.3d at 1209.

195 *Id.* at 1209 ("If a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature.").

196 *Id.* at 1210 ("The problem for the appellees in this case, however, is that they have not shown (nor have they even claimed) that Florida's constitutional and statutory scheme had as its purpose the intent to discriminate on account of, say, race, national origin, or some other insular classification . . . .").

197 *See* Jones v. DeSantis, No. 19-cv-300-RH/MJF, 2020 U.S. Dist. LEXIS 90729, at *112 (N.D. Fla. May 24, 2020) (holding, in a challenge to the constitutionality of Florida's system for determining

Uniformity Principle in this context to prohibit counties within a state from using different voting machines with substantially different error rates. Courts have also invalidated substantial variations among localities' election procedures or resources that led to disparities in voting opportunities. In contrast, courts have generally upheld grants of discretion concerning the timing or location of election-related processes, especially absentee and early voting, even though differences in such policies can substantially impact voters' ability to participate in statewide elections.

1. Voting Systems

Voters have invoked the Uniformity Principle to challenge the types of voting machines that states and counties adopt. These cases generally fall within two broad categories. In one line of precedent, plaintiffs challenged the Secretary of State's decision to certify a range of different types of voting machines which counties could choose to adopt. Such plaintiffs sought to prevent the use of less advanced voting systems with higher error or ballot-rejection rates, such as punch-card ballots, in certain counties. They argued that disparities among different counties' voting systems violated the Uniformity Principle by affording voters arbitrarily different likelihoods of having their votes counted in statewide elections. Courts were generally sympathetic to such claims, although, for various procedural and jurisdictional reasons, few of these matters resulted in binding precedent.

whether felons paid their court-ordered fines and fees to have their voting rights restored, that the plaintiffs had stated a "substantial claim" that "the different eligibility standards in different counties will violate . . . the equal-protection principle established by *Bush*"); League of Women Voters v. Blackwell, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005) (holding, in a challenge to the use of different types of voting machines in different counties, that "[a] state having power to ensure uniform treatment of voters cannot adopt policies leading to disparate treatment of those voters and thereafter plead 'no control' as a defense"), *aff'd in part and rev'd in part*, 548 F.3d 463 (6th Cir. 2008); State *ex rel.* Colvin v. Brunner, 896 N.E.2d 979, ¶ 60 (per curiam) (noting that the Uniformity Principle may have been violated when certain county prosecuting attorneys advised their respective county boards of elections to disregard a directive from the secretary of state that the prosecuting attorneys deemed unlawful); *see also* PG Publ'g Co. v. Aichele, 902 F. Supp. 2d 724, 758 n.17 (W.D. Pa. 2012) (suggesting that equal protection problems arise when "different local entities" employ "varying standards" that cause one person's vote to be valued over that of another), *aff'd*, 705 F.3d 91 (3d Cir. 2013); *In re* Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 839 A.2d 451, 461 (Pa. Commw. Ct. 2003) (en banc) (Leadbetter, J., dissenting) (arguing that, where a county election board instructed third-party ballot harvesters that they could return absentee ballots in violation of state law, the court should decline to count those ballots because "allowing a patchwork of different rules from county to county in a statewide election implicates equal protection concerns"), *rev'd*, 843 A.2d 1223, 1234–35 (Pa. 2004) (holding that absentee ballots returned in violation of state law were invalid).

The other line of cases, ironically, challenged the use of advanced electronic voting systems on the grounds that they were allegedly vulnerable to hacking, and did not produce a paper trail of ballots that could be manually reviewed by voters and counted or audited by election officials to confirm an election's results. These plaintiffs claimed that the availability of paper ballots for absentee voters, but not people who voted in-person, violated the Uniformity Principle. Except for a pair of outlier federal cases in Georgia,[198] courts consistently have rejected those claims.

The earliest challenges to voting systems arising from *Bush v. Gore* focused on states' decisions to allow counties to use outdated systems.[199] In *Common Cause v. Jones*,[200] California law specified that county officials could adopt any voting system certified by the Secretary of State.[201] The secretary certified several systems, including punch-card ballots, which allegedly were substantially less likely than other systems to record valid votes.[202] The US District Court for the Central District of California held that the plaintiffs had stated a valid Equal Protection Claim by alleging that the secretary's "permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory."[203] Following the court's refusal to dismiss the case, the secretary decertified the punch-card systems.[204] The court subsequently ruled that it was feasible for counties still using punch-card systems to

198 *See* Curling v. Raffensperger (*Curling III*), 403 F. Supp. 3d 1311, 1342, 1345 (N.D. Ga. 2019) (holding that plaintiffs had stated a valid equal protection claim "that Georgia's voting scheme results in the arbitrary and disparate treatment of its citizens based on their chosen method of voting: in person via DRE or by absentee paper mail-in ballot"); Curling v. Raffensperger (*Curling II*), 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019) (entering preliminary injunction barring the state from using DRE machines without paper trails after 2019); Curling v. Kemp (*Curling I*), 334 F. Supp. 3d 1303, 1322, 1325 (N.D. Ga. 2018) (holding that the use of electronic voting machines without paper trails was likely unconstitutional because, unlike paper ballots, they could be hacked, but declining to issue a preliminary injunction due to the proximity of the election), *aff'd in part on other grounds sub nom.*, Curling v. Worley, 761 F. App'x 927 (11th Cir. 2019) (holding that sovereign immunity did not bar the plaintiffs' claims, but declining to address the merits); *see also* Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1274 (N.D. Ga. 2019) (holding that a challenge to electronic voting machines was not moot despite the recent enactment of a law requiring the purchase of new machines).

199 Such challenges continued to be brought even years after that ruling. *See, e.g.*, Andrade v. NAACP of Texas, 345 S.W.3d 1, 11 (Tex. 2011) (holding that plaintiffs had standing to bring an equal protection challenge to the use of different voting technologies in different counties).

200 213 F. Supp. 2d 1106 (C.D. Cal. 2001), *reconsideration denied*, 213 F. Supp. 2d 1110 (C.D. Cal. 2002).

201 *Id.* at 1107 (citing CAL. ELEC. CODE §§ 19100, 19201 (West 2000)).

202 *Id.*

203 *Id.* at 1109.

204 *Common Cause*, 213 F. Supp. 2d at 1112.

replace them with certified voting systems for the 2004 elections and ordered them to do so.[205]

In 2003, however, voters successfully petitioned to hold a recall election for Governor Gray Davis.[206] The election was scheduled for October of that year, before punch-card machines were fully eliminated throughout the state.[207] Less than three months before the election, in *Southwest Voter Registration Education Project v. Shelley*,[208] voting rights groups sought a preliminary injunction to delay the recall election until election officials replaced the remaining punch-card systems.[209] The district court denied the motion, ruling that any deviations in error rates among different counties' voting systems would not "amount to illegal or unconstitutional treatment" of voters.[210] The court read *Bush* as "strongly hint[ing] that rational basis review might be appropriate to claims of marginally disparate error rates among varying voter technologies."[211] To the extent *Bush* supported "an elevated standard of review," the court added, "there are many reasons to believe [*Bush*'s] analysis was limited to its unique context."[212] Regardless of the proper level of scrutiny, the court concluded, the impossibility of obtaining replacement voting equipment in time for the October election was a compelling reason to allow counties to use their existing systems.[213]

A panel of the US Court of Appeals for the Ninth Circuit reversed, enjoining the recall election.[214] The Ninth Circuit emphasized that punch-card systems were "significantly more prone to errors that result in a voter's ballot not being counted than the other voting systems being used in California."[215] The Secretary of State's decision to decertify punch-card systems further confirmed their unreliability.[216] The court noted that the plaintiffs had "present[ed] almost precisely the same issue as the Court

205 *Id.* at 1113.

206 S.W. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1133 (C.D. Cal.), *rev'd*, 344 F.3d 882 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

207 *Id.* at 1134.

208 *Id.* at 1131.

209 *Id.* at 1134.

210 *Id.* at 1139.

211 *Id.* at 1140.

212 *S.W. Voter*, 278 F. Supp. 2d at 1140.

213 *Id.* at 1141.

214 S.W. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 913 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

215 *Id.* at 896.

216 *Id.* at 898–99.

considered in *Bush*, that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause."[217]

Only a week later, the panel's decision was reversed by the Ninth Circuit sitting en banc.[218] The en banc panel unanimously held—without explanation—that the plaintiffs had failed to establish a likelihood of success on the merits of their equal protection claim.[219] It further concluded that enjoining the election, which had already begun, would impose severe hardship on both the state and its voters that outweighed any benefit to the plaintiffs.[220] Thus, the court rejected the plaintiffs' request for injunctive relief and allowed the election to proceed.[221] Due to the brevity of the analysis, it is unclear whether the en banc panel was repudiating the district court's reasoning in *Common Cause*.

Plaintiffs were more successful in challenging differences among counties' voting machines in the US District Court for the Northern District of Illinois in *Black v. McGuffage*.[222] In *McGuffage*, the plaintiffs challenged an Illinois law that allowed each of the state's 110 local election authorities to choose among several types of voting systems certified by the state board of elections, including punch-card ballots (with either in-precinct or centralized counting) and optical-scan systems (also with either in-precinct or centralized counting).[223] Jurisdictions with optical-scan systems had lower error rates than those with punch-card systems. Jurisdictions with in-precinct counting also had lower error rates since election officials could alert people who voted in person about problems with their ballots; counties that used centralized counting could not.[224]

The plaintiffs argued that, by "leav[ing] the choice of voting system up to local authorities," the law violated the Equal Protection Clause.[225] They explained that the law allowed arbitrarily different treatment of similarly situated voters: "[S]ome authorities will choose a system with less accuracy than others. As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office."[226] The plaintiffs maintained that there was no rational basis for allowing different jurisdictions

217 *Id.* at 895.

218 *S.W. Voter*, 344 F.3d at 919–20 (en banc).

219 *Id.* at 919.

220 *Id.* 919–20.

221 *Id.*

222 209 F. Supp. 2d 889 (N.D. Ill. 2002).

223 *Id.* at 892.

224 *Id.*

225 *Id.* at 899.

226 *Id.*

participating in the same statewide elections to adopt different voting systems.[227]

Invoking *Bush*'s Uniformity Principle, the district court concluded that the plaintiffs had stated a valid claim.[228] The "heart of the problem," the court explained, is that "people in different counties have significantly different probabilities of having their votes counted."[229] The absence of a "uniform standard" for determining the validity of votes raised constitutional concerns, whether disparities resulted from differences among human counters, as in *Bush*, or voting machines.[230] These equal protection concerns were exacerbated, the court noted, because many of the jurisdictions that used voting systems with higher error rates had electorates that were disproportionately comprised of traditionally marginalized voters.[231] Following this ruling, the parties "reached a settlement under which Chicago and Cook County officials agreed to use their 'best, immediate and continuing efforts' to replace punch-card voting systems by 2006."[232]

This type of argument was also successful before a panel of the US Court of Appeals for the Sixth Circuit in *Stewart v. Blackwell*.[233] The plaintiffs complained that counties across the state used a variety of different voting systems, including punch-card ballots, optical scan systems, touchscreens, and even lever voting machines. As in Illinois, some counties with optical scan equipment tallied ballots at each precinct, allowing election officials to alert voters if their ballots contained overvotes or undervotes. Others tallied their ballots centrally, providing voters no such notice.[234] The plaintiffs alleged that allowing some counties to use "unreliable, deficient voting equipment, including the punch card ballot," violated the Equal Protection Clause.[235]

Citing *Bush*, the Sixth Circuit held that the Equal Protection Clause protects the right "to have one's vote counted on equal terms."[236] The use of different technologies in different counties meant that voters had "unequal chance[s]" of having their votes be recognized as valid.[237]

227 *Id.*

228 *McGuffage*, 209 F. Supp. 2d at 902.

229 *Id.* at 899.

230 *Id.*

231 *Id.*

232 Sauer, *supra* note 24, at 317.

233 *See* 444 F.3d 843, 859–60, 868–70 (6th Cir.), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. July 21, 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007).

234 *Id.* at 847.

235 *Id.* at 846. The plaintiffs also challenged the use of punch-card ballots under the Due Process Clause and section 2 of the Voting Rights Act. *Id.*

236 *Id.* at 868.

237 *Id.* at 870.

Accordingly, the use of less reliable voting equipment in certain counties was subject to strict scrutiny.[238] The state's interests in saving money and administrative convenience were insufficient to warrant the use of less reliable systems in certain jurisdictions.[239] The court concluded that the Secretary of State's decision to certify punch-card ballots and central-count optical scan systems was unconstitutional.[240]

The Sixth Circuit emphasized, "Unequal treatment and unfairness are perpetrated by allowing this technology to remain certified."[241] It added that the Secretary's decision to certify voting systems with different error rates would even fail rational basis scrutiny[242]—a conclusion that is almost certainly incorrect. The court declared, without citation, "The loss of so many votes because of the continued use of machines that the State admits are substandard is arbitrary and cannot be considered rational in light of so-claimed, but unsupported, cost concerns."[243] The court added, however, that it did "not seek to constitutionalize" or "mandate uniformity and absolute equality" in local voting procedures.[244] Judge Gilman's dissenting opinion objected that strict scrutiny should not apply in the context of a "challenge to the nuts-and-bolts of election administration" that involved neither discriminatory intent nor votes being weighted differently.[245] The full Sixth Circuit granted rehearing en banc and vacated the panel's ruling.[246] It later dismissed the case as moot before reaching a ruling when the Secretary of State voluntarily decertified the challenged voting systems.[247]

The US Court of Appeals for the Eleventh Circuit, recognizing the bounds of the Uniformity Principle, held that counties may use different types of voting systems, so long as their citizens have substantially

238 *Id.* at 862.

239 *Stewart*, 444 F.3d at 869.

240 *Id.* at 869–70 ("The continued certification of this technology by the Secretary of State does not provide the minimal adequate procedural safeguards to prevent the unconstitutional dilution of votes based on where a voter resides.").

241 *Id.* at 870.

242 *Id.* at 872.

243 *Id.* at 872–73.

244 *Id.* at 876.

245 *Stewart*, 444 F.3d at 883 (Gilman, J., dissenting).

246 Stewart v. Blackwell, No. 05-3044, 2006 U.S. App. LEXIS 32545, at *1 (6th Cir. July 21, 2006) (en banc).

247 Stewart v. Blackwell, 473 F.3d 692, 693–94 (6th Cir. 2007) (en banc) (order).

equivalent chances of having their votes counted.[248] In *Wexler v. Anderson*,[249] the Eleventh Circuit held that counties using touchscreen voting machines may apply different recount procedures than those with optical-scan machines.[250] The court noted that the state was not required to use the same voting system statewide.[251] It further pointed out that the plaintiffs did not claim that the differences between the recount procedures made it less likely that certain people would be able to "cast effective votes."[252] The court concluded that the state "has important reasons for employing different manual recount procedures according to the type of voting system a county uses," due to "the differences in the technologies themselves and the types of errors voters are likely to make in utilizing [them]."[253]

The second main category of challenges to voting machines involve the exact opposite type of claim. Rather than arguing that certain counties' systems were too antiquated because they relied on paper ballots, these plaintiffs maintained that certain counties' technology was too advanced, precisely because it eliminated the use of paper ballots. In California, for example, a few years after *Common Cause* and *Southwest Voter Registration Education Project*, a California voter argued in *Weber v. Shelley*[254] that Riverside County's decision to adopt Direct Recording Electronic ("DRE"), or touchscreen, voting machines violated her equal protection rights.[255] She argued that, unlike paper-based systems, DRE machines did not leave a "paper trail" of ballots cast.[256] Rather, information about people's votes was created and stored only electronically. The court rejected her claims, holding, "It is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-

248 *See* Wexler v. Anderson, 452 F.3d 1226, 1233 (11th Cir. 2006), *aff'g* Wexler v. Lepore, 342 F. Supp. 2d 1097 (S.D. Fla. 2004). *Lepore* rejected an Equal Protection challenge under *Bush* to differences among the recount procedures in various Florida counties because the state had established "uniform, nondifferential standards for what constitutes a legal vote under each certified voting system." *Lepore*, 342 F. Supp. 2d at 1108.

249 452 F.3d 1226.

250 *Id.* at 1233.

251 *Id.* ("[L]ocal variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on." (quoting Bush v. Gore, 531 U.S. 98, 134 (2000) (Souter, J., dissenting) (second alteration in original))).

252 *Id.* at 1232.

253 *Id.* at 1233.

254 347 F.3d 1101 (9th Cir. 2003).

255 *Id.* at 1103–04.

256 *Id.* at 1103.

guessing."[257] Most other courts to consider the issue have relied on this reasoning to reject identical claims.[258]

Even though the Georgia Supreme Court had flatly rejected a challenge to DRE voting machines in 2009,[259] a federal court in Georgia recently held in *Curling v. Kemp*[260] (later renamed *Curling v. Raffensperger*[261])

257 *Id.* at 1107 (citations omitted). Another California federal court subsequently rejected an equal protection challenge brought by disabled voters to the voting machines that several counties used. Paralyzed Veterans of Am. v. McPherson, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *29–32 (N.D. Cal. Sept. 9, 2008). The plaintiffs essentially brought a disparate impact claim, alleging that the machines allowed most people to deposit their ballots independently, but forced disabled voters to rely on third-party assistance. *Id.* at *70–71. The court noted, "[T]he plaintiffs have presented no evidence that a voter using an AutoMARK has ever been pressured by an assisting third party to change his or her vote; has ever been prevented from voting for the candidate of his or her choice; or has ever had his or her ballot improperly cast or not counted." *Id.* at *72–73. Thus, the use of such machines did not impose a severe burden on disabled voters' rights. *Id.* at *75. The court upheld the defendant counties' use of them under rational basis scrutiny. *Id.* at *78.

258 Heindel v. Andino, 359 F. Supp. 3d 341, 359, 365 (D.S.C.) (holding that plaintiffs lacked standing to pursue an equal protection claim against the use of DRE voting machines on the grounds they were susceptible to hacking, because any such hacking was purely speculative and the risk constituted a generalized grievance), *appeal dismissed and opinion vacated*, No. 19-1204, 2019 U.S. App. LEXIS 33121 (4th Cir. Nov. 5, 2019); Shelby Cnty. Advocs. for Valid Elections v. Hargett, 348 F. Supp. 3d 764, 772–74 (W.D. Tenn. 2018) (applying rational basis scrutiny and upholding the use of paperless electronic voting machines because "[n]o one is being turned away from the polls and there is no evidence that votes are not being counted" (citing *Weber*, 347 F.3d at 1106–07)), *aff'd*, 947 F.3d 977 (6th Cir. 2020) (per curiam); Wexler v. Lepore, 878 So. 2d 1276, 1281–82 (Fla. Dist. Ct. App. 2004) (rejecting challenge to certification of DRE machines on the grounds that they did not produce paper ballots to be used for recounts, and noting that "we cannot say the use of a paperless voting system severely restricts the right to vote in the State of Florida" (citing *Weber*, 347 F.3d at 1105–07)); Favorito v. Handel, 684 S.E.2d 257, 261–62 (Ga. 2009) (rejecting equal protection challenge to DRE voting machines because any voter could choose to cast an absentee paper ballot and the use of different recount procedures for DRE machines due to their lack of paper ballots was reasonable); Gusciora v. Corzine, No. MER-L-2691-04, 2010 N.J. Super. Unpub. LEXIS 2319, at *332–33 (N.J. L. Div. Feb. 1, 2010) ("[T]he State's decision to certify paperless DRE voting systems as an alternative to paper ballots, and the decision by the various counties to use such a system, represents reasonable nondiscriminatory choices, and thus do not violate a voter's equal protection or due process rights." (citing *Weber*, 347 F.3d at 1107)), *aff'd sub nom.* Gusciora v. Christie, No. A-5608-10T3, 2013 N.J. Super. Unpub. LEXIS 2278 (N.J. App. Div. Sept. 16, 2013) (per curiam); Andrade v. NAACP of Austin, 345 S.W.3d 1, 14 (Tex. 2011) (upholding a county's use of DRE voting machines without a paper trail because the machines offered "significant benefits" without imposing "severe restrictions on voters" (citing *Weber*, 347 F.3d at 1107)); *see also* Fla. Democratic Party v. Hood, 884 So. 2d 1148, 1153 (Fla. Dist. Ct. App. 2004) (upholding the Florida Department of State's emergency rule requiring manual recounts of paper ballots, but not votes cast on DRE machines).

259 *Favorito*, 684 S.E.2d at 261–62.

260 *Curling I*, 334 F. Supp. 3d 1303 (N.D. Ga. 2018), *aff'd in part on other grounds sub nom.*, Curling v. Worley, 761 F. App'x 927 (11th Cir. 2019).

261 *Curling II*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019).

that their lack of a paper trail likely violated the Equal Protection Clause.[262] The court relied on testimony from a computer science professor who explained how a hacker could insert an infected memory card into a DRE machine to contaminate it with undetectable malware.[263] A cybersecurity expert had also been able to remotely access a computer server containing confidential election-related information, until the FBI eventually seized the server due to the security vulnerability.[264] Additionally, the court emphasized that various governmental entities and other expert bodies had recommended that states adopt voting systems with paper ballots.[265]

Based on the possibility that someone might hack the state's voting systems, the court concluded that the plaintiffs had demonstrated a "serious risk" that "votes cast by DRE may be altered, diluted, or effectively not counted on the same terms as someone using another voting method," such as paper ballots.[266] The district court declined to issue a preliminary injunction enjoining the use of DRE machines in the 2018 election, however, because it would have been impossible for the state to adopt a new voting system in time.[267]

After the election, the court reaffirmed its earlier holding by denying a motion to dismiss the plaintiffs' claims.[268] The court reiterated, "Plaintiffs have plausibly and sufficiently demonstrated a legitimate concern that when they vote by DRE, their vote is in jeopardy of being counted less accurately and thus given less weight than a paper ballot."[269] Accordingly, the plaintiffs had adequately alleged that the state was engaging in "arbitrary and disparate treatment of its citizens based on their chosen method of voting: in person via DRE or by absentee paper mail-in ballot."[270] Even after the state legislature passed a law requiring that DRE machines be replaced with ballot-marking devices and optical scan machines,[271] the

262 *Curling I*, 334 F. Supp 3d at 1322, 1325, 1327 (finding that the plaintiffs had a likelihood of success on the merits of their constitutional claims, but denying a preliminary injunction due to the proximity of the election); *see also Curling III*, 403 F. Supp. 3d at 1311, 1343, 1345 (denying motion to dismiss); *Curling II*, 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019) (entering preliminary injunction barring the state from using DRE machines without paper trails after 2019).

263 *Curling I*, 334 F. Supp. 3d at 1308–09; *Curling III*, 403 F. Supp. 3d at 1319–20.

264 *Curling I*, 334 F. Supp. 3d at 1310; *Curling III*, 403 F. Supp. 3d at 1321. The court did not address whether any of the plaintiffs' experts' actions violated federal or state law.

265 *Curling I*, 334 F. Supp. 3d at 1311; *Curling III*, 403 F. Supp. 3d at 1322.

266 *Curling I*, 334 F. Supp. 3d at 1325.

267 *Id.* at 1327–28.

268 *Curling III*, 403 F. Supp. 3d at 1345.

269 *Id.* at 1343.

270 *Id.* at 1342.

271 *Curling II*, 397 F. Supp. 3d 1334, 1340 (N.D. Ga. 2019).

court entered a preliminary injunction to confirm that the state was prohibited from using DRE machines after 2019.[272]

The *Curling* court's analysis was pervasively flawed in numerous respects. First, the lynchpin of the plaintiffs' equal protection claim was that electronic voting is more susceptible to, or involved a higher likelihood of, manipulation than paper ballots.[273] But they failed to provide any evidence of the *relative* vulnerability of those systems to the court. Just as electronic voting machines are susceptible to hacking, paper ballots are susceptible to theft, loss, destruction, and alteration. Just as hackers could break into electronic computer systems, so too could criminals or corrupt insiders break into election offices to tamper with paper ballots. All voting systems are potentially vulnerable to illegal manipulation; different systems face different types of threats. The fact that Georgia's DRE machines and underlying networks had vulnerabilities did not establish that those systems were overall substantially *more* vulnerable than paper ballots.

Second, the district court did not contend with the Supreme Court's rulings in *Katzenbach v. Morgan*[274] and *McDonald v. Board of Election Commissioners*.[275] The Supreme Court held in those cases that, when a state takes steps to expand voting opportunities—for example, by allowing absentee voting—restrictions on such measures are subject only to rational-basis scrutiny.[276] Under that reasoning, even if absentee voting were more secure than in-person voting on DRE machines, the state's decision to expand voting rights by granting voters that alternative cannot subject the DRE system to heightened scrutiny. As discussed in Part IV, there are serious questions as to how to reconcile *Katzenbach* and *McDonald* with *Bush*'s Uniformity Principle, and it is unclear whether those cases fully survive *Bush*. But the district court failed to even consider these issues.

Third, the plaintiffs' attempt to invoke *Bush*'s Uniformity Principle necessarily fails because the state was not treating different groups of voters differently. Rather, it offered all voters the option to either cast their votes in person on DRE machines or on paper-based absentee ballots.[277] If any plaintiffs believed their votes were too insecure on a DRE machine,

272 *Id.* at 1412.

273 *Curling I*, 334 F. Supp. 3d at 1316 ("Plaintiffs allege that Defendants are requiring them to vote early, mail a paper absentee ballot, and pay for postage to avoid having to use unsecure DRE machines, thereby subjecting them to unequal treatment."); *see also id.* at 1325 (discussing plaintiffs' "concern that when they vote by DRE, their vote is in jeopardy of being counted less accurately and thus given less weight than a paper ballot. . . . Plaintiffs are alleging that they are less likely to be able to cast accurate or effective ballots when voting by DRE.").

274 384 U.S. 641 (1966).

275 394 U.S. 802 (1969).

276 *Id.* at 806–09; *Katzenbach*, 384 U.S. at 657.

277 *See Curling I*, 334 F. Supp. 3d at 1316.

they were free to cast absentee ballots, instead.[278] Because the state presented all voters with the same range of voting options, it did not deny anyone equal protection of the laws.

At heart, the plaintiffs were not really complaining about alleged violations of the Uniformity Principle. Their true contention was that *any* use of DRE machines would render *everyone's* votes—regardless of whether those votes had been cast on DRE machines or paper ballots—vulnerable to dilution by potentially fraudulent votes from hackers.[279] In other words, the plaintiffs objected to Georgia's adoption of DRE-based voting at all, rather than to the disparities between DRE machines and paper ballots. Their concerns existed equally, regardless of whether everyone voted on DRE machines, or the alternative of paper ballots were also available. Thus, the plaintiffs' argument did not truly sound in equal protection.

Finally, the plaintiffs' claims were based on the speculative possibility that someone might commit a crime by hacking the DRE voting machines in order to change vote tallies.[280] In other contexts, courts have held that plaintiffs lack standing to attempt to compel states to adopt additional election security measures based on the speculative possibility that people may illegally attempt to manipulate election results. They have rejected such concerns about election security as nonjusticiable generalized grievances.[281] Oddly, the district court held that the generalized grievance doctrine did not apply since plaintiffs' experts had already hacked into the state's voting systems.[282] The court should not have allowed plaintiffs to manufacture or bolster their own standing through their own witnesses' hacking. And, in any event, such hacking of a state's election-related systems is precisely the kind of threat to election integrity that courts usually treat as a generalized grievance, since it jeopardizes the accuracy and legitimacy of an election's outcome for all voters equally.[283] In short, the

278 *See* Favorito v. Handel, 684 S.E.2d 257, 261 (Ga. 2009).

279 *Cf. Curling I*, 334 F. Supp. 3d at 1324–25 (explaining the plaintiffs' claim that "the DRE voting system deprives them or puts them at imminent risk of deprivation of their fundamental right to cast an effective vote").

280 *Id.* at 1316 ("Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large."); *Curling III*, 403 F. Supp. 3d 1311, 1341 (N.D. Ga. 2019).

281 *See, e.g.*, Paher v. Cegavske, No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665, at *10–11 (D. Nev. May 27, 2020).

282 *Curling I*, 334 F. Supp. 3d at 1314 (holding that the generalized grievance doctrine was inapplicable because "[p]laintiffs have alleged that the DRE voting system was actually accessed or hacked multiple times" by their experts); *Curling III*, 403 F. Supp. 3d at 1340 ("Plaintiffs have alleged and offered evidence to show that the DRE voting system was actually accessed multiple times already—albeit by cybersecurity experts who reported the system's vulnerabilities to state authorities . . . .").

283 *See* Shelby Cnty. Advocs. for Valid Elections v. Hargett, No. 2:18-cv-02706-TLP-dkv, 2019 U.S. Dist. LEXIS 156740, at *25–27 (W.D. Tenn. Sept. 13, 2019), *aff'd*, 947 F.3d 977 (6th Cir. 2020); Sweigert

Curling district court went far beyond enforcing the constitutional right to vote. It instead displaced the state legislature and state executive officials to make subjective political judgments about the proper balance among election security, cost, ease of use, administrability, and other important state concerns.

Thus, plaintiffs have successfully invoked *Bush v. Gore* in numerous challenges to state certification laws that allowed some counties to use low-tech voting systems with higher error rates, while other counties used electronic equipment that yielded fewer rejected ballots. Outside of Georgia federal court, however, plaintiffs have been far less successful in bringing *Bush*-based equal protection challenges to electronic voting machines on the grounds they lack a paper trail and could be hacked.

2. Election Procedures

States may also violate *Bush*'s Uniformity Principle by delegating broad discretion to county or local officials to determine important policies or procedures for statewide elections. Violations can occur when variations among different localities' rules may cause voters in different counties or municipalities to have substantially different opportunities to vote.[284] For example, in *Pierce v. Allegheny County Bd. of Elections*,[285] the US District Court for the Eastern District of Pennsylvania held that the plaintiffs were likely to prove an equal protection violation where the challenged state law allowed officials in each county to adopt one of three different possible rules regarding the return of completed absentee ballots by third parties (colloquially, ballot harvesting).[286] The court explained that the Equal Protection Clause prohibited different counties across the state from employing "different standards . . . to determine whether an absentee ballot should be counted."[287] Voters in counties that allowed third-party ballot harvesting from people without disabilities "may be afforded greater voting strength than similarly-situated voters" in other counties.[288]

Similarly, in *Mullins v. Cole*,[289] a county clerk in West Virginia refused to accept electronic signatures from people who registered to vote

v. Podesta, 334 F. Supp. 3d 46, 54–55 (D.D.C. 2018); Stein v. Cortés, 223 F. Supp. 3d 423, 433 (E.D. Pa. 2016).

284 *Cf.* Somers v. S.C. State Election Comm'n, 871 F. Supp. 2d 490, 492, 497–98 (D.S.C. 2012) (dismissing equal protection challenge to "variations in transmission dates of state primary ballots to [military and overseas voters] by different county election commissions," due to lack of standing).

285 324 F. Supp. 2d 684 (W.D. Pa. 2003).

286 *Id.* at 705–06.

287 *Id.* at 699.

288 *Id.*

289 218 F. Supp. 3d 488 (S.D. W. Va. 2016).

online.[290] The clerk would instead send anyone who registered online a paper application to sign, along with a postage-prepaid return envelope.[291] The US District Court for the Southern District of West Virginia held, among other things, that this policy violated *Bush*'s Uniformity Principle, since clerks in other counties had not required online applicants to provide hard-copy signatures.[292]

Conversely, the US District Court for the District of Nevada rejected concerns about geographic disparities among different counties in *Paher v. Cegavske*,[293] which involved statewide presidential preference primary elections.[294] There, the Nevada Secretary of State adopted a vote-by-mail plan to mitigate the risk of COVID-19.[295] The plan required the state's largest county (Clark County, which includes Las Vegas) to automatically mail absentee ballots to all registered voters, including inactive voters, and allow "field registrars" to collect completed ballots from voters.[296] Other counties, in contrast, would mail ballots only to active voters and not allow collection by field registrars. Voters in those other counties sued, claiming that the plan violated equal protection by making it easier for Clark County residents to vote than for them.[297]

The district court rejected this argument, explaining that the state is "not constitutionally prohibited from making voting easier" for certain people.[298] It predicted that most of the ballots that Clark County mailed to inactive voters would be returned as undeliverable.[299] It further noted that Clark County had not received many requests from voters to have field registrars collect their ballots.[300] Thus, it was "unlikely" that allowing field registrars to pick up "an already voted ballot, for which there is also an option to drop off or mail-in with postage provided, would result in greater voting strength."[301]

The court went on to hold that, even if the unique voting rules for Clark County made voting easier there, such geographic distinctions among voting procedures were constitutionally permissible. While "Clark

290 *Id.* at 493.

291 *Id.* at 490.

292 *Id.* at 495 ("[T]he geographical disparity created by this policy between residents of Cabell County and [the] rest of West Virginia violates the Equal Protection Clause.").

293 No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665 (D. Nev. May 27, 2020).

294 *Id.* at *4.

295 *Id.* at *4–5.

296 *Id.* at *6.

297 *Id.* at *20.

298 *Id.* at *3.

299 *Paher*, 2020 U.S. Dist. LEXIS 92665, at *21–22.

300 *Id.* at *22.

301 *Id.*

County's Plan may make it easier or more convenient to vote in Clark County, [it] does not have any adverse effects on the ability of voters in other counties to vote."[302] Part IV of this Article will reconsider *Paher*'s holding, exploring whether a state—or local officials within a state—may selectively make voting easier for certain groups of people participating in an election.

Similar equal protection issues may also arise when some localities disregard state-level directives or policies. For example, in *Bryanton v. Johnson*,[303] the Michigan Secretary of State added a checkbox to voter registration forms and absentee ballot request forms, requesting that voters confirm their US citizenship.[304] The secretary ordered that voters be given ballots regardless of whether they checked the box, however. Different counties implemented these directives differently. While many counties followed the secretary's instructions, some omitted the checkbox from their forms.[305] Furthermore, counties that added the checkbox treated voters' failure to check it in different ways. Many counties followed the secretary's instructions and allowed people who left the box blank to cast ordinary in-person or absentee ballots. Some counties instead allowed voters who did not check the citizenship box to cast only provisional ballots, while one clerk's office would return the form to the voter with the question highlighted.[306] The court observed, "[I]nconsistent administration of the citizenship verification question will lead to extensive arbitrary and disparate treatment" of voters.[307]

Bryanton, however, takes equal protection principles to an unwarranted extreme. First, state laws, regulations, or administrative directives cannot be struck down under the Equal Protection Clause simply because some local officials refuse to follow them.[308] Second, the court required localities to treat voters identically even in matters that did not affect their ability to obtain a ballot and vote. Including a citizenship checkbox on election-related forms—particularly where citizenship was an unquestioned qualification for voting, no supporting evidence was required, and ballots were still provided to people who left the box blank—cannot be deemed a constitutionally cognizable burden on voting rights.

The court, however, held that the checkbox imposed a substantial burden on voters, because the voting process could take longer if people

302 *Id.* at *24.

303 902 F. Supp. 2d 983 (E.D. Mich. 2012).

304 *Id.* at 989.

305 *Id.* at 991–92.

306 *Id.* at 992.

307 *Id.* at 999; *see also id.* at 997 (discussing "inconsistencies" in application and enforcement).

308 *See id.* at 1001.

failed to complete it. The court pointed out that, when someone left the box blank election officials would remind the voter about the citizenship requirement, and someone might challenge the voter's eligibility.[309] These possibilities exist with regard to virtually any election-related requirement, however. *Bush*'s Uniformity Principle does not appear to require election officials throughout a state to treat voters in a mechanistically identical manner. Some differences may exist in the signage and layout of polling places; the layout and content of forms; election officials' greetings, interactions with, and statements to voters; and a universe of other such practical factors.

Finally, a main driving factor underlying the court's conclusion was that the secretary lacked authority under Michigan law to add the citizenship checkbox to registration or absentee ballot request forms.[310] The Eleventh Amendment and state sovereign immunity, however, precluded the plaintiffs from suing the secretary in federal court for violating state constitutional or statutory restrictions,[311] and the court asserted that it was not addressing the plaintiffs' state-law claims.[312] Moreover, a state official's violation of state law generally does not amount to a federal constitutional violation.[313] The Equal Protection Clause is not a backdoor vehicle for litigating state-law claims in federal court. In short, the plaintiffs should have directly challenged, in the proper forum, the secretary's authority to add a citizenship checkbox to election-related forms, rather than constitutionalizing either the decision of some officials to ignore that order, or minor differences in waiting times or voters' experiences at polling places that could arise among the jurisdictions that faithfully applied it.

One of the most important cases in which a litigant claimed that disparities among various counties' policies violated the Uniformity Principle was the Minnesota Supreme Court's ruling in *Sheehan v. Franken*.[314] *Sheehan* was an election contest arising from the 2008 US Senate election between Norm Coleman and Al Franken.[315] Based on the initial vote tally, incumbent Republican Coleman was ahead by 206 votes out of a total of

309 *Bryanton*, 902 F. Supp. 2d at 1004.

310 *Id.* at 1002–03.

311 *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that the exception to sovereign immunity in *Ex parte* Young 209 U.S. 123 (1908), is "inapplicable in a suit against state officials on the basis of state law").

312 *Bryanton*, 902 F. Supp. 2d at 986 ("[T]he Court will not deal with state law based Counts III and IV.").

313 *See* Nordlinger v. Hahn, 505 U.S. 1, 26 (1992) ("A violation of state law does not by itself constitute a violation of the Federal Constitution.").

314 767 N.W.2d 453 (Minn. 2009).

315 *See id.* at 456.

more than 2.4 million votes cast.[316] A manual recount put Franken ahead by 225 votes.[317]

Coleman filed an election contest in state court, arguing among other things that "differences among jurisdictions in their application of the statutory requirements for absentee voting" violated *Bush*'s Uniformity Principle.[318]

> In other words, because some local election boards had been willing to count absentee ballots despite certain technical defects—for example, if the ballot's witness was not a registered voter—Coleman argued that it would violate equal protection to disqualify other ballots whose only problem was that same technical defect.[319]

Rejecting this claim, the Minnesota Supreme Court held that "equal protection is not violated every time public officials apply facially neutral state laws differently."[320] Its ruling rested primarily on the US Supreme Court's 1944 ruling in *Snowden v. Hughes*,[321] issued over a half century before *Bush v. Gore*.[322] *Snowden* held that election officials' "unlawful administration" of a state law does not violate the Equal Protection Clause unless a plaintiff can show that those officials intentionally discriminated against him.[323] Applying *Snowden*, *Sheehan* held that disparities among different counties' policies for determining the validity of absentee ballots, including differing degrees of compliance with state laws governing their validity, did not constitute intentional discrimination.[324] The court recognized that "differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local officials reviewing absentee ballots."[325] Such differences among counties' policies, even

316 *Id.* at 457.

317 *Id.*

318 *Id.* at 458; *id.* at 463 (explaining that Coleman "argues that the differing application and implementation by election officials of the statutory requirements for absentee voting violated equal protection").

319 NED FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 324-25 (2016); *see also Sheehan*, 767 N.W.2d at 463 (explaining Coleman's argument "that similarly situated absentee ballots were treated differently depending on the jurisdiction in which they were cast and that this disparate treatment violated equal protection").

320 *Sheehan*, 767 N.W.2d at 463.

321 321 U.S. 1 (1944).

322 *Sheehan*, 767 N.W.2d at 463 (citing *Snowden*, 321 U.S. 1); *see also id.* at 464 ("*Snowden* requires a showing that the statutory standards were applied differently with the intent to discriminate in favor of one individual or class over another.").

323 *Snowden*, 321 U.S. at 7–8, 11–12.

324 *Sheehan*, 767 N.W.2d at 464 ("Coleman neither claims nor produced any evidence that the differing treatment of absentee ballots among jurisdictions during the election was the result of intentional or purposeful discrimination against individuals or classes.").

325 *Id.*

though they resulted in state law being applied inconsistently to materially identical ballots, did not violate the Equal Protection Clause.

Toward the end of its Equal Protection analysis, after setting forth its main reasoning, the court explained why its ruling was consistent with *Bush v. Gore*.[326] It held that *Bush* did not prohibit "[v]ariations in local practices for implementing absentee voting procedures."[327] Accordingly, various counties could establish differing procedures for processing absentee ballots, based in part on differences in "available resources," "personnel," and "technology."[328] Any resulting disparities in the treatment of materially identical absentee ballots were therefore constitutionally permissible.[329]

The court also distinguished *Bush* on the grounds that, unlike Florida's vague standard for determining the validity of votes, Michigan had established "clear statutory standards for acceptance or rejection of absentee ballots."[330] Finally, the Court dismissed *Bush*'s significance because that case involved materially identical ballots being treated differently, whereas Coleman's election contest involved materially identical absentee ballot return envelopes being treated differently.[331] The risk of partisan discrimination was lower, the court reasoned, since election officials reviewing absentee ballot envelopes did not know the particular candidate for whom a voter had cast their ballot.[332]

Unfortunately, Coleman did not seek certiorari from the US Supreme Court, so the Court did not have the opportunity to review the Minnesota Supreme Court's misapplication of *Bush*'s Uniformity Principle. *Sheehan* was a patently erroneous and unpersuasive reading of *Bush*, in several respects. First, the court incorrectly imposed excessively restrictive *mens rea* requirements for Equal Protection claims under the Uniformity Principle. The court held that disparate treatment of similarly situated voters did not violate the Equal Protection Clause unless election officials were intentionally discriminating against particular people or groups.[333]

In *Bush*, however, the Supreme Court never found that either the Secretary of State, or particular counties within the State of Florida, were intentionally discriminating against anyone. Rather, it emphasized the "arbitrary and disparate treatment" of voters that arose from the fact that

326 *Id.* at 466.

327 *Id.*

328 *Id.*

329 *Id.*

330 *Sheehan*, 767 N.W.2d at 464.

331 *Id.*

332 *Id.*

333 *Id.* at 464–65.

different election officials were treating materially identical ballots in completely different ways.[334] Coleman had satisfied the Equal Protection Clause's *mens rea* requirements, as applied in *Bush*, by demonstrating that "local election officials made deliberate and intentional decisions to apply particular interpretations of the statutory requirements for absentee voting."[335]

Second, the Minnesota Supreme Court conclusorily distinguished Michigan's absentee voting statute from Florida's "intent of the voter" standard on the grounds that Michigan's law established "clear . . . standards for acceptance or rejection of absentee ballots."[336] Even if Michigan's statute were more detailed than Florida's law, however, the fact remained that election officials in various counties were interpreting and applying it in substantially different manners, resulting in disparate treatment of identically completed absentee ballot materials. A statute that is reasonably susceptible to such disparate interpretations seems to raise the same Equal Protection concerns as Florida's law.

Third, the Minnesota Supreme Court's reasoning appears to be backwards in an important respect. Rather than focusing on *Bush*'s Uniformity Principle, *Sheehan* instead emphasized that *Bush* did not "address[] the question of 'whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.'"[337] Extrapolating from the *Bush* Court's silence on that issue, *Sheehan* concluded that counties have the prerogative to establish their own election-related policies—*even if disparities among such policies lead to materially identical ballot materials being treated differently*.

Sheehan failed to recognize that *Bush*'s Uniformity Principle acts as a constraint on disparities among political subdivisions' election-related policies. Though counties have broad discretion in administering statewide elections, such discretion does not authorize "arbitrary and disparate treatment" of voters that results in substantial differences in their opportunities to cast ballots or the likelihood that those ballots will be accepted and recognized as valid votes.[338] *Sheehan* mistakenly viewed disparities among counties' policies as a valid reason for allowing identical

334 Bush v. Gore, 531 U.S. 98, 104–05, 106 (2000) (per curiam) ("[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.").

335 *Sheehan*, 767 N.W.2d at 464.

336 *Id.* at 466.

337 *Id.* (quoting *Bush*, 531 U.S. at 109).

338 *Bush*, 531 U.S. at 104.

absentee ballot materials to be treated differently.[339] To the contrary, such disparate treatment of identical absentee ballot materials rendered unconstitutional the disparities among the counties' policies concerning absentee ballots.

Fourth, *Sheehan* discounted *Bush*'s relevance on the grounds that *Bush* involved inconsistent treatment of ballots themselves, whereas *Sheehan* involved inconsistent treatment of absentee ballot envelopes.[340] Both cases, however, involved the legal sufficiency of voters' markings on the legally required materials they submitted to vote. It seems arbitrary and contrary to *Bush*'s Equal Protection principles to conclude that the Constitution requires consistent treatment of comparably completed ballots, but not comparably completed envelopes containing ballots. In both cases, the validity of the person's vote itself is at stake. The Constitution's protections for voting rights should not depend on whether a state requires voters to provide information on the ballot itself, or the accompanying ballot envelope instead.

Finally, the *Sheehan* court primarily relied upon the US Supreme Court's 1944 ruling in *Snowden* as the basis for its reasoning.[341] *Snowden* long predated not only *Bush*, but the Civil Rights Era and most of modern election law. *Snowden* was of the era of *Colegrove v. Green*,[342] in which the Court was much more reticent to enter the "political thicket" by enforcing constitutional restrictions in the electoral process.[343] Had the Minnesota Supreme Court instead used *Bush*'s Uniformity Principle as the foundation for its analysis, it may well have reached a different outcome.

In short, it appears that the *Sheehan* Court sought to construe *Bush*'s Uniformity Principle as narrowly as possible, past the point of credulity. It refused to apply the principle in a case whose facts were surprisingly comparable to *Bush* itself: local officials in a statewide recount for a federal election applying inconsistent standards to determine whether particular votes could be counted. *Sheehan* appears inconsistent with both the holding and reasoning of *Bush*; future courts should reject *Sheehan* as a persuasive precedent on these issues.

339 *Sheehan*, 767 N.W.2d at 466 ("[T]he disparities in application of the statutory standards on which Coleman relies are the product of local jurisdictions' use of different methods to ensure compliance with the same statutory standards . . . .").

340 *Id.* ("In *Bush*, officials conducting the recount were reviewing the face of the ballot itself . . . .").

341 *Id.* at 463–64 (citing United States v. Snowden, 321 U.S. 1, 7–8, 11–12 (1944)).

342 328 U.S. 549 (1946).

343 *Id. at* 556; *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2090–2101 (2018) (discussing the evolution of voting as a fundamental right protected by the Equal Protection Clause over the course of the twentieth century).

3. Polling-Place Resources

The Uniformity Principle's requirement of equal treatment for all voters can extend down to the granular level of polling place resources. The US Court of Appeals for the Sixth Circuit's ruling in *League of Women Voters v. Brunner*[344] is the leading opinion applying the Equal Protection Clause to resource disparities among different polling places in the same election. The plaintiffs claimed that the state had conducted the 2004 presidential election using "non-uniform standards, processes, and rules," as well as "wholly inadequate systems, procedures, and funding."[345] The Sixth Circuit held that they stated a valid equal protection claim under *Bush*.[346] It emphasized that polling place wait times ranged from two to twelve hours, in part because polling places across the state had substantially different ratios of voters to voting machines.[347] At least one polling place was open until 4:00 A.M. on the morning after Election Day.[348] The court also noted a wide range of other concerns, including the allegations that some voters had been given incorrect information about where to vote, "[p]rovisional balloting was not used properly," and some disabled voters were improperly turned away.[349] The court concluded that *Bush*'s Uniformity Principle prohibited such substantial disparities among polling places across the state.[350]

Likewise, in *Fleming v. Gutierrez*,[351] voters in a certain New Mexico municipality waited up to five hours to vote in the 2012 presidential election—far longer than anywhere else in the state.[352] Some voting centers, which had replaced polling places at each precinct, did not close until midnight due to the lines.[353] The court termed the election a "debacle."[354] It found that the primary cause of the delay was that the county had established too few voting centers in the municipality and provided insufficient numbers of voting machines.[355] The court went on to emphasize that the

344 548 F.3d 463 (6th Cir. 2008).

345 *Id.* at 466.

346 *Id.* at 478.

347 *Id.* at 477–78 ("Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others.").

348 *Id.* at 478.

349 *Id.*

350 *Brunner*, 548 F.3d 463 at 476–77.

351 No. 13-CV-222, 2014 U.S. Dist. LEXIS 183748 (D. N. Mex. Sept. 12, 2014), *appeal dismissed as moot*, 785 F.3d 442 (10th Cir. 2015).

352 *Id.* at *3.

353 *Id.* at *8.

354 *Id.* at *3, *18.

355 *Id.* at *10.

county clerk's failure to provide enough resources was an intentional decision, rather than the result of mere negligence.[356] The court concluded that the county clerk's intentional failure to provide sufficient voting machines or voting centers to the municipality violated the Uniformity Principle.[357]

4. Timing and Location Issues

One aspect of the evolving jurisprudence under the Uniformity Principle may be particularly surprising. Courts have generally rejected equal protection challenges to differences among localities concerning the times and locations for early voting and voter registration. For example, in *Gustafson v. Illinois State Board of Elections*,[358] the US District Court for the Northern District of Illinois upheld a state law delegating broad authority over early voting to local officials.[359] The law empowered counties to determine how many early voting locations to establish. Many counties allowed early voting only at the office of the county clerk or election board, while others operated multiple sites. Moreover, some counties conducted early voting on weekends, others permitted it only on Saturday, and at least eight counties did not offer weekend voting at all.[360]

The court refused to apply any form of heightened scrutiny to these disparities because the statute "manifest[ed] no intent to invidiously discriminate based on race, class, or geographic location."[361] As discussed in Part IV, the district court also placed great weight on the principle that laws expanding voting opportunities, even just for certain groups of voters, are subject only to rational basis review.[362] Because the statute guaranteed a "bare minimum" of early voting opportunities for all Illinois voters, the court reasoned, any "district-to-district variation above and beyond those minimum standards is irrelevant."[363] The court concluded that the legislature could "allow[] each voting district to tailor its approach to early voting in a manner consistent with [that district's] unique demands and

356 *Id.* at *31–32.

357 *Fleming*, 2014 U.S. Dist. LEXIS 183748, at *32–33; *cf.* Wandering Medicine v. McCulloch, No. CV 12-135, 2014 U.S. Dist. LEXIS 183736, at *20–22 (D. Mont. Mar. 26, 2014) (holding that plaintiffs had stated a valid claim that election officials in three counties with Native American reservations intentionally discriminated against Native Americans by eliminating satellite voting locations).

358 No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209 (N.D. Ill. Sept. 30, 2007).

359 *Id.* at *33.

360 *Id.* at *4.

361 *Id.* at *18.

362 *See* Katzenbach v. Morgan, 384 U.S. 641, 657 (1966).

363 *Gustafson*, 2007 U.S. Dist. LEXIS 75209, at *19.

abilities."[364] The fact that "wide discretion might be applied inconsistently from one jurisdiction to another is to be expected."[365]

The US Court of Appeals for the Seventh Circuit reached the same conclusion in *Harlan v. Scholz*.[366] State law required all counties that used electronic poll books to allow same-day voter registration at polling places on Election Day.[367] Smaller counties that still used paper pollbooks, in contrast, had the option to allow same-day registration either at all polling places, or instead only at the central election office.[368] A Republican congressional candidate brought an equal protection challenge to the law on the grounds that it "disadvantages voters in smaller counties that do not have e-pollbooks, and thus comparatively boosts Democratic voter turnout."[369]

The district court granted a preliminary injunction.[370] It held that selectively allowing same-day voter registration only for residents of certain counties "severely burden[ed] [the] right to vote" of people living in counties that did not offer that opportunity, placing them "at a severe disadvantage."[371] The court added, "The application of this legislation favors the urban citizen and dilutes the vote of the rural citizen."[372] The Seventh Circuit, however, reversed this ruling.[373] The appellate court concluded that the plaintiff had failed to provide evidence "that the law severely burdens the smaller-county residents."[374] It concluded, "Even though [the law] does not force quite as many options on the smaller counties as it does on the . . . largest counties, it . . . provides realistic same-day options even in the smaller places."[375]

The Seventh Circuit's analysis ignored the Uniformity Principle upon which the district court's ruling was based. It did not assess whether voters in different counties were unconstitutionally afforded substantially different opportunities to vote. Rather, the court simply asked whether prohibiting same-day voter registration at polling places substantially burdened voting rights—the same analysis it would have applied had the rules for

364 *Id.* at *33.

365 *Id.* at *35.

366 866 F.3d 754 (7th Cir. 2017).

367 *Id.* at 755–56.

368 *Id.* at 756–57.

369 *Id.* at 757.

370 Harlan v. Scholz, 210 F. Supp. 3d 972 (N.D. Ill. 2016), *rev'd*, 866 F.3d 754 (7th Cir. 2017).

371 *Id.* at 976–77.

372 *Id.* at 977.

373 *Harlan*, 866 F.3d 754.

374 *Id.* at 759.

375 *Id.* at 761.

smaller counties applied equally across the state.[376] The court's approach was consistent with *Gustafson*, however.[377] Since same-day voter registration expanded voting opportunities, the Equal Protection Clause did not require the state to guarantee that alternative for everyone simply because the state had mandated it for citizens of large counties.[378]

C. *Vague and Subjective Statewide Standards*

In contrast to other types of constitutional claims under the Uniformity Principle, challenges to local officials' discretion in construing or applying vague statewide standards have generally failed.[379] Most of these cases fall into two categories. First, plaintiffs in recent years have argued that *Bush*'s Uniformity Principle prohibits states from enforcing various "matching" requirements. State laws often require election officials to determine whether a voter's signature on an absentee ballot, provisional ballot, or petition matches their signature on file. Other laws require officials to determine whether the address on an absentee or provisional ballot matches a voter's address on file, or a voter's appearance sufficiently "matches" (i.e., resembles) the picture on their identification card.[380] These statutes typically specify only that an election official must determine whether a match exists, without providing more detailed guidance either as to what constitutes a "match," or the types of deviations or errors that election officials should overlook.[381] Plaintiffs have argued that such general directives provide insufficient guidance, allowing different election officials to treat minor deviations differently.[382]

Most courts to consider the issue have rejected such claims, holding that requiring election officials to determine whether a voter's signature

376 *See id.*

377 *See supra* notes 358–65 and accompanying text.

378 *See infra* Part IV.

379 *See* Ga. Muslim Voter Project v. Kemp, 918 F.3d 1262, 1278–79 (11th Cir. 2019) (declining to stay a district court injunction that required election officials to implement "in good faith" a procedure to allow voters to cure defects in their signatures on absentee ballots, and holding that the order did not create equal protection problems due to vagueness). *But see* Ohio Republican Party v. Brunner, 544 F.3d 711, 733 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (expressing concern that counties' procedures for "deal[ing] with . . . mismatches" between voter registration records and motor vehicle records "may not be uniform and could result in disproportionate disenfranchisement" in violation of *Bush*).

380 *See, e.g.*, OKLA. STAT. ANN. tit. 26, § 7-114(B)(2) (West, Westlaw through 2019 legislation); TENN. CODE ANN. § 2-7-112(a)(1) (LEXIS through 2020 Regular Sess.); WIS. STAT. § 6.79(2)(a) (2020).

381 *See id.*

382 *See, e.g.*, ACLU v. Santillanes, 546 F.3d 1313, 1324 (10th Cir. 2008); Barber v. Bennett, No. CV-14-02489-TUC, 2014 U.S. Dist. LEXIS 165748, at *11–13 (D. Ariz. Nov. 27, 2014).

on a petition[383] or ballot materials[384] matches that person's signature on file provides sufficient guidance to prevent arbitrary treatment. Courts have similarly rejected challenges to laws requiring officials to confirm whether a voter's name on an identification card[385] or address on a ballot envelope[386] matches the information in that person's voter registration record.

383 *See, e.g.*, Lemons v. Bradbury, 538 F.3d 1098, 1106 (9th Cir. 2008) (concluding that "Oregon's standard for verifying referendum signatures [is] sufficiently uniform and specific to ensure equal treatment of voters," where the secretary of state directed local election officials to "[c]ompare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted" (alteration in original)); Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562, 573 (N.D. Ill.) (upholding signature match requirement for petition signatures because "it is neither arbitrary nor capricious for the [state board of elections] to instruct local election jurisdictions to see if the signature 'reasonably compares' to a voter's registration record card"), *aff'd*, 463 F.3d 604 (7th Cir. 2006).

384 *See Barber*, 2014 U.S. Dist. LEXIS 165748, at *11–12, *15, *19–21 (rejecting equal protection challenge to the alleged lack of specific standards for matching signatures on provisional ballot affidavits to election records, on the grounds that *Bush* "did not invalidate different county systems regarding implementation of election procedures," and the complaint focused on "individual and infrequent polling-place irregularities and verification procedures"); *see also* Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010) (rejecting equal protection challenge to the standard used to count write-in votes in a US Senate race, because "although the determination of whether to count the vote is subject to a certain degree of subjectivity, the standard itself is uniform across the board"); Miller v. Treadwell, 245 P.3d 867, 873 (Alaska 2010) ("We fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard."); *cf.* Saucedo v. Gardner, 335 F. Supp. 3d 202, 222–23 (D.N.H. 2018) (declining to reach equal protection claim because the court invalidated the signature-match requirement for absentee ballots on procedural due process grounds instead).

385 *See, e.g.*, Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 836–37 (S.D. Ind. 2006) (arguing that an election official's oath to fairly enforce election laws "certainly suffices to assuage the vague, hypothetical concerns cited by Plaintiffs" about the lack of guidance as to whether a person's name on their identification card "conform[s]" with the name in their voter registration record), *aff'd sub nom.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). Courts have likewise held that a law requiring election officials to confirm whether an identification card is "valid" is neither unconstitutionally vague nor grants too much discretion to those officials. *Santillanes*, 546 F.3d at 1313, 1324–25 (holding that terms such as "current" and "valid" were not "inherently confusing or difficult to apply given the function of the voter identification requirement: to match the person presenting as a voter with the identification"), *rev'g*, 506 F. Supp. 2d 598, 631–32, 641, 643 (D.N.M. 2007). *But see* DNC v. Bostelmann, No. 20-cv-249, 2020 U.S. Dist. LEXIS 102410, at *19–20 (W.D. Wis. June 10, 2020) (declining to dismiss equal protection challenge to alleged disparities among various counties' policies concerning absentee ballots, including what qualified as a valid postmark, their application of documentation and witness requirements, and construction of legal provisions concerning "indefinitely confined" voters).

386 *See* Ne. Ohio Coal. for the Homeless (*NEOCH IV*) v. Husted, No. 06-CV-896, 2016 U.S. Dist. LEXIS 74121, at *135–36, *138 (S.D. Ohio June 7, 2016) (holding that local election boards' discretion in deciding whether an absentee ballot envelope contained sufficient information "does not rise to the level of the standard-less recount in *Bush*"), *aff'd in relevant part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016) (*NEOCH V*).

Likewise, courts have upheld laws requiring election officials to identify potentially duplicative voter registration records by scouring various databases for matches.[387]

As mentioned earlier, these laws generally do not tell election officials specifically how to go about determining whether "matches" exist. Nor do they usually identify the type or quantity of discrepancies, mistakes, or omissions that would be sufficient to constitute a mismatch. Even though such matching requirements leave election officials with some degree of discretion and require them to exercise a modicum of personal subjective judgment, courts have held that the potential for minor variations among different officials' conclusions is constitutionally permissible. The Sixth Circuit, for example, stated, "Arguable differences in how election boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected."[388] Echoing this sentiment, one district court declared, "It is possible and perhaps even probable that these procedures will result in different election jurisdictions analyzing petition signatures differently, but differing results do not violate equal protection principles where they are not a result of arbitrary or capricious policies."[389]

The US District Court for the Northern District of Florida, in contrast, took a very different view, calling county officials' "discretion" concerning signature matching "problematic."[390] It pointed out that some counties may "go above and beyond to ensure voters have a chance to cure a signature mismatch," while others "may choose not to exercise th[at] level of care and concern."[391] Such discretion allowed officials in different counties to make "arbitrary and unreasonable decisions" in "reject[ing] ballots based on signature mismatches."[392] A divided Eleventh Circuit panel affirmed this analysis, stating:

> Florida allows each county to apply its own standards and procedures for executing the signature-match requirement, virtually guaranteeing a crazy quilt of enforcement of the requirement from county to county.... And even if election officials uniformly and

387 *See* Democratic Party v. Va. State Bd. of Elections, No. 13-CV-1218, 2013 U.S. Dist. LEXIS 151713, at *1–2, *7 (E.D. Va. Oct. 21, 2013); *cf.* Ohio Republican Party v. Brunner, 544 F.3d 711, 733 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (expressing concern that "the procedures each county uses to deal with these mismatches" between voter registration records and motor vehicle records "may not be uniform and could result in disproportionate disenfranchisement" in violation of *Bush*).

388 *NEOCH V*, 837 F.3d at 636.

389 Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562, 573 (N.D. Ill.), *aff'd*, 463 F.3d 604 (7th Cir. 2006).

390 Democratic Exec. Comm. v. Detzner, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018), *aff'd sub nom.* Democratic Exec. Comm. v. Lee, 915 F.3d 1312 (11th Cir. 2019).

391 *Id.*

392 *Id.*

expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures.[393]

Judge Gerald Bard Tjoflat issued a powerful dissent, systematically dismantling the district court's analysis.[394]

The Northern District of Florida's conclusion seems erroneous. Requiring election officials to compare a voter's name, address, or signature to voter registration records, or determine whether a person is the one depicted in the photograph on an identification card, calls for the ordinary exercise of human judgment. Given the wide variation among different types of names, addresses, and signatures (to say nothing of human faces), it would be extraordinarily difficult for regulators to attempt to catalogue and specify the appropriate response for every type of mistake, apparent discrepancy, or mismatch that could arise.[395] And it would be unduly burdensome and time consuming to require election officials to attempt to compare each inconsistency to a series of marginally different exemplars compiled in a guide to determine the appropriate response. Indeed, such attempts to enforce uniformity would themselves create second-order inconsistencies about whether election officials had analogized each name, address, or signature mismatch to the correct exemplar. It is unlikely that the Equal Protection Clause prohibits election officials from making such limited subjective judgments for themselves when engaging in fundamentally bureaucratic tasks involving election-related paperwork.

The other main category of cases in which plaintiffs have invoked the Uniformity Principle to challenge allegedly vague legal provisions is litigation over states' standards for determining whether ballots qualify as legally valid votes. These challenges most closely implicate the specific equal protection issue at the heart of *Bush*. Courts have emphasized that *Bush* requires states to apply uniform standards in counting ballots.[396] A vague

393 *Lee*, 915 F.3d at 1320.

394 *Id.* at 1331 (Tjoflat, J., dissenting).

395 The State of Colorado has made such an effort, preparing a guide to assist with signature matches. COLO. SEC'Y OF STATE, SIGNATURE VERIFICATION GUIDE (Sept. 13, 2018), https://perma.cc/UHL7-TYC6.

396 *See* Democratic Senatorial Campaign Comm. v. Detzner, 347 F. Supp. 3d 1033, 1038 (N.D. Fla. 2018) (holding that "the standards used to determine voter intent during a manual recount must be uniform so that votes have an equal chance of being counted," and affirming the use of Florida's rules as "uniform, nondifferential standards that provide a reasonable procedure to determine the intent of voters"); Baber v. Dunlap, 376 F. Supp. 3d 125, 139 n.20 (D. Me. 2018) (stating it is "unacceptable" for election officials to "apply varied standards for interpreting voter intent" to different ballots in the same election); Dolan v. Powers, 260 S.W.3d 376, 380, 382 (Mo. App. 2008) (ordering election officials to count votes where the voter circled the candidate's political party rather than filling in the oval near the candidate's name, and noting that "equal protection demands that ballots be considered according to specific, uniform, statewide standards, beyond vague directives to determine the intent of the voter" (quotation marks omitted)); Big Spring v. Jore, 109 P.3d 219, 225, 227 (Mont. 2005) ("The

"intent of the voter standard" on its own is generally insufficient because it leaves local officials too much discretion, allowing inconsistencies in application.[397] Legislatures or state officials must provide more specific guidance to ensure consistent treatment of ballots. Courts generally have upheld rules specifying how election officials should treat different types of potential errors on ballots[398] so long as they are reasonably detailed and determinate.[399]

In *State ex rel. League of Women Voters v. Herrera*,[400] for example, the New Mexico Supreme Court upheld the validity of a state law requiring handwritten marks on ballots to be counted as valid votes if precinct officials "unanimously agree that the voter's intent is clearly discernable," because the New Mexico Secretary of State had promulgated detailed rules on how to apply that standard.[401] The dispute began when the secretary—despite having promulgated such detailed guidance—issued an emergency regulation prohibiting election officials from applying that

Supreme Court concluded in *Bush* that allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause .... [S]imilar ballots [must be] treated uniformly from county to county ...."), *rev'g*, No. DV 04-258, 2004 Mont. Dist. LEXIS 3676, at *18–20 (Mont. Dist. Ct. Dec. 17, 2004) (holding that a county "may not accord arbitrary and disparate treatment to voters by applying different standards to the same type and class of ballots," and holding that ballots in which two bubbles were filled in for a race, but one was crossed out, should count as a vote for the other marked candidate); *see also* Rosello v. Calderon, No. 04-2551, 2004 U.S. Dist. LEXIS 27216, at *16–17 (D.P.R. Nov. 30, 2004) (asserting jurisdiction over equal protection claim under *Bush v. Gore* that alleged disparate treatment of absentee and "split" ballots), *mandamus denied sub nom.* Rossello-Gonzalez v. Calderon-Serra, 398 F.3d 1, 4 n.29 (1st Cir. 2004) (noting the district court's assertion that *Bush v. Gore* might allow plaintiffs to challenge the application of inconsistent standards for counting "split ballots," but concluding that no such claim existed because, after the lawsuit was filed, it appeared that the ballots would be adjudicated consistently); Burns v. Cnty. of Musselshell, 454 P.3d 685, 685, 691 (Mont. 2019) (holding that a county had violated equal protection restrictions by agreeing to a vague set of guidelines for counting write-in votes that deviated from state law in an election for county office); Appeal of McDonough, 816 A.2d 1022, 1030–31 (N.H. 2003) (McGuire, J., concurring) (stating that "having a uniform rule of ballot interpretation to determine voter intent is practicable and ... necessary," while affirming the state ballot law commission's decision concerning ballots where voters both cast a party-line vote and also voted for candidates in some individual races (quotation marks omitted)).

397 Bush v. Gore, 531 U.S. 98, 105–06 (2000) (per curiam).

398 *See, e.g.*, FLA. ADMIN. CODE 1S-2.027(4)(b)–(c) (2008) (providing examples of various types of potential errors on ballots).

399 *Detzner*, 347 F. Supp. 3d at 1038; *Dolan*, 260 S.W.3d at 380, 382; *see Appeal of McDonough*, 816 A.2d at 1029; *see also Big Spring*, 109 P.3d at 225, 227; *cf. Burns*, 454 P.3d at 685 (holding that a county had violated equal protection restrictions by agreeing to a vague set of guidelines for counting write-in votes that deviated from state law in an election for county office).

400 203 P.3d 94 (N.M. 2009).

401 *Id.* at 95 (quoting N.M. STAT. ANN. § 1-9-4.2(B) (LexisNexis 2003, as amended through 2007)).

statutory provision when counting ballots.[402] She concluded that the statute established a vague, subjective standard that was likely unconstitutional under *Bush v. Gore*.[403] The League of Women Voters sought a writ of mandamus to compel the secretary to continue enforcing the statute.[404] The New Mexico Supreme Court granted the writ, concluding that the statute was valid.[405]

The state supreme court began by emphasizing that *Bush* purported to be limited to the facts of the 2000 presidential election.[406] It further noted that, unlike in Florida, the New Mexico Secretary of State had provided "clear context and guidance for local election officials" as to what qualified as a valid vote.[407] The secretary had promulgated thirty "graphical examples of ballots with unconventional markings, accompanied by rules about how to interpret such marks."[408] This detailed guidance was enough to cabin election officials' discretion and prevent arbitrarily disparate treatment of voters who submit similarly marked ballots. Prohibiting election officials from counting votes that did not fall into any of those preidentified categories, the court added, could "lead to unnecessary disenfranchisement."[409] It also noted that New Mexico allowed a vote to be counted only when precinct officials reached a unanimous agreement about the voter's intent, while Florida lacked a unanimity requirement.[410]

The court acknowledged the "theoretical possibility" that "election officials in different parts of the state could interpret the same ballot marking differently."[411] It dismissed such concerns, however, claiming that "there must be some room for discretion by local officials in order to guard against disenfranchisement."[412] Thus, ballot-counting rules can survive constitutional scrutiny even if they do not address every conceivable way someone might fill out a ballot, but rather leave some residual of discretion for election officials.

Some courts nevertheless remain reluctant to make subjective assumptions about voter intent in cases where the ballot-counting rules do not specify whether particular markings may be counted as a vote. For

402 *Id.* at 96 (citing N.M. CODE R. § 1.10.12.15(C) (LexisNexis 2008)).

403 *Id.*

404 *Id.* at 95.

405 *Id.*

406 *League of Women Voters*, 203 P.3d at 97–98.

407 *Id.* at 98.

408 *Id.*

409 *See id.* at 99.

410 *Id.* at 98.

411 *Id.*

412 *League of Women Voters*, 203 P.3d at 98.

example, the absentee ballots at issue in *Big Spring v. Jore*[413] each featured darkened bubbles next to the names of two different candidates running for the same seat in the state legislature, along with an X through one of those bubbles.[414] Although the state had adopted rules for counting absentee ballots as required by *Bush*, those rules did not address a situation like that.[415] The Montana Supreme Court concluded that, in the absence of any specifically applicable rule, the ballots had to be rejected as either overvotes or spoiled ballots.[416] It explained that, under *Bush*, "allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause."[417] The court declined to speculate about the voters' intent.[418] Thus, the Uniformity Principle generally permits states to adopt objective standards that require election officials to exercise a limited degree of personal judgment over certain narrow issues, but such judgment must be especially cabined when it comes to interpreting ballots.

D. *The Uniformity Principle Two Decades Later*

Based on this analysis of nearly two decades' worth of cases in which courts have adjudicated claims arising under *Bush*'s Uniformity Principle, it is possible to draw both descriptive and normative conclusions. Descriptively, plaintiffs seem most likely to succeed when challenging legal directives that, on their face, expressly require or allow materially different treatment for different people participating in the same election. Courts have held that the Uniformity Principle prohibits most laws granting a different number of votes to each voter,[419] or affording different weights to their votes or petition signatures.[420] The principle also bars election officials from applying different treatment to identically cast ballots from different voters participating in the same election.[421]

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413 109 P.3d 219 (Mont. 2005).

414 *Id.* at 220.

415 *Id.* at 224.

416 *Id.* at 224–226.

417 *Id.* at 225.

418 *Id.* at 226.

419 *See* Day v. Robinwood W. Comm. Improvement Dist., No. 08CV01888, 2009 U.S. Dist. LEXIS 36586 (E.D. Mo. Apr. 29, 2009), *judgment entered*, 693 F. Supp. 2d 996 (E.D. Mo. 2010).

420 *See supra* note 111.

421 *See* Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 235 (6th Cir. 2011); Common Cause Ga. v. Kemp, 347 F. Supp. 3d 1270, 1297, 1299–1300 (N.D. Ga. 2018); Keyes v. Gunn, 230 F. Supp. 3d 588, 597–98 (S.D. Miss. 2017), *rev'd*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018); State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982, 984–86, 992–93 (Ohio 2008) (per curiam); *see also Stringer I*, 320 F. Supp. 3d 862, 897–901 (W.D. Tex. 2018), *rev'd sub nom. Stringer II*, 942 F.3d 715 (5th

There are two major exceptions to this observation. First, courts have been reluctant to apply the Uniformity Principle to early and absentee voting.[422] They have generally tolerated laws that single out certain groups of voters, or voters in particular geographic areas, for more extensive voting opportunities than others. In many ways, these rulings are surprising because, in other respects, the Uniformity Principle requires all people participating in the same election to be afforded equal opportunities to vote. Most of these rulings are based on the Supreme Court's holdings in *McDonald v. Board of Election Commissioners* that the right to vote does not include absentee voting,[423] and in *Katzenbach v. Morgan* that laws making it easier for certain groups to vote are subject only to rational basis scrutiny.[424] Part IV considers these precedents in greater depth.

Second, courts have likewise declined to apply the Uniformity Principle to felons challenging the administration of discretionary procedures for having their voting rights restored.[425] Outside these admittedly important contexts, however, laws that facially afford materially different treatment to different groups of voters participating in the same election appear to fare worst under the Uniformity Principle.

Courts have been almost as skeptical of laws that expressly delegate authority to county or municipal election officials to set substantial voting-related policies. Courts have been particularly unwilling to allow different jurisdictions within a state to adopt different voting systems with substantially different error rates.[426] They have likewise rejected inter-

Cir. 2019) (holding that plaintiffs lacked standing to challenge restrictions concerning the online registration system), *preliminary injunction renewed sub nom. Stringer III*, Nos. SA-16-CV-257, SA-20-CV-46, 2020 U.S. Dist. LEXIS 16686, at *20–21 (W.D. Tex. Jan. 30, 2020).

422 *See* Griffin v. Roupas, 385 F.3d 1128, 1129–30 (7th Cir. 2004); Suydam v. Town of Rumford, No. 15-cv-00203-NT, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2014); Fair Elections Ohio v. Husted, No. 12CV797, 2012 U.S. Dist. LEXIS 161614 (S.D. Ohio Nov. 1, 2012).

423 394 U.S. 802, 807–08 (1969).

424 384 U.S. 641, 657 (1966).

425 *See* Hand v. DeSantis, 946 F.3d 1272 (11th Cir. 2020) (citing Beacham v. Braterman, 300 F. Supp. 182, 183 (S.D. Fla.) (three-judge court), *summarily aff'd*, 396 U.S. 12 (1969)).

426 *See* Stewart v. Blackwell, 444 F.3d 843, 870–71 (6th Cir.), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. 2006), *vacated as moot en banc*, 473 F.3d 692 (6th Cir. 2007); Black v. McGuffage, 209 F. Supp. 2d 892, 897–99 (N.D. Ill. 2002); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1107–08 (C.D. Cal. 2001); Wexler v. Lepore, 342 F. Supp. 2d 1097, 1108, 1110 (S.D. Fla. 2004), *aff'd*, 452 F.3d 1226 (11th Cir. 2006).

Most courts have been far less receptive to equal protection challenges to electronic voting machines on the grounds they lack a paper trail and are more susceptible to hacking than paper ballots. *See* Weber v. Shelley, 347 F.3d 1101, 1103–04, 1106–07 (9th Cir. 2003); *supra* note 258 (collecting cases). *But see Curling III*, 403 F. Supp. 3d 1311, 1343–45 (N.D. Ga. 2019); *Curling II*, 397 F. Supp. 3d 1334, 1412 (N.D. Ga. 2019); *Curling I*, 334 F. Supp. 3d 1303, 1308, 1327–28 (N.D. Ga. 2018), *aff'd in part sub nom.* Curling v. Worley, 761 F. App'x 927 (11th Cir. 2019).

jurisdictional differences in rules concerning issues like third-party ballot harvesting,[427] electronic signatures on election-related documents,[428] and even the contents of voting-related forms.[429] And in extreme cases, differences among polling places' resources that lead to major disparities in voters' wait times may violate the Uniformity Principle, as well.[430] In contrast, courts have upheld grants of discretion to local officials over the timing and locations for early voting and voter registration.[431]

Finally, based on the facts of *Bush* itself, courts have insisted that jurisdictions develop specific standards for counting votes, rather than allowing election officials to decide for themselves what a voter intended their ballot markings to mean.[432] Courts are far more lenient when it comes to other allegedly vague standards that require election officials to exercise a limited degree of personal judgment or discretion, such as when determining whether a voter's signature[433] or personal information[434] "matches" official records, an identification card is "valid,"[435] or two government records with similar information both refer to the same voter.[436] Courts generally decline to invalidate such bureaucratic matching requirements under the Uniformity Principle.

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427 *See* Pierce v. Allegheny Cnty. Bd. of Elections, 324 F. Supp. 2d 684, 689–90, 706 (W.D. Pa. 2003). *But see* Paher v. Cegavske, No. 20-cv-00243-WGC, 2020 U.S. Dist. LEXIS 92665, at *23–25 (D. Nev. May 27, 2020).

428 *See* Mullins v. Collins, 218 F. Supp. 3d 488, 490–91, 495 (S.D. W. Va. 2016).

429 *See* Bryanton v. Johnson, 902 F. Supp. 2d 983, 985–86, 1001 (E.D. Mich. 2012).

430 League of Women Voters v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008); Fleming v. Gutierrez, No. 13-CV-222, 2014 U.S. Dist. LEXIS 183748, at *33–35 (D.N.M. Sept. 12, 2014), *appeal dismissed as moot*, 785 F.3d 442 (10th Cir. 2015).

431 Harlan v. Scholz, 866 F.3d 754, 755–56, 761 (7th Cir. 2017); Gustafson v. Ill. State Bd. of Elections, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209, at *3–6, *36–39 (N.D. Ill. Sept. 30, 2007).

432 *See supra* note 396. *Compare* Big Spring v. Jore, 109 P.3d 219, 220, 224, 226–28 (Mont. 2005), *with* State *ex rel.* League of Women Voters v. Herrera, 203 P.3d 94, 95, 101 (N.M. 2009).

433 *See, e.g.*, Lemons v. Bradbury, 538 F.3d 1098, 1106 (9th Cir. 2008); Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562, 573 (N.D. Ill.), *aff'd*, 463 F.3d 604 (7th Cir. 2006); Barber v. Bennett, No. CV-14-02489, 2014 U.S. Dist. LEXIS 165748, at *11–12 (D. Ariz. Nov. 27, 2014); *see also* Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244–45 (D. Alaska 2010); Miller v. Treadwell, 245 P.3d 867, 873 (Alaska 2010). *But see* Democratic Exec. Comm. v. Detzner, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018), *aff'd sub nom.* Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312 (11th Cir. 2019).

434 *See, e.g.*, *NEOCH IV*, 06-CV-896, 2016 U.S. Dist. LEXIS 74121, at *138 (S.D. Ohio June 7, 2016), *aff'd in relevant part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 836–37 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

435 *See, e.g.*, ACLU v. Santillanes, 546 F.3d 1313, 1324 (10th Cir. 2008). *But see* DNC v. Bostelmann, No. 20-cv-249, 2020 U.S. Dist. LEXIS 102410, at *19–20 (W.D. Wis. June 10, 2020).

436 *See, e.g.*, Democratic Party v. Va. State Bd. of Elections, No. 13-CV-1218, 2013 U.S. Dist. LEXIS 151713, at *1–2, *4–5 (E.D. Va. Oct. 21, 2013).

Thus, notwithstanding the Supreme Court's admonition that its analysis in *Bush* was "limited to the present circumstances,"[437] both federal and state courts have applied and enforced the Uniformity Principle across a wide variety of contexts.

III. *Bush v. Gore* and Judicial Relief in Election Cases

Bush's Uniformity Principle may be an obstacle when courts craft relief in constitutional cases concerning elections. Typically, a court must tailor relief to redress the injuries suffered by the plaintiffs in a case.[438] A few courts have held, however, that granting relief in election cases just to specific plaintiffs—particularly when it affords them extra opportunity to vote or a greater likelihood of having their ballots counted—can itself violate equal protection restrictions. Though the matter is far from settled, the Uniformity Principle may compel courts to grant broader relief in election cases than either traditional principles of equity or Article III requirements would otherwise permit them to. Alternatively, the principle might require courts to order more creative forms of relief than simply suspending a particular legal requirement only for certain voters.

The Sixth Circuit's early rulings in the *Northeast Ohio Coalition for the Homeless v. Husted* (*NEOCH II*)[439] case exemplify the difficult problems that injunctions applicable only to certain voters in election-related litigation may cause.[440] In 2010, the Ohio Secretary of State entered into a consent decree with NEOCH, an advocacy group, requiring election officials to count certain provisional ballots that failed to comply with state law.[441] Ohio law specified that a provisional ballot could be counted only if the voter cast it in the correct precinct and submitted an accurate and complete affirmation form.[442] The consent decree nevertheless required election officials to count provisional ballots from voters who: (1) were in the correct polling location; (2) confirmed their identity by using the last four digits of their social security number ("SSN-4 voters"); and (3) due to poll worker error, cast the ballot in the wrong precinct within that polling location ("right-location, wrong-precinct" ballots).[443]

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437 Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).

438 Morley, *Disaggregating Nationwide Injunctions*, *supra* note 32, at 17; Morley, *De Facto Class Actions?*, *supra* note 32, at 550–54.

439 696 F.3d 580 (6th Cir. 2012) (*NEOCH II*).

440 *Id.* at 580.

441 *Id.* at 584.

442 *Id.*

443 *Id.* Although the parties disputed the scope of the injunction, the Sixth Circuit ruled on appeal that it applied only to provisional ballots that were cast at the correct polling location. *Id.* at 590. The consent decree also required election officials to count provisional ballots from SSN-4 voters if the

In 2012, a union sued, claiming that the consent decree violated equal protection restrictions by requiring ballots cast in violation of state law to be counted only if they were from SSN-4 voters.[444] The union argued that anyone who voted in the wrong precinct within the correct polling location should, in effect, be able to take advantage of the consent decree by having their provisional ballots counted. NEOCH separately moved the district court to modify the consent decree to apply to all voters in order to eliminate any such equal protection concerns.[445] The Sixth Circuit held that limiting the consent decree to right-location, wrong-precinct ballots from only SSN-4 voters violated *Bush*'s Uniformity Principle.[446] By requiring election officials to count only certain voters' ballots cast in violation of state law, the consent decree valued their votes more than others.[447] The court concluded that right-location, wrong-precinct provisional ballots from all voters had to be counted for any races in which the voter was entitled to participate, unless the state could show that a "recalcitrant" voter intentionally voted in the wrong place.[448]

accompanying affirmation form was incorrect or incomplete due to poll worker error. *Id.* As discussed below, the district court later vacated that part of the injunction, since there was no evidence in the record that errors or omissions on affirmation forms were attributable to poll workers rather than the voters themselves. SEIU, Local No. 1 v. Husted, 906 F. Supp. 2d 745, 759 (S.D. Ohio), *stayed in part on other grounds*, 698 F.3d 341 (6th Cir. 2012).

444 *See* SEIU, Local 1 v. Husted, 887 F. Supp. 2d 761 (S.D. Ohio 2012), *aff'd in part and rev'd in part sub nom. NEOCH II*, 696 F.3d 580. The district court in this case agreed that limiting the consent decree to SSN-4 voters violated *Bush*'s Uniformity Principle. *Id.* at 794.

445 *See* Ne. Ohio Coal. for the Homeless v. Husted (*NEOCH I*), No. 06-CV-896, 2012 U.S. Dist. LEXIS 94086, at *13 (S.D. Ohio July 9, 2012), *aff'd in part and rev'd in part sub nom. NEOCH II*, 696 F.3d 580. The district court did not address the request at that time, however. *Id.* at *67.

446 *NEOCH II*, 696 F.3d at 598, 604 ("[T]he consent decree likely violates the equal protection principle recognized in *Bush v. Gore*."); *see also* Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 238 n.17 (6th Cir. 2011) (declining to address constitutionality of the consent decree).

447 *NEOCH II*, 696 F.3d at 598.

448 *Id.* at 599. The court went on to hold that the consent decree's requirement that election officials count provisional ballots with incomplete or erroneous affirmation forms only from SSN-4 voters raised similar equal protection concerns. *Id.* at 604 ("This discrepancy appears to create a *Bush v. Gore* problem. Similarly, the consent decree standing on its own also raises *Bush v. Gore* issues by virtue of treating some provisional ballots differently than others."). The district court, however, had not expressly addressed that issue. The Sixth Circuit therefore remanded the case without ruling on that issue so that the district court could consider it in the first instance. *Id.* On remand, the district court vacated the part of the consent decree requiring that provisional ballots with deficient affirmations be counted. SEIU, Local No. 1 v. Husted, 906 F. Supp. 2d 745, 759 (S.D. Ohio), *stayed in part on other grounds*, 698 F.3d 341 (6th Cir. 2012). The district court explained that the plaintiffs were not entitled to such relief because there was no evidence in the record that deficient affirmations ever resulted from poll worker error rather than voter error. *Id.* at 757–58. The Equal Protection Clause allowed the state to refuse to count ballots that did not comply with state law due to the voter's own mistakes. *Id.* at 758.

The plaintiffs then moved to clarify and modify the consent decree to require the state to count yet another category of provisional ballots that violated state law.[449] Ohio law required the affirmation forms accompanying provisional ballots to specify the type of identification the voter had used, such as a driver's license or the last four digits of their social security number.[450] The plaintiffs sought an order requiring election officials to count provisional ballots even when the accompanying affirmation forms lacked this information.[451] The district court held that, since state law made poll workers responsible for recording a voter's method of identification on the affirmation form, the consent decree required election officials to count provisional ballots from SSN-4 voters where the poll worker had failed to do so.[452] The court went on to discuss how the Sixth Circuit's recent ruling clarified that *Bush*'s Uniformity Principle prohibited courts from applying special voting rules just to certain voters.[453] It therefore expanded its order to require election officials to count provisional ballots

At the same time, the district court issued an injunction concerning yet another type of provisional ballot: those cast at the wrong precinct within the wrong polling location. *Id.* It held that there was "no logical or legal rationale" to count provisional ballots that had been cast at the wrong precinct within the correct location due to poll worker error, while refusing to count provisional ballots cast at the wrong precinct within the wrong location due to such errors. *Id.* at 750. The Sixth Circuit stayed the order. *Husted*, 698 F.3d 341. It held that the state was likely to succeed in demonstrating that the law was constitutional as applied to wrong-location, wrong-precinct voters. Unlike right-location, wrong-precinct voters, voters who arrive at the wrong location do so at least partly due to their own error, rather than solely due to poll worker error. *Id.* at 344 ("[A] voter who fails to utilize these tools and arrives at the wrong polling location cannot be said to be blameless in the same way as a right-place/wrong-precinct voter."). Additionally, allowing people to vote at the wrong location undermined the state's precinct-based voting system to a greater degree than allowing them to vote at the wrong precinct within the correct location. *Id.* at 344–45. Thus, the balance for wrong-location, wrong-precinct voters was quite different from that for right-location, wrong-precinct voters. The Sixth Circuit concluded by adding that the district court should not have changed the rules for the impending election so close to Election Day, after early voting had started. *Id.* at 346.

449 SEIU, Local 1 v. Husted, No. 12-CV-562, 2012 U.S. Dist. LEXIS 162015, at *10 (S.D. Ohio Nov. 13, 2012), *stayed sub nom.* Ne. Ohio Coal. for the Homeless v. Husted (*NEOCH III*), No. 12-4354, 2012 U.S. App. LEXIS 26926 (6th Cir. Nov. 16, 2012).

450 *Id.* at *11–12, 16.

451 *Id.* at *10.

452 *Id.* at *17. The court further ruled that the new affirmation form that the Secretary had developed improperly shifted responsibility to record a voter's method of identification from poll workers to the voters themselves. *Id.* It also held, as an alternative basis for its judgment, that declining to count provisional ballots based on state officials' failure to complete that part of the affirmation form would violate substantive due process. *Id.* at *26–28.

453 *Id. at* *29.

from any voter whose affirmation form failed to specify the type of identification they used.[454]

The Sixth Circuit stayed this ruling.[455] It held that state law did not require election officials, rather than the voters themselves, to record the type of identification that voters used on the affirmation forms.[456] And, in any event, sovereign immunity generally precluded federal courts from enforcing state law against state officials.[457] The court further opined that the original consent decree had been issued to make it easier for homeless people without identification to vote.[458] Requiring voters to record their type of identification—which could include the last four digits of their social security number—on their affirmation forms did not undermine that purpose.[459]

The Sixth Circuit reiterated the district court's concern that an injunction requiring election officials to count provisional ballots with incomplete affirmation forms exclusively for SSN-4 voters would raise equal protection problems.[460] Rather than justifying the district court's sweeping relief, however, the Sixth Circuit suggested that such concerns warranted even greater caution in granting an injunction. The court tersely declared:

> Even if such poll worker omission to record identification information was deemed to violate the consent decree, the proper remedy for such a violation would not include an injunction that creates an equal protection violation and builds on that violation by imposing the more sweeping relief of expanding the consent decree and the scope of those it benefits. The district court's order improperly expands the class of voters it was intended to cover and the types of provisional ballot issues it was meant to address.[461]

This part of the Sixth Circuit's opinion acknowledges two important facts that are seemingly in tension with each other. On the one hand, suspending statutory ballot-counting requirements only for certain voters likely violates *Bush*'s Uniformity Principle. On the other hand, expanding relief to all voters may often be a disproportionately overbroad remedy that interferes with a state's law more extensively than necessary to protect the plaintiffs' rights. Moreover, a federal court may lack Article III jurisdiction to grant such extensive relief; the Sixth Circuit pointed out that the plaintiffs likely lacked standing to assert the rights of all voters

454 *Id.* at *19–20, *29–30. ("Since Directive 2012-54 violates the Consent Decree and the Court must enjoin Directive 2012-54, as it applies to SSN-4 voters, the Secretary's application of the Directive to non-SSN-4 voters creates a *Bush v. Gore* violation of Equal Protection.").

455 *NEOCH III*, No. 12-4354, 2012 U.S. App. LEXIS 26926, at *2 (6th Cir. Nov. 16, 2012).

456 *Id.* at *8.

457 *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)).

458 *Id.* at *9.

459 *Id.* at *8.

460 *Id.*

461 *NEOCH III*, 2012 U.S. App. LEXIS 26926, at *10–11.

throughout the state.[462] Unfortunately, the court did not suggest what type of remedy would have been more appropriate to balance these competing concerns, had some form of relief been appropriate.

The US District Court for the Northern District of Georgia expressed similar equal protection concerns in *Democratic Party of Georgia v. Crittenden*.[463] In a previous case, the court had ordered election officials within one particular county to accept absentee ballots on which the voter had failed to write his or her correct birth year.[464] The *Crittenden* Court expressed concern that the state's other counties would continue to exercise discretion over whether to accept such ballots.[465] The court did not make a merits determination of whether the Constitution or federal law required election officials to count absentee ballots with erroneous or omitted information. Instead, "for the sake of statewide uniformity and assurance that all absentee mail-in ballots are equally treated," it ordered the Georgia Secretary of State to ensure that all absentee ballots that were "rejected solely because of an omitted or erroneous birth date" were counted.[466]

Conversely, rather than expanding the scope of an injunction beyond the particular plaintiffs in a case to avoid violating the Uniformity Principle, some courts simply refuse to issue such limited relief. In *Friedman v. Snipes*,[467] the plaintiffs were three voters who alleged that they had requested absentee ballots for a presidential election, but either never received them or received them too late.[468] They sought an injunction requiring their County Supervisors of Elections to accept ballots from all domestic absentee voters from those counties, so long as their ballots were postmarked by the close of polls on Election Day and received by election officials within ten days of the election.[469] That was the same deadline that state law established for military and overseas absentee voters.[470]

The US District Court for the Southern District of Florida rejected the claim, in part because the requested relief would create an equal protection violation. The court explained, "[T]he very relief requested by

462 *Id.* at *11 ("In expanding the consent decree on the NEOCH plaintiffs motion, the district court granted relief to a group of people who are not before the court, who have not requested relief, and whose interests are not implicated in the NEOCH litigation.").

463 347 F. Supp. 3d 1324, 1340–41 (N.D. Ga. 2018).

464 Martin v. Crittenden, 347 F. Supp. 3d 1302, 1309, 1311 (N.D. Ga. 2018).

465 *Democratic Party*, 347 F. Supp. 3d at 1341.

466 *Id.*

467 345 F. Supp. 2d 1356 (S.D. Fla. 2004).

468 *Id.* at 1358. The plaintiffs had included the Florida Secretary of State as a defendant, but dropped her from their request for a preliminary injunction for unspecified reasons. *Id.* at 1359 & n.4.

469 *Id.* at 1381.

470 *Id.* at 1369.

Plaintiffs, if granted, would amount to a denial of the equal protection rights of all domestic absentee voters who live outside of Broward and Miami-Dade counties."[471] Absentee ballots received within the ten-day window in Broward and Miami-Dade counties would be counted, but ballots received at the same time in other counties would not. "[G]ranting Plaintiffs' requested relief would ensure the unequal application of the law to domestic absentee voters throughout the state—precisely the unequal treatment against which the Constitution was designed to protect."[472]

Likewise, in *Fair Elections Ohio v. Husted*, as discussed earlier,[473] the deadline for requesting absentee ballots under Ohio law was the Saturday before Election Day.[474] The law contained an exception allowing people to request absentee ballots after that deadline if they, or their children, were unexpectedly hospitalized.[475] A plaintiff group sued under the Equal Protection Clause, arguing that people who were unexpectedly arrested after the deadline should similarly be able to request absentee ballots. The court rejected the claim, holding among other things that such an injunction would "exacerbate" equal protection concerns.[476] It explained that people other than prisoners might be unexpectedly prevented from going to the polls on Election Day.[477] "If the Court were to issue the injunction requested by Plaintiffs and extend the absentee ballot request deadline only as it applies to prisoners, the Court might actually create an equal protection violation . . . ."[478]

Thus, at the very least, both litigants and courts must consider the Uniformity Principle in determining the proper scope of relief in election litigation.[479] It remains unclear whether the principle prohibits courts from issuing injunctions that enforce the voting rights only of the particular plaintiffs in the cases before them. Conversely, awarding broader relief may contravene Article III's justiciability restrictions, traditional equitable principles, and many of the other considerations that make

471 *Id.* at 1380.

472 *Id.* at 1381–82.

473 *See supra* notes 180–87.

474 No. 12CV797, 2012 U.S. Dist. LEXIS 161614, at *6 (S.D. Ohio Nov. 1, 2012).

475 *Id. at* *5.

476 *Id.* at *65–66.

477 *Id.* at *66.

478 *Id.* at *66–67.

479 *Cf.* Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 799 (Ark. 2002) (noting, without adjudicating, the argument that a court order extending the hours for only certain polling places would violate equal protection); Black Voters Matter Fund v. Raffensperger, No. 20-cv-01489, 2020 U.S. Dist. LEXIS 75880, at *9–10 (N.D. Ga. Apr. 30, 2020) (holding that "providing postage to some voters" as the result of a court order issued after absentee voting had begun would not violate the *Bush* Uniformity Principle, but "could yield a measure of disparity" that would be against the public interest).

nationwide and statewide defendant-oriented injunctions so problematic.[480]

IV. The Uniformity Principle and the Selective Expansion of Voting Rights

Bush's Uniformity Principle requires that all voters participating in an election be given substantially equal opportunities to cast votes and have them be counted. Under this principle, disparities among voters which give some people an advantage in voting or having their votes counted likely violate the Equal Protection Clause. Another line of equal protection cases dating back to the Civil Rights Era, however, provides that the government may selectively make voting easier for some groups of voters, even if it excludes other, similarly situated people in the jurisdiction from such opportunities. This principle originated in the US Supreme Court's 1964 ruling in *Katzenbach v. Morgan*.[481] Under *Katzenbach*, the government's decision to expand voting opportunities only for certain groups of people is subject only to rational basis scrutiny.[482] These conflicting lines of authority have led to confusion and inconsistencies among lower-court rulings applying the Uniformity Principle—particularly cases involving challenges to state restrictions on absentee and early voting.

In *Katzenbach*, the Court rejected an equal protection challenge to section 4(e) of the Voting Rights Act.[483] That provision barred states from applying literacy requirements for voting to anyone who had completed the sixth grade in a school in Puerto Rico school where the language was not English.[484] At the time, Congress had not yet prohibited literacy requirements, and New York required voters to be literate.[485] Several New York voters challenged section 4(e), arguing among other things that it violated the Equal Protection Clause by imposing different voting requirements for different New York residents.[486] Those who were illiterate in English but had attended sixth grade in Puerto Rico were permitted to

480 *See* Morley, *De Facto Class Actions?*, *supra* note 32, at 449–503.

481 384 U.S. 641, 643 (1966) (citing 42 U.S.C. § 1973b (e) (1964) (current version 52 U.S.C. § 10303 (4)(e))).

482 *Id.* at 657.

483 *Id.* at 643 n.1.

484 *Id.* at 643.

485 The Supreme Court had upheld the constitutionality of literacy requirements in *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51–52 (1959) ("The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. . . . [I]n our society where newspapers, periodicals, books, and other printed material canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.").

486 *Katzenbach*, 384 U.S. at 656.

vote, while all other illiterate voters—including those educated in New York or a foreign country—were prohibited from voting.

The Supreme Court rejected this argument. It declared that section 4(e) did not "unconstitutionally den[y] or dilut[e] anyone's right to vote but rather . . . extends the franchise to persons who otherwise would be denied it by state law."[487] Since the statute was a "reform measure aimed at eliminating an existing barrier to the exercise of the franchise," rather than a restriction on voting rights, the classifications it drew were subject only to rational basis scrutiny.[488] The Court explained that, under the rational basis test, Congress need not "strike at all evils at the same time."[489] Rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[490] The Court went on to speculate about the range of possible legitimate considerations that might have led Congress to grant relief to people educated in Puerto Rican schools.[491]

The Court went on to apply this approach in *McDonald v. Board of Election Commissioners*.[492] The plaintiffs were pretrial detainees in the Cook County jail who argued that Illinois's absentee voting law violated the Equal Protection Clause.[493] The law allowed voters to cast absentee ballots only if, among other things, they were unable to vote in person because they were physically incapacitated or absent from the county on Election Day.[494] The plaintiffs argued that it was unconstitutionally arbitrary to allow voters who were "incapacitated" by physical disability to receive absentee ballots, but not those who were incapacitated by incarceration.[495] And it was similarly arbitrary to allow Cook County residents who were detained in other counties or states to cast absentee ballots (since they were absent from Cook County on Election Day), while prohibiting those detained within Cook County itself from doing so.[496]

The Court held that the case did not involve "the fundamental right to vote," but rather "a claimed right to receive absentee ballots."[497] It explained, "[T]he absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not

487 *Id.* at 656–57.

488 *Id.* at 657.

489 *Id.* (quoting Semler v. Dental Exam'rs, 294 U.S. 608, 610 (1935)).

490 *Id.* (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955)).

491 *Id.* at 657–58.

492 394 U.S. 802, 806 (1969).

493 *Id.* at 803.

494 *Id.* at 803–04.

495 *Id.*

496 *Id.*

497 *Id.* at 807.

themselves deny appellants the exercise of the franchise."[498] Thus, restrictions on eligibility for absentee voting are subject only to rational basis scrutiny.[499] The Court held that the state could validly allow only certain groups of voters to cast absentee ballots even though there were "many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible."[500] It concluded by stating that Illinois should be commended for making voting easier for some people, even though the legislation could have gone further.[501]

Morgan and *McDonald* draw the questionable distinction between laws that selectively extend the franchise or voting opportunities to only certain people, and laws restricting the franchise or voting opportunities. The Court did not seriously contend with the fact that both types of statutes lead to the same result: only certain people within the electorate receive favorable treatment with regard to voting. Whether that outcome is achieved by selectively extending special protections for voting rights to certain favored groups, as in *Morgan* and *McDonald*, or instead restricting the franchise for others, seems primarily a matter of statutory phrasing that should carry little weight.

Moreover, the Court's rational-basis approach to selective expansions of voting rights makes it easier for political parties in power to give their supporters disproportionate advantages in voting. The discretion to confer extra voting rights or opportunities only on certain segments of the electorate gives legislators a way of unfairly attempting to entrench themselves in power. Finally, it is difficult to square *Katzenbach*'s and *McDonald*'s toleration of disparate voting rules for different groups within the electorate with *Bush*'s Uniformity Principle, which prohibits "arbitrary and disparate" treatment of different voters within the same electorate.[502] When some voters are granted extra protection for their voting rights or opportunities to vote, they are not participating in the election "on an equal basis with other citizens in the jurisdiction."[503]

Bush's Uniformity Principle arguably reflects greater distrust of Congress and legislatures to fairly regulate elections.[504] This could reflect in part rising political polarization toward the end of the twentieth

498 *McDonald*, 394 U.S. at 807–08.

499 *Id.* at 809 (holding, with regard to absentee voting, that "statutory classifications will be set aside only if no grounds can be conceived to justify them").

500 *Id.* at 809–810.

501 *Id.* at 811.

502 Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

503 Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir. 2012) (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

504 I am grateful to Professor Rick Pildes for making this observation.

century.[505] Professor Michael Kang contends that, since the end of the Cold War, hyperpartisanship has "infected both parties' attitudes toward election administration . . . . Lawmakers more aggressively changed election rules affirmatively to boost their side and depress the other."[506] Many jurisdictions' ability to implement such changes was enhanced when *Shelby County v. Holder*[507] plunged federal preclearance review into limbo.[508]

Political parties' increased focus on changing election rules to achieve partisan goals may have led courts to view those rules more suspiciously and impose more exacting scrutiny. Professor Rick Pildes has suggested that *Bush*'s Uniformity Principle itself may have arisen from the Court's "structural concern for partisan capture of election processes."[509] Only a few years earlier, in *U.S. Term Limits, Inc. v. Thornton*,[510] the Court had held for the first time that the Elections Clause contains implicit restrictions to prevent partisan manipulation.[511] And after *Bush*, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[512] the majority held that a state constitution may transfer the authority to draw congressional district lines from a state's institutional legislature to an independent redistricting commission.[513] In doing so, it criticized the "conflict of interest inherent in legislative control over redistricting."[514]

While *Rucho v. Common Cause*[515] rejected political gerrymandering claims as nonjusticiable, the Court still acknowledged that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust"

505 *See* Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) ("American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.").

506 Michael S. Kang, *Voting Rights from Judge Frank Johnson to Modern Hyperpolarization*, 71 ALA. L. REV. 793, 808 (2020).

507 570 U.S. 529 (2013).

508 *Id.* at 556.

509 Richard Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 49 (2004); *see also* Richard H. Pildes, *Disputed Elections*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000 69, 84 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

510 514 U.S. 779 (1995).

511 *Id.* at 833–34 (declaring that the Elections Clause is "not a source of power to dictate electoral outcomes" or "to favor or disfavor a particular class of candidates").

512 576 U.S. 787 (2015).

513 *Id.* at 824. The US Constitution's Elections Clause grants the authority to regulate the "Manner" in which congressional elections are held—including the power to draw congressional district lines, *see* Smiley v. Holm, 285 U.S. 355, 366, 372–73 (1932)—specifically to the "Legislature" of each state, rather than to the state as an entity. U.S. CONST. art. I, § 4, cl. 1.

514 *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 821 (quoting Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1808 (2012)).

515 139 S. Ct. 2484 (2019).

and are "incompatible with democratic principles."[516] Thus, the Court's election law rulings over the past few decades largely reflect increasing discomfort with allowing political entities to exercise primary control over the electoral process.[517] From that perspective, *Bush*'s Uniformity Principle—which makes it harder for legislatures or election officials to single out particular groups for favorable treatment—may seem quite attractive. During the Civil Rights Era, in contrast, the Court would have been more willing to view measures providing additional voting opportunities in certain places or to particular groups as commendable attempts to reduce barriers to voting.

The unresolved tension between these competing lines of authority has led to inconsistencies and confusion among lower-court opinions, particularly when it comes to early and absentee voting. Applying *Katzenbach* and *McDonald*, lower courts have rejected equal protection challenges to restrictions on absentee voting[518] and disparities among counties in the availability of early voting.[519] For example, as discussed earlier,[520] in *Paher v. Cegavske*, the US District Court for the District of Nevada held that, in the context of statewide primary elections, it was permissible for only one county in the state to automatically mail absentee ballots to all absentee voters and deputize field registrars to pick them up.[521] The court emphasized that election officials "are not constitutionally prohibited from making voting easier," even selectively.[522] The Equal Protection Clause does not prohibit a county from "mak[ing] it easier or more convenient" for people in one county to vote, so long as it "does not have any adverse effects on the ability of voters in other counties to vote."[523]

On the other hand, other jurisdictions have held that the Uniformity Principle requires equal treatment of voters, even regarding early and absentee voting.[524] In *Obama for America v. Husted*, for example, the Sixth

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516 *Id.* at 2506 (quoting *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 791).

517 *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 90–92 (2016).

518 *See, e.g.*, Griffin v. Roupas, 385 F.3d 1128, 1130–31 (7th Cir. 2004); Suydam v. Town of Rumford, No. 15-cv-00203, 2015 U.S. Dist. LEXIS 72723, at *8–9 (D. Me. June 4, 2014); Fair Elections Ohio v. Husted, No. 12CV797, 2012 U.S. Dist. LEXIS 161614, at *10–12 (S.D. Ohio Nov. 1, 2012).

519 *See, e.g.*, Gustafson v. Ill. State Bd. of Elections, No. 06C1159, 2007 U.S. Dist. LEXIS 75209, at *36–39 (N.D. Ill. Sept. 30, 2007).

520 *Supra note* 293–302.

521 No. 20-cv-00243, 2020 U.S. Dist. LEXIS 92665, at *6 (D. Nev. May 27, 2020).

522 *Id.* at *3.

523 *Id.* at *24.

524 *See, e.g.*, Democratic Party of Ga. v. Crittenden, 347 F. Supp. 3d 1324, 1341 (N.D. Ga. 2018) (ordering all counties within the state to accept absentee ballots on which the voter had written the wrong birth year, but only because a court had previously ordered one county to do so); Bryanton v.

Circuit simply ignored *Katzenbach* and *Morgan*, despite repeated citations to it in the briefs.[525] In that case, through a series of legislative amendments, the Ohio legislature had adopted a statutory scheme allowing only military voters to vote in person over the three days immediately before Election Day.[526] President Barack Obama's campaign committee argued that the Equal Protection Clause prohibited the state from granting special voting privileges only to members of the military. The Sixth Circuit agreed, holding that the state did not have a valid interest in allowing members of the military to vote in person over the weekend before Election Day without also letting the general public do so, as well.[527] It emphasized that non-military voters also faced the possibility of last-minute emergencies. "At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters . . . ."[528]

Without addressing *Morgan* or *McDonald*, the Sixth Circuit added:

> Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents.[529]

The Supreme Court has not yet resolved the tension between its rulings in *Katzenbach* and *McDonald* on the one hand, and *Bush* on the other. These conflicting lines of authority are most likely to impact the continued validity of for-cause absentee voting. Currently, approximately fourteen states have excuse-based absentee voting, in which only certain groups of voters may cast absentee ballots.[530] Both federal law and many

Johnson, 902 F. Supp. 2d 983, 989 (E.D. Mich. 2012) (holding that different counties could not use different forms for requesting absentee ballots); Friedman v. Snipes, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004) (holding that the Equal Protection Clause required election officials to apply the same deadline for absentee ballots to all voters participating in a statewide election); Pierce v. Allegheny County Bd. of Elections, 324 F. Supp. 2d 684, 706 (W.D. Pa. 2003) (holding that the Equal Protection Clause prohibited different counties from applying different rules for third-party absentee ballot harvesting).

525 *See, e.g.*, Reply Br. of Intervenor Defs.-Appellants Mil. Grp., at 8, 9, 18, Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012).

526 *Husted*, 697 F.3d at 427.

527 *Id.* at 436.

528 *Id.*

529 *Id.* at 435.

530 *See, e.g.*, ALA. CODE § 17-11-3 (2019); ARK. CODE ANN. § 7-5-402 (2020); CONN. GEN. STAT. § 9-135 (2020); DEL. CODE ANN. tit. 15, § 5502 (2012); IND. CODE ANN. § 3-11-10-24 (West 2019); KY. REV. STAT. ANN. §§ 117.077, 117.085 (West 2002); LA. STAT. ANN. § 18:1303 (2018); MASS. GEN. LAWS ch. 54, § 86 (2020); MISS. CODE ANN. § 23-15-715 (2020); MO. ANN. STAT. § 115.277 (West 2020); N.H. REV. STAT. § 657:1 (2019); N.Y. ELEC. L. § 8-400 (LexisNexis 2020); S.C. CODE ANN. § 7-15-320 (2014); TENN.

states also offer special voting opportunities for members of the military and overseas citizens,[531] as well as emergency services workers.[532] And, more broadly, some states delegate substantial authority to county and local officials to decide the availability of early voting opportunities.[533] Vigorous enforcement of *Bush*'s Uniformity Principle and rejection of *Katzenbach* or *McDonald* would likely require invalidation of a wide range of fairly common voting statutes, as well as more centralized state-level control over the electoral process.

Conclusion

To the extent the Supreme Court attempted to limit its ruling in *Bush v. Gore* to the 2000 election, it has largely failed. To the contrary, dozens of federal and state courts have cited *Bush* over the past two decades as establishing an equal protection Uniformity Principle for elections. The principle prohibits election officials from affording materially different treatment to voters participating in the same election that substantially impacts their opportunity to either cast a ballot or have it accepted as valid. Courts have applied the principle across a wide variety of contexts, including where states accorded differing numbers of votes to each voter, applied disparate voting rules to different voters participating in the same election, or allowed local jurisdictions to adopt voting systems with substantially different error rates. Plaintiffs have been least successful when challenging various "matching" requirements, such as signature, identification, or record matches; disparities in the availability of absentee voting or early voting; and restrictions on discretionary procedures for the restoration of felons' voting rights.

The Uniformity Principle has also played an important role at the remedial stage of several election cases. Some courts have invoked it as the basis for extending relief to voters beyond the particular plaintiffs in a case. In other cases, the court denied relief in part because granting an

CODE ANN. § 2-6-201(2017); TEX. ELEC. CODE ANN. § 82.001 (West 2019); W. VA. CODE ANN. § 3-3-1 (LexisNexis 2020).

531 *See, e.g.*, Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Pub. L. No. 99-410, 100 Stat. 924 (1986), *amended by* Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, tit. V, subtitle H, §§ 575–89, 123 Stat. 2190, 2318–35 (2009) (codified as amended at 52 U.S.C. § 20302 (2018)).

532 *See* Matthew Catron, *Absentee Voting in Case of a Personal Emergency*, NAT'L CONF. OF STATE LEGIS. (Mar. 18, 2020), https://perma.cc/4FTR-383G.

533 *See, e.g.*, Gustafson v. Illinois State Board of Elections, No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209, at *19, *35 (N.D. Ill. Sept. 30, 2007) (upholding disparities among counties for early voting opportunities); *cf.* Harlan v. Scholz, 866 F.3d 754, 756–57 (7th Cir. 2017) (upholding disparities among counties in same-day voter registration activities).

injunction to only certain voters would raise serious constitutional questions.

The Court itself has yet to revisit *Bush*'s Uniformity Principle or offer any further insight into its scope. The principle directly conflicts with another line of authority dating back to the Supreme Court's rulings in *Katzenbach v. Morgan* and *McDonald v. Board of Election Commissioners*, which held that laws selectively protecting voting rights or extending voting opportunities exclusively for certain groups of voters are subject only to rational basis scrutiny. Whether *Bush* or *Katzenbach–McDonald* ultimately prevails will determine whether states may continue to exercise broad discretion over absentee and early voting, and the extent to which they must centralize control over the electoral process. Requiring substantially equal treatment of all voters in the electorate can reduce partisan manipulation and bolster both the actual and apparent fairness of the electoral process. Yet such uniformity can make it more difficult, costly, and burdensome for states to attempt to respond to the unique burdens that particular groups, such as members of the military or emergency responders, face in attempting to vote.

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THE INTRATEXTUAL INDEPENDENT "LEGISLATURE" AND THE ELECTIONS CLAUSE†

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ABSTRACT—Many states have delegated substantial authority to regulate federal elections to entities other than their institutional legislatures, such as independent redistricting commissions empowered to determine the boundaries of congressional districts. Article I's Elections Clause and Article II's Presidential Electors Clause, however, confer authority to regulate federal elections specifically upon State "legislatures," rather than granting it to States as a whole. An intratextual analysis of the Constitution reveals that the term "legislature" is best understood as referring solely to the entity within each state comprised of representatives that has the general authority to pass laws. Thus, state constitutional provisions or laws creating independent redistricting commissions that purport to limit a state legislature's power to draw congressional districts or otherwise regulate federal elections violate the Elections Clause.

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INTRODUCTION

The Elections Clause of the U.S. Constitution is the Swiss army knife of federal election law. Ensconced in Article I, it provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations."[1] Its Article II analogue, the Presidential Electors Clause, similarly specifies that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors" to select the President.[2] The concise language of these clauses performs a surprisingly wide range of functions implicating numerous doctrines and fields beyond voting rights, including statutory interpretation,[3] state separation of powers and other areas of state constitutional law,[4] federal court deference to state court rulings,[5]

[1] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[2] *Id.* art. II, § 1, cl. 2 (emphasis added).

[3] Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (concluding that, because the Constitution delegates plenary authority over presidential elections to state legislatures, "the text of [an] election law itself . . . takes on independent significance"); *id.* at 130 (Souter, J., dissenting) ("The issue is whether . . . the law as declared by the [state] court [is] different from the provisions made by the [state] legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen[.]").

[4] *See* McPherson v. Blacker, 146 U.S. 1, 25 (1892) (holding that the Presidential Electors Clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" to regulate federal elections, including through "any provision in the state constitution in that regard"); *cf. Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (recognizing that the Presidential Electors Clause is among the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government").

[5] Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) ("As a general

administrative discretion,[6] and preemption.[7]

States lack inherent power to regulate federal elections. Thus, when a state does so, it is acting "by virtue of a direct grant of authority" under the Elections Clause or Presidential Electors Clause.[8] These constitutional provisions are "express delegations of power"[9] that confer upon state legislatures the authority to "provide a complete code" for federal elections, including but not limited to laws concerning "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[10]

At first blush, the meaning of the term "legislature" in the Elections Clause and Presidential Electors Clause appears quite clear: it refers to the entity within each state comprised of elected representatives that enacts statutes. The Supreme Court, however, has taken a somewhat different view. In *Ohio ex rel. Davis v. Hildebrant*, the Court held that the Elections Clause allows a state's citizens to use the referendum process established by the state constitution to nullify a law enacted by the legislature concerning federal redistricting.[11] It tersely rejected the argument that the state legislature had exclusive power under the Elections Clause to enact or repeal laws governing congressional elections, dismissing it as "plainly without substance."[12] *Hildebrant* permits a state to enact laws concerning congressional elections through any process that the state constitution includes within the state's "legislative power," even if the state legislature

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rule, this Court defers to a state court's interpretation of a state statute. But in the case of a [state] law . . . applicable . . . to the selection of Presidential electors, the legislature is . . . acting . . . by virtue of a direct grant of authority made under [the Presidential Electors Clause] of the United States Constitution.").

[6] *See* Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1012 & n.2 (S.D. Ohio 2008) (holding that a directive from the Ohio Secretary of State concerning minor party candidates was unconstitutional because it "purport[ed] to create new law" and, under the Elections Clause, "the Secretary of State, a member of the executive branch of government, has no authority independent of the Ohio General Assembly to direct the method of the appointment of . . . federal officials").

[7] Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253–54 (2013) (holding that federal laws passed under the Elections Clause are not subject to the traditional presumption against preemption).

[8] *Palm Beach*, 531 U.S. at 76; *accord* Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections . . . only within the exclusive delegation of power under the Elections Clause.").

[9] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995).

[10] Smiley v. Holm, 285 U.S. 355, 366 (1932). For a compelling discussion of the debates in the Constitutional Convention concerning the Elections Clause, as well as the Supreme Court's history of interpreting it, see Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1220–33 (2012).

[11] 241 U.S. 565, 569–70 (1916).

[12] *Id.* at 569.

itself is not involved.[13]

The Supreme Court explored the issue in greater depth in *Smiley v. Holm*, in which it permitted a state governor to veto a federal redistricting bill passed by the state legislature because the state constitution included vetoes as part of the legislative process.[14] It explained that a legislature's exercise of its power under the Elections Clause to enact laws governing congressional elections "must be in accordance with the method which the State has prescribed for legislative enactments."[15] The Court added, "We find no suggestion in the [Elections Clause] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted."[16]

The scope of the Elections Clause is again before the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[17] Arizona voters passed a state constitutional amendment through the initiative process to "remove[] congressional redistricting authority from the Legislature and vest[] that authority in a new entity, the Arizona Independent Redistricting Commission ('IRC')."[18] A three-judge panel of the U.S. District Court for the District of Arizona upheld the IRC's constitutionality because "*Hildebrant* and *Smiley* . . . demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws,"[19] rather than the institutional legislature itself. The Elections Clause therefore "does not prohibit a state from vesting the power to conduct congressional districting" in an entity other than the state legislature, such as Arizona's redistricting commission.[20]

Arizona Independent Redistricting Commission is poised to be the Supreme Court's first holding about whether a state's institutional legislative body may be wholly stripped of its powers concerning federal redistricting, if not federal elections altogether.[21] The immediate effects of

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[13] *Id.* at 568–69.

[14] 285 U.S. 355, 368.

[15] *Id.* at 367.

[16] *Id.* at 367–68.

[17] 997 F. Supp. 2d 1047 (D. Ariz. 2014), *cert. granted*, 135 S. Ct. 46 (2014).

[18] *Id.* at 1048.

[19] *Id.* at 1054.

[20] *Id.* at 1056.

[21] The Court has already stated in dicta that a state may permit entities other than the legislature itself to redraw congressional districts. Chapman v. Meier, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *see also* Growe v. Emison, 507 U.S. 25, 34 (1993).

its ruling will reverberate far beyond Arizona, as six other states have transferred authority to determine congressional district boundaries to an entity other than the institutional legislature[22] More broadly, this case will revisit the meaning of the term legislature as used in the Elections Clause (and, by extension, Article II's Presidential Electors Clause), confirming whether it actually refers to: the legislature alone; the legislature *plus* whatever other processes or entities a state constitution includes within the lawmaking process; or any process or entity that a state constitution vests with legislative power over federal elections, to the potential exclusion of the institutional legislature.

This Essay contends that the term legislature should be interpreted in accordance with its plain meaning, as referring solely and exclusively to the multimember body of representatives within each state generally responsible for enacting its laws.[23] This conclusion becomes especially clear through an intratextual approach to the Elections Clause.

Part I of this Essay introduces the intratextual method of constitutional interpretation, explaining how the Constitution's repeated use of a term often provides a wealth of context from which a court may discern the term's meaning. Part II offers an intratextual interpretation of the Elections Clause, examining how each of the other contexts in which the Constitution uses the term legislature demonstrates that it refers to a specific institution. In fact, the Supreme Court itself employed an intratextual analysis in *Hawke v. Smith* to conclude that Article V permits a state to ratify a constitutional amendment only through a vote of its institutional legislature (or a specially called convention), not a public referendum.[24]

Part III shows that this understanding is confirmed by both a traditional textualist approach to the term, as well as the "independent state

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[22] *Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/redistricting/redistricting-commissions.aspx [http://perma.cc/R298-YKDT]; *see also* CAL. CONST. Art. XXI.

[23] Much academic debate on this issue has focused on whether the Presidential Electors Clause allows a state's citizens to change the state's method for allocating presidential electors from winner-take-all to a proportional system through a public initiative. *See, e.g.*, Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631 (2008) (defending the use of ballot initiatives to change state laws governing presidential elections); Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 629 (2008) ("A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question."); Nicholas P. Stabile, Comment, *An End Run Around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors*, 103 NW. U. L. REV. 1495 (2009) (arguing that the debates in the Constitutional Convention and historical practice establish that institutional legislatures have sole power to determine the manner in which a state will allocate its presidential electors among various candidates).

[24] 253 U.S. 221, 227–28 (1920).

legislature" doctrine.[25] This Essay briefly concludes that adopting an intratextual approach to the term legislature—one informed by both traditional textualism and the independent state legislature doctrine—would help the *Arizona Independent Redistricting Commission* Court reach the most accurate understanding of the Elections Clause.

I. IN DEFENSE OF AN INTRATEXTUAL APPROACH

Intratextualism counsels that the Constitution's use of "strongly parallel language [in different places] is a strong (presumptive) argument for parallel interpretation" of that language.[26] This approach urges a reader interpreting "a contested word or phrase that appears in the Constitution" to consider its meaning as it appears in other passages.[27] "[T]extually nonadjoining clauses" of the Constitution should be placed "side by side for careful analysis," to ensure that a proposed interpretation of a term makes sense in the various contexts in which the Constitution deploys it.[28]

Akhil Amar identifies three main types of intratextual arguments. First, when attempting to determine the meaning of a word in a particular clause, other constitutional provisions can "serve[] a basic dictionary function" by "illustrat[ing] [its] usage."[29] Second, a reader also may arrive at the "best" interpretation of a term by determining the meaning that would fit best with its usage throughout the Constitution.[30] Finally, when entire clauses are structured identically to each other, with only one or two key words changed, they generally should be read *in pari materia* and interpreted consistently.[31]

Amar contends that the "greatest virtue of intratextualism" is that "it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses."[32] He explores the Court's long legacy of intratextual analysis,[33] including Chief Justice John Marshall's use of intratextualism in *McCulloch v. Maryland*[34] and Justice Joseph Story's use of it in *Martin v.*

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[25] The independent state legislature doctrine provides that a state legislature is not bound by substantive restrictions or limits contained in a state constitution when exercising its power under the Elections Clause or Presidential Electors Clause to regulate federal elections. *See infra* Part III.B.

[26] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999).

[27] *Id.* at 748.

[28] *Id.* at 788.

[29] *Id.* at 791.

[30] *Id.* at 792–94.

[31] *Id.* at 794–95.

[32] *Id.* at 795.

[33] *Id.* at 755–58, 760–63.

[34] 17 U.S. (4 Wheat.) 316, 412 (1819).

Hunter's Lessee.[35] As mentioned earlier, in *Hawke v. Smith*, the Court adopted an intratextual approach to determine the meaning of the term legislature as it appears in Article V.[36] Academic commentators have also applied this technique to various constitutional provisions.[37]

Intratextual interpretation is not a mechanical process, however, as "certain chameleon words should sensibly mean different things in different clauses."[38] When the Constitution uses a word differently in different contexts, intratextualism can lead to misleading results.[39] Moreover, "[c]arried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound."[40] Thus, intratextualism should be used to "suggest possible readings" or "generate interpretative leads and clues" that must be assessed through "other tools of interpretation," not to "dictate results."[41]

Adrian Vermeule and Ernest A. Young offer a powerful critique of intratextualism, questioning its premise that the Constitution should be given a consistent, uniform interpretation. They point out that the document may lack internal consistency because its "component provisions were enacted at different times, in different circumstances, and for different reasons."[42] Even the text of the original, unamended Constitution is the result of numerous "tradeoffs, political battles won and lost, and

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[35] 14 U.S. (1 Wheat.) 304, 328–34 (1816). For a more recent example of the Court applying intratextual analysis, see *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008), in which the Court interpreted the phrase "right of the people" as used in the Second Amendment to protect an individual right to bear arms, because the Constitution's three other uses of that phrase "unambiguously refer to individual rights."

[36] 253 U.S. 221, 227–28 (1920).

[37] *E.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1021–22 (2007) (applying intratextualism to interpret the words "inferior" and "supreme" with regard to courts); Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 725 (2008) (same for the word "treaties"); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1757–58 (2002) (same for congressional authority to regulate Presidential elections); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172 (2003) (applying an intratextual comparison of the Interstate, Foreign, and Indian Commerce Clauses). For articles where intratextualism was deemed insufficient to support a particular interpretation, see Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 493–94 (2002), and Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 39 (2013).

[38] Amar, *supra* note 26, at 793; *accord id.* at 799.

[39] *E.g.*, Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1181 (2003); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 767–68 (2000).

[40] Amar, *supra* note 26, at 799.

[41] *Id.*

[42] Vermeule & Young, *supra* note 39, at 731; *accord* Clark, *supra* note 37, at 723.

compromised ideals."[43] Rather than an integrated document springing from a single author, it is the product of a body of people disagreeing, compromising, and amending each other's work. It is highly unlikely that the dozens of men who contributed to its writing all used important terms consistently.[44]

Moreover, because intratextualism requires judges to interpret a term as it appears in numerous constitutional provisions, this approach may unduly tax their "time, information, and expertise;" lead to more errors; and allow for more subjectivity than a clause-bound method of interpretation.[45] Intratextualism is more indeterminate and manipulable than clause-bound textualism, because it does not offer interpretive guidance when a term's apparent meaning based on a single clause in isolation differs from its apparent meaning based on other clauses in which it appears. Thus, a reader still must choose among competing interpretations using a theory or process other than intratextualism itself.[46] William Treanor, further critiquing intratextualism from an originalist perspective, adds that it is "unreliable" because it "privileges a small subset of contemporaneous usages (those in the constitutional document) over the larger body of relevant contemporaneous usages."[47]

At a minimum, intratextualism provides a useful data point for courts to consider in determining the meaning of a disputed term, and would be especially useful for the Supreme Court in interpreting the meaning of legislature in the Elections Clause and Presidential Electors Clause. The term is concrete and reasonably susceptible of only a limited number of definitions. Moreover, it does not appear to lend itself to the type of compromise or mutually inconsistent understandings to which other, more general language might be subject.

Additionally, the original, unamended Constitution uses legislature on several different occasions, thereby avoiding the issue of whether subsequent constitutional amendments employ it in the same manner. As

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[43] Vermeule & Young, *supra* note 39, at 742.

[44] *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610 (1842) (contending that because many of the Constitution's provisions "were matters of compromise of opposing interests and opinions[,] . . . no uniform rule of interpretation can be applied to it").

[45] Vermeule & Young, *supra* note 39, at 731; *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 941 (2003).

[46] Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, 87 GEO. L.J. 2327, 2330 (1999) (book review) (concluding that intratextualism "provides an almost limitless array of possible interpretations or readings and posits no standard for measuring or choosing among plausible interpretations").

[47] William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's* Bill of Rights, 106 MICH. L. REV. 487, 523–24 (2007).

Part II demonstrates, the numerous other constitutional clauses that use the term all refer to a state's sole lawmaking body comprised of elected representatives, rather than some broader conception of the word. This consistent pattern of usage creates a strong presumption that the Elections Clause and Presidential Electors Clause employ it in the same fashion. And, as discussed in Part III, the results of this intratextual analysis can be corroborated by both a plain meaning interpretation as well as the longstanding independent state legislature doctrine. Even if the constraints under which many judges operate may prevent them from using intratextualism effectively, the Supreme Court can devote sufficient time and attention to a case such as *Arizona Independent Redistricting Commission* to make intratextualism an appropriate and useful strategy.

II. INTRATEXTUALISM AND THE ELECTIONS CLAUSE

The Constitution contains numerous references to state legislatures that may be used to elucidate that term's meaning as it appears in the Elections Clause (and, by extension, the Presidential Electors Clause). These references may be divided into four groups: (i) those that discuss features of a legislature; (ii) those that distinguish between a state legislature and other state personnel or entities; (iii) those that confer quasi-legislative or nonlegislative powers upon legislatures; and (iv) those, such as the Elections Clause and Presidential Electors Clause, that confer legislative authority over certain subjects upon the legislature.

The text, context, original understanding, and consistent history of interpretation of the Constitution's first three types of references to the term legislature demonstrate that it is best understood as referring to a state's general lawmaking body of elected representatives, rather than a broader legislative power[48] or other entities upon which a state's constitution may attempt to confer a portion of that legislative power. These provisions create a strong, and ultimately insurmountable, presumption that the same meaning should be attributed to the term as it appears in the fourth category of clauses: those such as the Elections Clause and Presidential Electors Clause that grant state legislatures the power to enact certain types of laws.

A. Discussions of Legislatures

Several constitutional provisions' usage of the term legislature reveals that a legislature contains certain characteristics. For example, Article VI's Oath Clause requires that "Members of the several State Legislatures . . . be

[48] *Cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568–69 (1916).

bound by Oath or Affirmation, to support th[e] Constitution."[49] This provision contemplates that a state legislature will have members. And its requirement that such members pledge to uphold the federal Constitution is best understood as referring to individuals who belong to a particular lawmaking institution within a state, rather than members of some overarching legislative power that conceivably encompasses the entire voting public.

Similarly, Article I's Qualifications Clause provides that a person may vote for the U.S. House of Representatives if he possesses "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[50] This provision treats the legislature as an entity that presumptively features multiple branches and is comprised of representatives chosen by voters.

Article I's Senate Vacancies Clause (which has been superseded by the Seventeenth Amendment) states that, if a vacancy occurs in the U.S. Senate "during the Recess of the Legislature of any State," the state executive may make a temporary appointment "until the next Meeting of the Legislature."[51] Yet again, this provision contemplates the existence of an institutional legislature whose members periodically meet and which may be called into recess. Finally, the Domestic Violence Clause in Article IV provides that, "on Application of the [state] Legislature, or of the [state] Executive (when the Legislature cannot be convened)," the federal government shall protect a state against "domestic Violence."[52] This further corroborates the constitutional image of a legislature as a multimember body that periodically convenes and adjourns.

Thus, every clause that gives some insight into the nature of a legislature uses the term to refer to a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess.

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[49] U.S. CONST. art. VI, cl. 3. The Fourteenth Amendment contains similar references. Section 2 imposes penalties on states that deny the right to vote, including in elections for "members of the legislature." *Id.* amend. XIV, § 2. Section 3 prohibits a person from serving as a federal official who, while "a member of any state legislature," engages in "insurrection or rebellion" against the United States unless Congress removes the disability by a two-thirds vote. *Id.* amend. XIV, § 3.

[50] *Id.* art. I, § 2, cl. 1. The Seventeenth Amendment contains identical language concerning U.S. Senate elections. *Id.* amend. XVII, § 1.

[51] *Id.* art. I, § 3, cl. 2.

[52] *Id.* art. IV, § 4.

B. Provisions That Distinguish Between Legislatures and Other State Personnel and Entities

Several other constitutional provisions expressly distinguish between legislatures (and their members) and other state officials and entities. For example, as discussed above, the Oath Clause requires "Members of the several State Legislatures, and all executive and judicial Officers . . . of the several States" to take an oath or affirmation to support the Constitution.[53] Likewise, the Senate Vacancies Clause provides that, if a vacancy occurs while the "Legislature of any State" is in recess, "the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[54] And the Domestic Violence Clause requires the federal government to protect a state "against domestic Violence" upon "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)."[55] These provisions all distinguish between the state legislature and the state executive (or state executive officials). This juxtaposition of different branches suggests that, just as references to a state's executive are best construed as referring to its governor, references to a state's legislature are best construed as referring to its main lawmaking body comprised of elected representatives.

Even more telling is Article V, which specifies that a proposed constitutional amendment may be ratified either by "the Legislatures" or "Conventions" in three-fourths of the States, depending on the mode of ratification authorized by Congress.[56] This clause demonstrates that, when the Framers wished to authorize action by the people independent of their institutional legislatures, they knew how to do so. Article V further bolsters the conclusion that the term legislature refers exclusively to the particular institution within a state that exercises its general lawmaking authority.

C. References to Quasi-Legislative or Nonlegislative Powers

Numerous constitutional provisions confer authority on state legislatures other than the power to enact certain types of laws. The Constitution grants them the power to choose U.S. Senators (since repealed by the Seventeenth Amendment);[57] "fill" Senate vacancies;[58] "call" for a

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[53] *Id.* art. VI, cl. 3. Provisions of the Fourteenth Amendment discussed above reprise this list of State officials. *See supra* note 49.

[54] *Id.* art. I, § 3, cl. 2. The Seventeenth Amendment's vacancy provisions likewise distinguish between the state legislature and the state's "executive authority." *Id.* amend. XVII, § 2.

[55] *Id.* art. IV, § 4.

[56] *Id.* art. V.

[57] *Id.* art. I, § 3, cl. 1.

[58] *Id.* art. I, § 3, cl. 2; *cf. id.* amend. XVII, § 2.

convention for proposing amendments to the Constitution;[59] "[a]ppl[y]" for the federal government's "protect[ion] . . . against domestic Violence;"[60] "ratif[y]" proposed amendments to the Constitution;[61] and "[c]onsent" to the formation of new states,[62] or to the federal government's purchase and exercise of exclusive authority over land within the state for the erection of military facilities, docks, and other "needful Buildings."[63]

For most, if not all, of these provisions, the Framers' debates over the Constitution further confirm that they exclusively empower institutional legislatures to perform the specified acts. For example, as originally enacted, the Constitution directed state legislatures, rather than the electorate, to choose U.S. senators.[64] During the Constitutional Convention, John Dickinson moved that senators be elected by state legislatures for two reasons:

> 1. because the sense of the States would be better collected through their Governments; than immediately from the people at large. 2. because he wished the Senate to consist of the most distinguished characters . . . and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.[65]

He later added that granting legislatures this power would help preserve the states as distinct entities and "produce that collision" between the federal and state governments, "which should be wished for in order to check each other."[66]

Throughout the ensuing debate, all delegates used the term legislature consistently, referring to a particular, well-understood entity within each

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[59] *Id.* art. V.

[60] *Id.* art. IV, § 4.

[61] *Id.* art. V. Consistent with this provision, various constitutional amendments specify that they would not take effect unless ratified by a sufficient number of state "legislatures" within a specified period of time. *Id.* amend. XVIII, § 3; *id.* amend. XX, § 6; *id.* amend. XXII, § 2.

[62] *Id.* art. IV, § 3, cl. 1.

[63] *Id.* art. I, § 8, cl. 17.

[64] *Id.* art. I, § 3, cl. 1 (amended 1913). This provision's reference to legislatures was specifically intended to preclude the electorate from playing a direct role in selecting U.S. Senators. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 884 (1995) (Thomas, J., dissenting) ("In the context of congressional elections, the Framers obviously saw a meaningful difference between direct action by the people of each State and action by their state legislatures."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 701, at 182 (Boston, Hilliard, Gray, & Co. 1833) (observing that the Framers unanimously voted for the Senate to be "chosen by the legislature of each state" rather than "by the people thereof"); *see also* THE FEDERALIST NO. 63, at 323 (James Madison) (Ian Shapiro ed., 2009) (distinguishing, in its discussion of the U.S. Senate, between "the State legislatures" and "the people at large").

[65] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's Notes, Jun. 7, 1787) (statement of John Dickinson).

[66] *Id.* at 153 (Madison's Notes, Jun. 7, 1787) (statement of John Dickinson).

state.[67] Later in the convention, James Wilson reiterated:

> [O]ne branch of the Genl.—Govt. (the Senate or second branch) was to be appointed by the State Legislatures. The State Legislatures, therefore, by this participation in the Genl. Govt. would have an opportunity of defending their rights. . . . The States having in general a similar interest, in case of any proposition in the National Legislature to encroach on the State Legislatures, he conceived a general alarm [would] take place in the National Legislature itself, that it would communicate itself to the State Legislatures, and [would] finally spread among the people at large.[68]

Thus, in commenting on the selection of senators, Wilson expressly distinguished among a "State" as a whole, state legislatures, and "the people at large."[69]

Likewise, in discussing the Senate Vacancies Clause, the Framers' debates unmistakably concerned institutional legislatures: they discussed the relative frequency with which various states' legislatures met and the power of certain legislatures to select the state's governor.[70] The same is true of Article V's delegation of authority to state legislatures to call for a new constitutional convention and to ratify amendments to the Constitution.[71] As the Supreme Court recognized in *Hawke v. Smith*, legislature was "not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people."[72] The debates at the Constitutional Convention also confirm that the power to request federal assistance under the Domestic Violence Clause lies specifically in the institutional legislature.[73]

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[67] For example, Roger Sherman urged that "elections by the people" are not as likely "to produce such fit men as elections by the State Legislatures." *Id.* at 154 (Madison's Notes, June 7, 1787) (statement of Roger Sherman). Elbridge Gerry similarly contended that allowing the people to select Senators directly would give the "landed interest" an advantage and leave commercial interests with "no security." *Id.* at 152 (Madison's Notes, June 7, 1787) (statement of Elbridge Gerry). Conferring that power on state legislatures, in contrast, would "be most likely to provide some check in favor of the commercial interest [against] the landed; without which oppression will take place." *Id.*

[68] *Id.* at 355–56 (Madison's Notes, June 21, 1787) (statement of James Wilson); *see also id.* at 366 (King's Notes, June 21, 1787) (statement of James Wilson).

[69] *Id.* at 355–56 (Madison's Notes, June 7, 1787) (statement of James Wilson).

[70] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 231 (Max Farrand ed., 1911) (Madison's Notes, Aug. 9, 1787) (statement of James Wilson).

[71] U.S. CONST. art. V.

[72] 253 U.S. 221, 227 (1920). The Court elaborated, "When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose." *Id.* at 228; *see also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

[73] 2 FARRAND'S RECORDS, *supra* note 65, at 316–17, 466–67 (Madison's Notes, Aug. 17, 1787,

D. References to Legislative Authority

The text, context, and Framers' original understanding of the numerous constitutional provisions referring to legislatures discussed above confirm that they uniformly refer to the specific institution within each state that is comprised of elected representatives and exercises general lawmaking authority. Compelling evidence is therefore necessary to conclude that the term has a different, unique, and unusual meaning as used in the Elections Clause and Presidential Electors Clause.

The Supreme Court previously held that the term legislature should be accorded a different meaning in the Elections Clause (and, by extension, the Presidential Electors Clause) because those provisions—unlike the Constitution's other references to legislatures—confer a type of traditionally *legislative* authority on state legislatures: the ability to enact laws regulating federal elections.[74] The Court never explained, however, why this somewhat different context requires a unique definition of legislature that differs from its use throughout the rest of the Constitution.

In *Ohio ex rel. Davis v. Hildebrant*, the Court held that the Elections Clause permitted Congress to enact a law authorizing states to draw or alter congressional districts through either state legislation or public referenda.[75] It rejected as "plainly without substance" a challenge to a state referendum that nullified a redistricting plan enacted by the Ohio legislature.[76] Despite the Court's single passing reference to the Elections Clause, however, it assumed that any constitutional challenge to the use of public referenda to regulate federal elections must arise under the Guarantee Clause.[77]

According to the Court, the Petitioners were arguing that a public referendum "introduce[s] a virus" that "annihilates representative government and causes a State . . . to be not republican in form."[78] It summarily rejected that argument on the grounds that Guarantee Clause

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Aug. 30, 1787).

[74] Smiley v. Holm, 285 U.S. 355, 367 (1932) (holding that the language of the Elections Clause "aptly points to the making of laws"); *see also* Bush v. Gore, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting) (stating that the Elections Clause and Presidential Electors Clause "call upon legislatures to act in a lawmaking capacity whereas [the Ratification Clause] simply calls on the legislative body to deliberate upon a binary decision"); Seth Barrett Tillman, *Betwixt Principle and Practice: Tara Ross's Defense of the Electoral College*, 1 N.Y.U. J. L. & LIBERTY 922, 925–26 (2005) (book review) (contending that the term legislature can "have a variety of meanings depending on context"). The Seventeenth Amendment also may be read in part as authorizing the enactment of legislation concerning the temporary appointment of U.S. Senators to fill vacancies. U.S. CONST. amend. XVII, § 2.

[75] 241 U.S. 565, 569 (1916).

[76] *Id.*

[77] *Id.* (discussing U.S. CONST. art. IV, § 4).

[78] *Id.*

claims are nonjusticiable.[79] Thus, while *Hildebrant* mentioned the Elections Clause, it neither held nor purported to explain why the electorate or a public referendum qualifies as a legislature under the Elections Clause. Rather, the *Hildebrant* Court failed to recognize that a distinct Elections Clause claim existed, and instead transmuted the plaintiff's claim under that provision into a nonjusticiable Guarantee Clause argument.

In *Hawke v. Smith*, the Court held that the term legislature in the Article V Amendment Clause refers exclusively to "the representative body which ma[kes] the laws of the people."[80] The Court distinguished *Hildebrant* by contending that the case held the Elections Clause "plainly gives authority to the State to *legislate*" concerning federal elections through public referenda.[81] Congress therefore could recognize a "referendum as part of the legislative authority of the State" under constitutional provisions dealing with the enactment of laws.[82] "Such legislative action," the Court reasoned, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."[83]

Hawke's premise—that *Hildebrant* purported to interpret the Elections Clause—is an overstatement. As discussed above, *Hildebrant* misinterpreted or avoided the Elections Clause issue by transmuting it into a Guarantee Clause claim.[84] In any event, *Hawke* never explained why the term legislature should be given different meanings under the Elections Clause and Article V (or the other constitutional provisions it surveyed). The Court pointed out that enacting statutes under the Elections Clause to regulate federal elections is a traditional legislative activity, while ratifying constitutional amendments under Article V is a quasi- or nonlegislative act.[85] It did not explain, however, why this distinction requires or justifies attributing a different and unusual meaning to the term legislature. In light of the Constitution's consistent usage of that term throughout the rest of the document, there is a strong presumption that the Elections Clause and Presidential Electors Clause use it in the same manner—a presumption that neither *Hildebrant* nor *Hawke* overcomes.

The Court gestured toward these issues in *Smiley v. Holm*, in which it

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[79] *Id.*

[80] 253 U.S. 221, 227 (1920).

[81] *Id.* at 231 (emphasis added).

[82] *Id.* at 230.

[83] *Id.* at 231.

[84] *See supra* notes 76–79 and accompanying text.

[85] *Hawke*, 253 U.S. at 231.

considered whether the Elections Clause permits a state's governor to veto a state law regulating federal elections that the state's institutional legislature enacted.[86] *Smiley* reiterated that, unlike most other constitutional provisions referring to legislatures, the Elections Clause grants them lawmaking authority.[87] The Court held, "As the authority is conferred for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments."[88] *Smiley* never held that the term legislature should mean something other than a state's institutional, representative lawmaking body. Rather, it concluded only that when such an entity exercises authority under the Elections Clause, it must do so subject to the standard lawmaking process set forth in the state constitution, including a gubernatorial veto.[89]

Thus, the holdings of both *Hawke* and *Smiley* are consistent with an intratextual reading of the term legislature as used in the Elections Clause and Presidential Electors Clause, and *Hildebrant* does not actually address the issue. The Supreme Court never identified any evidence that the Framers intended to use the term differently in those provisions than throughout the rest of the Constitution. Nor did it provide a persuasive explanation as to why the word should mean something different when referring to the exercise of a traditionally legislative power rather than a quasi- or nonlegislative power.

The Federalist Papers confirm that the term legislature bears the same meaning in the Elections Clause as it does in Article I, Section Three, which permitted state legislatures to select U.S. senators. Federalist No. 59 explains that state legislatures seeking to undermine the national government are more likely to do so by abusing their power under the Elections Clause by refusing to hold House elections, than by refusing to appoint Senators.[90] The Elections Clause itself alleviates this risk by permitting Congress to impose its own rules for congressional elections if states fail to act.[91] The early *Commentaries* of both St. George Tucker[92] and

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[86] 285 U.S. 355, 365–66 (1932).

[87] *Id.* at 367.

[88] *Id.*

[89] *Id.* at 372–73.

[90] THE FEDERALIST NO. 59, at 302–04 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[91] *Id.* at 302.

[92] 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. Note D, pt. 2, at 143–44 (Philadelphia, William Young Birch & Abraham Small 1803).

Chancellor Kent[93] likewise discuss legislatures under Article I, Section Three and under the Elections Clause—often in the same sentence—without suggesting any potential differences in the term's meaning. Kent also distinguished between having the legislature select presidential electors and allowing the "people at large" to do so, confirming that a power vested in a "legislature" may not be exercised directly by the electorate as a whole.[94]

Thus, the best reading of the word legislature as it appears throughout the Constitution, including in the Elections Clause and Presidential Electors Clause, is that it refers solely and exclusively to a state's general lawmaking body comprised of elected representatives and cannot extend to other entities such as independent redistricting commissions.

III. CONFIRMING THE INTRATEXTUAL CONCLUSION

Even compelling intratextual arguments can be further bolstered through outside confirmation.[95] Here, an intratextual interpretation of the term legislature is confirmed by the original understanding of that term in the Founding Era, as well as the independent state legislature doctrine that courts applied for well over a century and a half following the Constitution's enactment.

A. Original Understanding

An intratextual interpretation of the term legislature is consistent with a clause-bound approach that focuses on how that term was generally understood in the Founding Era. Any such textual analysis must begin with dictionaries from that period.[96] Matthew Hale's 1713 *The History of the Common Law of England* defines the British legislature as comprised of three parts: the King of the Realm and the two Houses of Parliament.[97] Citing Hale's work, Samuel Johnson's mid-1700s dictionary defines legislature as "the power that makes laws."[98] Several other Founding Era dictionaries utilized Johnson's definition verbatim.[99] James Barclay's

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[93] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, pt. 2, lecture XI, at 210–12 (New York, O. Halsted 1826).

[94] *Id.*, pt. 2, lecture XIII, at 232.

[95] *See* Amar, *supra* note 26, at 799.

[96] *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014); District of Columbia v. Heller, 554 U.S. 570, 584 (2008).

[97] MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 2 (London, J. Nutt 1713).

[98] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 32 (London, W. Strahan 1755).

[99] *E.g.*, CALEB ALEXANDER, THE COLUMBIAN DICTIONARY OF THE ENGLISH LANGUAGE 285 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1800); THOMAS SHERIDAN, A COMPLETE

dictionary both incorporates Johnson's definition and, in its accompanying discussion, explains that the legislature is comprised of the House of Lords and the House of Commons.[100]

Entities such as the Arizona Independent Redistricting Commission would not qualify as legislatures under the prevailing definition from the Founding Era for at least three reasons. First, those definitions' use of the definite article "the" implies the existence of a single legislature within each sovereign entity. They appear to preclude recognition of multiple entities within a state as legislatures. Second, the definitions refer to the exercise of a general lawmaking power. An entity specifically empowered only to enact certain kinds of laws or perform certain narrow functions (i.e., drawing congressional districts) would not qualify as a legislature. Third, drawing congressional districts arguably does not even qualify as "mak[ing] laws."

Perhaps more importantly, every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives with the authority to enact laws,[101] and most other references to legislatures throughout those documents are consistent with that understanding.[102] If the Elections Clause and

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DICTIONARY OF THE ENGLISH LANGUAGE 360 (London, Charles Dilly, 2d ed. 1789).

[100] JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN, at xli–xlii, 603 (London, J.F. and C. Rivington, 1792).

[101] DEL. CONST. of 1776, art. 2 ("The legislature shall be formed of two distinct branches; they shall meet once or oftener in every year, and shall be called, 'The general assembly of Delaware.'"); GA. CONST. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people . . . and the representatives shall be elected yearly . . . ."); MD. CONST. of 1776, art. I ("THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, *The General Assembly of Maryland*."); MASS. CONST. pt. II, ch. I, § II, art. II; pt. II, ch. I, § III, art. I ("The Senate shall be the first branch of the legislature . . . . There [also] shall be, in the legislature of this commonwealth, a representation of the people, annually elected . . . ."); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men . . . who together shall form the legislature . . . ."); VA. CONST. of 1776, para. 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature."); *see also* N.H. CONST. of 1776, para. 4 (discussing "both branches of the legislature"); N.J. CONST. of 1776, art. VI (establishing the Council as "a free and independent branch of the Legislature of this Colony"); N.C. CONST. of 1776, declaration XVIII ("[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."); PA. CONST. of 1776, art. XVI ("[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances . . . ."); S.C. CONST. of 1778, art. IX (providing that the "journal shall be laid before the legislature when required by either house"). The organic documents of Connecticut and Rhode Island did not refer to a legislature. CHARTER OF CT. of 1662; GOVERNMENT OF NEW HAVEN COLONY of 1643; CONST. OF THE COLONY OF NEW-HAVEN of 1639; FUNDAMENTAL ORDERS OF CT. of 1639; R.I. & PROVIDENCE PLANTATIONS CHARTER of 1663. *See generally* FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909) (collecting historical state and colony constitutions).

[102] DEL. CONST. of 1776, art. 3, 5, 12–13, 16, 24–25, 29; GA. CONST. of 1777, art. XII, XXXV, LI,

Presidential Electors Clause used the term legislature in a broader capacity, they would apparently be the only provisions in any organic document from the Founding Era to do so—not a single precedent in any state constitution supports a more expansive interpretation.

The Federalist Papers and Justice Story's *Commentaries on the Constitution* reinforce this interpretation. Federalist No. 59 and Section 814 of Story's *Commentaries*, which focus specifically on the Elections Clause, contend that there "were only three ways" in which the power to regulate federal elections could have been allotted: "[I]t must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former."[103] They explain that the Elections Clause embodies the final alternative.[104] These passages' contrast of the "national legislature," which refers exclusively to Congress, with "state legislatures" strongly suggests that the latter refers to a state's analogue to Congress: its institutional legislature, comprised of elected representatives, which exercises general lawmaking authority.

William Rawle's *A View of the Constitution* likewise states that the Elections Clause permits Congress to "make or alter" regulations governing federal elections, "except as to the *place* of choosing senators," to "guard against a refractory disposition, should it ever arise in the legislatures of the states," concerning such elections.[105] He explains that the Elections Clause's exception concerning the place of choosing senators "was proper, as congress ought not to have the power of convening the state legislature at any other than its usual place of meeting."[106] Thus, Rawle also treated the entity empowered to select senators as the same one delegated sole constitutional authority to regulate federal elections (subject only to congressional override).

LIV–LV, LXII; MASS. CONST. pt. II, ch. II, § III, art. V; *id.* pt. II, ch. II, § III, art. VII, *superseded by* MASS. CONST. amend. XXV; *id.* pt. II, ch. III, art. I–II; *id.* pt. II, ch. VI, art. II; *id.* pt. II, ch. VI, art. X, *annulled by* MASS. CONST. amend. XLVIII; MD. CONST. of 1776, declarations III, V, VII–XII, XX, XXVI, XXVIII, XXX, XXXIII–XXXV, XLII; *id.* art. II, XV, XVIII, XXVI, XLIII, LVI; N.J. CONST. of 1776, art. XIX; N.Y. CONST. of 1777, art. III, V–VI, XII, XV, XVIII; N.C. CONST. of 1776, declaration XXV; *id.* art. XLIII; PA. CONST. of 1776, §§ 9, 30–31, 33, 35, 37, 47; S.C. CONST. of 1778, art. II, XII–XXIV, XXXIV, XXXVIII.

[103] THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009); *see also* 2 STORY, *supra* note 64, § 814, at 281.

[104] THE FEDERALIST NO. 59, at 301–02 (Alexander Hamilton) (Ian Shapiro ed., 2009); 2 STORY, *supra* note 64, § 814, at 281–82.

[105] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 42 (Philadelphia, H.C. Carey & I. Lea 1825).

[106] *Id.*

B. The Independent State Legislature Doctrine

Finally, the independent state legislature doctrine, which has been embraced by the Supreme Court, state courts, and both houses of Congress,[107] further confirms the accuracy of an intratextual interpretation of legislature. This doctrine recognizes that a state legislature's authority to regulate federal elections comes directly from the U.S. Constitution.[108] Consequently, a state constitution may neither impose substantive limits on the scope of a legislature's authority to regulate the time, place, or manner of federal elections, nor strip the legislature of its prerogative to do so. Arizona's Independent Redistricting Commission flatly violates the independent state legislature doctrine because the state constitutional amendment that created it purports to strip the legislature, as a matter of state constitutional law, of authority it derives directly from the U.S. Constitution.

In 1892, the Supreme Court recognized the independent state legislature doctrine in dicta in *McPherson v. Blacker*.[109] It stated that the Presidential Electors Clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" concerning presidential elections, including through "any provision in the state constitution in that regard."[110] This reasoning applies with equal force to congressional elections and the Elections Clause.

The Court went even further in *Leser v. Garnett*, in which it held that the doctrine also applies to a state legislature's role in ratifying constitutional amendments under Article V.[111] It ruled that a legislature's "function . . . in ratifying a proposed amendment to the Federal Constitution . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[112] A state constitutional provision purporting to prevent the legislature from ratifying certain amendments to the U.S. Constitution is therefore unenforceable.[113]

Several state courts have relied on the independent state legislature doctrine as an essential component of their holdings concerning the

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[107] *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198–204 (2014).

[108] Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause.").

[109] 146 U.S. 1 (1892).

[110] *Id.* at 25.

[111] 258 U.S. 130, 135 (1922).

[112] *Id.* at 137.

[113] *Id.* at 136–37.

Elections Clause and Presidential Electors Clause. For example, the Supreme Court of Rhode Island held in *In re Plurality Elections* that the state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States without restraint."[114] The court enforced a state law providing that a candidate had to receive only a plurality of votes to win a federal election, despite a state constitutional provision specifying that all candidates had to receive an absolute majority to prevail.[115]

Likewise, the Nebraska Supreme Court held that it was "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature" and a particular provision of the state constitution.[116] It explained that a state constitution may not "'circumscribe the legislative power' granted by the Constitution of the United States" to regulate the selection of presidential electors.[117] Other courts have reached the same conclusion.[118]

The U.S. House of Representatives adopted the independent state legislature doctrine in resolving an election challenge in *Baldwin v. Trowbridge*.[119] The House upheld the validity of votes cast in a congressional election pursuant to a state law that authorized voting by military members who were absent from their districts on Election Day, despite a state constitutional provision requiring that all votes be cast in person.[120] Similarly, in a report on the Electoral College, the U.S. Senate Committee on Privileges and Elections concluded that a state legislature's power under the Presidential Electors Clause to regulate presidential elections cannot be:

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[114] 8 A. 881, 882 (R.I. 1887).

[115] *Id.*

[116] State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 287 (Neb. 1948).

[117] *Id.* (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

[118] *See, e.g.*, *In re* Opinion of Justices, 45 N.H. 595, 601 (1864) (holding that, because a State legislature's "authority . . . to prescribe the time, place and manner of holding elections for representatives in Congress" is derived from the Elections Clause, "[t]he constitution and laws of this State are entirely foreign to the question"); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944). Modern courts also occasionally apply the independent state legislature doctrine. *See, e.g.*, PG Publ'g Co. v. Aichele, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution"), *aff'd* 705 F.3d 91 (3d Cir. 2013).

[119] D.W. BARTLETT, DIGEST OF ELECTION CASES, H.R. MISC. DOC. NO. 41-152, at 46–47 (1870).

[120] 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 856 (1907); *see also In re* Holmes, 1 *id.* § 525.

> taken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[121]

Numerous commentators have embraced the independent state legislature doctrine,[122] while others have rejected it.[123] Its longstanding history and acceptance by state and federal courts, as well as both houses of Congress, however, confirm the validity of an intratextual interpretation of the Elections Clause and Presidential Electors Clause. The legislature, as referenced in those provisions, is the state's general lawmaking body, and its power under the federal Constitution to regulate federal elections may not be reduced or withdrawn by state constitutions.

CONCLUSION

Because of the Constitution's numerous references to state legislatures, an intratextual approach sheds compelling light on the term's proper meaning in the Elections Clause and Presidential Electors Clause. The text, context, drafting history, contemporaneous interpretations, and history of subsequent judicial interpretation of the numerous other constitutional provisions referring to legislatures collectively confirm that the term refers exclusively to the elected body of representatives within each state that exercises general lawmaking authority. Neither the Supreme

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[121] S. REP. NO. 43-395, at 9 (1874).

[122] *See, e.g.*, Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution."); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail."); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) ("[S]tate legislatures are limited by constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but . . . state constitutional provisions concerning suffrage qualifications and the manner of choosing electors do not limit the substantive terms of legislation.").

[123] *See, e.g.*, Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 783–84 (2001) (arguing that the Founders did not construe the Presidential Electors Clause as authorizing state legislatures to act independently of state constitutions); *see also* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) (accepting Smith's conclusion that, "as a matter of historical practice, state legislatures were not understood at the time to be more 'independent' by virtue of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source of authority"); David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) ("It is far from clear what the relationship is between a state's constitution and the power that a state 'legislature' may exercise under Article II, Section 1 to 'direct' the 'manner' in which electors are appointed.").

Court nor academic commentators have provided a persuasive reason for concluding that, despite the consistent usage of the term throughout most of the Constitution, it should be given a different and unusual construction solely for purposes of the Elections Clause and Presidential Electors Clause.

In particular, there is no basis for concluding that the word legislature as used in the Elections Clause and Presidential Electors Clause refers broadly to a state's "lawmaking authority," allowing a state's voters to directly regulate federal elections through public initiatives or referenda. Likewise, because the Constitution specifically empowers the state legislature to regulate the "Time, Place and Manner" of federal elections, attempts to allow outside entities such as the Arizona Independent Redistricting Commission to determine the boundaries of congressional districts violate the U.S. Constitution.



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The New Elections Clause

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ESSAYS

THE NEW ELECTIONS CLAUSE

*Michael T. Morley**

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INTRODUCTION

The Elections Clause[1] and Presidential Electors Clause[2] are the constitutional sources of states' authority to regulate federal elections.[3]

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1 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .").

The "Swiss army kni[ves]" of federal election law, they also have been interpreted as creating special doctrines in a surprisingly broad range of fields such as statutory interpretation, preemption, and separation of powers in state government, as they relate to federal elections.[4]

The Supreme Court's recent ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*)[5] presents a bold new interpretation of the Elections Clause that will reverberate far beyond the issue immediately before the Court. Although the Elections Clause confers power specifically on the "Legislature" of each state to regulate congressional elections, the Supreme Court held that states may enact election laws through any of their "lawmaking processes," including public initiatives and referenda.[6] Moreover, a state may completely prohibit its institutional legislature from regulating certain aspects of congressional elections by conferring that authority on some other entity instead.[7] Applying these holdings, the Court affirmed the validity of a state constitutional amendment in Arizona, enacted through a public initiative, which transferred authority to draw congressional districts from the state legislature to an independent redistricting commission.[8]

Most commentary concerning the Court's ruling focuses on its immediate impact of approving the use of independent redistricting commissions,[9] as seven states have adopted.[10] This Essay contends that *AIRC* is a dramatic expansion of precedent based on sweeping reasoning that reshapes Elections Clause doctrine in largely unrecognized ways

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2 *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to select the President] . . . .").

3 Cook v. Gralike, 531 U.S. 510, 523 (2001); Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

4 Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 848–49 (2015).

5 135 S. Ct. 2652 (2015).

6 *Id.* at 2677.

7 *Id.* at 2671 ("[T]he people [of a state] may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

8 *Id.* (affirming Arizona's power to "creat[e] a commission operating independently of the state legislature to establish congressional districts").

9 *See, e.g.*, Lyle Denniston, *Opinion Analysis: A Cure for Partisan Gerrymandering?*, SCOTUSBLOG (June 29, 2015, 3:21 PM), http://www.scotusblog.com/2015/06/opinion-analysis-a-cure-for-partisan-gerrymandering/; Edward B. Foley, *The Constitution Needed a Judicial Assist*, OHIO STATE UNIV.: ELECTION L. AT MORITZ (June 29, 2015, 2:32 PM), http://moritzlaw.osu.edu/election-law/article/?article=13151.

10 *Redistricting Commissions: Congressional Plans*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 8, 2015), http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx.

across a range of other fields. This Essay offers a critical analysis of the "new" Elections Clause and its Article II analogue, the Presidential Electors Clause, as they remain in the wake of this tumultuous ruling.

Part I begins by analyzing the *AIRC* ruling itself. Rather than interpreting the Elections Clause's language, the Court attempted to implement what it perceived to be the provision's purpose: facilitating fair congressional elections. This Part argues that the majority opinion is best seen as a legal process interpretation,[11] but may also be viewed as a failed application of John Hart Ely's representation-reinforcing approach.[12] While the majority opinion is consistent with academic and popular opinion concerning redistricting commissions, it was inappropriate given the concrete, specific nature of the term being interpreted ("Legislature"), and is fundamentally at odds with the political theory underlying the Constitution.

The majority sought to further what it believed to be the Elections Clause's purpose by allowing states to insulate and protect the electoral process from politicians. The Framers, however, believed that the political branches themselves are the most important and reliable defenders of democracy; they deliberately and repeatedly chose to entrust most critical aspects of the electoral process to elected officials. The majority's approach could have significant implications in future cases involving clashes between the political branches and judiciary over the power to resolve election disputes and enforce the right to vote.

Part II turns to *AIRC*'s impact on Elections Clause and Presidential Electors Clause jurisprudence. Most basically, the ruling allows states to completely and permanently exclude their institutional legislatures from regulating congressional—and, by extension, presidential—elections, subject to no apparent limiting principle. The ruling also largely settles the issue of delegations under those provisions. It clarifies that, although the Elections Clause confers power to craft rules governing congressional elections specifically on the "Legislature" of each state, this power may be delegated to executive or administrative entities. It leaves undisturbed the Court's previous holding that the Elections Clause authorizes federal preemption of state laws concerning congressional elections, independent of the Supremacy Clause, without triggering a presumption against preemption.[13]

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11 *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (providing the definitive account of the legal process school of thought).

12 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (explaining theory).

13 Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253–54 (2013).

Another likely consequence of the Court's ruling is that, since the Presidential Electors Clause will probably be construed *in pari materia* with the Elections Clause, members of the public will be able to use public initiatives to reallocate their states' electoral votes in presidential elections on a proportional or district-by-district basis, rather than through the prevailing winner-take-all system. Thus, while *AIRC* is a congressional redistricting case, it could dramatically reshape the landscape of presidential politics by putting substantial numbers of electoral votes from traditionally partisan strongholds such as California and Michigan in play.

Finally, and perhaps most significantly, the ruling summarily and unnecessarily rejects the "independent state legislature doctrine." The doctrine provides that, when a legislature enacts a law regulating federal elections under the Elections Clause or Presidential Electors Clause, it is acting under a higher source of power "independent" of the state constitution, and therefore is not subject to substantive state constitutional constraints. Repudiating this doctrine, the Court declared that state laws relating to federal elections are subject to both state and federal constitutional restrictions, thereby facilitating challenges to provisions such as voter ID laws.

Part III surveys the remaining questions concerning the Elections Clause and Presidential Electors Clause that *AIRC* leaves open. Perhaps the most salient issue is the extent to which these provisions implicitly create a special canon of statutory interpretation for state laws governing federal elections. Several courts and commentators have suggested that, since these clauses confer authority specifically on state legislatures, rather than states as entities, courts must be particularly deferential to the plain meaning of laws enacted under them. Courts may not exercise the same interpretive discretion over state laws governing federal elections as they may possess in other contexts.[14] Although this "super-strong" plain meaning approach has been criticized,[15] it is a fair and fundamentally important principle that limits courts' ability to "interpret" the law, after the results of an election are known and a concrete dispute has arisen, to achieve their preferred electoral outcomes.

As the Court's ruling focused primarily on separation of powers at the state level, it also leaves unaddressed some federalism-related issues. Because the Presidential Electors Clause does not expressly authorize Congress to legislate concerning presidential elections, it remains possible that federal authority in that area is more limited than with congressional elections. It is also unclear whether *Printz v. United States*'s constraints on

14 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (concluding that, because the Constitution delegates plenary authority over presidential elections to state legislatures, "the text of [an] election law itself . . . takes on independent significance").

15 *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

commandeering limit Congress's power to direct state and local officials in their conduct of federal (or state) elections.[16] Finally, the Court has held that the Elections Clause implicitly prohibits states from enacting laws designed to benefit or hinder certain candidates.[17] The Court has yet to fully flesh out the scope of this important limit on states' authority over federal elections.

The Elections Clause and Presidential Electors Clause are the sources of a wide range of constitutional doctrines concerning federal elections. While *AIRC*, on its face, addresses only the meaning of "Legislature" in the Elections Clause and the validity of redistricting commissions, the Court's broad reasoning sweeps much further. This Essay offers a first analysis of the "new" Elections Clause in the wake of this ruling.

I. *ARIZONA INDEPENDENT REDISTRICTING COMMISSION*

In *AIRC*, the Court adopted a sweeping interpretation of the Elections Clause, despite other available lines of reasoning that would have permitted it to reach comparable conclusions on narrower grounds. Section A discusses the breadth of the ruling, demonstrating that the Court adopted a particularly far-reaching interpretation of the Elections Clause. Section B explains that the Court's approach is best understood as a legal process interpretation of the clause, which was a particularly questionable approach given the nature of that provision. Finally, Section C shows that the political theory underlying the Court's ruling is fundamentally at odds with that which permeates the Constitution.

A. Breadth of the Ruling

The Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations."[18] The people of Arizona enacted an initiative amending their state constitution to transfer authority to determine congressional district boundaries from the institutional legislature to a

16 521 U.S. 898, 935 (1997).

17 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."); *see, e.g.*, Cook v. Gralike, 531 U.S. 510, 524 (2001) (holding that the Elections Clause did not authorize a state to enact a law "plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal").

18 U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

bipartisan commission.[19] The amendment raised two serious questions under the Elections Clause. First, from a purely procedural perspective, the Elections Clause permits only the "Legislature" to enact laws regulating federal elections. The redistricting commission, however, was created by a constitutional amendment that was directly enacted by the people of the state through a public initiative, rather than the legislature. Second, substantively, putting aside the manner in which the amendment was enacted, it strips the legislature of its authority to craft congressional districts and vests that power instead in an independent commission. The appellant,[20] the Arizona state legislature, challenged the amendment solely on substantive grounds, foregoing any procedural arguments.[21] The Court's ruling, however, swept aside objections of either type.

Even if the Court did not wish to adopt the appellant's[22] and dissent's[23] position that independent redistricting commissions are categorically unconstitutional, it could have reached any number of moderate or compromise rulings. For example, it could have held that, although the Elections Clause confers authority to regulate federal elections specifically on institutional state legislatures, the legislature may delegate that power to other entities, such as independent commissions. This approach would have validated the procedural objection to Arizona's commission, since Arizona's institutional legislature was not involved in the creation of the state's redistricting commission, while rejecting the substantive one.

From a policy perspective, it might be objected that legislatures would refuse to voluntarily relinquish their power over redistricting. Four of the seven current congressional redistricting commissions, however, were established by state legislatures and subsequently ratified by voters.[24] A fifth stemmed directly from a constitutional convention.[25] Only two congressional redistricting commissions were created through public

19 ARIZ. CONST. art. IV, pt. 2, § 1.

20 The case was an appeal from a three-judge panel of the U.S. District Court for the District of Arizona directly to the U.S. Supreme Court. *AIRC*, 135 S. Ct. 2652, 2662 (2015); *see* 28 U.S.C. § 2284(a) (2012).

21 Brief for Appellant at 24, 36, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314).

22 *Id.*; *see also* Morley, *supra* note 4 (presenting intratextual argument against validity of the Arizona commission).

23 *AIRC*, 135 S. Ct. at 2678 (Roberts, C.J., dissenting).

24 *See* Act of Nov. 7, 1995, 206th Leg., Second Ann. Sess., 1995 N.J. Laws 2510 (codified at N.J. CONST. art. IV, § 3); S.J. Res. 105, 52nd Leg., First Reg. Sess., 1993 Idaho Sess. Laws 1530 (codified at IDAHO CONST. art. III, § 2); H.B. 2322, 16th Leg., Reg. Sess., 1992 Hawaii Sess. Laws 1029 (codified at HAW. CONST. art. IV, § 2); S.J. Res. 103, 48th Leg., Reg. Sess., 1983 Wash. Sess. Laws 2202 (codified at WASH. CONST. art. II, § 43).

25 *See* MONT. CONST., art. V, § 14(2).

initiatives.[26] Interpreting the Elections Clause as referring exclusively to institutional legislatures therefore would have preserved the majority of commissions that presently exist and realistically left the door open to the creation of others.

Alternatively, the Court could have modified its holding by declaring that, while the term "Legislature" refers to any entity or process to which a state constitution commits "legislative authority,"[27] a state is not free to exclude its "actual" institutional legislature from that definition. In other words, the Court could have interpreted "Legislature" to refer to the institutional legislature, *as well as* any other processes or entities through which the state constitution allows election laws or redistricting plans to be adopted (including either public initiative or approval by a redistricting commission). This view would have been consistent with the Court's Elections Clause precedents, which upheld the use of public referenda[28] and gubernatorial vetoes[29] without categorically excluding institutional legislatures from regulating any aspect of federal elections.

Such reasoning would have led the Court to reject the procedural objection to the Arizona commission, because state laws concerning federal elections may be enacted through public initiative. It would have upheld the substantive challenge, however, because the state constitutional amendment completely excluded the institutional legislature from participating in redistricting. The Court might have felt that this interpretation still would have allowed the institutional legislature to maintain too much control over the redistricting process and other aspects of federal elections. Such concerns could have been alleviated, however, by state constitutional provisions limiting a legislature's ability to override or nullify the outcome of a public initiative[30] or determination of a redistricting commission.

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26 *See* Proposition 20, CAL. SEC'Y OF STATE (Nov. 2010) (codified at CAL. CONST. art. XXI), http://vig.cdn.sos.ca.gov/2010/general/pdf/english/text-proposed-laws.pdf#prop20; Proposition 106, ARIZ. SEC'Y OF STATE (Sept. 2000) (codified at ARIZ. CONST. art. IV, pt. 2, § 1), http://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf.

27 *See AIRC*, 135 S. Ct. at 2668 n.17, 2671.

28 Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

29 Smiley v. Holm, 285 U.S. 355, 365–66 (1932).

30 Indeed, state constitutional provisions authorizing initiatives already contain such restrictions. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(6)(B)–(C) (prohibiting the legislature from "repeal[ing] an initiative measure approved by a majority of the votes cast thereon," and requiring a three-fourths vote of the legislature to amend a measure adopted by initiative); CAL. CONST. art. II, § 10(c) ("[The Legislature] may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."); *cf.* ARK. CONST. art. V, § 1 (requiring a two-thirds vote to amend or repeal any measure adopted by initiative).

Finally, the Court also could have adopted a broad reading of "Legislature," as referring to any entity or process through which a state's lawmaking authority is exercised, while holding that the Elections Clause implicitly prohibits delegation of that power. Thus, while the Elections Clause allows the people of a state to adopt a redistricting plan via public initiative—which is one of the state's lawmaking processes—they could not permit an independent commission to do so. By way of comparison, the Constitution, as originally enacted, empowered state legislatures to appoint U.S. Senators;[31] it likely would have been unconstitutional for a legislature to transfer that authority to an executive agency or independent commission.[32]

This interpretation would have been bolstered by the fact that, unlike other constitutional provisions which refer to states as overall entities, the Elections Clause specifically confers responsibility for regulating federal elections on state legislatures in particular. Such a direct delegation to a particular branch of state government reasonably could be construed as implicitly prohibiting that branch from delegating that power to some other entity. The *AIRC* Court summarily rejected this possibility, based solely on a concession from appellant's counsel.[33]

Rather than any of these narrower, compromise possibilities, the Court instead adopted a sweepingly broad interpretation of the Elections Clause that went far beyond precedent. At most,[34] *Ohio ex rel. Davis v. Hildebrant* authorized a state's voters to enact measures concerning federal elections through legislative channels *in addition* to the state legislature, such as public initiatives or referenda.[35] And *Smiley v. Holm* clarified that, when such laws are enacted by the institutional legislature, they remain subject to gubernatorial veto.[36] Neither of those cases compels the

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31 U.S. CONST. art. I, § 3, cl. 1.

32 *See, e.g.*, State *ex rel.* Van Alstine v. Frear, 125 N.W. 961, 971 (Wis. 1910) (rejecting pre–Seventeenth Amendment challenge to non-binding public referendum on U.S. Senate candidates, because legislators retained their power and obligation to "exercise their conscientious judgments" on the issue); State *ex rel.* McCue v. Blaisdell, 118 N.W. 141, 147 (N.D. 1908) (same, because "[t]he Legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates"). *See generally* Derek T. Muller, *Legislative Delegations and the Elections Clause*, FLA. ST. U. L. REV. (forthcoming) (manuscript at 5–8), http://papers.ssrn.com/abstract_id=2650432.

33 *AIRC*, 135 S. Ct. at 2671 ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

34 I have argued elsewhere that the *Hildebrant* Court actually did not reach the merits of the petitioners' Elections Clause claim, construing it instead as a non-justiciable Guarantee Clause argument. Morley, *supra* note 4, at 861.

35 241 U.S. 565, 569 (1916).

36 285 U.S. 355, 365–66 (1932).

conclusion that the Elections Clause permits a state's voters to completely exclude an institutional legislature from regulating any aspects of federal elections.[37]

Importantly, the Court's ruling contains no limiting principle. Nothing in the opinion turned on the fact that the commission was empowered to determine congressional district boundaries, as opposed to regulating other aspects of federal elections. Since the Court repeatedly denied that the Elections Clause's reference to "Legislature" refers to the institutional legislature,[38] it does not appear there is any core nucleus of authority over federal elections that a state's actual legislature must retain. To the contrary, under the Court's reasoning, the people of a state may completely exclude their institutional legislature from regulating *all* aspects of federal elections, delegating that authority instead to the Secretary of State, an executive agency, or an independent commission, among other possibilities. This is an extremely odd and unsatisfying interpretation of a constitutional provision expressly specifying that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[39] In the Court's view, this clause effectively means "The Constitution of a State may prohibit the Legislature from prescribing the Times, Places and Manner of holding Elections for Senators and Representatives."

B. Competing Theories of Constitutional Interpretation

The majority opinion and principal dissent in *AIRC* dramatically illustrate diametrically opposed theories of constitutional interpretation. The dissent relies on textualism, by focusing on the meaning of the word "Legislature" as used in the Elections Clause;[40] intratextualism, by considering how other clauses in the Constitution use that term;[41] and original understanding.[42] While the majority makes a desultory attempt at

37 *Cf. AIRC*, 135 S. Ct. at 2671 ("[T]he Elections Clause permits the people of Arizona to provide for redistricting by . . . a commission operating independently of the state legislature . . . .").

38 *See id.* at 2671–75.

39 U.S. CONST. art. I, § 4, cl. 1.

40 *AIRC*, 135 S. Ct. at 2679 (Roberts, C.J., dissenting) (explaining that Founding Era dictionaries demonstrate that "'the Legislature' referred to an institutional body of representatives, not the people at large").

41 *Id.* at 2680–83 ("The unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way."); *see also* Morley, *supra* note 4 (setting forth a detailed intratextual analysis of the Elections Clause). *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (explaining intratextualism).

42 *AIRC*, 135 S. Ct. at 2684 (Roberts, C.J., dissenting) ("The history of the Elections Clause further supports the conclusion that 'the Legislature' is a representative body.").

demonstrating that the term "Legislature" actually refers to something other than a state's institutional legislature,[43] most of the opinion provides a non-interpretivist, legal process interpretation of the Elections Clause.

The leading theorists of the legal process school, Henry M. Hart, Jr. and Albert M. Sacks, presented their theory solely as one of statutory interpretation, but prominent commentators have gone on to apply it to constitutional law, as well.[44] Hart and Sacks contend that, when construing a legal text, "[t]he first task . . . is to determine what purpose ought to be attributed to it."[45] They explain that legal enactments "ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably."[46] When a law's actual purpose is unclear, a court may attempt to reconstruct what the purpose of a reasonable legislator would have been.[47] Thus, to apply a statutory or constitutional provision under the legal process approach, a court must seek to implement its underlying purpose, whether actual or constructive.

The *AIRC* majority believed that "[t]he dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation."[48] It was intended to ensure that state officials did not attempt to manipulate the outcomes of federal elections.[49] Particularly since "the initiative and the referendum . . . were not yet in our democracy's arsenal" when the Elections Clause was drafted, its reference to "Legislatures" could not have been intended to prevent states' electorates from regulating federal elections through such means.[50]

The legal process school also stresses institutional competence. Each organ of government has its own structure and processes, and therefore is uniquely competent to handle certain kinds of issues.[51] Consistent with this insight, the *AIRC* majority extolled the importance of independent

43 *Id.* at 2671 (discussing the definition of "Legislature" in Founding Era dictionaries).

44 William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2052 (1994).

45 HART & SACKS, *supra* note 11, at 1125 (emphasis removed); *see also id.* at 1374 (advocating that courts should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can").

46 *Id.* at 1125.

47 *See id.* at 1374, 1378.

48 *AIRC*, 135 S. Ct. at 2672.

49 *Id.*

50 *Id.*

51 HART & SACKS, *supra* note 11, at 4 ("[D]ifferent procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions."); *see also id.* at 160.

commissions in combatting political gerrymandering by legislatures.[52] The Court strained to construe the Elections Clause so as to allow states to assign responsibility for redistricting to what the Court perceived to be the most appropriate institution for the task. Had the majority shared the Chief Justice's doubts about redistricting commissions,[53] it might have adopted a less aggressive interpretation of the Elections Clause.

The Court's reasoning is vulnerable to the standard objections to legal process interpretations. Legal process theory treats the legislative process—and, by extension, the constitutional drafting process—as fundamentally rational. Public choice theory convincingly demonstrates, however, that deliberations of lawmaking bodies are chaotic, path-dependent, and fraught with tradeoffs, negotiations, and compromises.[54] By attempting to further the purpose underlying a legal provision, rather than enforcing its plain meaning, a court is implementing a rule that has not actually survived the bicameral legislative process or constitutional ratification process. As Professor John F. Manning notes,

> [i]f the Court feels free to adjust the semantic meaning of [a legal provision] when the rules embedded in the text seem awkward in relation to the [provision's] apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a [measure's] enactment.[55]

The work of John Hart Ely—who was by no means a strict textualist—suggests another, more targeted objection. He argued that courts cannot interpret certain provisions of the Constitution, such as "privileges and immunities" and "equal protection," based solely on their plain text, because the language is too vague.[56] His representation reinforcement theory counsels courts to construe such broad phrases in a manner that will keep open the "channels of political change" and protect "discrete and insular minorities" from oppression.[57] The *AIRC* majority

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52 *AIRC*, 135 S. Ct. at 2677 (explaining that Arizona's voters sought to "restore 'the core principle of republican government'" by "turn[ing] to the initiative to curb the practice of gerrymandering" (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005))); *see also id.* at 2676 (emphasizing that independent commissions "have succeeded to a great degree" in combatting political conflicts of interest (quoting Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1808 (2012))).

53 *Id.* at 2691 (Roberts, C.J., dissenting) (discussing the "partisanship" that has infected Arizona's commission).

54 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–44 (1990).

55 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 111 (2006).

56 ELY, *supra* note 12, at 11–14.

57 *Id.* at 103 & n.97.

likely would enthusiastically agree that its opinion adopts a representation-reinforcing approach, because its whole purpose is to allow states to take steps to prevent politicians from drawing congressional district lines on a partisan basis, for the benefit of entrenched incumbents.[58]

Even apart from the Chief Justice's empirical concerns about the impartiality and fairness of purportedly independent commissions,[59] the majority opinion fails as an attempt at representation reinforcement for one fundamental reason: the term "Legislature" is not the type of broad provision embodying general principles that calls for some outside moral or political theory to meaningfully implement.[60] It is a concrete term, used repeatedly throughout the Constitution itself, most state constitutions during the Founding Era, and the constitutional convention. The nature and context of these references demonstrate that it refers to a specific entity within each state: a body comprised of elected representatives with general, statewide lawmaking authority that periodically convenes.[61]

C. A New Political Theory

The most significant impact of the majority's approach is that it wholeheartedly embraces a political theory concerning the electoral process that is fundamentally at odds with the one underlying the Constitution itself. Whether viewed from a legal process or representation-reinforcing perspective,[62] the majority opinion rests on the view that legislatures cannot be trusted with redistricting authority, because they have structural incentives to succumb to the temptation of political gerrymandering.[63] Indeed, the majority goes so far as to completely ignore the U.S. House of Representatives's interpretation of the Elections Clause in resolving an election contest, dismissing it as a largely party-lines vote.[64]

The Framers, however, were of a very different view. They believed that Congress was the only entity that could be "trusted" with control over

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58 *See supra* notes 48–49 and accompanying text.

59 *See supra* note 53.

60 *AIRC*, 135 S. Ct. 2652, 2689–90 (2015) (Roberts, C.J., dissenting).

61 Morley, *supra* note 4.

62 *See supra* Section I.B.

63 *See supra* note 52.

64 *AIRC*, 135 S. Ct. at 2674 (declaring that the House's interpretation of the Elections Clause in *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866), "is not a disposition that should attract this Court's reliance"). The majority did not acknowledge the numerous other authorities that agreed with the House's conclusion that the Elections Clause confers powers specifically on institutional state legislatures. *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198–202 (2014) (citing cases).

the electoral process.[65] Justice Story explains that lodging authority over congressional elections in any entity other than Congress itself would undermine "its independence, its purity, and even its existence."[66] By granting Congress power over congressional elections, the "major evil of interference by other branches of government is entirely avoided, while a substantial degree of responsibility is still provided by regular elections, the interim demands of public opinion, and the desire of each House to preserve its standing in relation to the other institutions of government."[67]

Even aside from Congress's authority to make rules concerning congressional elections under the Elections Clause,[68] each House of Congress has sole authority to determine the elections and returns of its members[69] and to effectively nullify the outcomes of elections by expelling members.[70] Congress is likewise responsible for determining the outcome of presidential elections. The House and Senate have power to count electoral votes,[71] including the authority to reject votes they deem invalid.[72] In the event that a candidate for President or Vice President fails to receive a majority of electoral votes, as determined by Congress, then the House or Senate, respectively, determine the winner of that office.[73] The House also has the power to impeach federal officers,[74] and the Senate is responsible for trying all impeachments.[75]

Allowing Congress to control and even determine the outcomes of federal elections creates a substantial risk of direct partisan manipulation. Yet the Constitution's structure embodies the Framers' repeated, deliberate decisions to entrust Congress with such responsibility. Although the Court's skepticism of allowing the political branches to control the

65 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 220 (Legal Classics Library 1986) (1826); *cf.* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 47 (photo. reprint 2003) (2d ed. 1829) (discussing the need of legislative bodies to be able to defend themselves from encroachments and interference).

66 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 831, at 295 (Bos., Hilliard, Gray & Co. 1833).

67 Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986).

68 U.S. CONST. art. I, § 4, cl. 1.

69 *Id.* art. I, § 5, cl. 1; *see, e.g.*, *Morgan*, 801 F.2d at 450; McIntyre v. Fallahay, 766 F.2d 1078 (7th Cir. 1985).

70 U.S. CONST. art. I, § 5, cl. 2.

71 *Id.* amend. XII.

72 3 U.S.C. § 15 (2012) (allowing Members of Congress to object to the counting of particular electoral votes).

73 U.S. CONST. amend. XII.

74 *Id.* art. I, § 2, cl. 5.

75 *Id.* art. I, § 3, cl. 6.

electoral process has a valid basis and is widely shared,[76] it runs contrary to the political theory embedded in the Constitution itself.

The Court's willingness to reinterpret even a clear and concrete provision such as the Elections Clause in light of its skepticism about the political branches' ability to fairly handle election-related issues raises questions over the extent to which the Court will defer to Congress's resolution of disputes that more directly impact the right to vote. The same fairness concerns that led the Court to permit entities other than a state's institutional legislature to redraw congressional districts might similarly motivate it to permit entities other than the respective Houses of Congress to determine which congressional candidates should be seated or which electoral votes should be counted. Thus, the theory underlying *AIRC* sets the stage for greater judicial enforcement of the constitutional right to vote and a potential clash with Congress over the scope of its constitutional prerogatives.

II. COLLATERAL IMPACT ON FEDERAL ELECTION LAW

Although *AIRC*'s most immediate consequence is to establish the constitutionality of redistricting commissions, the Court's ruling also impacts Elections Clause jurisprudence in a variety of other, potentially further-reaching ways. Section A explains that a state legislature—defined broadly as including any process or entity that a state constitution authorizes to exercise legislative authority—may delegate power over federal elections to other organs of government. Section B discusses the Court's summary rejection of the independent state legislature doctrine. And Section C examines *AIRC*'s implications for states' rules for allocating presidential electors among candidates. As mentioned earlier, *AIRC* left undisturbed the Court's earlier holding that federal laws enacted pursuant to the Elections Clause which preempt state statutes governing congressional elections are not subject to a presumption against preemption.[77]

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76 *See, e.g.*, ELY, *supra* note 12; Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 333 (2007) (embracing independent commissions as "the only realistic way to curb political gerrymandering"); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 838 (1997) ("[W]hile commissions are no panacea, they offer a viable means of restoring a degree of efficiency, fairness, and finality to a state's decennial gerrymander."); *cf.* Cain, *supra* note 52, at 1842–43 (offering recommendations to improve commissions).

77 Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253–54 (2013).

A. Non-Delegation Doctrine

The *AIRC* Court not only adopted an expansive interpretation of "Legislature," but held that any process or entity that qualifies as a legislature may delegate its power under the Elections Clause to other organs of state government.[78] Interestingly, the Court did not cite any authority or offer any analysis in support of its holding, but rather rested this conclusion exclusively on a concession by appellant's counsel.[79]

Prior to this ruling, courts had periodically wrestled with delegation issues under the Elections Clause. Recognizing that the Elections Clause is one of the Constitution's only provisions that "confers a power on a particular branch of a State's government,"[80] some courts had suggested that the provision might implicitly bar legislatures from transferring that power to other entities, or substantially restrict legislatures' ability to make such delegations.[81]

The *AIRC* Court held that the power to regulate federal elections is fully delegable. Because the Elections Clause confers power on both legislatures and Congress, it is reasonable to assume that the same limitations on delegation apply to both entities. In general, Congress may delegate its powers so long as it cabins the agency's discretion based on an "intelligible principle."[82] The Supreme Court has upheld every congressional delegation of authority it has encountered over the past

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78 *AIRC*, 135 S. Ct. 2652, 2671 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

79 *Id.*

80 Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

81 *See, e.g.*, Green Party of Tenn. v. Hargett, 882 F. Supp. 2d 959, 1017–18 (M.D. Tenn. 2012) ("[G]iven the absence of statutory standards for the exercise of the State Elections Coordinator's discretion," a state law authorizing the coordinator to develop criteria for determining whether a group qualifies as a minor political party is not "a permissible delegation of legislative authority."), *rev'd* 700 F.3d 816 (6th Cir. 2012). Of course, it still would violate the Elections Clause for an organ of state government to attempt to regulate federal elections in the absence of a delegation from an entity or process that qualifies as a "Legislature." *See* Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008) ("Even if the Ohio General Assembly could delegate its authority to a member of the executive branch . . . , there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which [federal elections are conducted]."); Grills v. Branigin, 284 F. Supp. 176, 180 (S.D. Ind. 1968) ("[The Elections Clause] clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly . . . ."), *aff'd* Branigin v. Duddleston, 391 U.S. 364 (1968).

82 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

eighty years.[83] It has approved delegations based on exceedingly vague criteria, allowing agencies to set standards that are "fair and equitable"[84] or that serve "the public interest, convenience, or necessity."[85] Based on these precedents, most commentators contend that the non-delegation doctrine is effectively dead,[86] and surprisingly few mourn its loss.[87]

The Court has never directly addressed whether the Elections Clause imposes any constraints on the power of state legislatures or Congress to delegate their authority to regulate federal elections. Even assuming that some limit exists, it is likely nothing more than the "intelligible principle" standard to which other delegations of federal legislative authority are subject.[88] Thus, it will be virtually impossible for a litigant to successfully challenge even sweeping and effectively standardless delegations by legislatures over election-related regulations to independent commissions, executive officials, administrative agencies, or local entities.

B. Independent State Legislature Doctrine

Aside from its approval of redistricting commissions, perhaps the most important and far-reaching aspect of *AIRC* was the Court's summary rejection of the independent state legislature doctrine. The doctrine recognizes that, when a legislature enacts a law that applies to federal elections, it is acting "by virtue of a direct grant of authority" from the Elections Clause and Presidential Electors Clause.[89] Thus,

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83 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000); *cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 420–21 (1935).

84 Yakus v. United States, 321 U.S. 414, 423 (1944).

85 NBC v. United States, 319 U.S. 190, 216 (1943).

86 Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded*, 16 ST. JOHN'S J. LEGAL COMMENT. 1, 39 (2002) ("It will certainly be a long time before a court of appeals is once again moved to bring the doctrine out from the shadows into the sunlight.").

87 *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165 (2004) ("[T]he nondelegation doctrine, as a general requirement that Congress must circumscribe the discretion of administrative agencies, should be rejected."); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory."); *cf.* Sunstein, *supra* note 83, at 315–16 (arguing that nondelegation canons of statutory interpretation, rather than a substantive nondelegation doctrine, exist).

88 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

89 Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam); *see also supra* note 3 and accompanying text.

> Although laws governing federal elections must be enacted through the "legislative process" set forth in the state constitution, . . . a state constitution cannot restrict the [substantive] scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted.[90]

As the Supreme Court stated in *McPherson v. Blacker*, the Constitution's delegations specifically to state legislatures of power to regulate federal elections "operat[e] as a limitation upon the State in respect of any attempt to circumscribe th[at] legislative power," including through "any provision in the state constitution in that regard."[91]

Under the independent state legislature doctrine, if a state law concerning federal elections conflicts with a state constitution, the law prevails. For example, in *In re Plurality Elections*, a Rhode Island statute required a candidate for federal office to receive only a plurality of votes in order to win.[92] The state constitution, in contrast, required candidates for public office to receive a majority of votes to prevail.[93] The Rhode Island Supreme Court held that, because state legislatures act pursuant to their authority under the U.S. Constitution when enacting laws regulating federal elections, the law was enforceable regardless of any contrary provision in the state constitution.[94] Numerous other courts[95] and commentators[96] have recognized and applied the doctrine.

Without so much as acknowledging any of these authorities—including the Court's own statement in *McPherson*—the *AIRC* majority summarily repudiated the doctrine. It held, "Nothing in th[e] [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[97] As

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90 Morley, *supra* note 64, at 199–200 (quoting Smiley v. Holm, 285 U.S. 355, 368 (1932)).

91 146 U.S. 1, 25 (1892).

92 8 A. 881, 882 (R.I. 1887).

93 *Id.*

94 *Id.* at 881–82.

95 *E.g.*, PG Publ. Co. v. Aichele, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012), *aff'd on other grounds*, 705 F.3d 91 (3d Cir. 2013); State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948); *In re* Opinions of Justices, 45 N.H. 595, 601 (1864); *see also* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944).

96 Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962); Morley, *supra* note 64, at 198–204; Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 (1951); Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 87 (1937).

97 *AIRC*, 135 S. Ct. 2652, 2673 (2015).

mentioned earlier, the Court dismissed the House of Representatives's endorsement and application of the independent state legislature doctrine as a largely partisan maneuver,[98] and completely ignored a Senate committee report recognizing the doctrine.[99]

Under the majority's ruling, a state legislature (as well as other entity or process that qualifies as a "Legislature" under the Elections Clause) is bound by substantive restrictions set forth in the state constitution when enacting laws governing federal elections. Such laws, such as proof-of-citizenship or voter identification requirements, may therefore be challenged on state, as well as federal, constitutional grounds.[100] The Court thus has ratified additional barriers to state efforts to protect the integrity of federal elections.

C. Reallocating Presidential Electors

The *AIRC* Court's interpretation of the Elections Clause likely applies to the Presidential Electors Clause as well, as the two provisions are typically read *in pari materia*.[101] Just as the Elections Clause empowers the state "Legislature" to regulate the time, place, and manner of congressional elections,[102] the Presidential Electors Clause grants the "Legislature" power to regulate the process for choosing presidential electors.[103] The *AIRC* majority interpreted the term legislature in the Elections Clause to include public initiatives and referenda. It is likely to interpret the Presidential Electors Clause the same way.

Commentators have long debated the constitutionality of reallocating a state's electoral votes for President through a public initiative or referendum.[104] Under *AIRC*, voters likely may use the public initiative

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98 *Id.* at 2674.

99 *See* S. REP. NO. 43-395, at 9 (1874).

100 *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104–05 (2014); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); *cf.* Morley, *supra* note 64, at 190 ("The standards that the modern Supreme Court has adopted for determining the constitutionality of election laws are consistent with over a century-and-a-half of state constitutional precedents that long predate most federal voting rights cases.").

101 *See* Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1970) (Black, J., announcing the judgment of the Court) ("It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."); *see also* Burroughs v. United States, 290 U.S. 534, 544–45 (1934).

102 U.S. CONST. art. I, § 4, cl. 1.

103 *Id.* art. II, § 1, cl. 2.

104 *Compare* Michael McLaughlin, Note, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 3000 (2008) (arguing that initiatives may not be used to change state laws relating to federal elections), *and* Nicholas P. Stabile, Comment, *An End Run Around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the*

process to change the way in which states allocate their electoral votes in presidential elections. All states except for Nebraska[105] and Maine[106] allocate their electoral votes on a winner-take-all basis, meaning that the presidential candidate who receives a plurality of the state's popular vote receives all of that state's electoral votes. For example, in the 2012 election, Barack Obama received 60.24% of the popular vote in California, yet was awarded all 55 of that state's electoral votes.[107]

At least three main alternatives exist. States could follow the example of Nebraska and Maine by awarding presidential electors on a district-by-district basis to the presidential candidate who receives the most votes in each congressional district.[108] The candidate who receives the most statewide votes would be awarded the state's two additional electors. Under this system, Obama would have received 43 of California's electoral votes, and Romney would have received 12.[109] Alternatively, a state's electors could be awarded in proportion to the percentage of the statewide popular vote received by each candidate who exceeds some minimum threshold. Under this approach, California would have awarded 34 of its electoral votes to Obama, and 21 to Romney.[110] Some commentators

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Method of Distributing Electors, 103 NW. U. L. REV. 1495 (2009), *with* Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008), *and* David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575, 599 (2006) (defending the constitutionality of using public initiatives to change the method for allocating a state's electoral votes). *Cf.* Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 629 (2008) ("A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question.").

105 NEB. REV. STAT. § 32-1038(1) (2015).

106 ME. STAT. tit. 21-A, § 802 (2015).

107 FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 28 (2013), http://www.fec.gov/pubrec/fe2012/federalelections2012.pdf.

108 *Supra* notes 105–06.

109 David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2012 and 2008 Elections*, DAILY KOS (Nov. 19, 2012, 12:30 PM), http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections (specifying that Obama won 41 of California's 53 congressional districts, as well as the statewide vote, and Romney won 12 congressional districts).

110 *See* RHODES COOK, AMERICA VOTES 30: 2011–2012 ELECTION RETURNS BY STATE 10 (2014) (specifying that Obama won 60.2% of the statewide vote in California and Romney won 37.1%). Approximately 2.7% of the popular vote was split among twelve third-party and independent candidates. FED. ELECTION COMM'N, *supra* note 107, at 28. None of them received enough votes to be allotted an elector. The "extra" electors that

instead have recommended various schemes for awarding a state's electoral votes based on the outcome of the national popular vote.[111]

In states that generally cast their electoral votes for a particular party's candidate, politicians from that party likely could prevent the institutional legislature from changing the method for allocating electoral votes. Under *AIRC*, activists and voters may use the initiative process to circumvent party bosses and ensure their state's electoral votes more closely reflect the views of the state's electorate as a whole. Petitions for such initiatives were circulated in California in past election cycles, but none received enough signatures to be placed on the ballot.[112] Particularly since initiatives often are introduced in off-year election cycles, when voter turnout is lower,[113] it is reasonably possible that such a measure—like the Arizona initiative that gave rise to *AIRC* in the first place—might succeed. *AIRC* thus opens the door to potential realignments in presidential politics.

III. REMAINING QUESTIONS

AIRC has reshaped Elections Clause doctrine and resolved several longstanding controversies concerning its meaning.[114] This Part discusses some important questions that remain. Section A argues that the Elections Clause should be read as imposing a special duty on state and federal courts to apply the plain meaning of state laws relating to federal elections. Section B questions whether Congress's authority to regulate congressional elections is truly coextensive with its power to regulate congressional elections under the Elections Clause. Section C discusses possible "commandeering" concerns with federal election statutes. Finally, Section D examines implicit limits on the power the Elections Clause grants states to regulate congressional elections.

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neither Obama nor Romney won directly likely would have been split between Obama and Romney on a pro rata basis.

111 *See, e.g.*, Vikram David Amar, Response, *The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237 (2011).

112 *See, e.g.*, Memorandum from Katherine Montgomery, Initiative Program Manager, Cal. Sec'y of State, to All County Clerks/Registrars of Voters and Proponent (Feb. 2, 2011), elections.cdn.sos.ca.gov/ccrov/pdf/2011/february/11008km.pdf (transmitting official title and summary for Ballot Initiative #10-0024, entitled Electoral College Reform Act); Letter from Anthony F. Andrade, Jr., Proponent, to Edmund G. Brown, Jr., Att'y Gen., State of Cal. (May 21, 2007), http://oag.ca.gov/system/files/initiatives/pdfs/07-0016%20(2007-05-22_07-0016_AINS).pdf (submitting amendments to proposed ballot initiative #07-0016, entitled Electoral Reform California).

113 *See* Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?*, 1 PEPP. DISP. RESOL. L.J. 123, 139 n.100 (2001) (citing sources).

114 *See supra* Part II.

A. Strict Statutory Construction and the Democracy Canon

Perhaps the most significant Elections Clause doctrine the *AIRC* Court did not address is its requirement that both state and federal courts take special care to enforce the plain text of state election statutes, rather than applying their own judicial gloss or other doctrines, such as Professor Rick Hasen's "Democracy Canon."[115]

As discussed throughout this Essay, the Elections Clause and Presidential Electors Clause are grants of constitutional authority to state legislatures—construed broadly by the *AIRC* Court as embracing any lawmaking entity or process authorized by a state's constitution—rather than to states as a whole. The Supreme Court has recognized that this specific delegation of authority imposes a special duty on other governmental entities to ensure that they apply election laws as written by the legislature, rather than with the flexibility and discretion they otherwise might be permitted to apply.

In *Bush v. Palm Beach County Canvassing Board*, the Supreme Court observed that, "[a]s a general rule, [it] defers to a state court's interpretation of a state statute."[116] When a legislature enacts a law regulating a presidential election, however, it is acting "by virtue of a direct grant of authority made under [the Presidential Electors Clause]."[117] Laws enacted under the Presidential Electors Clause—and, by extension, the Elections Clause—require a special interpretive approach.

Seven Justices went on to apply such an approach in *Bush v. Gore*.[118] Chief Justice Rehnquist's concurrence, in which Justices Scalia and Thomas joined, stated that, when a legislature acts under the Presidential Electors Clause, "the text of the election law itself . . . takes on independent significance."[119] Courts have a unique duty to ensure they do not "depart[] from the statutory meaning" of such laws, even if they generally would have such interpretive power.[120]

The four-Justice dissent written by Justice Souter echoed this sentiment, recognizing that the U.S. Supreme Court's responsibility was to ensure that the Florida Supreme Court had not "displaced the state legislature's" enactments, and that the "law as declared by the court" was not "different from the provisions made by the legislature, to which the

115 Hasen, *supra* note 15.

116 531 U.S. 70, 76 (2000) (per curiam).

117 *Id.*

118 531 U.S. 98 (2000) (per curiam).

119 *Id.* at 113 (Rehnquist, C.J., concurring).

120 *Id.* at 115.

National Constitution commits responsibility for determining how each State's Presidential electors are chosen."[121]

Applying a super-strong plain meaning construction of laws regulating federal elections—indeed, all elections—promotes fair outcomes because it minimizes the opportunity for partisan manipulation. Election laws are enacted before election disputes arise, behind at least a partial "veil of ignorance."[122] Because the legislature often will not know which candidate will benefit from a particular rule, there is an increased likelihood that the rule will be fair.[123] When courts must interpret and apply the rule, particularly after an election is over, they generally know which candidates and political parties will benefit from different possible interpretations. There is a substantial risk that such knowledge may color courts' views, leading to rulings that are at least partially outcome-driven. Indeed, some courts have gone so far as to recognize that adopting an unexpected interpretation of the rules governing an election after-the-fact can amount to a due process violation.[124] Limiting courts' discretion to interpret election rules may ameliorate the possibility of their partisan bias improperly influencing the outcome of election litigation.

B. Federal Regulation of Presidential Elections

Another issue the Elections Clause raises is whether Congress's authority over presidential elections is coextensive with its power over congressional elections. The Elections Clause expressly permits Congress to "make or alter" state election laws;[125] the Presidential Electors Clause lacks analogous language. The material difference in language between the Elections Clause and Presidential Electors Clause has not caused the Supreme Court pause, however. Rather, the Court held that the federal government has inherent authority to regulate presidential elections.[126] This issue might be ripe for more careful consideration, however, in light

121 *Id.* at 130 (Souter, J., dissenting); *see also* Reform Party v. Black, 885 So. 2d 303, 312 (Fla. 2004) ("[A]lthough the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the direct grant of authority to the Legislature through the United States Constitution."); *cf.* Roe v. Alabama, 68 F.3d 404, 406–07 (11th Cir. 1995) (holding that a state court's construction of an election law contrary to its plain meaning violated voters' constitutional rights).

122 JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

123 Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1378–82 (2012).

124 *Roe*, 68 F.3d at 406–07; Griffin v. Burns, 570 F.2d 1065, 1078–79 (1st Cir. 1978).

125 U.S. CONST. art. I, § 4, cl. 1.

126 *See supra* note 101; *cf.* Amar, *supra* note 111, at 260 (arguing that the Elections Clause empowers Congress to regulate presidential elections because congressional and presidential elections occur simultaneously, and rules concerning the latter may affect turnout for the former).

of the Court's recent attention (such as it is) to the language and meaning of the clause, as well as the strict limits it has imposed on the scope of Congress's power to enforce constitutional rights under Section 5 of the Fourteenth Amendment.[127]

C. Commandeering and Federal Election Law

The Court has yet to squarely address whether *Printz*'s anti-commandeering prohibitions[128] apply to laws enacted pursuant to the Elections Clause and whatever authority Congress might possess over presidential elections. Nevertheless, it appears that anti-commandeering challenges to federal voting laws are unlikely to succeed.

Printz held that it is "fundamentally incompatible with our constitutional system of dual sovereignty" for Congress to "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[129] It invalidated interim provisions of the Brady Handgun Violence Prevention Act,[130] enacted under the Commerce Clause,[131] which required "state and local law enforcement officials to conduct background checks on prospective handgun purchasers."[132]

Over a century before *Printz*, the Court had held that state election officials may be called upon to "fulfil [sic] duties which they owe to the United States" in connection with federal elections.[133] And in *Branch v. Smith*, a four-Justice plurality held that federal laws requiring state officials to engage in tasks relating to federal elections do not amount to unconstitutional commandeering, because they simply "regulat[e] (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations" under the Elections Clause.[134] That ruling drew a stinging dissent from Justices Thomas and O'Connor, who questioned the plurality's refusal to apply *Printz* to the Elections Clause.[135]

Many commentators have argued that the Elections Clause expressly authorizes commandeering of state officials, at least for congressional elections. Commandeering proponents point out that the types of statutes

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127 City of Boerne v. Flores, 521 U.S. 507 (1997).

128 Printz v. United States, 521 U.S. 898, 935 (1997).

129 *Id.*

130 Pub. L. No. 103-159, § 102(a)(1), 107 Stat. 1536, 1536–39 (1993) (codified at 18 U.S.C. § 922(s)(2), (s)(6)(B)–(C)), *invalidated by Printz*, 521 U.S. at 935.

131 *Printz*, 521 U.S. at 923–24.

132 *Id.* at 902.

133 *Ex Parte* Siebold, 100 U.S. 371, 387 (1879).

134 538 U.S. 254, 280 (2003) (plurality opinion).

135 *Id.* at 301–02 (O'Connor, J., concurring in part and dissenting in part).

the clause expressly authorizes Congress to enact necessarily must be implemented by state and local election officials.[136] Consistent with this view, courts have rejected anti-commandeering challenges to the National Voter Registration Act (NVRA),[137] which requires state officials to make voter registration forms available at certain public offices and proscribes detailed requirements for their processing.[138] Paul McGreal, however, offers a persuasive argument that the Constitution's "text, history, precedent, [and] structure," as well as "prior government practice," demonstrates that Congress may not commandeer state and local officials under the Elections Clause.[139]

Other commentators[140] sidestep the Elections Clause issue by contending that, even if Article I does not authorize Congress to commandeer state officials, it may do so when enacting laws under Section 5 of the Fourteenth Amendment.[141] The Court also has yet to directly address this theory. Such an approach might be more persuasive than an argument under the Elections Clause itself, since the Fourteenth

136 Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237–38; Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 897 (2002); Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 82–83 (1996); *see also* Amar, *supra* note 111, at 259–60; Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1372 n.84 (2014).

137 Pub. L. No. 103-31, 107 Stat. 77, 77 (1993) (codified in scattered sections of 39 U.S.C. and 52 U.S.C. (2012)).

138 Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) ("Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators."); *see also* Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997) (affirming the NVRA's constitutionality because the Elections Clause empowers Congress to direct states to amend their laws governing federal elections); Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) (pre-*Printz* case affirming NVRA).

139 Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 553–54 (2001).

140 Caminker, *supra* note 136, at 239–40; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24–25 (2007); Brian C. Brook, Note, *Federalizing the First Responders to Acts of Terrorism via the Militia Clauses*, 54 DUKE L.J. 999, 1005–06 (2005); *see also* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 940 (2013); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 888–89 (1998). *But see* Michael D. Hatcher, Note, Printz *Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177, 189–90 (1999).

141 U.S. CONST. amend. XIV, § 5.

Amendment abrogates state sovereignty in a variety of ways[142] and, unlike the Elections Clause, applies equally to congressional and presidential elections. Federal election laws would be subject to closer scrutiny, however, because Congress is not permitted to legislate under Section 5 unless the statute is both congruent and proportional to a constitutional violation.[143]

D. Limits on State Authority

A final Elections Clause issue that also remains for future resolution is the limit of states' authority to enact laws concerning federal elections. States have no inherent power to regulate federal elections; their only power to do so comes from the Elections Clause and Presidential Elections Clause.[144] The Court has explained that the Elections Clause grants states broad power to enact a "complete code for congressional elections," concerning not only "times and places," but also "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[145] It allows states "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[146]

This broad delegation of authority is subject to implied limits not set forth in the Constitution's text. The Court has held that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[147] States therefore lack power to enact laws governing congressional elections that fall into any of those categories. The Court has applied this principle to invalidate state laws that attempted, directly or indirectly, to impose term limits for Congress. In *U.S. Term Limits, Inc. v. Thornton*, it struck down a statute prohibiting a candidate from appearing on the ballot if he or she already had served a specified number of terms in

142 *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 518 (2004) (recognizing that Congress may abrogate states' sovereign immunity when legislating under Section 5, but not Article I).

143 City of Boerne v. Flores, 521 U.S. 507 (1997).

144 Cook v. Gralike, 531 U.S. 510, 523 (2001); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995); *see also* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

145 Smiley v. Holm, 258 U.S. 355, 366 (1932).

146 *Id.*

147 *U.S. Term Limits*, 514 U.S. at 833–34.

the U.S. House or U.S. Senate, though the person could still run as a write-in candidate.[148]

Likewise, in *Cook v. Gralike*, it held unconstitutional a law that required negative messages to be printed on the ballot next to the names of candidates who refused to support a particular constitutional amendment imposing term limits for Congress.[149] The Court explained that the provision "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal."[150] It added, "'[B]y directing the citizen's attention to the single consideration' of the candidates' fidelity to term limits, the labels imply that the issue 'is an important—perhaps paramount—consideration in the citizen's choice . . . .'"[151] The Court concluded that such an attempt to "dictate electoral outcomes" is "not authorized by the Elections Clause."[152]

The Court has never enforced the Elections Clause's implicit limits on states' authority outside of the term limits context. Its holding that states lack power to "dictate electoral outcomes" or "favor or disfavor a class of candidates"[153] is potentially far-reaching, however. Many facially neutral election laws may systematically benefit or hinder candidates from a particular party. It is unclear whether the Elections Clause's restriction on state power hinges on the intent of the legislature or the effects of a statute, and how closely the Court will scrutinize a law's effects to determine whether it impermissibly affects an election's outcomes. Excluding candidates from the ballot, or printing derogatory warnings next to their names on the ballot, are direct and substantial handicaps specific to particular candidates. It remains to be seen whether future Courts will enforce the Elections Clause's implied restrictions broadly to prohibit other measures that might affect the outcome of an election, such as voter identification laws, absentee voting restrictions, or reductions in early voting periods.

CONCLUSION

The Elections Clause sits at a critical intersection of federalism, separation of powers, and constitutional rights. It confers power on a

148 *Id.* at 835 (holding that "a state-imposed ballot access restriction is [not] constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses").

149 *Cook*, 531 U.S. at 514–15.

150 *Id.* at 524.

151 *Id.* at 525 (quoting Anderson v. Martin, 375 U.S. 399, 402 (1964)).

152 *Id.* at 526 (quoting *U.S. Term Limits*, 514 U.S. at 833–34).

153 *U.S. Term Limits*, 514 U.S. at 833–34.

specific branch of state government, expressly authorizes federal preemption of state laws (if not federal commandeering of state officials[154]), and contemplates regulation of the fundamental constitutional right to vote. While *AIRC* has largely settled questions concerning delegation of Elections Clause authority, the independent state legislature doctrine, and the permissibility of reallocating a state's presidential electors through popular initiative (assuming the Presidential Electors Clause is read *in pari materia*), other important issues remain. Perhaps most significantly, whether *AIRC* is viewed as a legal process or representation-reinforcing ruling, the majority's approach raises substantial questions about how far the Court will go in allowing the judiciary to preserve the fairness of federal elections and enforce the right to vote despite express textual grants of constitutional authority over the electoral system to Congress. The Elections Clause thus serves not only as the constitutional basis for a range of election-related doctrines, but perhaps as a harbinger for the reinterpretation of other related provisions, as well.

154 *See supra* Section III.C.

https://electionlawblog.org/?p=129477#more-129477

The (unsteady) origins of the Plenary Presidential Elector Selection Power Doctrine

June 10, 2022, 10:41 am

Derek Muller

Rick P. has posted something that I've been puzzling over for a while, and I'm glad he did so: there's a formal legal distinction between the "Legislature Thereof Clauses," more popularly known as the "independent state legislature doctrine" theory, and this concept that I'll unhelpfully coin as the "Plenary Presidential Elector Selection Power Doctrine." This doctrine has never been exercised in any form (with a caveat about Florida in 2000, which I'll get to at the end), and it has never (to my knowledge) been defended in any academic literature. So where did it come from?

Briefly, the Constitution gives the State "Legislature" the power to "direct" the "manner" of "appoint[ing]" presidential electors, and the "manner" of holding congressional elections. As the "independent state legislature doctrine" goes, that means the legislature–to the exclusion of the governor, the state courts, and even the state constitution–sets the rules. There are nuances about how far it might go, and, of course, there are sharp detractors on the theory

But the Plenary Presidential Elector Selection Power Doctrine is different. In its weakest and (mostly) uncontroversial form (even if unpopular), it acknowledges that the state legislature has the power to directly choose presidential electors (most recently done in Colorado in 1876, but out of vogue since 1824). That's, simply put, the original public meaning of the Presidential Electors Clause.

In its strongest form, however, it argues that the state legislature may "at any time" retake the power to choose presidential electors–even after the election has been held. That's a remarkable claim, because once the state legislature, exercising its power under the Clause, directs the people to choose presidential electors, *things change*. And they change for several reasons.

First, Congress has the power to "determine the time of choosing the electors." It has done so: the first Tuesday after the first Monday in November. Article II does not give states the power to choose them after that date.

Second, Congress has a mechanism in federal law for the event of a "failed election," but that is hardly a constitutional claim, and it's quite unclear that the legislature has any power to exercise it absent pre-election enabling legislation.

Third, the legislature would be ignoring its own rules if it reclaimed that power after Election Day. All states designate

how to canvass the votes, how to contest an election, and who is in charge of that process. The legislature hasn't designated itself for that role (and none really has come close recently). Changing the rules after the election risks major Due Process Clause concerns.

Given all these issues, where did this "strong" notion of the Plenary Presidential Elector Selection Power Doctrine come from? Again, it's not in any academic literature I've seen. It appears to derive from a misreading of *McPherson v. Blacker*, a 1892 Supreme Court case on the selection of presidential electors. Michigan had switched from an at-large system of choosing electors to a district-based one. The Court noted that "it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." "Plenary" being the operative word–by district or at-large; by the people or by the legislature.

And then comes this phrase from the opinion: "Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

Wow! That sounds like an incredible power. Until you read the context.

The Court here is quoting from legislative history, a 1874 Senate report. The question in Congress was whether Congress as an institution could compel states to award presidential electors by district. (And here, Congress invokes a version of the independent state legislature doctrine: the state legislature can resume the choosing of electors if it so desires, even if it has been previously given to the people.)

But the "at any time" language has been abused from its original context. It was whether Congress (or some pre-existing state law) could take the power away from the state legislature; it was not about whether the state legislature could pick a new method after Election Day.

If the legislature *today* (in 2022) resumes power over the choosing of electors, it could not retroactively, say, choose Kennedy or Nixon electors for the 1960 election. That election is over. It occurred pursuant to laws that took place at the time, on the date chosen by Congress. But if the legislature wants to *pick that power back up* and run with it for 2024, it is within its power (even if no legislature since Colorado in 1876 has done so).

For Plenary Presidential Elector Selection Power Doctrine proponents, however, the language from *McPherson* quoting a congressional report citing "at any time," joined with "plenary," leads to this mystical power to a legislature being able to do whatever it wants, whenever it wants, after an

election.

The *one* caveat about a potential exercise of this power is Florida in 2000. The Secretary of State submitted a certificate of ascertainment to the Archivist in November 2000 identifying the Bush electors as the winning slate, the legislature was nervous as the "safe harbor" deadline approached and judicial resolution remained unclear. It then began the process in December 2000 of reclaiming that power (in a concurrent resolution, writing, "the manner that the Florida Legislature directs that electors for President and Vice President of the United States of America be appointed in the year 2000 is by appointment by the Florida Legislature"). They planned to appoint the *same* slate of electors as those whom the Secretary of State had already certified as the winner. But they attempted to do so *independently* of the election that had just occurred. (Attorney Roger Magnuson pressed for this solution to the legislature as he saw weaknesses in "ratifying" what the Secretary of State had done.) Florida never did so (although one chamber passed the resolution). It would have created complications in Congress if it did. And even here, the legislature was effectively ratifying the Secretary of State's decision rather than revisiting it.

Again, I think this is not a well-founded legal power. I think proper Electoral Count Act reform can help clean up the

statutory ambiguities. But it also highlights the limitations of statutory fixes: if someone, somewhere is arguing that the Constitution creates this tremendous empowerment of legislatures, no statutory fix can solve that. It requires some careful legal analysis to identify the weaknesses of the argument and the proper scope of the constitutional authority, beginning with Congress's power to determine the time of choosing electors.

McPherson v. Blacker

Supreme Court of the United States

Argued October 11, 1892. ; October 17, 1892, Decided

No. 1170.

Reporter
146 U.S. 1 *; 13 S. Ct. 3 **; 36 L. Ed. 869 ***; 1892 U.S. LEXIS 2171 ****

McPHERSON v. BLACKER.

Prior History: **[****1]** ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

WILLIAM McPherson, Jr., Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock filed their petition and affidavits in the Supreme Court of the State of Michigan, on May 2, 1892, as nominees for presidential electors, against Robert R. Blacker, Secretary of State of Michigan, praying that the court declare the act of the legislature, approved May 1, 1891, (Act No. 50 of the Public Acts of Michigan of 1891), entitled "An act to provide for the election of electors of President and Vice President of the United States, and to repeal all other acts and parts of acts in conflict herewith," void and of no effect, and that a writ of mandamus be directed to be issued to the said Secretary of State, commanding him to cause to be delivered to the sheriff of each county in the State, between the first of July and the first of September, 1892, "a notice in writing that at the next general election in this State, to be held on Tuesday, the 8th day of November, 1892, there will **[****2]** be chosen (among other officers to be named in said notice) as many electors of President and Vice President of the United States as this State may be entitled to elect Senators and Representatives in the Congress."

The statute of Michigan, (Howell's Ann. Stats. of Michigan, 133, c. 9,) provided: "The secretary of state shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State, a notice in writing, that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz.: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of the state land office, members of the state board of education, electors of President and Vice President of the United States, and a representative in Congress for the district to which each of such counties shall belong."

A rule to show cause having been issued, the respondent, as secretary of state, answered the petition, and denied that he had refused to give the notice **[****3]** thus required, but he said, "That it has always been the custom in the office of the secretary of state, in giving notices under said section 147, to state in the notice the number of electors that should be printed on the ticket in each voting-precinct in each county in this State, and following such custom with reference to such notice, it is the intention of this respondent in giving notice under section 147 to state in said notice that there will be elected one presidential elector at large, and one district presidential elector, and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting-precinct, so that the election may be held under and in accordance with the provisions of act No. 50 of the Public Acts of the State of Michigan of 1891."

By an amended answer the respondent claimed the same benefit as if he had demurred.

Relators relied in their petition upon various grounds as invalidating act No. 50 of the Public Acts of Michigan of 1891, and among them, that the act was void because in conflict with clause two of section one of Article II of the Constitution of the United States, and with the Fourteenth **[****4]** Amendment to that instrument, and also in some of its provisions in conflict with the act of Congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice President, and to provide for and regulate the counting of the votes for President and Vice President, and the decision of questions arising thereon." The Supreme Court of Michigan unanimously held that none of the objections urged against the validity of the act were tenable; that it did not conflict with clause two of section one of Article II of the Constitution or with the Fourteenth Amendment thereof; and that the law was only inoperative so far as in conflict with the law of Congress in a matter in reference to which Congress had the right to legislate. The opinion of the court will be found reported, in advance of the official series, in 52 Northwestern Rep. 469.

Judgment was given, June 17, 1892, denying the writ of mandamus, whereupon a writ of error was allowed to this court.

The October term, 1892, commenced on Monday, October 10, and on Tuesday, October 11, the first day upon which the application could be made, a motion to advance the case was submitted by counsel, **[****5]** granted at once in view of the exigency disclosed upon the face of the papers, and the cause heard that day. The attention of the court having been called to other provisions of the election laws of Michigan than those supposed to be immediately involved, (Act No. 190, Public Acts, Michigan, 1891, pp. 258, 263), the Chief Justice, on Monday, October 17, announced the conclusions of the court, and directed the entry of judgment affirming the judgment of the Supreme Court of Michigan, and ordering the mandate to issue at once, it being stated that this was done because immediate action under the state statutes was apparently required and might be affected by delay, but it was added that the court would thereafter file an opinion stating fully the grounds of the decision.

Act No. 50 of the Public Acts of 1891 of Michigan is as follows:

"An act to provide for the election of electors of President and Vice President of the United States, and to repeal all other acts and parts of acts in conflict herewith.

SECTION 1. The People of the State of Michigan enact, That at the general election next preceding the choice of President and Vice President of the United States, there shall be **[****6]** elected as many electors of President and Vice President as this State may be entitled to elect of Senators and Representatives in Congress in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of President and Vice President of the United States in each district who shall be known and designated on the ballot, respectively, as eastern district elector of President and Vice President of the United States at large, and western district elector of President and Vice President of the United States at large; there shall also be elected in like manner two alternate electors of President and Vice President, who shall be known and designated on the ballot, as eastern district alternate elector of President and Vice President of the United States at large, and western district alternate elector of President and Vice President of the United States at large, for which purpose the first, second, sixth, seventh, eighth and tenth congressional districts shall compose one district to be known as the eastern electoral district, and the third, fourth, fifth, ninth, eleventh and twelfth congressional districts

shall compose [****7] the other district, to be known as the western electoral district; there shall also be elected by the electors in each congressional district into which the State is or shall be divided, one elector of President and Vice President, and one alternate elector of President and Vice President, the ballots for which shall designate the number of the congressional district and the persons to be voted for therein, as district elector and alternate district elector of President and Vice President of the United States respectively.

"SEC. 2. The counting, canvassing and certifying of the votes cast for said electors at large, and their alternates and said district electors and their alternates, shall be done, as near as may be, in the same manner as is now provided by law for the election of electors of President and Vice President of the United States.

"SEC. 3. The Secretary of State shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the State to the same, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following [****8] said general election. In case of death, disability, refusal to act or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers.

"SEC. 4. The said electors of President and Vice President shall convene in the senate chamber at the capital of the State at the hour of twelve o'clock [****9] at noon, on the first Wednesday of December immediately following their election, and shall proceed to perform the duties of such electors as required by the Constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings except as herein provided.

"SEC. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance travelled each way in going to and returning from said place of meeting, the same to be paid by the state treasurer upon the allowance of the board of state auditors.

"SEC. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Approved May 1, 1891.

Section 211 of Howell's Annotated Statutes of Michigan (vol. 1, c. 9. p. 145) reads:

"For the purpose of canvassing and ascertaining the votes given for electors of President and Vice President of the United States, the board of state canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before [****10] that time as the secretary of state shall appoint; and the powers, duties, and proceedings of said board, and of the secretary of state, in sending for, examining, ascertaining, determining, certifying and recording the votes and results of the election of such electors, shall be in all respects, as near as may be, as hereinbefore provided in relation to sending

for, examining, ascertaining, determining, certifying and recording the votes and results of the election of State officers."

Section 240 of Howell's Statutes, in force prior to May 1, 1891, provided: "At the general election next preceding the choice of President and Vice President of the United States, there shall be elected by general ticket as many electors of President and Vice President, as this State may be entitled to elect of Senators and Representatives in Congress."

The following are sections of Article VIII of the Constitution of Michigan:

"SEC. 4. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of State auditors, to examine and adjust all claims against the State, not otherwise provided for by general law. They shall constitute a board state canvassers, **[****11]** to determine the result of all elections for governor, lieutenant-governor, and state officers, and of such other officers as shall by law be referred to them.

"SEC. 5. In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected." (1 Howell's Ann. Stats. Mich. 57.)

Reference was also made in argument to the act of Congress of February 3, 1887, to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes.24 Stat. 373, c. 90.

Syllabus

The validity of a state law providing for the appointment of electors of President and Vice President having been drawn in question before the highest tribunal of a State, as repugnant to the laws and Constitution of the United States, and that court having decided in favor of its validity, this court has jurisdiction to review the judgment under Rev. Stat. § 709.

Under **[****12]** the second clause of Article II of the Constitution, the legislatures of the several States have exclusive power to direct the manner in which the electors of President and Vice President shall be appointed.

Such appointment may be made by the legislatures directly, or by popular vote in districts, or by general ticket, as may be provided by the legislature.

If the terms of the clause left the question of power in doubt, contemporaneous and continuous subsequent practical construction has determined the question as above stated.

The second clause of Article II of the Constitution was not amended by the Fourteenth and Fifteenth Amendments, and they do not limit the power of appointment to the particular manner pursued at the time of the adoption of these amendments, or secure to every male inhabitant of a State, being a citizen of the United States, the right from the time of his majority to vote for presidential electors.

A state law fixing a date for the meeting of electors, differing from that prescribed by the act of Congress, is not thereby wholly invalidated; but the date may be rejected and the law stand.

Counsel: Mr. Henry M. Duffield, Mr. Fisher A. Baker, and Mr. Attorney **[****13]** General for plaintiffs in error.

The English colonies in America were distinct and separate communities, each of which had a government or political organization of its own.There was no such thing as a general organization or union, and no power to form one, although some of the colonies acted together in the common defence, as against the Indians, and in the wars between England and France, which resulted, a few years before the Revolution, in establishing the dominion of the English over Canada and the Northwest. 1 Curtis' Const. Hist. U.S. 1-4; Lodge's Hist. Eng. Col. in Am. 351-352, 367-370; Scott's Development of Const. Liberty in English Colonies, 36.

Such being the nature of the colonial governments and the character of their existence, it was inevitable that they should treat each other as equals when they came to act together in resisting the encroachments of the English government, and achieving their own independence. The rule of voting by States, established at the outset, was continued by the Articles of Confederation, and was carried into the rules of the convention which framed the Constitution.1 Elliot's Deb. 164. The Constitution itself made the separate and **[****14]** individual approval of nine of the States necessary, in order to its adoption at all, and made it possible for the new government to go into operation with four States left out, and each in the enjoyment of a separate independence.

Strenuous efforts were made in a number of the States to defeat a ratification of the Constitution, but it does not appear that the provisions for the election of the President and Vice President excited any particular animosity or were the subject of any serious controversy. Hamilton's statements in regard to these provisions, in the sixty-eighth number of the Federalist, seem to have reflected the general judgment, as they did, undoubtedly, his own opinion and that of Madison. From them it is evident that legislative appointments were not at that time contemplated; but the shortness of time allowed by Congress explains why that mode was adopted in some States at the first election.

This brief statement of the condition of things prior to and at the time of the adoption of the Constitution brings us to the consideration of the questions in discussion here; which are: (1) Does the Michigan statute contravene and is it repugnant to Art. II, sec. 1, **[****15]** clause 2, of the Constitution of the United States? (2) Does it contravene and was it repugnant to the Fourteenth Amendment to the Constitution of the United States? (3) Is it in contradiction of and opposition to the act of Congress of February 3, 1887?

I. The Michigan statute is in conflict with Art. II, sec. 1, clause 2, of the Constitution of the United States, which provides vides that, "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

In legal effect it commands the State to "appoint" the electors, and delegates to the legislature the power to "direct" the manner of their appointment; thus imposing one duty on the State and another on the legislature. We contend that the words "the State," as thus used, mean the artificial being, the legal entity, the body politic, which is the sovereign State.

Immediately preceding the present use of the word in the Constitution it had been repeatedly employed to designate the State in its sovereign capacity. Art. I, sec. 10, clause 1: "No State shall enter into any treaty, **[****16]** alliance or confederation," etc. Clause 2: "No State shall, without the consent of the United

States, lay any imposts or duties," etc.; again: "And the net produce of all duties and imposts laid by any State," etc. Clause 3: "No State shall, without the consent of Congress, lay any duty of tonnage." Similar uses of the term in other parts of the Constitution suggest themselves, as Art. III, sec. 2, that "the judicial power shall extend to controversies between tween two or more States, . . . between a State and the citizens of another State, . . . between a State or the citizens thereof and foreign States, citizens or subjects." Art. IV, sec. 3: "New States may be admitted into this Union."

Whenever the Constitution confers any power on or reserves any right to the people of the States or to any state functionaries, it is careful to so declare explicitly, as in the case of Art. I, sec. 2, for choosing representatives in Congress by the "people of the several States;" Art. I, sec. 3: choosing United States Senators "by the legislature" of the State. Art. IV, sec. 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. **[****17]** V: "On the application of the legislatures of two-thirds of the several States, Congress shall call a convention for proposing amendments to the Constitution." Finally, the Tenth Amendment provides "that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved respectively to the States or the people."

Strong support of this contention that the State must appoint its presidential electors is found in the third and immediately succeeding clause of the same section, afterwards superseded by the Twelfth Amendment, which provided that when the election of President is cast upon the House of Representatives "the votes shall be taken by States, the representative from each State having one vote," etc.

Nor are judicial interpretations lacking to sustain our contention. See Hepburn v. Ellzey, 2 Cranch, 445; Penhallow v. Doane, 3 Dall. 54; Ware v. Hylton, 3 Dall. 199, 225; Buckner v. Finley, 2 Pet. 586; and Texas v. White, 7 Wall. 700, where the court says, (p. 721,) "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of definite boundaries and organized under the **[****18]** government's sanction and limited by a written constitution and established by the consent of the governed. It is the union of such States under a common Constitution which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it, one people and one country."

What the Constitution intends by the term "State" is the sovereign State, a legal although an artificial being, a great political corporation with imperial prerogatives and powers, the great State that in the minds of many of the men of the convention which framed the Constitution was greater almost than the United States; the State of whose proper sovereignty they would not give up one jot or tittle; a State which has a great seal; which has a seat of government; which has a system of courts to decide any controversy concerning an appointment; which has a military and civil power which can record its decree; and which from its high plane of sovereignty can command respect for its choice, and if its choice is not respected can command obedience to its will.

It is said that this clause of the Constitution provides that this appointment **[****19]** shall be made "in such manner as the legislature may direct," and it is claimed that these words are so plenary as to permit the legislature to take this great power from the sovereign State, and, cutting it up, divide it among fourteen disjointed fractions of the territory of the State, each of which shall choose one elector of President and Vice President of the United States. It is sufficient answer to this to say, that under the form of prescribing the manner in which the State shall appoint, the power is not conferred upon the legislature to deprive the State of all appointing power.

The Supreme Court of the State of Michigan, "admitting that if the question were to be determined solely by reference to the language employed, there would be much force in the contention that the State must act as a unit, and that no lesser body could be delegated to perform any portion of the duty vested in the State body corporate, and that it might possibly be held that the words 'in such manner as the legislature thereof may direct' confer only the limited power of directing how the State, acting as an entirety, shall make its appointment," held that the case was a proper one in which to have **[****20]** resort to contemporaneous construction, and reached the conclusion that such contemporaneous construction settled the legality of district electors.

We submit, with great deference, that that learned court was in error in this respect: (a) because the language of the Constitution is so plain, clear and determinate that it requires no interpretation; and (b) because there has, in fact, been no such interpretation.

(a) The rule as to interpretation is thus stated by Mr. Justice Story: "Where its words are plain, clear and determinate they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, scope and design, of the instrument. Contemporary construction is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality **[****21]** of that construction, and the known ability and talents of those by whom it was given, is the credit to which it is entitled. It can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries." Now, in this case, as has already been said, the language is clear, and no interpretation is necessary.

(b) But even if it were otherwise, there has been no such continuous action as to amount to an interpretation. The mere fact that among the variant methods of appointing presidential electors, which came into practice a few years after the adoption of the Constitution, a few of the States did for a time choose electors by districts, is not evidence of any such contemporaneous construction as should conclude the court from giving the true and plain exposition of the text. On the contrary, the fact, which is historical, that all the States which had originally adopted a district system soon abandoned it, and that as early as 1834 presidential electors in every State in the Union were appointed by the State, being chosen either by the popular vote or by the legislature, is evidence that **[****22]** the real contemporaneous construction of this provision was adverse to the district plan.

In [1] the election of 1788, ten States participated. In five, the appointments were made by the legislatures.In two, the electors were elected by the people on a general ticket. In two, the State was divided into congressional districts, in each of which two candidates for elector were chosen, from which the legislature elected one as an elector. In Virginia alone, were the electors elected separately in each district.

Fifteen States took part in the election of 1792. In nine the electors were chosen by the legislature. In three, they were elected by the people on a general ticket. In Virginia, as before, the electors were elected in separate districts, and Massachusetts and North Carolina adopted schemes partaking in part of the nature of an election by the people in districts, and in part of the nature of an election by the legislature.

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[1] In the briefs of counsel this subject is treated much at length, with full references to authorities. A brief summary is thought to be sufficient to make the general line of argument clear.

In the election of 1796 sixteen States took part. **[****23]** In nine, the electors were appointed by the legislature. Two adhered to a popular election on a general ticket. Three adhered to the district system. Massachusetts adhered to its own system and Tennessee delegated the power to citizens named by the legislature.

In 1800 party strife ran high, and some changes were made and others attempted with a view to affect the general result. Massachusetts and Virginia gave up the district system and adopted that of electing by the legislature.Pennsylvania adopted a modified form of the latter system.

The action of the two populous States of Virginia and Massachusetts in abandoning the district method in the election of 1800, but for opposite political or party reasons, settled the fate of that method, and it was only a question of time when it would entirely disappear. The system of electing by general ticket was definitely adopted by North Carolina in 1812, Kentucky and Massachusetts in 1824, Indiana and Illinois in 1828, New York, Delaware, Tennessee, and Maine in 1832; and by Maryland in 1838. Since the presidential election of 1832, the district method has not been used by any State in the union.

This is an abandonment for sixty **[****24]** years; and when the reasons which led the States to this course are considered, it is certainly a most important and significant fact.The method of having the electors appointed by the concurrent or joint vote of the two houses of the legislature of a State, was also abandoned as a part of the same evolution, and with nearly the same unanimity. South Carolina, with a legislature always fresh from the people, continued the practice until 1860. All the other States had abandoned the system by 1828, except Delaware, and it was abandoned there before 1832. During the reconstruction period, before all the Southern States had been re-admitted to Congress and the Union, Florida used the legislative method for a single election, that of 1868, the legislature and state officers having been elected in May, and no other state election being provided for until 1870. Colorado was admitted to the Union August 1, 1876, and a legislature and state officers were elected on the first Tuesday of October. To save the expense and trouble of another election, the legislature made the appointments for that year. The legislative appointments in Florida and Colorado were, therefore, provisional or temporary; **[****25]** and that method was resorted to because of the exceptional conditions, and not for the purpose of overcoming or overriding the political sentiments or preferences of a majority of the people in those States.

The district system of choosing electors was not obnoxious to the Constitution in its original object and purpose, for the reason that if that object and purpose had been attainable and had been actually accomplished, any division in the votes of the electors of a State, would have been the result of an exercise by each elector of his individual judgment and discretion, and not the result of the political will or partisan voice of the district by which he was chosen; but it is obnoxious to that plan as it was practically and ultimately developed, and as it has now for sixty years actually existed. The legislation establishing it in the early history of the nation took place in times of partisan excitement, and should have no more weight with a court as a construction of the Constitution than the law that we are discussing should have weight; for the legislation then was prompted by and born of the very same spirit of which this law is born, a mad desire for temporary power.There **[****26]** is no rule of constitutional interpretation, or of judicial duty, which requires the court, in determining the constitutional validity of the district system, to adhere to the obsolete original design of the Constitution, and to disregard the plan of the electoral college as it actually exists, after a century of practical experience and development.

In the late Mr. Justice Miller's Lectures on the Constitution of the United States, p. 149, is the following: "As originally adopted, and as it now exists, it was supposed that the body of electors interposed between

the state legislatures and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a President selected by immediate popular suffrage on the one side, and the opposite evil of an election by the direct vote of the States in their legislative bodies on the other, would both be avoided. A very short experience, however, demonstrated that these electors, whether chosen by the legislatures of the States, as they were originally, or by the popular suffrage of each State, as they have come to be now, or by **[****27]** limited districts in each State, as was at one time the prevailing system, are always but the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature or the more popular suffrage by which the legislature itself was elected. So that it has come to pass that this curious machinery is only a mode of casting the vote to which a State is entitled in the election of President in favor of that candidate who is the favorite of the majority of the people entitled to vote for the more popular branch of the state legislature in each State."

And in In re Green, 134 U.S. 377, 379, this court said, speaking through Mr. Justice Gray:

"The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors **[****28]** of representatives in Congress. Constitution, art. 1, sects. 2, 3.

In accord with the provisions of the Constitution Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed, and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them. Rev. Stat. §§ 131-143; Acts of February 3, 1887, c. 90, 24 Stat. 373; October 19, 1888, c. 1216, 25 Stat. 613.

"Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States."

II. The Michigan Statute is in violation of the Fourteenth and **[****29]** Fifteenth Amendments to the Constitution of the United States.

The electoral system, as it actually exists, having been recognized by those amendments, the general ticket method for choosing presidential electors was thereby made the permanent and only constitutional method of appointment.

At the time of the adoption of those amendments in every State of the Union the male inhabitants thereof twenty-one years of age, and citizens of the United States, by express provision of law, possessed and exercised the right of voting at an election for the electors of President and Vice President of the United States, and the right of voting for all the electors of President and Vice President of the United States to which the State was entitled.

That this was a right and a privilege no one will deny; that it cannot be abridged by state legislation must be conceded. The only question that remains is: does Act No. 50 of the Public Acts of 1891 deprive any citizen of the United States of twenty-one years of age, who is an inhabitant of Michigan, of his right to vote for electors of President and Vice President of the United States, or does it in any manner abridge this right?

Under the **[****30]** prior law every citizen of the United States who was a male inhabitant of Michigan and twenty-one years of age had the right to vote for as many electors of President and Vice President as the State was entitled to elect of Senators and Representatives in Congress. At the coming election in Michigan that would be fourteen. Under Act No. 50 no such citizen has the right to vote for more than two such electors. In other words, his right under the Fourteenth Amendment, if it is applicable, is to vote for fourteen electors of President and Vice President, while under Act No. 50 that right is so abridged that he can vote for but two. It is too plain for argument that if the amendment applies there is an abridgment, if not a denial, of this right.

I am not unmindful that this reasoning will render necessary the striking out of Article II, section 1, clause 2, of the Constitution, the words "in such manner as the legislature thereof may direct." Such, I believe, to be the effect of the amendment.

The electors of President and Vice President, under the amendment, must be chosen by the votes of the qualified citizens at an election for that purpose. There cannot be any other construction **[****31]** of the words "the right to vote at an election for the choice of electors of President and Vice President of the United States."

It cannot be said that if the voter votes for members of a legislature which chooses the electors, this will satisfy the amendment. The amendment gives him by its express terms the right to vote for "members of the legislature" and "electors of President and Vice President."

This right to vote for electors -- not for one elector, not for as many as the legislature may name, but for all -- this right which is specifically named, cannot be taken away by any subsequent act of a state legislature.

III. The Michigan statute is in conflict with the act of Congress of February 3, 1887, 24 Stat. 373, c. 90. This will be seen by placing the two in parallel columns.

Act of Congress.	**Act No. 50.**
SEC. 1. Electors of each State to meet on the second Monday in January following their appointment.	SEC. 4. Electors shall convene . . . on the first Wednesday in December immediately following their election.
SEC. 3 makes it the duty of the Executive of each State to communicate under the seal of the State to the Secretary of State of the United States a certificate of the ascertainment of the electors appointed setting forth their names, the canvass, and the number of votes for each person for whose appointment any or all votes have been given or cast; also	SEC. 3 makes it the duty of the secretary of state to prepare three lists of the names of the electors and alternate electors, procure thereto the signature of the governor, affix the seal of the State thereto, and deliver such certificates thus signed and sealed to one of the electors on or before the first

Act of Congress.	Act No. 50.
to deliver to the electors of such State the same certificate in triplicate under the seal of the State. . . .	Wednesday of December next following the election.
Such certificate to the electors shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for the transmitting by such electors to the seat of government the lists of all persons voted for as President and of all persons voted for as Vice President.	NOTE. -- That no provision is made in the state act for sending any certificate to the Secretary of State of the United States or any other United States officials and no provision for making any statement of the number of votes given for any and all persons for whose appointment any votes were cast.

[**32]** We understand it to be conceded that, in so far as it conflicts with the act of Congress, the state statute is void.We contend that such a conflict in legislation invalidates the whole act. When an act of a state legislature, purporting to carry out a duty imposed on the State by the Constitution of the United States, directs certain officers of the State to do certain things, which the act of Congress passed in pursuance of the Constitution of the United States, commands other state officers to do and to perform in a different manner, the whole of the state law is illegal and void. The vice of the state law is that it is in hostility to the act of Congress. There is no presumption that the state law was passed in ignorance of the United States law. The legislature are presumed to know the laws of the United States governing state action.

Mr. A. A. Ellis, Attorney General of the State of Michigan, (with whom was Mr. John W. Champlin on the brief,) and Mr. Otto Kirchner, for defendant in error, said, on the question of jurisdiction:

I. The decision of the Supreme Court of the State of Michigan, refusing the mandamus prayed for, is not reviewable by this court, because: (a) **[****33]** The case does not fall within the 25th section of the Judiciary Act, Rev. Stat. § 709; and (b) The subject matter of this controversy is not of judicial cognizance.

(a) Under Rev. Stat. § 709 this court may review the final judgment or decree in any suit by the highest court of a State in the following cases only: (1) Where is drawn in question the validity of a statute of or an authority exercised under the United States, and the decision is against its validity; or (2) Where is drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or (3) Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority. Ryan v. Thomas, 4 Wall. 603; Caperton v. Ballard, 14 Wall. 238; Simmerman v. Nebraska, 116 U.S. 54.

The validity **[****34]** of the law in question is in no way involved in the application for the mandamus. There is nothing inconsistent between it and the statute under which the respondent, secretary of state, is required to act. It cannot, therefore, be claimed that the validity of a statute of the State of Michigan on

the ground of its being repugnant to the Constitution, treaty or laws of the United States, is drawn in question in the mandamus proceeding. The case, therefore, is not within the second subdivision of § 25 of the Judiciary Act.

Neither can it be claimed that any right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and that the decision of the Supreme Court of Michigan was against any such title, right, privilege or immunity. The case, therefore, is not within the last clause of § 25 of the Judiciary Act.

It cannot be contended that it is under the first subdivision of the section.

The duty of the secretary of state to give the statutory notice of the election was a public duty. But conceding, for the sake of argument, that a candidate for office at the next general election **[****35]** has a right under the statute to insist that notice of the election shall be given, and to enforce such right by mandamus; the right, if any, rests entirely upon the statute of the State of Michigan, and is in no way affected by the Constitution, or treaty, or statute, or commission held or authority exercised under the United States.

It is true that the Supreme Court of Michigan in passing upon the relators' right to the mandamus prayed for decided that the law did not conflict with any provision of the Federal Constitution, and that it was void only so far as it conflicted with the Act of Congress. But the expression by the state court of an opinion upon a Federal question does not give this court jurisdiction of the case unless it appears that it was necessary to pass upon the Federal question in order to decide the case; and if a decision might have been reached by the state court without passing upon the Federal question this court will not take cognizance of the cause. Railroad Co. v. Rock, 4 Wall. 177; Lawler v. Walker, 14 How. 149; De Saussure v. Gaillard, 127 U.S. 216.

There are other grounds upon which the decision of the court refusing the mandamus might have been **[****36]** placed without touching any Federal question. A mandamus is not a writ of right in Michigan even when it is asked against a public officer to compel him to discharge a public duty. In all cases it is granted or refused in the sound discretion of the court. People v. Regents of the University of Michigan, 4 Michigan, 98; Mabley v. Superior Court Judge of Detroit, 41 Michigan, 31; Hale v. Risley, 69 Michigan, 596.

(b) The subject-matter of this controversy is not of judicial cognizance.Judicial power is, in its nature, necessarily exclusive. It does not trench upon the domain of any other department of the government. It will not allow any other department of the government to trench upon its domain. A matter is of judicial cognizance when the courts have power to dispose of it finally. Miller on the Constitution, 314; Hayburn's Case, 2 Dall. 408, 409, note; United States v. Ferreira, 13 How. 40; United States v. Yale Todd, 13 How. 52, note; In re Cooper, 143 U.S. 472.

Applying the principles of these decisions to the case at bar, we say that this controversy is not judicial, because whatever decision this court, or any other court, may make as to the validity of the state **[****37]** law, is subject to review by political officers and agencies. See Royce v. Goodwin, 22 Michigan, 496, and Sutherland v. The Governor, 29 Michigan, 320.

The legal status of the situation may be stated thus:

1. The canvass and final-determination as to who is elected to the office of elector rests with the board of state canvassers in the first instance. This decision is not subject to review or control by any court within the State of Michigan.

2. If the decision of the board of canvassers as to who is elected to the office of presidential elector is contested, the final decision of the controversy rests in the next place with the legislature of the State in joint convention. It cannot be contended that the action of the legislature is subject to judicial review or control.

3. It then rests with the governor of the State, whose duty it is to certify the action of the state board of canvassers. He may have to decide between contending boards. The action of the governor, as we have already shown, is not subject to judicial review or control.

4. And, finally, the whole matter rests with both houses of the Congress of the United States.

It is manifest, therefore, that **[****38]** whatever decision the court may render in this case is not final, but is subject to review by the political agencies already referred to.

The object of this proceeding is not to determine whether the notice prayed for in the petition should be given, but to obtain a decision upon the validity of the State law. That decision is, as we have already seen, subject to review, and subject to be utterly disregarded by the various political agencies referred to.

II. This court is bound by the decision of the Supreme Court of Michigan as to all matters sought to be raised by the petition, except the question as to whether the state statute contravenes the Fourteenth Amendment to the Constitution.

The only conflict between the state statute and the act of Congress relates to the time of the meeting of the electors and the certification of their appointment. Wherever the state law and the act of Congress conflict, the latter of course controls. The Supreme Court of Michigan held that what remained of the state law was a valid expression of the legislative will within constitutional limitations. The validity of so much of the state statute as does not conflict with the act of Congress, **[****39]** barring the Federal question already referred ti, is, we submit, a question of local law upon which the determination of the local tribunal is conclusive.

Opinion by: FULLER

Opinion

[*22] **[**6]** **[***873]** MR. CHIEF JUSTICE FULLER, after stating the case as above reported, delivered the opinion of the court. [1]

[*23] The Supreme Court of Michigan held in effect that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

And, having ruled all objections to the validity of the act urged as arising under the state constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the Constitution and laws of the United States.

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[1] The judgment of affirmance was entered as above stated October 17, 1892, and the mandate issued at once. The opinion was delivered and filed November 7, 1892.

We are not authorized to revise the conclusions of the state court on these matters of local law, and those conclusions being accepted, **[****40]** it follows that the decision of the Federal questions is to be regarded as necessary to the determination of the cause. DeSaussure v. Gaillard, 127 U.S. 216.

Inasmuch as under section 709 of the Revised Statutes of the United States, we have jurisdiction by writ of error to re-examine and reverse or affirm the final judgment in any suit in the highest court of a State in which a decision could be had, where the validity of a statute of the State is drawn in question on the ground that it is repugnant to the Constitution and laws of the United States and the decision is in favor of its validity, we perceive no reason for holding that this writ was improvidently brought.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress.

But the judicial power of the United States extends **[****41]** to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. **[*24]** Boyd v. Thayer, 143 U.S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U.S. 672.

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitively disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.

On behalf of plaintiffs in error it is contended that the act is void because in conflict with (1) **[****42]** clause two of section one of Article II of the Constitution of the United States; (2) the Fourteenth and Fifteenth Amendments to the Constitution; and (3) the act of Congress of February 3, 1887.

The second clause of section one of Article II of the Constitution is in these words: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve Congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment because the State is to appoint as a body politic and corporate, and so must act as a unit and cannot delegate the authority to subdivisions created **[****43]** for the purpose; and it is argued that the appointment **[*25]** of electors by

districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.

"A State in the ordinary sense of the Constitution," said Chief Justice Chase, Texas v. White, 7 Wall. 700, 721, "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The State does not act by its people in their **[***874]** collective capacity, but through such political agencies as are duly constituted and established. The **[**7]** legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed. The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several States and the citizens of each State. What is forbidden or required **[****44]** to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.The clause under consideration does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the State in its entirety because **[****45]** arrived **[*26]** at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed.

By the first paragraph of section two, Article I, it is provided: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature;" and by the third paragraph "when vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Section four reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Although it is thus declared that the people of the several States shall choose the members of Congress, (language which induced **[****46]** the State of New York to insert a salvo as to the power to divide into districts, in its resolutions of ratification,) the state legislatures, prior to 1842, in prescribing the times, places and manner of holding elections for representatives, had usually apportioned the State into districts, and assigned to each a representative; and by act of Congress of June 25, 1842, 5 Stat. 491, c. 47, (carried forward as § 23 of the Revised Statutes), it was provided that where a State was entitled to more than one representative, the election should be by districts. It has never been doubted that representatives in Congress thus chosen represented the entire people of the State acting in their sovereign capacity.

By original clause three of section one of Article II, and by the Twelfth Amendment which superseded that clause, in case of a failure in the election of President by the people, the House of Representatives is to choose the President; and "the vote shall be taken by States, the representation from [*27] each State having one vote." The State acts as a unit and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in Congress elected [****47] by districts.

The State also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors.It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them [****48] to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled. Stuart v. Laird, 1 Cranch, 299, 309.

It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as [**8] conveying the broadest power of determination. It was used in Article V of the Articles of Confederation, which provided that "delegates shall be annually appointed in such manner as the legislature [*28] of each State shall direct;" and in the resolution of Congress of February 21, 1787, which declared it expedient that "a convention of delegates who shall have been appointed by the several States," should be held.The appointment of delegates was, in fact, made by the legislatures directly, but [****49] that involved [***875] no denial of authority to direct some other mode. The Constitutional Convention, by resolution of September 17, 1787, expressed the opinion that the Congress should fix a day "on which electors should be appointed by the States which shall have ratified the same," etc., and that "after such publication, the electors should be appointed, and the Senators and Representatives elected."

The Journal of the Convention discloses that propositions that the President should be elected by "the citizens of the United States," or by the "people," or "by electors to be chosen by the people of the several States," instead of by the Congress, were voted down, (Jour. Con. 286, 288; 1 Elliot's Deb. 208, 262,) as was the proposition that the President should be "chosen by electors appointed for that purpose by the legislatures of the States," though at one time adopted. Jour. Con. 190; 1 Elliot's Deb. 208, 211, 217. And a motion to postpone the consideration of the choice "by the national legislature," in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in Committee of the Whole. Jour. Con. 92; 1 Elliot's [****50] Deb. 156. Gerry proposed that the choice should be made by the State executives; Hamilton, that the election be by electors chosen by electors

chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, **[*29]** that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other **[****51]** ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey and South Carolina. Pennsylvania, by act of October 4, 1788, Acts Penn. 1787-1788, p. 513, provided for the election of electors on a general ticket. Virginia, by act of November 17, 1788, was divided into twelve separate districts and an elector elected in each district, while for the election of Congressmen the State was divided into ten other districts. Laws Va. Oct. Sess. 1788, pp. 1, 2; 12 Henning's **[****52]** Stat. 648. In Massachusetts the general court, by resolve of November 17, 1788, divided the State into districts for the election of Representatives in Congress, and provided for their election December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of President and Vice President of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. Mass. Resolves, 1788, p. 53. In Maryland, **[*30]** under act of December 22, 1788, electors were elected on general ticket, five being residents of the Western Shore and three of the Eastern Shore. Laws Md. 1788, Nov. Sess. c. 10. In New Hampshire an act was passed November 12, 1788, Laws N.H. 1789, p. 167, providing for the election of five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equalled double the number of electors elected. There being no choice the appointment was made **[****53]** by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the State might not be lost, to concur in the electors chosen by the senate. The State of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the Constitution.

Fifteen States participated in the second **[**9]** presidential election, in nine of which electors were chosen by the legislatures. Maryland, (Laws Md. 1790, c. 16, [2 Kelty]; Laws 1791, c. 62, [2 Kelty],) New Hampshire, (Laws N.H. 1792, 398, 401,) and Pennsylvania (Laws Penn. 1792, p. 240,) elected their

electors on a general ticket, and Virginia by districts. Laws Va. 1792, p. 87, [13 Henning, 536]. In Massachusetts the general court by resolution of June 30, 1792, divided the State into four districts, in each of two of which five electors were elected, and in each of the other **[****54]** two three electors. Mass. Resolves, June, 1792, p. 25. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the House of Representatives. The legislature was not in session and did not meet until November 15, while under the act of Congress of March 1, 1792, (1 Stat. 239, c. 8,) the electors were to assemble on December 5. The legislature passed an act dividing the State into four districts, and directing the members of the legislature residing in each district to meet on the 25th of November and choose three electors. 2 Iredell N. **[*31]** Car. Laws, 1715 to 1800, c. 15 of 1792. At the same session an act was passed dividing the State **[***876]** into districts for the election of electors in 1796, and every four years thereafter. Id. c. 16.

Sixteen States took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine States the electors were appointed by the legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, was entitled "An act to alter the mode of electing **[****55]** electors," and provided for dividing the State into ten districts, each of which districts should "elect and appoint one person, being a resident of the said district, as an elector." Laws Md. 1795, c. 73, [2 Kelty]. Massachusetts adhered to the district system, electing one elector in each Congressional district by amajority vote. It was provided that if no one had a majority, the legislature should make the appointment on joint ballot, and the legislature also appointed two electors at large in the same manner. Mass. Resolves, June, 1796, p. 12. In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, "one in the district of Washington, one in the district of Hamilton, and one in the district of Mero," and, "that the said electors may be elected with as little trouble to the citizens as possible," certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others **[****56]** of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Laws Tenn. 1794, 1803, p. 109; Acts 2d Sess. 1st Gen. Assembly Tenn. c. 4.Electors were chosen by the persons thus designated.

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least "until some uniform mode of choosing a President and Vice-President of the United States shall be prescribed by an amendment **[*32]** to the Constitution." Laws Va. 1799, 1800, p. 3.Massachusetts passed a resolution providing that the electors of that State should be appointed by joint ballot of the senate and house. Mass. Resolves, June, 1800, p. 13. Pennsylvania appointed by the legislature, and upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17. Six States, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which had theretofore followed that course. Tennessee, by act of October 26, 1799, designated persons by name to choose its three electors as under the **[****57]** act of 1796. Laws Tenn. 1794-1803, p. 211; Acts 2d Sess. 2d Gen. Ass. Tenn. c. 46.

Without pursuing the subject further, it is sufficient to observe that, while most of the States adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824 and 1828. Massachusetts used the general ticket system, in 1804, (Mass. Resolves, June, 1804, p. 19,) chose

electors by joint ballot of the legislature in 1808 and in 1816, (Mass. Resolves, 1808, pp. 205, 207, 209; 1816, p. 233;) used the district system again in 1812 and in 1820, (Mass. Resolves, 1812, p. 94; 1820, p. 245;) and returned to the general ticket system in 1824, (Mass. Resolves, 1824, p. 40.) In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. N.Y. Rev. Stat. 1827, Part I, Title vi, c. 6. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in **[****58]** all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the States excepting South Carolina, where the legislature chose them up to and including 1860. Journals 1860, Senate pp. 12, 13; House, 11, **[*33]** 15, 17. And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166,) and by Colorado in 1876, as prescribed by § 19 of the schedule to the constitution of the State, which was admitted into the Union **[**10]** August 1, 1876. Gen. Laws Colorado, 1877, pp. 79, 990.

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly fifty years after the adoption of that instrument, after stating that "in some States the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole State; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district," adds: "No question has ever arisen as to the constitutionality of either **[****59]** mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, (3 Elliot's Deb. 100, 101,) has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it." And he remarks that "it has been thought desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people." Story Const. 1st Ed. § 1466.

Such an amendment was urged at the time of the adoption of the Twelfth Amendment, the suggestion being that all electors should be chosen by popular vote, the States to be divided for that purpose into districts. It was brought **[***877]** up again in Congress in December, 1813, but the resolution for submitting the amendment failed to be carried. The amendment was renewed in the House of Representatives in December, **[*34]** 1816, and a provision for the division of the States into single districts for the choice of electors received a majority vote, but not two-thirds. Like amendments were offered in the Senate by Messrs. Sanford of New York, Dickerson **[****60]** of New Jersey and Macon of North Carolina. December 11, 1823, Senator Benton introduced an amendment providing that each legislature should divide its State into electoral districts, and that the voters of each district "should vote, in their own proper persons," for President and Vice-President, but it was not acted upon. December 16, and December 24, 1823, amendments were introduced in the Senate by Messrs. Dickerson of New Jersey and Van Buren of New York, requiring the choice of electors to be by districts; but these and others failed of adoption, although there was favorable action in that direction by the Senate in 1818, 1819 and 1822. December 22, 1823, an amendment was introduced in the House by Mr. McDuffie of South Carolina, providing that electors should be chosen by districts assigned by the legislatures, but action was not taken. [1] The subject was again brought forward in 1835, 1844, and subsequently, but need not be further dwelt

[1] 1 Benton's Thirty Years View, 37; 5 Bent. Cong. Deb. 110, 677; 7 Id. 472-74, 600; 3 Niles' Reg. 240, 334; 11 Id. 258, 274, 293, 349; Annals Cong., (1812-13,) 847.

upon, except that it may be added that, on the 28th of May, 1874, a report was made by Senator Morton, chairman of the Senate Committee on Privileges and Elections, recommending an amendment dividing the States into electoral districts, [****61] and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the [*35] Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st [****62] Sess. 43 Cong. No. 395.

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Even in the heated controversy of 1876-1877 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged; and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.

In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in In re Green, 134 U.S. 377, 379, " [**11] no more officers or agents of the United States than are the members of the state legislatures when acting as electors of Federal senators, or the people [****63] of the States when acting as the electors of representatives in Congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.

The question before us is not one of policy but of power, and [*36] while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of [****64] the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

It is argued that the district mode of choosing electors, while not obnoxious to constitutional objection, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon

demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors the original expectation may be said to have been frustrated. Miller on Const. Law, 149; Rawle on Const. 55; Story Const. § 1473; The Federalist, No. 68. But we can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. **[****65]** Still less can we recognize the doctrine, that because the Constitution has been found in the march **[***878]** of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

[*37] Nor are we able to discover any conflict between this act and the Fourteenth and Fifteenth Amendments to the Constitution. The Fourteenth Amendment provides:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SECTION 2. Representatives shall be apportioned among the several States according to their **[****66]** respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

The first section of the Fifteenth Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

In The Slaughter-house Cases, 16 Wall. 36, this court held that the first clause of the Fourteenth Amendment was primarily intended to confer citizenship on the negro race; and, secondly, to give definitions of citizenship **[****67]** of the United States; and citizenship of the States, and it recognized the distinction between citizenship of a State and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the States embrace generally those fundamental civil rights for the security and establishment of which organized **[*38]** society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause of the Fourteenth Amendment.

We decided in Minor v. Happersett, 21 Wall. 162, [**12] that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for [****68] the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the State; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the Fourteenth Amendment made all citizens voters.

The Fifteenth Amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. United States v. Cruikshank, 92 U.S. 542; United States v. Reese, 92 U.S. 214.

If because it happened, at the time of the adoption of the Fourteenth Amendment, that those who exercised the elective franchise in the State of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of Article II has been so amended that the States can no longer appoint [****69] in such manner as the legislatures thereof may direct; and yet no such result is indicated by the language used nor are the amendments necessarily inconsistent with that clause. The first [*39] section of the Fourteenth Amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the State having attained majority, and being a citizen of the United States, then the basis of representation to which each State is entitled in the Congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State.There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote [****70] for presidential electors.

The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. In re Kemmler, 136 U.S. 436.

The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being [***879] singled out as a special subject for discriminating and hostile legislation. Pembina Company v. Pennsylvania, 125 U.S. 181, 188.

In Hayes v. Missouri, 120 U.S. 68, 71, Mr. Justice Field, speaking for the court, said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.As we said in Barbier [****71] v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some [*40] and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its

application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U.S. 237."

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of Article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect.

The third clause of section 1 of Article II of the Constitution is: "The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

Under the act of Congress of March 1, 1792, **[****72]** 1 Stat. 239, c. 8, it was provided that the electors should meet and give their votes on the first Wednesday in December at such place in each State as should be directed by the legislature thereof, and by act of Congress of January 23, 1845, 5 Stat. 721, c. 2, that the electors should be appointed in each State on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed; provided that each State might by law provide for the filling of any vacancies in its college of electors when such college meets to give its electoral vote; and provided that when any State shall have held an election for the purpose of choosing electors and has failed to **[**13]** make a choice on the day prescribed, then the electors may be appointed on a subsequent day in such manner as the State may by law provide. These provisions were carried forward into sections 131, 133, 134, and 135 of the Revised Statutes. Rev. Stat. Title III, c. 1, p. 22.

By the act of Congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice President," etc., 24 Stat. 373, c. 90, it was provided that the electors of **[****73]** each State should meet and give their **[*41]** votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by Congress. In this respect it is in conflict with the act of Congress, and must necessarily give way. But this part of the act is not so inseparably connected in substance with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of Congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. The state law yields only to the extent of the collision. Cooley Const. Lim. * 178; Commonwealth v. Kimball, 24 Pick. 359; Houston v. Moore, 5 Wheat. 1, 49. The construction to this effect by the state court is of persuasive force, if not of controlling weight.

We do not think this result affected by the provision in act No. 50 in relation to a tie vote. Under the constitution of the State of Michigan, in case two or more persons have an equal and the highest number of **[****74]** votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention chooses one of these persons to fill the office. This rule is recognized in this act, which also makes it the duty of the governor in such case to convene the legislature in special session for the purpose of its application, immediately upon the determination by the board of state canvassers.

We entirely agree with the Supreme Court of Michigan that it cannot be held as matter of law that the legislature would not have provided for being convened in special session but for the provision relating to

the time of the meeting of the electors contained in the act; and are of opinion that that date may be rejected and the act be held to remain otherwise complete and valid.

And as the State is fully empowered to fill any vacancy which may occur in its electoral college, when it meets to give its electoral vote, we find nothing in the mode provided for anticipating such an exigency which operates to invalidate the law.

[*42] We repeat that the main question arising for consideration is one of power and not of policy, and we are unable to arrive at any other conclusion than **[****75]** that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the Constitution of the United States for want of power in its enactment.

The judgment of the Supreme Court of Michigan must be

Affirmed.

Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n

Supreme Court of the United States

March 2, 2015, Argued; June 29, 2015, Decided

No. 13-1314

Reporter
576 U.S. 787 *; 135 S. Ct. 2652 **; 192 L. Ed. 2d 704 ***; 2015 U.S. LEXIS 4253 ****; 83 U.S.L.W. 4633; 25 Fla. L. Weekly Fed. S 533

ARIZONA STATE LEGISLATURE, Appellant v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: As Amended July, 2, 2015.

Prior History: [****1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047, 2014 U.S. Dist. LEXIS 21871 (D. Ariz., 2014)

Disposition: Affirmed.

Syllabus

[*787] [*713] [**2655]** Under Arizona's Constitution, the electorate shares lawmaking authority on equal footing with the Arizona Legislature. The voters may adopt laws and constitutional amendments by ballot initiative, and they may approve or disapprove, by referendum, measures passed by the Legislature. Ariz. Const., Art. IV, pt. 1, §1. "Any law which may be enacted by the Legislature . . . may be enacted by the people under the Initiative." Art. XXII, §14.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map the AIRC adopted in 2012 for congressional districts, arguing that the AIRC and its map violated the "Elections Clause" of the U.S. Constitution, which provides: "The Times, Places and Manner of holding Elections for Senators **[****2]** and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Because "Legislature" means the State's representative assembly, the Arizona Legislature contended, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. A three-judge District Court held that the Arizona Legislature had standing to sue, but rejected its complaint on the merits.

Held:

1. The Arizona Legislature has standing to bring this suit. In claiming that Proposition 106 stripped it of its alleged constitutional prerogative to engage in redistricting and that its injury would be remedied by a court order enjoining the proposition's enforcement, the Legislature **[**2656]** has shown injury that is 'concrete and particularized' and 'actual or imminent,' " *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170, "fairly traceable to the challenged action," and "redressable by a favorable ruling," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 1140, 185 L. Ed. 2d 264, 269. Specifically, **[*788]** Proposition 106, together with the Arizona Constitution's ban on efforts by the Arizona Legislature to undermine the pur- **[***714]** poses of an initiative, would "completely nullif[y]" any vote by the Legislature, now or "in the **[****3]** future," purporting to adopt a redistricting plan. *Raines* v. *Byrd*, 521 U.S. 811, 823-824, 117 S. Ct. 2312, 138 L. Ed. 2d 849. Pp. ___ - ___, 192 L. Ed. 2d, at 721-724.

2. The Elections Clause and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts. Pp. ___ - ___, 192 L. Ed. 2d, at 724-736.

(a) Redistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 567, 36 S. Ct. 708, 60 L. Ed. 1172, and the Governor's veto, *Smiley* v. *Holm*, 285 U.S. 355, 369, 52 S. Ct. 397, 76 L. Ed. 795. While exercise of the initiative was not at issue in this Court's prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking. Pp. ___ - ___, 192 L. Ed. 2d, at 724-727.

(b) Title 2 U.S.C. §2a(c)-which provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it must follow federally prescribed redistricting procedures--permits redistricting in accord with Arizona's initiative. From 1862 through 1901, apportionment Acts required a State to follow federal procedures unless "the [state] legislature" drew district lines. In 1911, Congress, recognizing that States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, replaced the reference to redistricting by the state "legislature" with a reference to redistricting of a State "in the manner **[****4]** provided by the laws thereof." §4, 37 Stat. 14. The Act's legislative history "leaves no . . . doubt," *Hildebrant*, 241 U.S., at 568, 36 S. Ct. 708, 60 L. Ed. 1172, that the change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437. "If they include [the] initiative, it is included." *Id.*, at 3508. Congress used virtually identical language in enacting §2a(c) in 1941. This provision also accords full respect to the redistricting procedures adopted by the States. Thus, so long as a State has "redistricted in the manner provided by the law thereof"--as Arizona did by utilizing the independent commission procedure in its Constitution--the resulting redistricting plan becomes the presumptively governing map.

Though four of §2a(c)s five default redistricting procedures--operative only when a State is not "redistricted in the manner provided by [state] law"--have become obsolete as a result of this Court's decisions embracing the one-person, one-vote principle, this infirmity does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." Pp. ___ - ___, 192 L. Ed. 2d, at 727-729.

[*789] (c) The Elections Clause permits the people of Arizona to provide for redistricting by independent commission. The history **[****5]** and purpose of the Clause weigh heavily against precluding the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such preclusion would also run up against the Constitution's animating principle that the **[**2657]** people themselves are the originating source of all the **[***715]** powers of government. Pp. ___ - ___, 192 L. Ed. 2d, at 729-736.

(1) The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S., at ___, 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 . Ratification arguments in support of congressional oversight focused on potential abuses by state politicians, but the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. Pp. ___ - ___, 192 L. Ed. 2d, at 730-731.

(2) There is no suggestion that the Election Clause, by specifying "the Legislature thereof," required assignment of congressional redistricting authority to the State's representative body. It is characteristic of the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government. See, *e.g.*,*Alden* v. *Maine*, 527 U.S. 706, 752, 119 S. Ct. 2240, 144 L. Ed. 2d 636. "Through the structure of its **[****6]** government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority, Ariz. Const., Art. IV. The Elections Clause should not be read to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. And reading the Clause to permit the use of the initiative to control state and local elections but not federal elections would "deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, p. 374 (Hamilton). Pp. ___ - ___, 192 L. Ed. 2d, at 731-733.

(3) The Framers may not have imagined the modern initiative process in which the people's legislative power is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. It would thus be perverse to interpret **[****7]** "Legislature" in the Elections Clause to exclude lawmaking by the people, particularly when such lawmaking is intended to advance the prospect **[*790]** that Members of Congress will in fact be "chosen . . . by the People of the several States." Art. I, §2. Pp. ___ - ___, 192 L. Ed. 2d, at 733-735.

(4) Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would not just stymie attempts to curb gerrymandering. It would also cast doubt on numerous other time, place, and manner regulations governing federal elections that States have adopted by the initiative method. As well, it could endanger election provisions in state constitutions adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Pp. ___ - ___, 192 L. Ed. 2d, at 735-736.

997 F. Supp. 2d 1047, affirmed.

Counsel: Paul D. Clement argued the cause for appellant.

Eric J. Feigin argued the cause for the United States, as amicus curiae, by special leave of court.

Seth P. Waxman argued the cause for appellees.

Judges: Ginsburg, J., **[***716]** delivered the opinion of the Court, in which Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined.

Opinion by: GINSBURG

Opinion

[*791] **[***716]** **[**2658]** Justice **Ginsburg** delivered the opinion of the Court.

This case concerns an endeavor by Arizona **[****8]** voters to address the problem of [1] partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power. [1] "[P]artisan gerrymanders," this Court has recognized, "[are incompatible] with democratic principles." *Vieth* v. *Jubelirer*, 541 U.S. 267, 292, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (plurality opinion); *id.*, at 316, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (Kennedy, J., concurring in judgment). Even so, the Court in *Vieth* did not grant relief on the plaintiffs' partisan gerrymander claim. **[*792]** The plurality held the matter nonjusticiable. *Id.*, at 281, 124 S. Ct. 1769, 158 L. Ed. 2d 546. Justice Kennedy found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation. *Id.*, at 317, 124 S. Ct. 1769, 158 L. Ed. 2d 546.

[2] In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." App. 50. Proposition 106 amended Arizona's Constitution **[****9]** to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, Brief for Appellant 42, 47; Tr. of Oral Arg. 3-4, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the **[**2659]** Commission and its map for congressional districts violated the "Elections Clause" of the U.S. Constitution. That Clause, critical to the resolution of this case, provides:

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[1] The term "gerrymander" is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander. See E. Griffith, The Rise and Development of the Gerrymander 16-19 (Arno ed. 1974).

[3] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." Art. I, §4, cl. 1.

The Arizona Legislature's complaint alleged that "[t]he word 'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people," **[****10]** App. 21, ¶37; so read, the Legislature urges, the Clause precludes **[***717]** resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, "the Legislature" **[*793]** is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature's complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? 573 U.S. 990, 135 S. Ct. 46, 189 L. Ed. 2d 895 (2014).

We now affirm the District Court's judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that [4] lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission **[****11]** is used in districting for Arizona's own Legislature.

I

A

[Direct lawmaking by the people was "virtually unknown when the Constitution of 1787 was drafted."] Donovan & Bowler, An Overview of Direct Democracy in the American States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998). There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's townhall meetings and the submission of early state constitutions to the people for ratification. See Lowell, The Referendum in the United States, in The Initiative, Referendum and Recall 126, 127 (W. Munro ed. 1912) (hereinafter IRR); W. Dodd, The Revision and **[*794]** Amendment of State Constitutions 64-67 (1910). [2] But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States. See generally Persily, The Peculiar Geography of Direct Democracy: Why **[**2660]** the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11 (1997).

[5] The two main "agencies of direct legislation" are the initiative and the referendum. Munro, Introductory, in IRR 8. The initiative operates entirely outside the States' representative assemblies; it

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[2]The Massachusetts Constitution of 1780 is illustrative of the understanding that the people's authority could trump the state legislature's. Framed by a separate **[****12]** convention, it was submitted to the people for ratification. That occurred after the legislature attempted to promulgate a Constitution it had written, an endeavor that drew opposition from many Massachusetts towns. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 96-101 (1996); G. Wood, The Creation of the American Republic, 1776-1787, pp. 339-341 (1969).

allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." D. Magleby, Direct Legislation 1 (1984). **[***718]** While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls." *Ibid.* "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission." Johnson, Direct Legislation as an Ally of Representative Government, **[****13]** in IRR 139, 142.

In 1898, South Dakota took the pathmarking step of affirming in its Constitution the people's power "directly [to] control the making of all ordinary laws" by initiative and referendum. Introductory, *id.*, at 9. In 1902, Oregon became the first State to adopt the initiative as a means, not only to enact ordinary laws, but also to amend the State's Constitution. J. Dinan, The American State Constitutional **[*795]** Tradition 62 (2006). By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State's Constitution. *Id.*, at 62, and n. 132, 94, and n. 151. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. *Ibid.* [3]

B

For the delegates to Arizona's constitutional convention, direct lawmaking was a "principal issu[e]." J. Leshy, The Arizona State Constitution 8-9 (2d ed. 2013) (hereinafter Leshy). By a margin of more than three to one, the people of Arizona ratified the State's Constitution, which included, among lawmaking means, initiative and referendum provisions. *Id.*, at 14-16, 22. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. *Id.*, at 22.

In particular, [7] the Arizona Constitution "establishes the electorate [of Arizona] as a coordinate source of legislation" on equal footing with the representative legislative body. *Queen Creek Land & Cattle Corp.* v. *Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451, 501 P. 2d 391, 393 (1972); *Cave Creek Unified School Dist.* v. *Ducey*, 233 Ariz. 1, 4, 308 P. 3d 1152, 1155 (2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks omitted)). The initiative, housed under the article of the Arizona Constitution concerning the **[*796]** "Legislative Department" and the section defining the State's "legislative authority," reserves for the people "the power to propose laws and amendments to the constitution." Art. IV, pt. 1, §1. **[**2661]** The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution **[****15]** may be enacted by the people under the Initiative." Art. XXII, §14. Accordingly, "[g]eneral references to the power of the 'legislature'" in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass **[***719]** their elected representatives and make laws directly through the initiative." Leshy xxii.

C

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[3] [6] The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118, 137, 151, 32 S. Ct. 224, 56 L. Ed. 377 (1912) (rejecting challenge to referendum mounted under Article IV, §4's undertaking by the United States to "guarantee to every State in th[e] Union a Republican Form of Government"). But see *New York* v. *United States*, 505 U.S. 144, 185, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("[P]erhaps not all claims under the **[****14]** Guarantee Clause present nonjusticiable political questions.").

Proposition 106, vesting redistricting authority in the AIRC, was adopted by citizen initiative in 2000 against a "background of recurring redistricting turmoil" in Arizona. Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1831 (2012). Redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970's, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965. See *id.*, at 1830-1832. [4]

[8] Aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections," App. 50, Proposition 106 amended the Arizona Constitution to remove congressional redistricting authority from the state **[*797]** legislature, lodging that authority, instead, in a new entity, the AIRC. Ariz. Const., Art. IV, pt. 2, §1, ¶¶3-23. The AIRC convenes after each census, establishes final district boundaries, and certifies the new districts to the Arizona Secretary of State. ¶¶16-17. [9] The Legislature may submit nonbinding recommendations to the AIRC, ¶16, and is required to make necessary appropriations for its operation, ¶18. The highest ranking officer and minority leader of each chamber of the Legislature each select one member of the AIRC from a list compiled by Arizona's Commission on Appellate Court Appointments. ¶¶4-7. The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission. ¶8. A Commission's tenure is confined to one redistricting cycle; each member's time in office "expire[s] upon the appointment of the first member of the next **[****17]** redistricting commission." ¶23.

[10] Holders of, or candidates for, public office may not serve on the AIRC, except candidates for or members of a school board. ¶3. No more than two members of the Commission may be members of the same political party, *ibid.*, and the presiding fifth member cannot be registered with any party already represented on the Commission, ¶8. Subject to the concurrence of two-thirds of the Arizona Senate, AIRC members may be removed by the Arizona Governor for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office. ¶10. [5]

[*798] **[**2662]** Several **[****18]** other States, as a means to curtail partisan gerrymandering, **[***720]** have also provided for the participation of commissions in redistricting. Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting. [6] The California Redistricting Commission, established by popular initiative, develops redistricting plans which can be halted by public referendum. [7] Still other States have given commissions

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[4] From Arizona's admission to the Union in 1912 to 1940, no congressional districting occurred because Arizona had only one Member of Congress. K. Martis, The Historical Atlas of United States Congressional Districts, 1789-1983, p. 3 (1982) (Table 1). Court-ordered congressional districting plans were in place from 1966 to 1970, and from 1982 through 2000. See *Klahr* v. *Williams*, 313 F. Supp. 148 (Ariz. 1970); *Goddard* v. *Babbitt*, 536 F. Supp. 538 (Ariz. 1982); *Arizonans for Fair Representation* v. *Symington*, 828 F. Supp. 684 (Ariz. 1992); Norrander & Wendland, **[****16]** Redistricting in Arizona, in Reapportionment and Redistricting in the West 177, 178-179 (G. Moncrief ed. 2011).

[5] In the current climate of heightened partisanship, the AIRC has encountered interference with its operations. In particular, its dependence on the Arizona Legislature for funding, and the removal provision have proved problematic. In 2011, when the AIRC proposed boundaries the majority party did not like, the Governor of Arizona attempted to remove the Commission's independent chair. Her attempt was stopped by the Arizona Supreme Court. See Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1835-1836 (2012) (citing *Mathis* v. *Brewer*, No. CV-11-0313-SA (Ariz. 2011)); *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012).

[6] See Haw. Const., Art. IV, §2, and Haw. Rev. Stat. §§25-1 to 25-9 (2009 and 2013 Cum. Supp.); Idaho Const., Art. III, §2; Mont. Const., Art. V, §14; N. J. Const., Art. II, §2; Wash. Const., Art. II, §43.

an auxiliary role, advising the legislatures on redistricting, [8] or serving as a "backup" in the event the State's representative body fails to complete redistricting. [9] Studies report that nonpartisan and bipartisan commissions generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge. See Miller & Grofman, Redistricting Commissions in the Western United States, 3 U. C. Irvine L. Rev. 637, 661, 663-664, 666 (2013).

D

On January 17, 2012, the AIRC approved final congressional and state legislative maps based on the 2010 census. See Arizona Independent Redistricting, Final Maps, http://azredistricting.org/Maps/Final-Maps/default.asp (all Internet materials as visited June 25, 2015, and included in Clerk of **[****19]** Court's case file). Less than five months later, on June 6, 2012, the Arizona Legislature filed suit in the United States District Court for the District of Arizona, naming as defendants the AIRC, its five members, and the Arizona Secretary of State. The Legislature sought both a declaration **[*799]** that Proposition 106 and congressional maps adopted by the AIRC are unconstitutional, and, as affirmative relief, an injunction against use of AIRC maps for any congressional election after the 2012 general election.

A three-judge District Court, convened pursuant to 28 U.S.C. §2284(a), unanimously denied a motion by the AIRC to dismiss the suit for lack of standing. The Arizona Legislature, the court determined, had "demonstrated that its loss of redistricting power constitute[d] a [sufficiently] concrete injury." 997 F. Supp. 2d 1047, 1050 (2014). On the merits, dividing two to one, the District Court granted the AIRC's motion to dismiss the complaint for failure to state a claim. Decisions of this Court, the majority concluded, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.*, at 1054. As the "lawmaking power" in Arizona "plainly includes the power to enact **[****20]** laws through initiative," the District Court held, the "Elections Clause permits [Arizona's] establishment and use" of the Commission. *Id.*, at 1056. Judge Rosenblatt dissented in part. **[***721]** Proposition 106, in his view, unconstitutionally denied "the **[**2663]** Legislature" of Arizona the "ability to have any outcome-defining effect on the congressional redistricting process." *Id.*, at 1058.

We postponed jurisdiction, and now affirm.

II

We turn first to the threshold question: Does the Arizona Legislature have standing to bring this suit? [11] Trained on "whether the plaintiff is [a] proper party to bring [a particular lawsuit,]" standing is "[o]ne element" of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines* v. *Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). "To qualify as a party with standing to litigate," the Arizona Legislature "must show, first and foremost," injury in the form of "'invasion of a legally **[*800]** protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The Legislature's injury also must be "fairly traceable to the

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[7] See Cal. Const., Art. XXI, §2; Cal. Govt. Code Ann. §§8251-8253.6 (West Supp. 2015).

[8] See Iowa Code §§42.1-42.6 (2013); Ohio Rev. Code Ann. §103.51 (Lexis 2014); Me. Const., Art. IV, pt. 3, §1-A.

[9] See Conn. Const., Art. III, §6; Ind. Code §3-3-2-2 (2014).

challenged action" and "redressable by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 1147, 185 L. Ed. 2d 264, 275 (2013) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it "primary **[****21]** responsibility" for redistricting. Brief for Appellant 51, 53. To exercise that responsibility, the Legislature urges, it must have at least the opportunity to engage (or decline to engage) in redistricting before the State may involve other actors in the redistricting process. See *id.*, at 51-53. Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature's action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, see *infra*, at ___ - ___, 192 L. Ed. 2d, at 729-736, [12] one must not "confus[e] weakness on the merits with absence of Article III standing." *Davis* v. *United States*, 564 U.S. 229, 249, n. 10, 564 U.S. 229, 131 S. Ct. 2419, 2434, 180 L. Ed. 2d 285, 302 (2011); see *Warth* v. *Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits" of the claim).

The AIRC argues that the Legislature's alleged injury is insufficiently concrete to meet the standing requirement absent some "specific legislative act that would have taken effect but for Proposition 106." Brief for Appellees 20. The United States, as *amicus curiae* ***[****22]***, urges that even more is needed: The Legislature's injury will remain speculative, the United States contends, unless and until the Arizona Secretary of State refuses to implement a competing redistricting **[*801]** plan passed by the Legislature. Brief for United States 14-17. In our view, the Arizona Legislature's suit is not premature, nor is its alleged injury too "conjectural" or "hypothetical" to establish standing. *Defenders of Wildlife*, **[***722]** 504 U.S., at 560, 112 S. Ct. 2130 119 L. Ed. 2d 351 (internal quotation marks omitted).

Two prescriptions of Arizona's Constitution would render the Legislature's passage of a competing plan and submission of that plan to the Secretary of State unavailing. Indeed, those actions would directly and immediately conflict with the regime Arizona's Constitution establishes. Cf. **[**2664]** *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 944, n. 2, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (failure to apply for permit which "would not have been granted" under existing law did not deprive plaintiffs of standing to challenge permitting regime). First, [13] the Arizona Constitution instructs that the Legislature "shall not have the power to adopt any measure that supersedes [an initiative], in whole or in part, . . . unless the superseding measure furthers the purposes" of the initiative. Art. IV, pt. 1, §1(14). Any redistricting map passed by the Legislature **[****23]** in an effort to supersede the AIRC's map surely would not "furthe[r] the purposes" of Proposition 106. Second, [14] once the AIRC certifies its redistricting plan to the Secretary of State, Arizona's Constitution requires the Secretary to implement that plan and no other. See Art. IV, pt. 2, §1(17); *Arizona Minority Coalition for Fair Redistricting* v. *Arizona Independent Redistricting Comm'n*, 211 Ariz. 337, 351, 121 P. 3d 843, 857 (App. 2005) (*per curiam*) ("Once the Commission certifies [its] maps, the secretary of state must use them in conducting the next election."). To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government.

Raines v. *Byrd*, 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997), does not aid AIRC's argument that there is no standing here. In *Raines*, this Court held that six *individual Members* of Congress lacked **[*802]** standing to challenge the Line Item Veto Act. *Id.*, at 813-814, 829-830, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (holding specifically and only that "individual members of Congress [lack] Article III

standing"). The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers' votes. *Id.*, at 815-817, 117 S. Ct. 2312, 138 L. Ed. 2d 849. The "institutional injury" **[****24]** at issue, we reasoned, scarcely zeroed in on any individual Member. *Id.*, at 821, 117 S. Ct. 2312, 138 L. Ed. 2d 849. "[W]idely dispersed," the alleged injury "necessarily [impacted] all Members of Congress and both Houses . . . equally." *Id.*, at 829, 821, 117 S. Ct. 2312, 138 L. Ed. 2d 849. None of the plaintiffs, therefore, could tenably claim a "personal stake" in the suit. *Id.*, at 830, 117 S. Ct. 2312, 138 L. Ed. 2d 849.

In concluding that the individual Members lacked standing, the Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress." *Id.*, at 829, 117 S. Ct. 2312, 138 L. Ed. 2d 849. "[I]ndeed," the Court observed, "both houses actively oppose[d] their suit." *Ibid.* Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and **[***723]** it commenced this action after authorizing votes in both of its chambers, App. 26-27, 46. That "different . . . circumstanc[e]," 521 U.S., at 830, 117 S. Ct. 2312, 138 L. Ed. 2d 849, was not *sub judice* in *Raines*. [10]

[*803] **[**2665]** Closer to the mark is this Court's decision in *Coleman* v. *Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." *Id.*, at 446, 59 S. Ct. 972, 83 L. Ed. 1385. [11] We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. *Ibid.* *Coleman*, as we later explained in *Raines*, stood "for the proposition that [15] legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S., at 823, 117 S. Ct. 2312; 138 L. Ed. 2d 849. [12] Our

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[10] *Massachusetts* v. *Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923), featured in Justice Scalia's dissent, *post*, at 4, 192 L. Ed. 2d, at 756, bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated **[****25]** the Tenth Amendment. *Id.*, at 262 U.S. 480, 43 S. Ct. 597, 67 L. Ed. 1078. If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." *Id.*, at 485, 43 S. Ct. 597, 67 L. Ed. 1078. As *parens patriae*, the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.*, at 485-486, 43 S. Ct. 597, 67 L. Ed. 1078. As astutely observed, moreover: "The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions . . . are hard to reconcile." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009) (comparing *Mellon* with *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (rejecting on the merits the claim that the Voting Rights Act of 1965 invaded reserved powers of the States to determine voter qualifications and regulate elections), *Nebraska* v. *Wyoming*, 515 U.S. 1, 20, 115 S. Ct. 1933, 132 L. Ed. 2d 1 (1995) (recognizing that Wyoming could bring suit to vindicate the State's "quasi-sovereign" interests in the physical environment within its domain (emphasis deleted; internal quotation marks omitted)), and *Massachusetts* v. *EPA*, 549 U.S. 497, 520, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (maintaining that Massachusetts **[****26]** "is entitled to special solicitude in our standing analysis")).

[11] *Coleman* concerned the proposed Child Labor Amendment, which provided that "Congress shall have power to limit, regulate, and prohibit **[****27]** the labor of persons under eighteen years of age." 307 U.S., at 435, n. 1, 59 S. Ct. 972, 83 L. Ed. 1385 (internal quotation marks omitted).

[12] The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been ["especially rigorous when reaching the merits of the dispute would force

conclusion that the Arizona Legislature has standing fits that bill. **[*804]** Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, see *supra*, at 11, 192 L. Ed. 2d, at 721, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan, *Raines*, **[***724]** 521 U.S., at 823-824, 117 S. Ct. 2312; 138 L. Ed. 2d 849. [13]

This dispute, in short, "will be resolved **[****28]** . . . in a concrete factual context conducive to a [realistic appreciation of the consequences of judicial action."] **[**2666]** *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). [14] Accordingly, we proceed to the merits. [15]

III

On the merits, we instructed the parties to address this question: Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? The Elections Clause is set out at the start of this opinion, *supra*, at ___, 192 L. Ed. 2d, at 716. Section 2a(c) provides:

> [16] "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives **[*805]** to which such State is entitled under such apportionment shall be elected in the following manner: [setting out five federally prescribed redistricting **[****29]** procedures]."

Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916); *Hawke* v. *Smith (No. 1)*, 253 U.S. 221, 40 S. Ct. 495, 64 L. Ed. 871 (1920); and *Smiley* v. *Holm*, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932).

A

Davis v. *Hildebrant* involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. A 1915 Act redistricting the State for the purpose of congressional elections had been submitted to a popular vote, resulting in disapproval of the legislature's measure. State election officials

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[the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."] *Raines* v. *Byrd*, 521 U.S. 811, 819-820, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

[13] In an endeavor to wish away *Coleman*, Justice Scalia, in dissent, suggests the case may have been "a 4-to-4 standoff." *Post*, at ___, 192 L. Ed. 2d, at 757. He overlooks that Chief Justice Hughes' opinion, announced by Justice Stone, was styled "Opinion of the Court." 307 U.S., at 435, 59 S. Ct. 972, 83 L. Ed. 1385. Describing *Coleman*, the Court wrote in *Raines*: "By a vote of 5-4, we held that [the 20 Kansas Senators who voted against ratification of a proposed federal constitutional amendment] had standing." 521 U.S., at 822, 117 S. Ct. 2312, 138 L. Ed. 2d 849. For opinions recognizing the precedential weight of *Coleman*, see *Baker* v. *Carr*, 369 U.S. 186, 208, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *United States* v. *Windsor*, 570 U.S. 744, 805, 806, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (Alito, J., dissenting) (slip op., at 4-5, 133 S. Ct. 2675, 186 L. Ed. 2d 808).

[14] Curiously, Justice Scalia, dissenting on standing, berates the Court for "treading upon the powers of state legislatures." *Post*, at 6, 192 L. Ed. 2d, at 758. He forgets that the party invoking federal-court jurisdiction in this case, and inviting our review, is the Arizona State Legislature.

[15] Justice Thomas, on the way to deciding that the Arizona Legislature lacks standing, first addresses the merits. In so doing, he overlooks that, in the cases he features, it was entirely immaterial whether the law involved was adopted by a representative body or by the people, through exercise of the initiative.

asked the State's Supreme Court to declare the referendum void. That court rejected the request, holding that the referendum authorized by Ohio's Constitution "was a part of the legislative power of the State," and "nothing in [federal statutory law] or in [the Elections Clause] operated to **[***725]** the contrary." 241 U.S., at 567, 36 S. Ct. 708, 60 L. Ed. 1172. This Court affirmed the Ohio Supreme Court's judgment. In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, *ibid.*, legitimately exercised by the **[****30]** people to disapprove the legislation creating congressional districts. [17] For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, [the word encompassed a veto power lodged in the people.] See *id.*, at 569, 36 S. Ct. 708; 60 L. Ed. 1172 (Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

[*806] *Hawke* v. *Smith* involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that [18] "ratification by a State of a constitutional amendment is not **[**2667]** an act of legislation within the proper sense of the word." 253 U.S., at 229, 40 S. Ct. 495, 64 L. Ed. 871. Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. *Id.*, at 226, 40 S. Ct. 495, 64 L. Ed. 871. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.*, at 229, 40 S. Ct. 495, 64 L. Ed. 871. *Davis* v. *Hildebrant*, the Court explained, involved the enactment of legislation, *i.e.*, a redistricting plan, and properly held that "the referendum **[****31]** [was] part of the legislative authority of the State for [that] purpose." 253 U.S., at 230, 40 S. Ct. 495, 64 L. Ed. 871.

Smiley v. *Holm* raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor's veto. The Minnesota Supreme Court had held that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota's legislative authority includes not just the two Houses of the legislature; it includes, in addition, a make-or-break role for the Governor. In holding that the Governor's veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an "electoral" function "in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment," [16] a "ratifying" function for "proposed amendments to the Constitution under Article V," **[*807]** as explained in *Hawke* v. *Smith*, and a "consenting" function "in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17." 285 U.S., at 365-366, 52 S. Ct. 397, 76 L. Ed. 795.

In contrast to those other functions, we observed, [19] redistricting "involves lawmaking in its essential features and most important aspect." *Id.*, at 366, 52 S. Ct. 397, 76 L. Ed. 795. Lawmaking, we further noted, ordinarily "must be in accordance with **[***726]** the method which the State has prescribed for legislative enactments." *Id.*, at 367, 52 S. Ct. 397, 76 L. Ed. 795. In Minnesota, the State's Constitution had made the Governor "part of the legislative process." *Id.*, at 369, 52 S. Ct. 397, 76 L. Ed. 795. And the Elections Clause, we explained, respected the State's choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to "the Legislature" a ratifying,

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[16] The Seventeenth Amendment provided for election **[****32]** of Senators "by the people" of each State.

electoral, or consenting function. Nothing in the Elections Clause, we said, "attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted." *Id.*, at 368, 52 S. Ct. 397, 76 L. Ed. 795.

The Chief Justice, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were "chosen [in each State] by the Legislature thereof." Art. I, §3; see *post*, at 1, 8 - 9, 19, 192 L. Ed. 2d, at 736, 741, 747. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting "the Legislature" to mean "the people"? **[****33]** *Post*, at 1, 192 L. Ed. 2d, at 737. *Smiley*, as just indicated, answers that question. [20] Article I, §3, gave state legislatures "a function different from that of lawgiver," 285 U.S., at 365, 52 S. Ct. 397, 76 L. Ed. 795; it made each of **[**2668]** them "an electoral body" charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke*, "the power to legislate in the enactment of the laws of a State is derived from the people of the State." 253 U.S., at 230, 40 S. Ct. 495, 64 L. Ed. 871. Ratification, however, "has its source in the Federal Constitution" and is not "an act **[*808]** of legislation within the proper sense of the word." *Id.*, at 229-230, 40 S. Ct. 495, 64 L. Ed. 871.

Constantly resisted by The Chief Justice, but well understood in opinions that speak for the Court: "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434, 52 S. Ct. 607, 76 L. Ed. 1204 (1932) (citing *Smiley*, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795). Thus ["the Legislature" comprises the referendum and the Governor's veto in the context of regulating congressional elections.] *Hildebrant*, see *supra*, at 15 - 16, 192 L. Ed. 2d, at 724-725; *Smiley*, see *supra*, at 17 - 18, 192 L. Ed. 2d, at 725-726. In the context of ratifying constitutional amendments, in contrast, ["the Legislature" has a different identity,] **[****34]** one that excludes the referendum and the Governor's veto. *Hawke*, see *supra*, at 16, 192 L. Ed. 2d, at 724. [17]

In sum, our precedent teaches that [22] [redistricting is a legislative function, **[***727]** to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto.] The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional barrier **[*809]** to a [State's **[****35]** empowerment of its people] by embracing that form of lawmaking.

B

We take up next the statute the Court asked the parties to address, [23]2 U.S.C. §2a(c), a measure modeled on the Reapportionment Act Congress passed in 1911, Act of Aug. 8 (1911 Act), ch. 5, §4, 37

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[17] The list of constitutional provisions in which the word "legislature" appears, appended to The Chief Justice's opinion, *post*, at 28 - 32, 192 L. Ed. 2d, at 752-754, is illustrative of the variety of functions state legislatures can be called upon to exercise. For example, Art. I, §2, cl. 1, superseded by the Seventeenth Amendment, assigned an "electoral" function. See *Smiley v. Holm*, 285 U.S. 355, at 365, 52 S. Ct. 397, 76 L. Ed. 795. Article I, §3, cl. 2, assigns an "appointive" function. Article I, §8, cl. 17, assigns a "consenting" function, see *Smiley*, 285 U.S., at 366, 52 S. Ct. 397, 76 L. Ed. 795, as does Art. IV, §3, cl. 1. "[R]atifying" functions are assigned in Art. V, Amdt. 18, §3, Amdt. 20, §6, and Amdt. 22, §2. See *Hawke v. Smith*, 253 U.S. 221, at 229, 40 S. Ct. 495, 64 L. Ed. 871. But [21]Art. I, §4, cl. 1, unquestionably calls for the exercise of lawmaking authority. That authority can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves. See *infra*, at 24 - 35, 192 L. Ed. 2d, at 729-736.

Stat. 14. Section 2a(c), we hold, permits use of a commission to adopt Arizona's congressional districts. See *supra*, at 15, 192 L. Ed. 2d, at 724. [18]

From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be required to follow federally prescribed procedures for redistricting unless "the legislature" of the State drew district lines. *E.g.*, Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, §4, 31 Stat. 734. In drafting the 1911 Act, Congress focused on **[**2669]** the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation **[****36]** by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton); see *supra*, at 3 - 5, 192 L. Ed. 2d, at 717-718. To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof*." Ch. 5, §4, 37 Stat. 14 (emphasis added). [19]

[*810] Some Members of Congress questioned whether the language change was needed. In their view, existing apportionment legislation (referring to redistricting by a State's "legislature") "suffic[ed] to allow, whatever the law of the State may be, the people of that State to control [redistricting]." 47 Cong. Rec. 3507 (statement of Sen. Shively); cf. *Shiel* v. **[***728]** *Thayer*, Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 351 (1861) (view of House Committee of Elections Member Dawes that Art. I, §4's reference to "the Legislature" meant simply the "constituted authorities, through whom [the State] choose[s] to speak," prime among them, the State's Constitution, "which rises above . . . all legislative action"). Others anticipated that retaining the reference to "the legislature" would "condem[n] . . . any [redistricting] legislation by referendum or by initiative." 47 Cong. Rec. 3436 (statement of Sen. Burton). In any event, proponents of the change maintained, "[i]n view of the very serious evils arising from gerrymanders," Congress should not "take any chances in [the] **[****38]** matter." *Id.*, at 3508 (same). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States," they urged, required Congress "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.*, at 3436; see *id.*, at 3508 (statement of Sen. Works).

As this Court observed in *Hildebrant*, "the legislative history of th[e] [1911 Act] leaves no room for doubt [about why] **[*811]** the prior words were stricken out and the new words inserted." 241 U.S., at 568, 36 S. Ct. 708, 60 L. Ed. 1172. The change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437 (statement of

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[18]The AIRC referenced §2a(c) in briefing below, see Motion to Dismiss 8-9, and Response to Plaintiff's Motion for Preliminary Injunction 12-14, in No. 12-1211 (D Ariz.), and in its motion to dismiss or affirm in this Court, see Motion to Dismiss or Affirm 28-31.

[19]The 1911 Act also required States to comply with certain federally prescribed districting rules—namely, that Representatives be elected "by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants," and that the districts "be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative." Act of Aug. 8, 1911, ch. 5, §§3-4, 37 Stat. 14. When a State's apportionment of Representatives remained constant, the Act directed the State to continue using its pre-existing districts "until [the] State shall be redistricted as herein prescribed." See §4, *ibid.* The 1911 Act did not address redistricting in the **[****37]** event a State's apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.

Sen. Burton). [24] The 1911 Act, in short, left the question of redistricting "to the laws and methods of the States. If they include initiative, it is included." *Id.*, at 3508.

While the 1911 Act applied only to reapportionment following the 1910 census, see *Wood* v. *Broom*, 287 U.S. 1, 6-7, 53 S. Ct. 1, 77 L. Ed. 131 (1932), Congress used virtually identical language when it **[**2670]** enacted §2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761-762. Section 2a(c) sets forth congressional-redistricting procedures operative only if the State, "after any apportionment," had not redistricted "in the manner provided by the law thereof." The 1941 **[****39]** provision, like the 1911 Act, thus accorded full respect to the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map. [20]

The Arizona Legislature characterizes §2a(c) as an "obscure provision, narrowed by subsequent developments to the brink of irrelevance." Brief for Appellant 56. True, four of the five default redistricting procedures—operative only when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch* v. *Smith*, 538 U.S. 254, 273-274, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) (plurality opinion). Concretely, the default **[*812]** procedures specified in §2a(c)(1)-(4) contemplate that a State would continue to use pre-existing **[****40]** **[***729]** districts following a new census. The one-person, one-vote principle announced in *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964), however, would bar those procedures, except in the "unlikely" event that "the decennial census makes no districting change constitutionally necessary," *Branch*, 538 U.S., at 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (plurality opinion).

[25] Constitutional infirmity in §2a(c)(1)-(4)'s default procedures, however, does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." [21] As just observed, Congress expressly directed that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature, court decree (see *id.*, at 274, 123 S. Ct. 1429, 155 L. Ed. 2d 407), or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives. [22]

There can be no dispute that [27] Congress itself may draw a State's congressional-district boundaries. See *Vieth*, 541 U.S., at 275, 124 S. Ct. 1769; 158 L. Ed. 2d 546 (plurality opinion) (stating that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"). The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State "Legislature[s]," precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting

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[20] Because [a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map,] [nothing in §2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.]

[21] The plurality in *Branch* v. *Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003), considered the question [26] whether §2a(c) had been repealed by implication and stated, "where what it prescribes is constitutional," the provision "continues to apply."

[22] The Chief Justice, in dissent, insists that §2a(c) and its precursor, the 1911 Act, have [nothing to do with this case.] *Post*, at 20 - 21, 23, 192 L. Ed. 2d, at 748-749, 750. Undeniably, however, it was the very purpose of the measures to recognize the legislative authority each State has to determine its own **[****41]** redistricting regime.

plan under **[*813]** its plenary authority to "make or alter" the State's plan. See Brief for Appellant 56-57; **[**2671]** Reply Brief 17. In other words, the Arizona Legislature regards §2a(c) as a futile exercise. The Congresses that passed §2a(c) and its forerunner, the 1911 Act, did not share that wooden interpretation of the Clause, nor do we. Any uncertainty about the import of §2a(c), however, is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative, see *infra*, at 24 - 35, 192 L. Ed. 2d, at 729-736, leaving no arguable conflict between §2a(c) and the first part of the Clause.

C

In accord with the District Court, see *supra*, at 9, 192 L. Ed. 2d, at 717, we hold that[28] the Elections Clause permits the people of Arizona to provide for redistricting by independent **[****42]** commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves **[***730]** are the originating source of all the powers of government.

We note, preliminarily, that [29] dictionaries, even those in circulation during the founding era, capaciously define the word "legislature." Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." 2 A Dictionary of the English Language (1st ed. 1755); *ibid.* (6th ed. 1785); *ibid.* (10th ed. 1792); *ibid.* (12th ed. 1802). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." 2 A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. Compendious Dictionary of the English Language 174 (1806). And Nathan Bailey **[*814]** similarly defined "legislature" as "the Authority of making **[****43]** Laws, or Power which makes them." An Universal Etymological English Dictionary (20th ed. 1763). [23]

[30] As to the "power that makes laws" in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. See Ariz. Const., Art. IV, pt. 1, §1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). See also *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 672, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976) ("In establishing legislative bodies, the people can reserve to themselves **[****44]** power to deal directly with matters which might otherwise be assigned to the legislature."). As well in Arizona, the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do. See Tr. of Oral Arg. 15-16 (answering the Court's question, may the Arizona Legislature itself establish a commission to attend to redistricting, **[**2672]** counsel for appellant responded yes, state legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves).

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[23] Illustrative of an embracive comprehension of the word "legislature," Charles Pinckney explained at South Carolina's ratifying convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." 4 Debates on the Federal Constitution 328 (J. Elliot 2d ed. 1863). Participants in the debates over the Elections Clause used the word "legislature" interchangeably with "state" and "state government." See Brief for Brennan Center for Justice at N. Y. U. School of Law as *Amicus Curiae* 6-7.

I

[31] The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override **[*815]** state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 (2013), the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id.*, at 8, 133 S. Ct. 2247, 2253, 186 L. Ed. 2d 239, 250) (citing The Federalist No. 59, pp. 362-363 (C. Rossiter ed. 1961) (A. Hamilton)).

The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench **[***731]** themselves or place their interests over those **[****45]** of the electorate. As Madison urged, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention 241 (M. Farrand rev. 1966). Madison spoke in response to a motion by South Carolina's delegates to strike out the federal power. Those delegates so moved because South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 223-224 (1996). The problem Madison identified has hardly lessened over time. Conflict of interest is inherent when "legislators dra[w] district lines that they ultimately have to run in." Cain, 121 Yale L. J., at 1817.

Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. Theophilus Parsons, a delegate at the Massachusetts ratifying convention, warned that "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the states into districts for the election of representatives." Debate in Massachusetts **[****46]** Ratifying Convention (16-17, 21 Jan. 1788), in 2 The Founders' Constitution 256 (P. Kurland & R. Lerner eds. 1987). Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because "the State governments **[*816]** *may* abuse their power, and regulate . . . elections in such manner as would be highly inconvenient to the people." Letter to Charles Tillinghast (24 Dec. 1787), in *id.*, at 253. He described the Clause as a way to "ensure to the *people* their rights of election." *Ibid.*

While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people's legislative prerogatives—the initiative and the referendum—were not yet in our democracy's arsenal. See *supra*, at 3 - 5, 192 L. Ed. 2d, at 717-718. [32] The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands. [24]

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[24] The Chief Justice, in dissent, cites *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), as an important precedent we overlook. **[****47]** *Post*, at 24 - 25, 192 L. Ed. 2d, at 750-751. There, we held that state-imposed term limits on candidates for the House and Senate violated the Clauses of the Constitution setting forth qualifications for membership in Congress, Art. I, §2, cl. 2, and Art. I, §3, cl. 3. We did so for a reason entirely harmonious with today's decision. Adding state-imposed limits to the qualifications set forth in the Constitution, the Court wrote, would be "contrary to the 'fundamental principle of our representative democracy,' . . . that 'the people should choose whom they please to govern them.'" 514 U.S., at 783, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (quoting *Powell* v. *McCormack*, 395 U.S. 486, 547, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)).

[2673]** 2

The Arizona Legislature maintains that, by specifying "the Legislature thereof," the Elections Clause renders the State's representative body the sole "component of state government **[***732]** authorized to prescribe . . . regulations . . . for congressional redistricting." Brief for Appellant 30. The Chief Justice, in dissent, agrees. But [33] it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. See *Alden* v. **[*817]** *Maine*, 527 U.S. 706, 752, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) ("A State is entitled to order the processes of its own governance."); The Federalist No. 43, at 275 (J. Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do **[****48]** so."). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority. See Ariz. Const., Art. IV; *supra*, at 5 - 6, 192 L. Ed. 2d, at 718-719.

[34] This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009); see *United States* v. *Lopez*, 514 U.S. 549, 581, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive **[****49]** by putting the States in competition for a mobile citizenry.'" *Bond* v. *United States*, 564 U.S. 211, 221, 564 U.S. 211, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011)) (quoting *Gregory*, 501 U.S., at 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410).

[35] We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on **[*818]** the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution. See *Shiel*, H. R. Misc. Doc. No. 57, at 349-352 (concluding that Oregon's Constitution prevailed over any conflicting legislative measure setting the date for a congressional election).

[2674]** The Chief Justice, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46-47 (1866). See *post*, at 15 - 16, 192 L. Ed. 2d, at 745-746. There, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan **[***733]** Legislature, however, passed a law permitting soldiers to vote in **[****50]** other locations. One candidate would win if the State Constitution's requirement controlled; his opponent would prevail under the Michigan Legislature's prescription. The House Elections

Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power.

As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State's Constitution is void. *Baldwin*, H. R. Misc. Doc. No. 152, at 50. The *Baldwin* majority's ruling, furthermore, appears in tension with the Election Committee's unanimous decision in *Shiel* just five years earlier. (The Committee, we repeat, "ha[d] no doubt that the constitution of the State ha[d] fixed, beyond the control of the legislature, the time for holding [a congressional] election." *Shiel*, H. R. Misc. Doc. No. 57, at 351.) Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. See U.S. House of Representatives **[*819]** Congress Profiles: 39th Congress (1865-1867), **[****51]** http://history.house.gov/Congressional-Overview/Profiles/39th/ ; Biographical Directory of the United States Congress: Trowbridge, Rowland Ebenezer (1821-1881). Cf. Cain, 121 Yale L. J., at 1817 (identifying legislative conflict of interest as the problem independent redistricting commissions aimed to check). In short, *Baldwin* is not a disposition that should attract this Court's reliance.

We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, §4, really says "No" to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, at 376. The Elections Clause is not sensibly read to subject States to that deprivation. [25]

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[37] The Framers **[****52]** may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty **[**2675]** seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 227.

[*820] The people's ultimate sovereignty had been expressed by John Locke in 1690, a near century before the Constitution's formation:

> **[***734]** [38] "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their **[****53]** safety and security." Two Treatises of Government §149, p. 385 (P. Laslett ed. 1964).

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[25] [36] A State may choose to regulate state and national elections differently, which is its prerogative under the Clause. *E.g.*, Ind. Code §3-3-2-2 (creating backup commission for congressional but not state legislative districts).

Our Declaration of Independence, ¶2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." U.S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell* v. *McCormack*, 395 U.S. 486, 540-541, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). In this light, [39] it would be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be "chosen . . . by the People of the several States," Art. I, §2. See Cain, 121 Yale L. J., at 1817.

The Chief Justice, in dissent, suggests that independent commissions established by initiative are a high-minded experiment that has failed. *Post*, at 26 - 27, 192 L. Ed. 2d, at 752. For this assessment, The Chief Justice cites a three-judge Federal **[*821]** District Court opinion, **[****54]** *Harris* v. *Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). That opinion, he asserts, "detail[s] the partisanship that has affected the Commission." *Post*, at 26, 192 L. Ed. 2d, at 751. No careful reader could so conclude.

The report of the decision in *Harris* comprises a *per curiam* opinion, an opinion concurring in the judgment by Judge Silver, and a dissenting opinion by Judge Wake. The *per curiam* opinion found "in favor of the Commission." 993 F. Supp. 2d, at 1080. Deviations from the one-person, one-vote principle, the *per curiam* opinion explained at length, were "small" and, in the main, could not be attributed to partisanship. *Ibid.* While partisanship "may have played some role," the *per curiam* opinion stated, deviations were "predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act." *Id.*, at 1060. Judge Silver, although she joined the *per curiam* opinion, made clear at the very outset of that opinion her finding that "partisanship did not play a role." *Id.*, at 1046, n. 1. In her concurring opinion, she repeated her finding that the evidence did not show partisanship at work, *id.*, at 1087; instead, she found, the evidence "[was] overwhelming [that] the final map was a product of the commissioners's consideration of appropriate redistricting criteria." *Id.*, at 1088. To describe *Harris* as a decision criticizing the Commission for **[****55]** **[**2676]** pervasive partisanship, *post*, at 26, 192 L. Ed. 2d, at 751, The Chief **[***735]** Justice could rely only upon the dissenting opinion, which expressed views the majority roundly rejected.

Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." Cain, 121 Yale L. J., at 1808. But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." *Ibid.* They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.

[*822] 4

Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the "Times, Places and Manner" of holding federal elections. Art. I, §4. For example, the people of California **[****56]** provided for permanent voter registration, specifying that "no amendment by the Legislature shall provide for a general biennial or other periodic reregistration of voters." Cal. Elec. Code Ann. §2123 (West 2003). The people of Ohio banned ballots providing for straight-ticket voting along party lines. Ohio Const., Art. V, §2a. The people of Oregon shortened the deadline for voter registration to 20 days prior to an election. Ore. Const., Art. II, §2. None of those measures permit the state legislatures to override the people's prescriptions. The Arizona Legislature's theory—that the lead role in regulating federal elections cannot be wrested from "the Legislature," and vested in commissions initiated by the people—would endanger all of them.

The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." [26] **[*823]** Core aspects of the electoral process regulated by state constitutions include voting by "ballot" or "secret ballot," [27] voter registration, [28] absentee voting, [29] vote counting, [30] **[***736]** and victory **[**2677]** thresholds. [31] Again, the States' legislatures **[****57]** had no hand in making these laws and may not alter or amend them.

The importance of direct democracy as a means to **[****58]** control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States' legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures. See Persily & Anderson, Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1006-1008 (2005) (describing cases in which "indirect pressure of the initiative process . . . was sufficient to spur [state] legislature[s] to action"). Turning the coin, the legislature's responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

[*824] * * *

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[26] See App. to Brief for Appellees 11a-29a (collecting state constitutional provisions governing elections). States' constitutional conventions are not simply past history predating the first election of state legislatures. Louisiana, for example, held the most recent of its 12 constitutional conventions in 1992. J. Dinan, The American State Constitutional Tradition 8-9 (2006) (Table 1-1). The State's provision for voting by "secret ballot" may be traced to the constitutional convention held by the State in 1812, see La. Const., Art. VI, §13, but was most recently reenacted at the State's 1974 constitutional convention, see Art. XI, §2.

[27] Madison called the decision "[w]hether the electors should vote by ballot or viva voce" a quintessential subject of regulation under the Elections Clause. 2 Records of the Federal Convention 240-241 (M. Farrand rev. 1966).

[28] Miss. Const., Art. XII, §249; N. C. Const., Art. VI, §3; Va. Const., Art. II, §2; W. Va. Const., Art. IV, §12; Wash. Const., Art. VI, §7.

[29] *E.g.*, Haw. Const., Art. II, §4; La. Const., Art XI, §2; N. D. Const., Art. II, §1; Pa. Const., Art. VII, §14.

[30] *E.g.*, Ark. Const., Art. III, §11 (ballots unlawfully not counted in the first instance must be counted after election); La. Const., Art XI, §2 (all ballots must be counted publicly).

[31] *E.g.*, Ariz. Const., Art. VII, §7 (setting plurality of votes as the standard for victory in all elections, excluding runoffs); Mont. Const., Art. IV, §5 (same); Ore. Const., Art. II, §16 (same).

Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes. [40] But the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes. Article I, §4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 404-405, 4 L. Ed. 579 (1819). So comprehended, the Clause doubly empowers **[****59]** the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." The Federalist No. 57, at 352 (J. Madison). In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005). The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

Affirmed.

Dissent by: ROBERTS; SCALIA; THOMAS

Dissent

Chief Justice **Roberts**, with whom Justice **Scalia**, Justice **Thomas**, and Justice **Alito** join, dissenting.

Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, §3, to "the people **[***737]** thereof." The Amendment resulted from an arduous, decades-long campaign in **[****60]** which reformers across the country **[*825]** worked hard to garner approval from Congress and three-quarters of the States.

What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, §4. That Clause vests **[**2678]** congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court. The Constitution contains seventeen provisions referring to the "Legislature" of a State, many of which cannot possibly be read to mean "the people." See Appendix, *infra*. Indeed, several provisions expressly distinguish "the Legislature" from "the People." See Art. I, §2; Amdt. 17. This Court has accordingly defined "the Legislature" in the Elections Clause as "*the representative body* which ma[kes] the **[****61]** laws of the people." *Smiley* v. *Holm*, 285 U.S. 355, 365,

52 S. Ct. 397, 76 L. Ed. 795 (1932) (quoting *Hawke* v. *Smith (No. 1)*, 253 U.S. 221, 227, 40 S. Ct. 495, 64 L. Ed. 871 (1920); emphasis added).

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a noble endeavor—although it does not seem so "independent" in practice—but the "fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *INS* v. **[*826]** *Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution. I respectfully dissent.

I

The majority begins by discussing policy. I begin with the Constitution. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." **[****62]** Art. I, §4, cl. 1.

The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty "shall" be carried out "in each State by the Legislature thereof."

In Arizona, however, redistricting is not carried out by the legislature. Instead, as the result of a ballot initiative, **[***738]** an unelected body called the Independent Redistricting Commission draws the lines. See *ante*, at 6 - 7, 192 L. Ed. 2d, at 719. The key question in the case is whether the Commission can conduct congressional districting consistent with the directive that such authority be exercised "by the Legislature."

The majority concedes that the unelected Commission is not "the Legislature" of Arizona. The Court contends instead that the people of Arizona as a whole constitute "the Legislature" for purposes of the Elections Clause, and that they may delegate the congressional districting authority conferred by that Clause to the Commission. *Ante*, at 25, 192 L. Ed. 2d, at 730. The majority provides no support for the delegation part of **[**2679]** its theory, and I am not sure whether the majority's analysis is correct on that issue. But even giving the **[****63]** Court the benefit **[*827]** of the doubt in that regard, the Commission is still unconstitutional. Both the Constitution and our cases make clear that "the Legislature" in the Elections Clause is the representative body which makes the laws of the people.

A

The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. See *ante*, at 5 - 6, 25, 27 - 28, 192 L. Ed. 2d, at 718-728, 730, 731-732. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority's words, "retain autonomy to establish their own governmental processes," *ante*, at 27, 192 L. Ed. 2d, at 732, if those "processes" violate the United States Constitution. In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way. Art. VI, cl. 2; *Cook* v. *Gralike*, 531 U.S. 510, 523, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (2001). The majority opinion therefore largely misses the point.

The relevant question in this case is how to define "the Legislature" under the Elections Clause. The majority opinion does not seriously turn to that question until page 24, and even then it fails to provide a coherent answer. The Court seems to conclude, based largely on its understanding of the "history and purpose" of the Elections Clause, *ante*, at 24, 192 L. Ed. 2d, at 729, that "the Legislature" encompasses any entity in a State that exercises legislative power. **[****64]** That circular definition lacks any basis in the text of the Constitution or any other relevant legal source.

The majority's textual analysis consists, in its entirety, of one paragraph citing founding era dictionaries. The majority points to various dictionaries that follow Samuel Johnson's definition of "legislature" as the "power that makes laws." *Ibid.* (internal quotation marks omitted). The notion that this definition corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority's own admission that "[d]irect lawmaking by **[*828]** the people was virtually unknown when the Constitution of 1787 was drafted." *Ante*, at 3, 192 L. Ed. 2d, at 717 (internal quotation marks omitted); see *ante*, at 27, 192 L. Ed. 2d, at 731. Moreover, Dr. Johnson's first example of the usage of "legislature" is this: "Without the concurrent consent of all three parts of the legislature, no law is or can be made." 2 A Dictionary of the English Language (1st ed. 1755) (emphasis deleted). Johnson borrowed **[***739]** that sentence from Matthew Hale, who defined the "Three Parts of the Legislature" of England as the King and the two houses of Parliament. History of the Common Law of England 2 (1713). (The contrary notion that the people **[****65]** as a whole make the laws would have cost you your head in England in 1713.) Thus, even under the majority's preferred definition, "the Legislature" referred to an institutional body of representatives, not the people at large.

Any ambiguity about the meaning of "the Legislature" is removed by other founding era sources. "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. Online 131, 147, and n. 101 (2015) (citing eleven State Constitutions). The Federalist Papers are replete with references to "legislatures" that can only be understood as referring to representative institutions. *E.g.*, The Federalist No. 27, pp. 174-175 (C. Rossiter ed. 1961) (A. Hamilton) (describing "the State **[**2680]** legislatures" as "select bodies of men"); *id.*, No. 60, at 368 (contrasting "the State legislatures" with "the people"). Noah Webster's heralded American Dictionary of the English Language defines "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws." 2 An American Dictionary of the English Language (1828). It continues, "The legislatures of most **[****66]** of the states in America . . . consist of two houses or branches." *Ibid.* (emphasis deleted).

[*829] I could go on, but the Court has said this before. As we put it nearly a century ago, "Legislature" was "not a term of uncertain meaning when incorporated into the Constitution." *Hawke*, 253 U.S., at 227, 40 S. Ct. 495, 64 L. Ed. 871. "What it meant when adopted it still means for the purpose of interpretation." *Ibid.* "A Legislature" is "the representative body which ma[kes] the laws of the people." *Ibid.*; see *Smiley*, 285 U.S., at 365, 52 S. Ct. 397; 76 L. Ed. 795 (relying on this definition); *Colorado Gen. Assembly* v. *Salazar*, 541 U.S. 1093, 1095, 124 S. Ct. 2228, 159 L. Ed. 2d 260 (2004) (Rehnquist, C. J., dissenting from denial of certiorari) (same).

B

The unambiguous meaning of "the Legislature" in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way. When seeking

to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself. Our precedents new and old have employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole. See, *e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513, 536-537, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014); *id.*, at 599, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (Scalia, J., concurring in judgment); *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 414-415, 4 L. Ed. 579 (1819); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 1 Wheat. 304, 328-330, 4 L. Ed. 97 (1816); Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999).

The Constitution includes seventeen provisions referring **[****67]** to a State's "Legislature." See Appendix, *infra*. Every one of those references is consistent with the understanding of a **[***740]** legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature—and flatly incompatible with the majority's reading of "the Legislature" to refer to the people as a whole.

Start with the Constitution's first use of the term: "The House of Representatives shall be composed of Members **[*830]** chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Art. I, §2, cl. 1. This reference to a "Branch of the State Legislature" can only be referring to an institutional body, and the explicit juxtaposition of "the State Legislature" with "the People of the several States" forecloses the majority's proposed reading.

The next Section of Article I describes how to fill vacancies in the United States Senate: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which **[****68]** shall then fill such Vacancies." §3, cl. 2. [1] The references to "the Recess of the Legislature of any State" and "the next Meeting of the Legislature" are only consistent with an institutional **[**2681]** legislature, and make no sense under the majority's reading. The people as a whole (schoolchildren and a few unnamed others excepted) do not take a "Recess."

The list goes on. Article IV provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." §4. It is perhaps conceivable that all the people of a State could be "convened"—although this would seem difficult during an "Invasion" or outbreak of "domestic Violence"—but the only natural reading of the Clause is that "the Executive" may submit a federal application when "the Legislature" as a representative body cannot be convened.

Article VI provides that the "Senators and Representatives before mentioned, and the Members of the several **[*831]** State Legislatures, and all executive and judicial Officers, **[****69]** both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Cl. 3. Unless the majority is prepared to make all the people of every State swear an "Oath or Affirmation, to support this Constitution," this provision can only refer to the "several State Legislatures" in their institutional capacity.

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[1] This provision was modified by the Seventeenth Amendment.

Each of these provisions offers strong structural indications about what "the Legislature" must mean. But the most powerful evidence of all comes from the Seventeenth Amendment. Under the original Constitution, Senators were "chosen by the Legislature" of each State, Art. I, §3, cl. 1, while Members of the House of Representatives were chosen "by the People," Art. I, §2, cl. 1. That distinction was critical to the Framers. As James Madison explained, the Senate would "derive its powers from the States," while the House would "derive its powers from the people of [***741] America." The Federalist No. 39, at 244. George Mason believed that the power of state legislatures to select Senators would "be a reasonable guard" against "the Danger . . . that the national, will swallow up the State Legislatures." 1 Records of the Federal Convention of 1787, p. 160 (M. Farrand [****70] ed. 1911). Not everyone agreed. James Wilson proposed allowing the people to elect Senators directly. His proposal was rejected ten to one. Debates in the Federal Convention of 1787, S. Doc. No. 404, 57th Cong., 1st Sess., 8 (1902).

Before long, reformers took up Wilson's mantle and launched a protracted campaign to amend the Constitution. That effort began in 1826, when Representative Henry Storrs of New York proposed—but then set aside—a constitutional amendment transferring the power to elect Senators from the state legislatures to the people. 2 Cong. Deb. 1348-1349. Over the next three-quarters of a century, no fewer than 188 joint resolutions proposing similar reforms were introduced in both Houses of Congress. 1 W. Hall, The [*832] History and Effect of the Seventeenth Amendment 183-184 (1936).

At no point in this process did anyone suggest that a constitutional amendment was unnecessary because "Legislature" could simply be interpreted to mean "people." See *Hawke*, 253 U.S., at 228, 40 S. Ct. 495, 64 L. Ed. 871 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown [****71] in the adoption of the amendment."). In fact, as the decades rolled by without an amendment, 28 of the 45 States settled for the next best thing by [**2682] holding a popular vote on candidates for Senate, then pressuring state legislators into choosing the winner. See, *e.g.*, Abstract of Laws Relating to the Election of United States Senators, S. Doc. No. 393, 59th Cong., 2d Sess. (1907). All agreed that cutting the state legislature out of senatorial selection entirely would require nothing less than to "Strike out" the original words in the Constitution and "insert, 'elected by the people'" in its place. Cong. Globe, 31st Cong., 1st Sess., 88 (1849) (proposal of Sen. Jeremiah Clemens).

Yet that is precisely what the majority does to the Elections Clause today—amending the text not through the process provided by Article V, but by judicial decision. The majority's revision renders the Seventeenth Amendment an 86-year waste of time, and singles out the Elections Clause as the only one of the Constitution's seventeen provisions referring to "the Legislature" that departs from the ordinary meaning of the term.

The Commission had no answer to this point. See Tr. of Oral Arg. 42 (Justice Alito: "Is there any other provision where legislature means [****72] anything other than the conventional meaning?" Appellee: "I don't know the answer to that question.").

The Court's response is not much better. The majority observes that "the Legislature" of a State may perform different [*833] functions under different provisions of the Constitution. Under Article I, §3, for example, "the Legislature" performed an "electoral" function by choosing Senators. The "Legislature" plays a "consenting" function under Article I, §8, and Article IV, §3; a "ratifying" function [***742] under Article V; and a "lawmaking" function under the Elections Clause. *Ante*, at 19, and n. 17, 192 L.

Ed. 2d, at 726. All true. The majority, however, leaps from the premise that "the Legislature" performs different *functions* under different provisions to the conclusion that "the Legislature" assumes different *identities* under different provisions.

As a matter of ordinary language and common sense, however, a difference in function does not imply a difference in meaning. A car, for example, generally serves a transportation function. But it can also fulfill a storage function. At a tailgate party or a drive-in movie, it may play an entertainment function. In the absence of vacancies at the roadside motel, it could provide a lodging function. To a neighbor **[****73]** with a dead battery, it offers an electricity generation function. And yet, a person describing a "car" engaged in any of these varied functions would undoubtedly be referring to the same thing.

The Constitution itself confirms this point. Articles I and II assign many different functions to the Senate: a lawmaking function, an impeachment trial function, a treaty ratification function, an appointee confirmation function, an officer selection function, a qualification judging function, and a recordkeeping function. Art. I, §1 §3, cls. 5, 6; §5, cls. 1, 3; §7, cl. 2; Art. II, §2, cl. 2. Yet the identity of the Senate remains the same as it discharges these various functions.

Similarly, the House of Representatives performs different functions, including lawmaking, impeachment, and resolving Presidential elections in which no candidate wins a majority in the Electoral College. Art. I, §1; §2, cl. 5; §7, cl. 2; Amdt. 12. The President is assigned not only executive functions, Art. II, but also legislative functions, such as approving or vetoing bills, convening both Houses of Congress, and recommending **[*834]** measures for their consideration, Art. I, §7, cl. 2; Art. II, §3. Courts not only exercise a judicial function, **[****74]** Art. III, §1, but may **[**2683]** also perform an appointment function, Art. II, §2, cl. 2. And so on. Neither the majority nor the Commission points to a single instance in which the identity of these actors changes as they exercise different functions.

The majority attempts to draw support from precedent, but our cases only further undermine its position. In *Hawke*, this Court considered the meaning of "the Legislatur[e]" in Article V, which outlines the process for ratifying constitutional amendments. The Court concluded that "Legislature" meant "the representative body which ma[kes] the laws of the people." 253 U.S., at 227, 40 S. Ct. 495 64 L. Ed. 871. The Court then explained that "[t]he term is often used in the Constitution *with this evident meaning*." *Ibid.* (emphasis added). The Court proceeded to list other constitutional provisions that assign different functions to the "Legislature," just as the majority does today. *Id.*, at 227-228, 40 S. Ct. 495, 64 L. Ed. 871; see *ante*, at 19, n. 17, 192 L. Ed. 2d, at 726.

Unlike the majority today, however, the Court in *Hawke* never hinted that the meaning of "Legislature" varied across those different provisions because they assigned different functions. To the contrary, the Court drew inferences from the Seventeenth Amendment and its predecessor, Article I, §3—in which "the Legislature" played an *electoral* function—to **[****75]** define **[***743]** the "Legislature" in Article V, which assigned it a *ratification* function. See 253 U.S., at 228, 40 S. Ct. 495, 64 L. Ed. 871. The Court concluded that "Legislature" refers to a representative body, whatever its function. As the Court put it, "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose." *Ibid.* (citing Art. I, §2).

[*835] *Smiley*, the leading precedent on the meaning of "the Legislature" in the Elections Clause, reaffirmed the definition announced in *Hawke*. In *Smiley*, the petitioner argued—as the Commission does here—that "the Legislature" referred not just to "the two houses of the legislature" but to "the entire legislative power of the state . . . however exercised." Brief for Petitioner, O. T. 1931, No. 617, p. 22 (internal quotation marks omitted). The Court did not respond by holding, as the majority today suggests, that "'the Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections," or that **[****76]** "'the Legislature' has a different identity" in the Elections Clause than it does in Article V. *Ante*, at 18 - 19, 192 L. Ed. 2d, at 726-727. Instead, the Court in *Smiley* said this:

> "Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* . . . the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.'" 285 U.S., at 365, 52 S. Ct. 397, 76 L. Ed. 795 (quoting *Hawke*, 253 U.S., at 227, 40 S. Ct. 495, 64 L. Ed. 871).

Remarkably, the majority refuses to even acknowledge the definition of "the Legislature" adopted in both *Smiley* and *Hawke*, and instead embraces the interpretation that this Court unanimously rejected more than 80 years ago. [2]

[2684]** C

The history of the Elections Clause further supports the conclusion that "the Legislature" is a representative body. **[*836]** The first known draft of the Clause to appear at the Constitutional Convention provided that **[****77]** "Each state shall prescribe the time and manner of holding elections." 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836). After revision by the Committee of Detail, the Clause included the important limitation at issue here: "The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed *by the legislature of each state*; but their provisions concerning them may, at any time, be altered *by the legislature of the United States*." *Id.*, at 225, 40 S. Ct. 495, 64 L. Ed. 871 (emphasis added). The insertion of "the legislature" **[***744]** indicates that the Framers thought carefully about which entity within the State was to perform congressional districting. And the parallel between "the legislature of each state" and "the legislature of the United States" further suggests that they meant "the legislature" as a representative body.

As the majority explains, the debate over the ratification of the Elections Clause centered on its second part, which empowers Congress to "make or alter" regulations prescribed by "the Legislature" of a State. See *ante*, at 25 - 27, 192 L. Ed. 2d, at 730-731. Importantly for our purposes, however, both sides in this debate "recognized the distinction between the state legislature and the people themselves." *Brown* v. *Secretary of State of Florida*, 668 F. 3d 1271, 1275-1276, n. 4 (CA11 2012).

The Anti-Federalists, **[****78]** for example, supported vesting election regulation power solely in state legislatures because state "legislatures were more numerous *bodies*, usually *elected annually*, and thus

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[2] The only hint of support the majority can glean from precedent is a passing reference in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434, 52 S. Ct. 607, 76 L. Ed. 1204 (1932), a case about how to interpret "trade or commerce" in the Sherman Act. See *ante*, at 18, 192 L. Ed. 2d, at 726. And even that selected snippet describes the "legislature" as a "body." 286 U.S., at 434, 52 S. Ct. 607, 76 L. Ed. 1204.

more likely to be in sympathy with the interests *of the people*." Natelson, The Original Scope of the Congressional Power To Regulate Elections, 13 U. Pa. J. Const. L. 1, 31 (2010) (emphasis added) (citing sources from ratification debates). Alexander Hamilton and others responded by raising the specter of state legislatures—which he described as "local administrations"—deciding to "annihilate" the Federal Government by "neglecting to provide for **[*837]** the choice of persons to administer its affairs." The Federalist No. 59, at 363. As the majority acknowledges, the distinction between "the Legislature" and the people "occasioned no debate." *Ante*, at 27, 192 L. Ed. 2d, at 731. That is because everybody understood what "the Legislature" meant.

The majority contends that its counterintuitive reading of "the Legislature" is necessary to advance the "animating principle" of popular sovereignty. *Ante*, at 24, 192 L. Ed. 2d, at 729. But the ratification of the Constitution was the ultimate act of popular sovereignty, and the people who ratified the Elections Clause did so knowing that it assigned authority to "the Legislature" **[****79]** as a representative body. The Elections Clause was not, as the majority suggests, an all-purpose "safeguard against manipulation of electoral rules by politicians." *Ante*, at 26, 192 L. Ed. 2d, at 730. Like most provisions of the Constitution, the Elections Clause reflected a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like. See The Federalist No. 59, at 364 (describing the power allocated to state legislatures as "an evil which could not have been avoided"). This Court has no power to upset such a compromise simply because we now think that **[**2685]** it should have been struck differently. As we explained almost a century ago, "[t]he framers of the Constitution might have adopted a different method," but it "is not the function of courts . . . to alter the method which the Constitution has fixed." *Hawke*, 253 U.S., at 227, 40 S. Ct. 495, 64 L. Ed. 871.

D

In addition to text, structure, and history, several precedents interpreting the Elections Clause further reinforce that "the Legislature" refers to a representative body.

[*745]** The first precedent comes not from this Court, but from Congress. Acting under its authority to serve as "the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, §5, cl. 1, the House of Representatives in 1866 confronted **[****80]** a dispute about who should be seated as the Congressman **[*838]** from the Fifth District of Michigan. At a popular convention, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in alternative locations. If only the local votes counted, one candidate (Baldwin) would win; if the outside votes were included, the other candidate (Trowbridge) would be entitled to the seat. See *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46-47 (1866).

The House Elections Committee explained that the Elections Clause conferred power on "the Legislature" of Michigan to prescribe election regulations. "But," the Committee asked, "what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country?" *Id.*, at 47. The Committee decided, and the full House agreed, that "the Legislature" in the Elections Clause was the "legislature *eo nomine*"—the legislature *by that name*, a representative **[****81]** body. *Ibid.* That conclusion followed both from the known meaning of "the Legislature" at the time of the framing and the many other uses of the word in the Constitution that would not be compatible with a popular convention. Thus, "[w]here there is a conflict of authority between the

constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount." *Id.*, at 46; see *California Democratic Party* v. *Jones*, 530 U.S. 567, 603, 120 S. Ct. 2402, 147 L. Ed. 2d 502, and n. 11 (2000) (Stevens, J., dissenting) (relying on *Baldwin* for its conclusion that "the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State'").

The majority draws attention to the minority report in *Baldwin*. *Ante*, at 29, 192 L. Ed. 2d, at 733. Under the present circumstances, I take some comfort in the Court's willingness to consider **[*839]** dissenting views. Still, the minority report does not diminish the force of *Baldwin*. The report cites a Michigan Supreme Court precedent that allegedly reached a contrary result, but that case turned entirely on state constitutional questions arising from a state election—not federal constitutional questions arising from a federal election. See *People ex rel. Twitchell* v. *Blodgett*, 13 Mich. 127 (1865). The majority also contends that *Baldwin* "appears in tension with" an earlier **[****82]** House Elections Committee precedent. *Ante*, at 29, 192 L. Ed. 2d, at 733. By its own terms, however, that earlier precedent did not involve a conflict between a state legislative act and a state constitutional provision. See *Shiel* v. *Thayer*, 1 Bartlett Contested Election **[**2686]** Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 350 (1861) ("the two branches of the legislature differed upon the question . . . and so the bill never became a law"). In any event, to the degree that the two precedents **[***746]** are inconsistent, the later decision in *Baldwin* should govern. [3]

The next relevant precedent is this Court's decision in *McPherson* v. *Blacker*, 146 U.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: "Each State shall appoint, in such Manner *as the Legislature thereof* may direct, a Number of Electors . . . ." §1, cl. 2 (emphasis added). The question was whether the state legislature, as a body of representatives, could divide authority to appoint electors **[****83]** across each of the State's congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained, **[*840]** "*can neither be taken away nor abdicated*." 146 U.S., at 35, 13 S. Ct. 3, 36 L. Ed. 869 (emphasis added; internal quotation marks omitted).

Against that backdrop, the Court decided two cases regarding the meaning of "the Legislature" in the Elections Clause. In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916), the Ohio Legislature passed a congressional redistricting law. Under the Ohio Constitution, voters held a referendum on the law and rejected it. A supporter of the law sued on behalf of the State, contending that the referendum "was not and could not be a part of the legislative authority of the State and therefore could have no influence on . . . the law creating congressional districts" under the Elections Clause. *Id.*, at 567, 36 S. Ct. 708, 60 L. Ed. 1172.

This Court rejected the challenger's constitutional argument as a nonjusticiable claim that the referendum "causes a State . . . to be not republican" in violation of the Guarantee Clause of the Constitution. *Id.*, at 569, 36 S. Ct. 708, 60 L. Ed. 1172 (citing Art. IV, §4). The Court also rejected an argument that Ohio's use of the referendum violated a federal statute, and held **[****84]** that Congress had the power to pass

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[3] The majority's suggestion that *Baldwin* should be dismissed as an act of partisanship appears to have no basis, unless one is willing to regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee. *Ante*, at 29 - 30, 192 L. Ed. 2d, at 733.

that statute under the Elections Clause. *Id.*, at 568-569, 36 S. Ct. 708, 60 L. Ed. 1172. *Hildebrant* in no way suggested that the state legislature could be displaced from the redistricting process, and *Hildebrant* certainly did not hold—as the majority today contends—that "the word ['Legislature' in the Elections Clause] encompassed a veto power lodged in the people." *Ante*, at 16, 192 L. Ed. 2d, at 725. *Hildebrant* simply approved a State's decision to employ a referendum *in addition to* redistricting by the legislature. See 241 U.S., at 569, 36 S. Ct. 708, 60 L. Ed. 1172. The result of the decision was to send *the Ohio Legislature* back to the drawing board to do the redistricting.

In *Smiley*, the Minnesota Legislature passed a law adopting new congressional districts, and the Governor exercised his veto power under the State Constitution. As noted above, the Minnesota secretary of state defended the veto on the ground that "the Legislature" in the Elections Clause referred not just to "the two houses of the legislature" but **[*841]** to "the entire legislative power of the state . . . however **[***747]** exercised." This Court rejected that argument, reiterating that the term "Legislature" **[**2687]** meant "the representative body which made the laws of the people." 285 U.S., at 365, 52 S. Ct. 397, 76 L. Ed. 795 (quoting *Hawke*, 253 U.S., at 227, 40 S. Ct. 495, 64 L. Ed. 871). The Court nevertheless went on to hold that the **[****85]** Elections Clause did not prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature. 285 U.S., at 373, 52 S. Ct. 397, 76 L. Ed. 795. As in *Hildebrant*, the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan.

The majority initially describes *Hildebrant* and *Smiley* as holding that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." *Ante*, at 19, 192 L. Ed. 2d, at 726. That description is true, so far as it goes. But it hardly supports the result the majority reaches here. There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether. See *Salazar*, 541 U.S., at 1095, 124 S. Ct. 2228, 159 L. Ed. 2d 260 (Rehnquist, C. J., dissenting from denial of certiorari) ("to be consistent with Article I, §4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself"). Nothing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies **[****86]** deposing it entirely.

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The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be **[*842]** exclusive in congressional districting, but neither may it be excluded.

The majority's contrary understanding requires it to accept a definition of "the Legislature" that contradicts the term's plain meaning, creates discord with the Seventeenth Amendment and the Constitution's many other uses of the term, makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority's decision is to erase the words "by the Legislature thereof" from the Elections Clause. That is a judicial error of the most basic order. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803).

II

The Court also issues an alternative holding that a federal statute, 2 U.S.C. §2a(c), permits Arizona to vest redistricting authority in the Commission. *Ante*, at [****87] 19 - 23, 192 L. Ed. 2d, at 727-729. The majority does not contend that this statutory holding resolves the constitutional question presented, see *ante*, at 23, 192 L. Ed. 2d, at 729, so its reading of Section 2a(c) is largely beside the [***748] point. With respect, its statutory argument is also hard to take seriously. Section 2a(c) does not apply to this case. And even if it did, it would likely be unconstitutional. [4]

A

Section 2a(c) establishes a number of default rules that govern the States' manner [**2688] of electing representatives "[u]ntil a State is redistricted in the manner provided by the law thereof." Section 2a(c) is therefore "inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict" the State. *Branch* v. *Smith*, 538 U.S. 254, 275, [*843] 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) (plurality opinion); see *id.*, at 298-300, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (O'Connor, J., concurring in part and dissenting in part). Here, the Commission *has* redistricted the State "in the manner provided by the law thereof." So by its terms, Section 2a(c) does not come into play in this case.

The majority spends several pages discussing Section 2a(c), but it conspicuously declines to say that the statute actually applies to this case. [5] The majority notes that the pre-1911 versions of Section 2a(c) applied only until "the legislature" [****88] redistricted the State, while the post-1911 versions applied only until the State is redistricted "in the manner provided by the law thereof." The majority also describes in detail the legislative history that accompanied the 1911 amendment. But if Section 2a(c) does not apply, its legislative history is doubly irrelevant.

The majority seems to suggest that Section 2a(c) somehow indicates federal approval for the district lines that the Commission has drawn. See *ante*, at 23, 192 L. Ed. 2d, at 729. But the statute does nothing of the sort. Section 2a(c) explains what rules apply "[u]ntil a State is redistricted"; it says nothing about what rules apply *after* a State is redistricted. And it certainly does not say that the State's redistricting plan will by some alchemy become federal law. No legislative drafter remotely familiar with the English language would say that a State had to follow default rules "[u]ntil [it] is redistricted in the manner provided by the law thereof," when what he meant was "any redistricting plan that the State adopts shall become federal law." And if the drafter was doing something as significant [****89] as transforming state law into federal law, he presumably would have taken care to make that dramatic step "unmistakably clear." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (internal quotation marks omitted). Tellingly, our most recent case on the meaning of Section 2a(c) [*844] seems not to have even considered the majority's position. See *Branch*, 538 U.S. 254, 123 S. Ct. 1429, 155 L. Ed. 2d 407.

Indeed, the majority does not even seem persuaded by its own argument. The majority quickly cautions, in discussing Section 2a(c), that "a State is required to comply with the Federal Constitution, the Voting

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[4] Not surprisingly, Section 2a(c) was barely raised below and was not addressed by the District Court. See *ante*, at 19, n. 18, 192 L. Ed. 2d, at 727.

[5] The majority is prepared to say that Section 2a(c) has more than "nothing to do with this case." *Ante*, at 23, n. 22, 192 L. Ed. 2d, at 729. Not exactly a ringing endorsement.

Rights Act, and other federal laws when it draws and implements its district map." *Ante*, at 22, n. 20, 192 L. Ed. 2d, at 728. The majority therefore concludes **[***749]** that "nothing in §2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements." *Ibid.* But here the Arizona Legislature has challenged "a state district map on the ground that it violates one . . . of those federal requirements"—the Elections Clause. If we take the majority at its word, nothing in Section 2a(c) should affect that challenge.

B

Not only is the majority's reading of Section 2a(c) implausible as a matter of statutory interpretation, it would also likely violate the Constitution in multiple ways.

First, the majority's reading of Section 2a(c) as a statute approving the lines **[****90]** **[**2689]** drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections; the second part of the Clause gives Congress the power to "make or alter such Regulations." There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations. In essence, the majority's proposed reading permits Congress to use the second part of the Elections Clause to nullify the first. Yet this Court has expressly held that "Congress ha[s] no power to alter Article I, section 4 [the Elections Clause]." *Smiley*, 285 U.S., at 372, 52 S. Ct. 397, 76 L. Ed. 795; see also *Clinton* v. *City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 **[*845]** (1998) (Congress may not circumvent Article I constraints on its lawmaking power); *Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (same).

Second, the majority's interpretation of Section 2a(c) would create a serious delegation problem. As a general matter, Congress may pass statutes that delegate some discretion to those who administer the laws. It is a well-accepted principle, however, that Congress may not delegate authority to one actor when the Constitution vests that authority in another actor. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U.S. 457, 472, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). The majority's reading of Section 2a(c) contradicts that rule **[****91]** by allowing Congress to delegate federal redistricting authority to a state entity other than the one in which the Elections Clause vests that authority: "the Legislature."

Third, the majority's interpretation conflicts with our most recent Elections Clause precedent, *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 (2013). There we explained that when Congress legislates under the Elections Clause, it "*necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.*, at 14, 133 S. Ct. 2247, 2257 186 L. Ed. 2d 239, 253. That is so because "the power the Elections Clause confers [on Congress] is none other than the power to pre-empt." *Id.*, at ___-___, 133 S. Ct. 2247, 2257 186 L. Ed. 2d 239, 253. Put differently, "*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that." *Id.*, at ___, n. 6, 133 S. Ct. 2247, 2257 186 L. Ed. 2d 239, 254). Under the majority's interpretation of Section 2a(c), however, Congress has done the opposite of preempting or displacing state law—it has *adopted* state law.

[*750]** Normally, when "a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). The multiple

serious constitutional doubts raised by the majority's interpretation of Section 2a(c)—in addition to the sheer weakness of its **[*846]** reading as a **[****92]** textual matter—provide more than enough reason to reject the majority's construction. Section 2a(c) does not apply to this case.

III

Justice Jackson once wrote that the Constitution speaks in "majestic generalities." *West Virginia Bd. of Ed.* v. *Barnette,* 319 U.S. 624, 639, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). In many places it does, and so we have cases expounding on "freedom of speech" and "unreasonable searches and seizures." Amdts. 1, 4. Yet **[**2690]** the Constitution also speaks in some places with elegant specificity. A Member of the House of Representatives must be 25 years old. Art. I, §2, cl. 2. Every State gets two Senators. Art. I, §3, cl. 1. And the times, places, and manner of holding elections for those federal representatives "shall be prescribed in each State by the Legislature thereof." Art. I, §4, cl. 1.

For the reasons I have explained, there is no real doubt about what "the Legislature" means. The Framers of the Constitution were "practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina* v. *United States*, 199 U.S. 437, 449, 26 S. Ct. 110, 50 L. Ed. 261, 41 Ct. Cl. 503, T.D. 961 (1905). We ought to give effect to the words they used.

The majority today shows greater concern about redistricting practices than about the **[****93]** meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004); *ante*, at 1, 192 L. Ed. 2d, at 716. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution. "Failure of political will does not justify unconstitutional remedies." *Clinton*, 524 U.S., at 449, 118 S. Ct. 2091, 2108, 141 L. Ed. 2d 393, 449 (Kennedy, J., concurring); see *Stern* v. *Marshall*, 564 U.S. 462, **[*847]** 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010); *Bowsher* v. *Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); *Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317; *Myers* v. *United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

Indeed, the Court has enforced the text of the Constitution to invalidate state laws with policy objectives reminiscent of this one. Two of our precedents held that States could not use their constitutions to impose term limits on their federal representatives in violation of the United States Constitution. *Cook*, 531 U.S. 510, 121 S. Ct. 1029, 149 L. Ed. 2d 44; *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 **[***751]** (1995). The people of the States that enacted these reforms surely viewed them as measures that would "place the lead rein in the people's hands." *Ante*, at 27, 192 L. Ed. 2d, at 731. Yet the Court refused to accept "that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Term Limits*, 514 U.S., at 831, 115 S. Ct. 1842, 131 L. Ed. 2d 881. The majority approves just such an evasion of **[****94]** the Constitution today. [6]

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[6] *Term Limits* was of course not decided on the abstract principle that "the people should choose whom they please to govern them." *Ante*, at 27, n. 24, 192 L. Ed. 2d, at 731 (quoting 514 U.S., at 783, 115 S. Ct. 1842, 131 L. Ed. 2d 881). If that were the rule, the people could choose a 20-year-old Congressman, a 25-year-old Senator, or a foreign President. But see Art. I, §2, cl. 2; §3, cl. 3; Art. II, §1, cl. 5. *Term Limits* instead relied on analysis of the text, structure, and history of the Constitution—all factors that cut strongly against the majority's position today.

The Court also overstates the effects of enforcing the plain meaning of the Constitution in this case. There is no dispute that Arizona may continue to use its Commission to draw lines for state legislative elections. The representatives chosen in those elections will then be responsible for **[**2691]** congressional redistricting as members of the state legislature, so the work of the Commission will continue to influence Arizona's federal representation.

Moreover, reading the Elections Clause to require the involvement of the legislature will not affect most other redistricting **[*848]** commissions. As the majority notes, many States have commissions that play an "auxiliary role" in congressional redistricting. **[****95]** *Ante*, at 8, and nn. 8-9, 192 L. Ed. 2d, at 720. But in these States, unlike in Arizona, the legislature retains primary authority over congressional redistricting. See Brief for National Conference of State Legislatures as *Amicus Curiae* 3-17.

The majority also points to a scattered array of election-related laws and constitutional provisions enacted via popular lawmaking that it claims would be "endangered" by interpreting the Elections Clause to mean what it says. *Ante*, at 33, 192 L. Ed. 2d, at 735. Reviewing the constitutionality of these farflung provisions is well outside the scope of this case. Suffice it to say that none of them purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) (Scalia, J., dissenting).

Absent from the majority's portrayal of the high motives that inspired the Arizona Commission is any discussion of how it has actually functioned. The facts described in a recent opinion by a three-judge District Court detail the partisanship that has affected the Commission on issues ranging from staffing decisions to drawing the district lines. See *Harris* v. *Arizona Independent* ***[****96]*** *Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). The *per curiam* opinion explained that "partisanship played some role in the design of the map," that "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts," and that the Commission retained a mapping consultant that "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." **[***752]** *Id.*, at 1046, 1047, 1053. The hiring of the mapping consultant provoked sufficient controversy that the Governor of Arizona, supported **[*849]** by two-thirds of the Arizona Senate, attempted to remove the chairwoman of the Commission for "substantial neglect of duty and gross misconduct in office." *Id.*, at 1057; see *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012) (explaining the removal and concluding that the Governor exceeded her authority under the Arizona Constitution).

Judge Silver's separate opinion noted that "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." 993 F. Supp. 2d, at 1083. Judge Wake's separate opinion described the Commission's "systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality **[****97]** districts" as "old-fashioned partisan malapportionment." *Id.*, at 1091, 1108. In his words, the "Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason." *Id.*, at 1092.

The District Court concluded by a two-to-one margin that this partisanship did not rise to the level of a constitutional violation. The case is pending on appeal before this Court, and I take no position on the merits question. But a finding that the partisanship in the redistricting plan did not violate the Constitution

hardly **[**2692]** proves that the Commission is operating free of partisan influence—and certainly not that it complies with the Elections Clause.

* * *

The people of Arizona have concerns about the process of congressional redistricting in their State. For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers **[*850]** who won passage of the Seventeenth Amendment. Indeed, several constitutional amendments over the past century have **[****98]** involved modifications of the electoral process. Amdts. 19, 22, 24, 26. Unfortunately, today's decision will only discourage this democratic method of change. Why go through the hassle of writing a new provision into the Constitution when it is so much easier to write an old one out?

I respectfully dissent.

Appendix to opinion of Roberts, C. J.

APPENDIX:

"LEGISLATURE" IN THE CONSTITUTION

Art. I, §2, cl. 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, §3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." (Modified by Amdt. 17.)

Art. I, §3, cl. 2: "Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into **[***753]** three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third **[****99]** Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." (Modified by Amdt. 17.)

Art. I, §4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed **[*851]** in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Art. I, §8, cl. 17: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

Art. II, §1, cl. 2: "Each State shall appoint, in such Manner as the Legislature thereof **[****100]** may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding **[**2693]** an Office of Trust or Profit under the United States, shall be appointed an Elector."

Art. IV, §3, cl. 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

Art. IV, §4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

Art. V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for **[*852]** proposing Amendments, which, in either Case, shall be **[****101]** valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United **[***754]** States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amdt. 14, §2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of **[****102]** electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Modified by Amdts. 19, 26.)

Amdt. 14, §3: "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, **[*853]** or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds **[****103]** of each House, remove such disability."

Amdt. 17, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, elected by the people **[**2694]** thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

Amdt. 17, cl. 2: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct."

Amdt. 18, §3: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Superseded by Amdt. 21.)

Amdt. 20, §6: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date **[****104]** of its submission."

Amdt. 22, §2: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution **[*854]** by the Legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

[*755]** Justice Scalia, with whom Justice Thomas joins, dissenting.

I do not believe that the question the Court answers is properly before us. Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute "cases" or "controversies" committed to our resolution by Art. III, §2, of the Constitution.

What those who framed and ratified the Constitution had in mind when they entrusted the "judicial Power" to a separate and coequal branch of the Federal Government was the judicial power they were familiar with—that traditionally exercised by English and American courts. The "cases" and "controversies" that those courts entertained did not include suits between units of government regarding their legitimate powers. The job of the courts was, in Chief Justice Marshall's words, "solely, to decide on the rights of individuals," *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 170, 2 L. Ed. 60 (1803). Tocqueville considered this one reason the new democracy could safely confer upon **[****105]** courts the immense power to hold legislation unconstitutional:

> "[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. . . .
>
> "I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could only attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. . . . But **[*855]** the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice." 1A. de Tocqueville, Democracy in America 102-103 (P. Bradley ed. 1948).

[2695]** That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual **[****106]** contexts that enable "realistic appreciation of the consequences of judicial action," *ante*, at 14, 192 L. Ed. 2d, at 724. To the contrary. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). It keeps us minding our own business.

We consult history and judicial tradition to determine whether a given "'disput[e is] appropriately resolved through the judicial process.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted). What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers. Nearly every separation-of-powers case presents questions like the ones in this case. But we have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit **[***756]** in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm. That is why, for example, it took this Court over 50 years to rule upon the constitutionality of the Tenure of Office Act, passed in 1867. If the law of standing **[****107]** had been otherwise, "presumably President Wilson, or Presidents Grant and Cleveland before him, would . . . **[*856]** have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress." *Raines* v. *Byrd*, 521 U.S. 811, 828, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

We do not have to look far back in the United States Reports to find other separation-of-powers cases which, if the Arizona Legislature's theory of standing is correct, took an awfully circuitous route to get here. In *Zivotofsky* v. *Kerry*, *ante*, p. 1, 576 U.S. 1, 135 S. Ct. 2076, 192 L. Ed. 2d 83, the President could have sued for an injunction against Congress's attempted "direct usurpation" of his constitutionally-conferred authority to pronounce on foreign relations. Or in *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015), a Federal District Judge could have sought a declaratory judgment that a bankruptcy court's adjudicating a *Stern* claim improperly usurped his constitutionally conferred authority to decide cases and controversies. Or in *NLRB* v. *Noel Canning*, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014), the Senate could have sued the President, claiming a direct usurpation of its prerogative to advise on and consent to Presidential appointments. Each of these cases involved the allocation of power to one or more branches of a government; and we surely would have dismissed suits **[****108]** arising in the hypothesized fashions.

We have affirmatively rejected arguments for jurisdiction in cases like this one. For example, in *Raines*, 521 U.S., at 829-830, 117 S. Ct. 2312, 138 L. Ed. 2d 849, we refused to allow Members of Congress to challenge the Line Item Veto Act, which they claimed "'unconstitutionally expand[ed] the President's power'" and "'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.'" *Id.*, at 816, 117 S. Ct. 2312, 138 L. Ed. 2d 849. In *Massachusetts* v. *Mellon*, 262 U.S. 447, 479-480, 43 S. Ct. 597, 67 L. Ed. 1078 (1923), we refused to allow a State to pursue its claim that a conditional congressional appropriation "constitute[d] an effective means of inducing the States to **[**2696]** yield a portion of their sovereign rights." (And *Mellon* involved a contention that *one* government infringed upon *another* government's power—far closer to the **[*857]** traditional party-versus-party lawsuit than is an intragovernmental dispute.) We put it plainly: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved

powers of the several States," *id.*, at 483, 43 S. Ct. 597, 67 L. Ed. 1078 and because the State could not show a discrete harm except the alleged usurpation of its powers, we refused to allow the State's appeal.

The sole precedent the Court relies upon is *Coleman* v. *Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939). *Coleman* can be distinguished from the present case as readily as it was **[****109]** distinguished in *Raines*. In *Raines*, the accurate-in-fact (but inconsequential-in-principle) distinction was that the Senators in *Coleman* **[***757]** had their votes nullified, whereas the Members of Congress claimed that their votes could merely be rendered ineffective by a Presidential line-item veto. *Raines*, *supra*, at 823-824, 117 S. Ct. 2312; 138 L. Ed. 2d 849. In the present case we could make the accurate-in-fact distinction that in *Coleman* individual legislators were found to have standing, whereas here it is the governmental body, the Arizona Legislature, that seeks to bring suit. But the reality is that the supposed holding of *Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes.

Coleman was a peculiar case that may well stand for nothing. The opinion discussing and finding standing, and going on to affirm the Kansas Supreme Court, was written by Chief Justice Hughes and announced by Justice Stone. Justice Frankfurter, joined by three other Justices, held there was no standing, and would have dismissed the petition (leaving the judgment of the Kansas Supreme Court in place). Justice Butler, joined by Justice McReynolds, dissented (neither joining Hughes's opinion **[****110]** nor separately discussing standing) and would have reversed the Kansas Supreme Court.

That adds up to two votes to affirm on the merits, two to reverse on the merits (without discussing standing) and four **[*858]** to dismiss for lack of standing. Justice Stanley Reed, who was on the Court and apparently participated in the case, is not mentioned in any of the opinions recorded in the United States Reports. So, in order to find *Coleman* a binding precedent on standing, rather than a 4-to-4 standoff, one must assume that Justice Reed voted with Hughes. There is some reason to make that assumption: The four Justices rejecting standing went on to discuss the merits, because "the ruling of the Court just announced removes from the case the question of petitioners' standing to sue." 307 U.S., at 456, 59 S. Ct. 972, 83 L. Ed. 1385 (Black, J., concurring). But then again, if nine Justices participated, how could it be that on one of the two issues in the case the Court was "equally divided and therefore . . . expresse[d] no opinion"? *Id.*, at 447, 59 S. Ct. 972, 83 L. Ed. 1385.

A pretty shaky foundation for a significant precedential ruling. Besides that, the two dissenters' mere assumption of standing—neither saying anything about the subject nor joining Hughes's opinion on the point—produces (if **[****111]** you assume Reed joined Hughes) a majority for standing but no majority opinion explaining why. And even under the most generous assumptions, since the Court's judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction, **[**2697]** *Zivotofsky* v. *Clinton*, 566 U.S. 189, 194, 566 U.S. 189, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012)—*Coleman*'s discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

The Court asserts, quoting *Raines*, 521 U.S., at 819-820, 117 S. Ct. 2312, 138 L. Ed. 2d 849, that the Court's standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Ante*, at 14_, n. 12, 192 L. Ed. 2d, at 723. The cases **[***758]** cited

to support this dictum fail to do so; they are merely cases where a determination of unconstitutionality is avoided by applying what there is no reason to believe is anything other than *normal* **[*859]** standing requirements. It seems to me utterly implausible that the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the **[****112]** President, and not when they were treading upon the powers of state legislatures and executives. Quite to the contrary, I think they would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.

I would dismiss this case for want of jurisdiction.

* * *

Normally, having arrived at that conclusion, I would express no opinion on the merits unless my vote was necessary to enable the Court to produce a judgment. In the present case, however, the majority's resolution of the merits question ("legislature" means "the people") is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice.

Justice Thomas, with whom Justice Scalia joins, dissenting.

Reading today's opinion, one would think the Court is a great defender of direct democracy in the States. As it reads "the Legislature" out of the Times, Places and Manner Clause, U.S. Const., Art. I, §4, the majority offers a paean to the ballot initiative. It speaks in glowing terms of the "characteristic **[****113]** of our federal system that States retain autonomy to establish their own governmental processes." *Ante*, at 27, 192 L. Ed. 2d, at 732. And it urges "[d]eference to state lawmaking" so that States may perform their vital function as "'laboratories'" of democracy. *Ante*, at 28, 192 L. Ed. 2d, at 732.

These sentiments are difficult to accept. The conduct of the Court in so many other cases reveals a different attitude toward the States in general and ballot initiatives in particular. **[*860]** Just last week, in the antithesis of deference to state lawmaking through direct democracy, the Court cast aside state laws across the country—many of which were enacted through ballot initiative—that reflected the traditional definition of marriage. See *Obergefell* v. *Hodges*, *ante*, 135 S. Ct. 2584, 192 L. Ed. 2d 609.

This Court's tradition of disdain for state ballot initiatives goes back quite a while. Two decades ago, it held unconstitutional an Arkansas ballot initiative imposing term limits on that State's Members of Congress, finding "little significance" in the fact that such term limits were adopted by popular referendum. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 822, n. 32, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995). One year later, it held unconstitutional a ballot initiative that would have prevented the enactment of laws under which "'homosexual, lesbian or bisexual orientation, **[****114]** conduct, practices or relationships [would] constitute or otherwise be the basis of . . . any minority status, quota preferences, protected **[***759]** **[**2698]** status or claim of discrimination.'" *Romer* v. *Evans*, 517 U.S. 620, 624, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). The Court neither gave deference to state lawmaking nor said anything about the virtues of direct democracy. It instead declared that the result of the ballot initiative was an aberration—that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id.*, at 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855. But if "constitutional tradition" is the measuring stick, then it is hard to understand how the Court condones a redistricting practice that was unheard of for nearly

200 years after the ratification of the Constitution and that conflicts with the express constitutional command that election laws "be prescribed in each State by the Legislature thereof," Art. I, §4.

The Court's lack of respect for ballot initiatives is evident not only in what it has done, but in what it has failed to do. Just this Term, the Court repeatedly refused to review cases in which the Courts of Appeals had set aside state laws passed through ballot initiative. See, *e.g.*, *County of Maricopa* v. *Lopez-Valenzuela*, 575 U.S. 1044, 135 S. Ct. 2046, 192 L. Ed. 2d 177 (2015) (Thomas, J., dissenting from denial of certiorari) (state constitutional **[*861]** amendment denying bail **[****115]** for illegal aliens arrested in certain circumstances); *Herbert* v. *Kitchen*, 574 U.S. 874, 135 S. Ct. 265, 190 L. Ed. 2d 138 (2014) (state constitutional amendment retaining traditional definition of marriage); *Smith* v. *Bishop*, 574 U.S. 875, 135 S. Ct. 271, 190 L. Ed. 2d 139 (2014) (same); *Rainey* v. *Bostic*, 574 U.S. 875, 135 S. Ct. 286, 190 L. Ed. 2d 140 (2014) (same); *Walker* v. *Wolf*, 574 U.S. 876, 135 S. Ct. 316, 190 L. Ed. 2d 142 (2014) (same). It did so despite warnings that its indifference to such cases would "only embolden the lower courts to reject state laws on questionable constitutional grounds." *Lopez-Valenzuela, supra,* at 1045, 135 S. Ct. 2046, 192 L. Ed. 2d 177, 178 . And it refused to grant a stay pending appeal of a decision purporting to require the State of Alabama to issue marriage licenses to same-sex couples, even though Alabama's licensing laws had not been challenged in that case. See *Strange* v. *Searcy*, 574 U.S. 1145, 135 S. Ct. 940, 191 L. Ed. 2d 149 (2015) (Thomas, J., dissenting from denial of application for stay). In each decision, the cheers for direct democracy were conspicuously absent.

Sometimes disapproval of ballot initiatives has been even more blatant. Just last Term, one dissenting opinion castigated the product of a state ballot initiative as "stymieing the right of racial minorities to participate in the political process." *Schuette* v. *BAMN*, 572 U.S. 291, 337-338, 134 S. Ct. 1623, 1651, 188 L. Ed. 2d 613, 643 (2014) (Sotomayor, J., joined by Ginsburg, J., dissenting) It did not hail the ballot initiative as the result of a "State's empowerment of its people," *ante,* at 19, 192 L. Ed. 2d, at 727, nor offer any deference to state lawmaking. Instead, it complained that "[t]he majority of Michigan **[****116]** voters changed the rules in the middle of the game, reconfiguring the existing political process . . . ." *Schuette*, 572 U.S., at 340, 134 S. Ct. 1623, 1631, 188 L. Ed. 2d 613, 646 . And it criticized state ballot initiatives as biased against racial minorities because such minorities "face an especially uphill battle" in seeking the passage of such initiatives. *Id.*, at 356, 134 S. Ct. 1623, 1662, 188 L. Ed. 2d 613, 655). How quickly the tune has changed.

[*760]** And how striking that it changed here. The ballot initiative in this case, unlike those that the Court has previously treated so dismissively, was unusually democracy-reducing. It did not ask the people to approve a particular redistricting **[*862]** plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future. The Court's characterization of this as direct democracy at its best is rather like **[**2699]** praising a plebiscite in a "banana republic" that installs a strongman as President for Life. And wrapping the analysis in a cloak of federalism does little to conceal the flaws in the Court's reasoning.

I would dispense with the faux federalism and would instead treat the States in an evenhanded manner. That means applying the Constitution **[****117]** as written. Although the straightforward text of Article I, §4, prohibits redistricting by an unelected, independent commission, Article III limits our power to deciding cases or controversies. Because I agree with Justice Scalia that the Arizona Legislature lacks Article III standing to assert an institutional injury against another entity of state government, I would dismiss its suit. I respectfully dissent.

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The Constitution versus "Independent State Legislature" Theory

Thomas Knapp



Photo by MILLER PHOTOGRAPHY

Democrats, the Cato Institute's Andy Craig points out at The Daily Beast, are trafficking in panic over an upcoming Supreme Court case, Moore v. Harper.

While the case is nominally about who gets to decide whether newly drawn political district lines pass constitutional muster, its particulars intersect with controversy over something called the "independent state legislature

doctrine," and therefore with disgraced former president Donald Trump's scheme to overturn the 2020 presidential election using slates of fake alternate electors" to replace the real ones.

If the Court gets this wrong, the Democratic Party line goes, state legislative majorities can just throw out presidential election results that don't go their party's way, and instead appoint presidential electors who support their preferred candidates.

Craig's case against the panic is solid: While the US Constitution does say that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," it also provides that "Congress may determine the Time of chusing the Electors." That time is "election day," currently set by federal law as the Tuesday after the first Monday in November.

Once that election has been held, the electors have been chosen. No backsies. If a state legislature wants to choose electors in some other way, it has to act BEFORE the election rather than in a fit of pique afterward.

There is, however, a larger issue with the "independent state legislature" doctrine, and that issue is whether state constitutions (and state court rulings under those constitutions) may in any way constrain a legislature's power to "direct" the "manner" of choosing electors.

Could, for example, the Florida Senate and Representatives just unilaterally decide to choose its presidential electors based on the outcome of a bipartisan game of strip poker, where each hand is worth an elector in addition to a discarded pair of boxer briefs?

The answer is no.

Florida's state constitution specifies the manner of choosing electors, and Florida's legislature is bound by that constitution.

Where federal jurisdiction is concerned, another part of the Constitution is worth looking at. Article IV, section 4 specifies that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

While we could argue over precisely what constitutes a "republican form of government," a lawless legislature, declaring itself unbound by the votes of the electorate and the constitution which empowers it to govern, clearly doesn't meet the standard.

Neither would a military junta which used the Texas Army National Guard to seize control of Austin, or a crank who declared himself emperor of New Hampshire from his Manchester apartment.

State legislatures may only "direct" the way electors are chosen within the strictures set by their states' constitutions, and they can't retroactively change those procedures after the date set by Congress for an election.

It seems unlikely that the Supreme Court will use Moore v. Harper to void the US Constitution, state constitutions, and its own power to enforce the "republican form of government" clause.

So don't panic. Yet.

JULY 6, 2022 3:29PM

The Limits of Independent State Legislature Theory

By **Andy Craig**

At the end of a term with many high-profile and controversial decisions, the Supreme Court agreed to hear a case next term that could upend election law in the United States. In ***Moore v. Harper***, the court agreed to hear an argument known as the independent state legislature (ISL) theory. This case has the potential to have a wide-ranging impact and many election law experts are **sounding the alarm**.

I have been **critical of the ISL theory** and mostly unpersuaded of its merits, at least in its more radical forms with regard to elections. Helen White of Protect Democracy offers **a good explanation** of why originalists should reject ISL, and how **recent research** has demonstrated it conflicts with the understanding of the Founders and historical practice dating all the way back to the ratification era. I largely agree with her analysis and the scholarship she cites.

However, the ISL theory's potential effect on presidential elections is being misunderstood and overstated by some critics of the conservative majority on the Supreme Court. Even as somebody who mostly disagrees with the theory, I'd like to sound a note of caution. Popular progressive talk show host Thom Hartmann, for example, **flatly endorsed** the interpretation that ISL would enable the worst possible election subversion schemes, and that the Supreme Court is plotting to use it to steal the 2024 election for Republicans. This is wrong, and it's important for even those who disagree with ISL doctrine to be able to explain why.

This confusion is partly because the real ISL theory, endorsed and

advocated by serious legal scholars and founded in a credible (if still debatable) interpretation of the Constitution, is being conflated with arguments made by Trump and his acolytes in the 2020 election. These claims invoked the theory in name, but the interpretation claimed by people such as John Eastman and some Republican lawmakers (and **rightly rejected** by **others**) is frivolous and unsupported even on ISL's own terms.

So what is the independent state legislature theory? It starts with the Constitution's **Elections Clause**, which provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, **shall be prescribed in each State by the Legislature thereof**..." (emphasis added).

The point of contention is in that reference to "the Legislature thereof." Does that mean only the elected body consisting of state representatives and state senators? Or does it refer to the state's lawmaking process more broadly, however that might be organized by the state's constitution, including things like possible gubernatorial vetoes and judicial review by state courts? It's the former interpretation that would make state legislatures "independent" of any constraints under the state's constitution, on the theory that any such limits on their power are overridden by the federal Constitution.

The practical implications of this question were made plain in a 2015 case concerning Arizona's independent redistricting commission, which was created by voters through a ballot initiative. Members of the Arizona state legislature sued in federal court, arguing that this usurped a power the federal Constitution grants only to them. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court **rejected that argument** in an opinion written by Justice Ginsburg and joined by the three other liberals together with Justice Kennedy.

Now a similar case will go before a changed court, with Kennedy and Ginsburg both replaced by more conservative justices who are presumed to be more sympathetic to the dissents in the Arizona case. In *Moore*, the North Carolina state courts struck down the congressional districts adopted by the state legislature, holding that they violated the state

constitution due to excessive gerrymandering. Like happened in Arizona, North Carolina legislators filed a federal suit claiming that state constitutions and courts can not constrain their exercise of the power granted by the Elections Clause.

Observers widely expect the court to endorse the independent state legislature theory, though how far they will go with it is an open question. The consequences could be substantial, overturning popular reform moves in many states to limit partisan gerrymandering. That might include independent commissions and the use of referendums like in Arizona, state court rulings like the one at stake in North Carolina, and state executive actions such as many states controversially used to alter their election procedures in response to the pandemic. These would be big and consequential changes to how federal elections are run, and those concerned with election law and policy are right to say so.

Such a ruling could also have troubling practical consequences, splitting the process of setting rules for elections to state office from the rules for federal elections, even though both appear on the same ballots on the same day. Such a possibility was once so troubling that **the Constitution was amended** in record time to avoid it.

So that's what's at stake for House and Senate elections. What about presidential elections? What does *Moore* potentially mean **for Electoral Count Act reform** and concerns about attempted subversion like we saw in the 2020 election?

The Constitution's **Electors Clause**, governing how members of the Electoral College are chosen, contains similar language granting the decision over method of selection to each state's "legislature." In the 2020 election and after, advocates for Trump **argued** this **amounts** to a sweeping power for state legislators to overturn the results of the presidential election in their state. Even after a state's voters chose Biden and thus his slate of electors, and after that result was duly confirmed by both state and federal courts, the claim was that Republican-majority legislatures could appoint Trump electors instead. In its most outlandish version, proponents argue legislators could revoke their state's 2020 electoral votes right now, long after the election is over and the winner

has taken office.

But this is not what independent state legislature theory would do on its own terms, and it is not what has been advocated by serious proponents. There has been no indication from the conservative justices, including in their dissents in *Arizona* and other recent cases, that they would condone such an action. That's because it would contradict the plain text of the Constitution regardless of any theory about the powers of state legislatures.

In both congressional and presidential elections, Congress has a time-setting power to determine *when* the elections occur, even as the *how* is mostly left to the states. For presidential elections, that means state legislatures (however that term is construed) have broad power to decide what manner the state will use to choose its presidential electors. But they must implement the method chosen on the date set by federal law, which is Election Day. That's the deadline.

States could say they won't hold a presidential election at all, and instead the legislature itself will pick who will cast the state's electoral votes. This is a power every state already has, and they always have. But in practice, the use of popular elections for president is well-settled and heavily entrenched, such that no state is likely to abandon letting voters have their say. No state has used legislative selection **since 1876**. It is politically unthinkable to abolish presidential elections altogether, even in the most heavily Republican states.

The claim made by Trump supporters in 2020 goes beyond that and says that legislatures can hold an election to choose electors but then decide they don't like the outcome and overturn the results. This is false and would render Congress's time-setting power a nullity. You can't decide how you're going to do something (appoint electors) after the time set for doing it (Election Day) has already passed. Once the state has decided to hold an election to choose electors, and then actually done so on Election Day, that process is final and state legislators have no further say in the matter.

This is true regardless of how the court rules in *Moore*. There is no need

for Electoral Count Act reform to address it, nor should the pending case be any obstacle to much-needed ECA reform. That's because ECA reform is compatible with however the court might rule on the independent state legislature theory. A **reformed ECA should clearly articulate** the principle that Election Day constitutes a firm deadline for states to decide how they will choose their electors, but this is already current law and what the Constitution clearly requires.

Given the likelihood that the Supreme Court will endorse some version of the independent state legislature theory, it's important for opponents of Trump-style election subversion to not overstate the effect it would have. No matter what the court rules in *Moore*, **it will remain unlawful and unconstitutional** for state legislatures to overturn presidential election results after the fact.

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AN UNPRECEDENTED AND UNCONSTITUTIONAL POWER GRAB

How Democrats are Abusing the Constitution to Nationalize Elections

Republican Staff Report

Committee on House Administration
Committee on the Judiciary

U.S. House of Representatives



August 24, 2021

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EXECUTIVE SUMMARY

Voting in free and fair elections is a foundation of American democracy. Every eligible voter must be able to cast a ballot, all lawful votes must be counted according to state law, and all Americans should have confidence in the outcome of elections. Radical Democrat legislation introduced in the House of Representatives would upend these principles, preventing common-sense measures to reduce voter fraud and putting partisan Washington, D.C. bureaucrats in charge of local elections. This legislation amounts to a partisan power grab designed to keep elected Democrats in power.

Under the Constitution, states maintain primary authority over election administration, with the federal government playing only a supporting role. Democrats ignore this Constitutional division of power to target and attack the election processes in Republican-led states. In a seemingly coordinated effort across government, Democrats have falsely and without evidence claimed that Republican-led states have instituted laws that are akin to "Jim Crow 2.0"[1] and passed to intentionally suppress minority votes. President Biden's Justice Department has even filed a meritless voting rights lawsuit against a Republican-led state—a state that actually allows greater election access than President Biden's home state of Delaware—and baselessly threatened that state efforts to return to pre-pandemic voting practices could be voting rights violations.

The centerpiece of the Democrats' legislative effort is H.R. 4, a radical far-left bill to weaponize the Voting Rights Act (VRA) to nationalize elections and prohibit popular voter integrity measures. At the time of its passage in 1965, the VRA was an exceptional and necessary departure from the principles of federalism to fight Democrat-led segregation and discrimination in voting in several states.[2] The VRA sought to overcome the exceptional conditions of pervasive state resistance and barriers that prevented minority voters from exercising their right to vote guaranteed under the 15th Amendment.[3]

Democrats refuse to accept that the United States today is different than the United States as it existed in the 1960s. Democrats refuse to accept the fact that the VRA has worked—that voter registration and minority turnout have hit record levels and continue to grow.[4] As the Supreme Court recognized in *Shelby County v. Holder*, a recent case in which the Court evaluated a portion of the VRA, "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[5]

The Committee on House Administration and the Committee on the Judiciary have received ample evidence documenting how more minority Americans are participating in elections

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[1] *See, e.g.*, Andrew E. Busch, *'Jim Crow 2.0' Is Imaginary – and Divisive*, Commentary, Real Clear Politics (Aug. 20, 2021), https://www.realclearpolitics.com/articles/2021/08/20/jim_crow_20_is_imaginary__and_divisive_146276.html.
[2] History, Voting Rights Act of 1965, https://www.history.com/topics/black-history/voting-rights-act (last visited Apr. 14, 2021).
[3] *Id.*
[4] *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).
[5] *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

than ever before. An election law expert testified that "minority participation is exponentially better now than it was in 1965."[6] He elaborated that registration disparities between certain minority and non-minority populations in states previously covered under the VRA are below the national average and are lower than the registration disparities in Democrat-led states such as "California, New York, Connecticut, D.C., Delaware, and Virginia."[7] In addition, according to data from the 2020 election, voter turnout was higher across all racial groups.[8] More Americans voted in the last two elections than ever before in our nation's history.[9]

Republicans embrace the great strides our country has made in electoral participation. Democrats seem unwilling to accept these facts. Instead, Democrats have created a false "crisis" in voting rights to justify their unprecedented and unconstitutional power grab. H.R. 4 would give the Department of Justice (DOJ) and federal courts the power to exert considerable control over state and local elections. H.R. 4 would effectively prohibit states from implementing popular voter integrity measures—like voter ID—by requiring these laws to be approved by partisan bureaucrats in Washington.

Democrats' push to nationalize elections in H.R. 4 can only be properly evaluated in conjunction with H.R. 1, their grab-bag bill to empower Democrat special interests and mandate far-left California-style elections. Taken together, these two bills are a massive federal power grab that would mandate some of the worst "pandemic-style" election administration changes of 2020 permanently across the nation. These bills do little to actually improve voting rights where there is intentional discrimination, and they do absolutely nothing to promote election integrity.

This Republicans staff report of the Committee on House Administration and the Committee on the Judiciary presents the evidence available to the Committees in relation to H.R.

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[6] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong., at 6 (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc.).

[7] *Id.*

[8] *Id.*

[9] U.S. CENSUS BUREAU, Table A-9, Reported Voting Rates in Presidential Election Years, by Selected Characteristics: November 1964 to 2016, *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html; U.S. CENSUS BUREAU, Voting and Registration in the Election of November 2020, *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html. *See also* Jacob Fabina, *Record High Turnout in the 2020 General Election: Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html ("Despite unique challenges to voter registration and voting created by COVID-19 and heightened concerns about turnout as a result, the 2020 election had the highest voter turnout of the 21st century."); *Election Administration And Voting Survey 2020 Comprehensive Report: A Report From The U.S. Election Assistance Commission To The 117th Congress* ii, U.S. ELECTION ASSISTANCE COMM'N (2020), https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf

> (The 2020 EAVS confirms that the 2020 general election saw the highest turnout of any federal general election recorded by the EAVS to date, with 67.7% of the citizen voting age population (CVAP) casting ballots that were counted, an increase of 6.7 percentage points from 2016 levels. Nearly every state saw an increase in turnout compared to the 2016 EAVS. Furthermore, more than 209 million people were active registered voters for the 2020 general election, which represents an all-time high, and more than 161 million voters cast ballots that were counted for this election.).

4. It details how the radical provisions in H.R. 4 are not supported by data or experience. It explains how H.R. 4 is an unnecessary and unconstitutional power grab in support of Democrats' progressive goals. The report exposes how Democrats are politicizing voting rights, placing their partisan objective ahead of American constitutional rights.

At a time when our country faces real crises at home and abroad, Democrats in Washington have chosen to devote their limited time to addressing a manufactured one. It is easier today than ever before to vote in the United States, as the data reflects. But rather than celebrate this progress, Democrats continue their baseless attacks on Republican-led voter integrity measures and selectively target election laws in Republican-led states. H.R. 4 is merely a continuation of President Biden's and Washington Democrats' aggressive efforts to radically restructure every facet of American society in their progressive image.

I. H.R. 4's Radical Overhaul of Voting Rights and Elections Is Not Supported by Facts or Data

Despite what Democrats allege, the information available to the Committees does not support such a radical overhaul of the Voting Rights Act as proposed in H.R. 4. Voter registration overall and voter turn-out among minority populations have reached record levels.[10] Some states previously covered by the VRA actually outperform states that were not subject to the provisions of the VRA. As the Supreme Court has noted, the circumstances have changes since 1965 requiring a fresh examination of voting rights.

A. The United States Has Made Great Strides in Ballot Access for Minority Americans

Voting is a fundamental and constitutionally protected right in the United States. All eligible voters must have access to the ballot, and all lawful votes must be counted. Although the United States has struggled in the past with ensuring voting rights in some Democrat-led southern states, the country has made tremendous progress since then. It is easier today for eligible Americans to vote than ever before in our nation's history. More Americans voted in the last two elections than ever before in our nation's history.[11]

Voter registration overall and minority turn-out in the United States have hit record levels and continue to grow.[12] According to Census Bureau reports, turnout for the 2020 election broke the modern record, set in 1992.[13] Turnout among all races has also increased in recent presidential elections.[14] Racial minorities have also grown as a share of the overall electorate.[15]

Judicial Watch senior attorney Russell Nobile, an expert in election law, detailed these improvements in testimony before the Subcommittee on the Constitution of the House Judiciary Committee. Nobile told the Subcommittee that "minority participation is exponentially better now than it was in 1965."[16] He explained that "registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi—all previously covered (in whole or part) the VRA—are all below the national average" and are lower than the registration disparities in "California, New York, Connecticut, D.C., Delaware, and Virginia."[17] As for turnout, Nobile testified that the "2020

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[10] *Id. See also Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).

[11] *Id. See also* Grace Segers, *Record voter turnout in 2018 midterm elections*, CBS News (Nov. 7, 2018), https://www.cbsnews.com/news/record-voter-turnout-in-2018-midterm-elections/.

[12] *Id.*

[13] United States Census Bureau, *2020 Presidential Election Voting and Registration Tables Now Available* (April 29, 2021) https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html.

[14] *See id.*

[15] *Id.*

[16] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 6 (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc.).

[17] *Id.*

election had a higher turnout across all racial groups" and in Mississippi, a previously covered jurisdiction, "turnout for black voters . . . exceeded that of whites."[18] Given the recent Census data, Nobile concluded that "it is simply not credible to claim that Jim Crow style voter suppression currently exists."[19]

B. Democrats Selectively Target Republican States While Ignoring Democrat States

The Constitution sets forth a decentralized election administration system in which states maintain primary authority.[20] This decentralized system provides additional levels of security while affording states the ability to innovate to best serve the needs of their voters.[21] Democrats seek to undermine this decentralized process to consolidate power in the federal government and stop state-based voter integrity measures. As noted by Weber County, Utah, Clerk/Auditor Ricky Hatch in a February 2021 Committee on House Administration Hearing:

> Understanding that America's constitutionally decentralized election infrastructure recognizes that policies that may be best suited for one state may not be best suited for others. We respectfully encourage the federal government to engage in a robust federalism process with both state and local stakeholders regarding any legislative or regulatory changes relating to elections.[22]

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[18] *Id.*

[19] *Id.* at 7.

[20] U.S. Const. art. I § 4, cl. 1. *See also* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[21] "The decentralization of the American election system means hackers would have to gain access to thousands of county and municipal systems, and to hundreds of thousands of machines, to make a dent in the electoral outcome." Reid Wilson, *Hacking the election is nearly impossible. But that's not Russia's goal*, THE HILL (Sept. 10, 2016), https://thehill.com/policy/cybersecurity/295170-hacking-the-election-is-nearly-impossible-but-thats-not-russias-goal.

> One reason [the election cannot be hacked] is that our election system is highly decentralized. There are more than 9,000 polling places from sea to shining sea, each of which is overseen by its own staff and equipped with its machines—either paper ballots or one of several brands of electronic voting machine. Each precinct reports its results independently. There is no centralized, federal election board. There is no national voter database. There is no U.S. election infrastructure that can be infiltrated or hacked.

Haley Sweetland Edwards and Chris Wilson, *It's Almost Impossible for the Russians to Hack the U.S. Election. Here's Why.* TIME (Sept. 21, 2016), https://time.com/4500216/election-voting-machines-hackers-security/. *See also Elections: System Security*, Washington Secretary of State, https://www.sos.wa.gov/elections/system-security.aspx ("State and local autonomy over election administration is a critical source of resilience for the US election process. Further, the decentralized structure allows state and local officials to innovate by creating and implementing solutions, which effectively manage the risk to their unique systems.").

[22] *Strengthening American Democracy,* Hearing before H. Comm. on Admin. (Feb. 25, 2021) (written testimony of Ricky Hatch, Clerk/Auditor, Weber County, Utah, at 3, https://docs.house.gov/meetings/HA/HA00/20210225/111246/HHRG-117-HA00-Wstate-HatchCPAR-20210225.pdf).

Democrats attack election integrity efforts in states like Georgia, Texas, and Florida as an excuse to nationalize elections. In doing so, Democrats completely disregard existing laws in Democrat strongholds like President Biden's home state of Delaware that are more restrictive. For example, Georgia's new election integrity law provides 17 days of early voting (compared to 10 days of early voting in 2018),[23] while Delaware will only have 10 days beginning in 2022.[24] New York provides only ten days of early voting.[25] Even the *Washington Post* gave President Biden a rating of "Four Pinocchios"—its worst rating—on his claim that the new Georgia voting law "ends voting hours early."[26] In addition, the pending Texas election reform legislation would prohibit drive-through and 24-hour voting, which local jurisdictions implemented temporarily due to the pandemic.[27] Neither Delaware nor New York currently allow drive-through or 24-hour voting.[28]

C. Democrats Ignored Perspectives of Local Election Officials

Democrats are not seriously interested in letting states decide what works best for their residents, or at the very least learning from local election administrators on the best ways to increase access to the ballot box and efficiently administer elections. In fact, the Democrats on the Committee on House Administration are so uninterested that they did not call a single witness that had administered an election until the last full committee hearing. This means that during the previous 18 hearings on elections and the one legislative hearing on H.R. 1 hosted by the Committee on House Administration,[29] in which the Democrats called over 100 witnesses, only their last two witnesses had ever administered an election on the state or county level. Democrats attempted to call certain Secretaries of States, and officials with the title of "Election Administrator," but these individuals also never administered elections. At the Subcommittee on Elections hearing on June 11, 2021, Rep. Bryan Steil exemplified this fact during the following exchange with Isabel Longoria, the Election Administrator from Harris County in Texas:

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[23] Ga. Code Ann. § 21-2-385(d) (Amended by *Election Integrity Act of 2021*); Ga. Code Ann. § 21-2-385(d)(1)(A). *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[24] Isabel Hughes and Sarah Gamard, *Georgia Republican lawmaker wants to emulate Delaware's 'draconian' voting laws*, DEL. NEWS J., https://www.delawareonline.com/story/news/politics/2021/04/13/georgia-republican-lawmaker-wants-emulate-what-he-calls-delawares-draconian-voting-laws/7186971002/. *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[25] *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[26] Glenn Kessler, *Biden falsely claims the new Georgia law 'ends voting hours early'*, Analysis, WASH. POST (Mar. 30, 2021), https://www.washingtonpost.com/politics/2021/03/30/biden-falsely-claims-new-georgia-law-ends-voting-hours-early/.

[27] *'No constitutional right to have 24-hour voting,' Gov. Abbott speaks to KHOU 11 about voting rights, results of 2020 election*, KHOU-11 (Jul. 14, 2021).

[28] Karl Rove, *Texas Democrats Suppress the Vote*, WALL ST. J. (Jul. 14, 2021).

[29] The Committee on House Administration and its Subcommittee on Elections held hearings over the 116th and 117th Congresses to inform the drafting of H.R. 4. *See Hearings*, U.S. H. of Reps. Comm. on H. Admin., 117th Cong., https://cha.house.gov/committee-activity/hearings.

Rep. Steil: Have you ever administered an election?

Ms. Longoria: No. Everyone's got to start somewhere, so I started six months ago as the elections administrator.[30]

A similar exchange occurred between Rep. Steil and Shenna Bellows, the Maine Secretary of State, at a hearing on February 25, 2021. In response to Rep. Steil's question on whether she had ever administered an election, Ms. Bellows stated, "I am in the process of administering my first election at the district level. . . . This is my first term as Secretary of State."[31]

Democrats knew that engaging directly with experienced state and local election administrators would hurt their efforts to overhaul the nation's election laws, so they conveniently did not request their participation in the hearings. Fortunately, Republican-invited witnesses included several experienced election administrators, such as Weber County, Utah Clerk/Auditor Ricky Hatch, Washington Secretary of State Kim Wyman, Kentucky Secretary of State Michael G. Adams, Louisiana Secretary of State R. Kyle Ardoin, Alabama Secretary of State John H. Merrill, and U.S. Election Assistance Commission (EAC) Chair Donald Palmer. Every experienced election administrator with whom Republicans engaged expressed serious concerns about H.R. 1. They repeatedly stressed that the numerous mandates throughout H.R. 1 would not work in their jurisdictions, would cost an incredible amount of money to implement, and could even make elections less secure.[32]

A common theme that the Committees have heard repeatedly from election officials serving on both state and local levels is to preserve state flexibility in elections. Given the unique needs and diverse demographics of the country's voting population, what may work in one state may not be feasible in other states or jurisdictions.

- During the Committee on House Administration hearing on July 12, 2021, Kentucky Secretary of State Michael Adams reiterated this point when he urged the Committee to "let Kentucky be Kentucky, let Louisiana be Louisiana and Vermont be Vermont, and respect the laboratories of democracy that lead to innovation in a decentralized election

[30] *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Isabel Longoria, Elections Administrator, Harris County, TX).

[31] *Strengthening American Democracy Before the H. Comm. on H. Admin.*, 117th Cong. (2021) (statement of Shenna Bellows, Secretary of State, Maine).

[32] *See generally, Strengthening American Democracy:* Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Ricky Hatch; *The Elections Clause: Constitutional Interpretation and Congressional Exercise*: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Michael G. Adams; *Voting in America: Ensuring Free and Fair Access To The Ballot:* Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Kim Wyman; *The Impact Of COVID-19 On Voting Rights And Election Administration: Ensuring Safe And Fair Elections*: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of R. Kyle Ardoin; The Impact Of COVID-19 On Voting Rights And Election Administration: Ensuring Safe And Fair Elections: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of John H. Merrill; *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Donald Palmer.

system."[33]

- On April 22, 2021, when asked whether states were best situated to administer elections at a House Judiciary Subcommittee hearing, North Carolina Lieutenant Governor Mark Robinson testified: "Absolutely the states should remain in charge . . . . We need to stop this at the insinuation that somehow the people in Washington, D.C., know better than the people in North Carolina. You. Do. Not. And we will not tolerate it."[34]

- On February 25, 2021, in his written testimony before the Committee on House Administration, Weber County, Utah, Clerk/Auditor Ricky Hatch noted that "[c]ounties are integral in elections administration and therefore, federal policies should provide flexibility for local decision-making and in the nation's elections system."[35]

It is unfortunate that Democrats seem to forget that the goal of election reform in prior efforts was to promote state flexibility, not dictate to states how to run their elections.[36] Taking power and flexibility away from state and local elections officials creates an unnecessary and purely partisan nationalization of our country's elections system contrary to the Constitution and principles of federalism.

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[33] *The Elections Clause: Constitutional Interpretation and Congressional Exercise:* Hearing Before the Subcomm. on Elections, 117th Cong. (2021) (statement of Michael Adams, Kentucky Secretary of State).

[34] *Oversight of the Voting Rights Act: The Evolving Landscape of Voting Discrimination:* Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary, 117th Cong., at 37 (2021) (statement of Lt. Gov. Mark Robinson, North Carolina).

[35] *Strengthening American Democracy,* Hearing before H. Comm. on Admin. (Feb. 25, 2021) (written testimony of Ricky Hatch, Clerk/Auditor, Weber County, Utah, at 3, https://docs.house.gov/meetings/HA/HA00/20210225/111246/HHRG-117-HA00-Wstate-HatchCPAR-20210225.pdf).

[36] Conference Report on H.R. 3295, Help America Vote Act of 2002, 148 Cong. Record 133, H7838 (Oct. 10, 2002), https://www.congress.gov/107/crec/2002/10/10/CREC-2002-10-10-pt1-PgH7836-4.pdf

> (I want to stress that the name of the commission, the Election Assistance Commission, is not an accident. The commission's purpose is to assist States with solving their problems. It is not meant and does not have the power to dictate to States how to run their elections. This will not be a bill where Washington D.C. turns around and says, this is the way you do it. It will not have rulemaking authority. The fundamental premise of the legislation on the commission was to have no rulemaking authority, and it cannot impose its will on the States . . . .This leaves the power of responsibility for running elections right where it needs to be: in the hands of the citizens of this country. Local control has the further added benefits of allowing for flexibility so that local authorities can tailor their procedures meet demands and unique community needs . . . . By necessity elections must occur at the State and local level. One-size-fits-all solutions do not work and only lead to inefficiencies. States and locales must retain the power and the flexibility to tailor solutions to their own unique problems. This legislation will pose certain basic requirements that all jurisdictions will have to meet, but they will retain the flexibility to meet the requirements in the most effective manner.).

D. The Supreme Court Has Noted Changing Circumstances

In 1965, Congress passed the VRA because some Democrat-led southern states were taking active steps to prevent minorities from voting.[37] In enacting the VRA, Congress cited its enforcement authority under the Fifteenth Amendment,[38] which provides "that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude."[39] According to the 2006 Senate report from the VRA's last amendment, Congress initially enacted the VRA "to remedy 95 years of pervasive racial discrimination in voting, which resulted in the almost complete disenfranchisement of minorities in certain areas of the country."[40] In two recent decisions, the Supreme Court has noted how the United States has changed since the 1960s and reinforced that states have the power to enhance election integrity.[41]

1. Preclearance Was an "Extraordinary" Measure to Remedy "Exceptional Conditions"

In 2013, the Supreme Court held in *Shelby County v. Holder* that Section 4 of the VRA was unconstitutional "in light of current conditions."[42] By 2010, Alabama remained a covered state under Section 4 of the VRA, meaning jurisdictions in Alabama had to seek preclearance for voting changes. Shelby County, located within the state, sued the U.S. Attorney General seeking a declaratory judgment, finding that the VRA's coverage formula and preclearance requirement was unconstitutional.[43] Preclearance "turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at the time."[44] Shelby County argued that conditions had changed dramatically in the decades since the 1960s, making Section 5 an unnecessary infringement on state sovereignty.[45]

In 2013, the case went before the U.S. Supreme Court. In its decision, the Court noted that in 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide."[46] In addition, Census Bureau data showed that African American voter turnout exceeded white voter turnout in five of the six states that Section 5 originally covered and in that final state the gap was less than 0.5 percent.[47] In its holding, the

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[37] *See generally* S. REP. NO. 109-295, at 2 (2006).
[38] Voting Rights Act of 1965, 79 Stat. 437, 89 Pub. L. 110 ("An Act To enforce the fifteenth amendment to the Constitution of the United States and for other purposes."). *Compare with* Rep. Terri Sewell, Congressional Authority Statement for H.R. 4 (117th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 167, No. 147, available at https://www.congress.gov/117/crec/2021/08/17/167/147/CREC-2021-08-17-pt1-PgH4338-2.pdf.
[39] *History and Enforcement of the Voting Rights Act of 1965:* Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Justice, 116th Cong. (2019), written testimony of Paige Whitaker at 2, https://crsreports.congress.gov/product/pdf/TE/TE10033 (Last accessed 8/23/2021).
[40] S. REP. NO. 109-295, at 2 (2006).
[41] *See, generally, Shelby County v. Holder,* 570 U.S. 529 (2013); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, (2021)
[42] *Holder*, 570 U.S. at 531.
[43] *Id.* at 529.
[44] *Id.*
[45] *Id.* at 547.
[46] *Id.* at 525.
[47] *Id.* at 548.

Court invalidated the Section 4 coverage formula as outdated, finding that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[48] Chief Justice Roberts, writing for the Court, said that the Court's decision "in no way affects" Section 2 of the VRA, nor did the Court issue a holding on Section 5.[49] Chief Justice Roberts wrote:

> Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.[50]

The Court shared this chart to demonstrate the tremendous progress made from 1965 to 2004.[51]

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

[48] *Id.* at 535.
[49] *Id.* at 557.
[50] *Id.*
[51] *Id. at 548.*

And the trends over the past two midterm and presidential elections have continued in a positive direction.

Voter Turnout Trends in the United States[52]

Turnout	2014	2016	2018	2020
Total	41.9	61.4	53.4	66.8
White (Non-Hispanic)	45.8	65.3	57.5	70.9
Black	39.7	59.4	51.1	62.6
Asian	27.1	49	40.6	59.7
Hispanic	27	47.6	40.4	53.7

In essence, the Court stated that the current formula in Section 4 is unconstitutional because it fails to reflect the reality of the tremendous progress the country has made since 1965. Although the Court struck down Section 4, Section 2 remains in place. This section provides an avenue for citizens to sue when they believe voting practices or procedures in their state discriminate on the basis of race, color, or membership in a specific language minority group. Additionally, Section 3(c) remains an effective tool within the VRA. This provision, also known as "bail-in" coverage, requires that when a court finds "intentional discrimination" on the part of a state or political subdivision in violation of the 14th and 15th Amendments justifying equitable relief, that the court "retain jurisdiction" and require the political subdivision to obtain approval from the court for any electoral change.[53]

Despite the clear facts standing against them, Democrats are desperate to expand federal power, even to the point of moving the goal posts to achieve their ends. Noted progressive activist Stacey Abrams served as a Democrat witness at a Committee on House Administration hearing on February 25, 2021, where she made the shocking pronouncement that voter turnout does not matter for voter suppression analyses. She testified:

> Rep. Barry Loudermilk: In your written testimony, you explain that Georgia saw record high turnout in the 2020 general election including from communities of color. . . . I understand your work focuses on ending voter suppression . . . and you allege that the suppression continued

[52] *The Diversifying Electorate–Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)*, Thom File, U.S. CENSUS BUREAU (May 2013), https://www.census.gov/library/publications/2013/demo/p20-568.html; *Voting and Registration in the Election of November 2014*, U.S. CENSUS BUREAU (July 2015), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html; *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html; *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAU (Apr. 2019), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html; *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

[53] *Id;* 52 U.S.C. § 10302(c).

	during the 2020 election. So, my question is, can you explain how you reconcile the record of high turnout with allegations of voter suppression particularly in light of Georgia's photo ID requirements for in-person voting?
Ms. Abrams:	So, I would begin by stating that there has never been a direct correlation between turnout and suppression.[54]

Democrats, including President Joe Biden, like to claim that the country is currently experiencing what they call "Jim Crow 2.0." This is simply not true.[55] As the Supreme Court stated in *Shelby County,* the nation has made tremendous progress since the 1960s. Voter registration and minority turn-out have hit record levels and continue to grow,[56] Judicial Watch senior attorney Russell Nobile testified before a House Judiciary Subcommittee that "minority participation is exponentially better now than it was in 1965. Based on this data, it is hard to contend that Section 5 needs to be expanded as proposed in H.R. 4."[57] Nobile stated that "registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi—all previously covered (in whole or part) by Section 5—are all below the national average" and are lower than the registration disparities in "California, New York, Connecticut, D.C., Delaware, and Virginia."[58] As for turnout, Nobile testified that the "2020 election had a higher turnout across all racial groups" and in Mississippi, a previously covered jurisdiction, "turnout for black voters . . . exceeded that of whites."[59]

2. States have Authority to Protect the Integrity of Elections

On July 1, 2021, the Supreme Court issued its opinion in *Brnovich v. Democratic National Committee*,[60] a case concerning section 2 of the VRA. In 2016, the Democratic National Committee (DNC), the Arizona Democratic Party, and other liberal groups challenged two of Arizona's voting regulations under Section 2.[61]

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[54] *Strengthening American Democracy,* Hearing before H. Comm. on Admin., 117th Cong. (Feb. 25, 2021), https://www.youtube.com/watch?v=fl77J1RlVm4&t=4150s.
[55] *See, among others*, Andrew E. Busch, *'Jim Crow 2.0' Is Imaginary – and Divisive*, Commentary, Real Clear Politics (Aug. 20, 2021), https://twitter.com/thehill/status/1428748912966438922.
[56] *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).
[57] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc., at 6).
[58] *Id.*
[59] *Id.*
[60] No. 19-1257, 594 U. S. ____ (2021), https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.
[61] Complaint, *Democratic Nat'l Comm., et al. v. Hobbs*, et al., No. 2:16-cv-01065-DLR (Ariz. D.C. Apr. 15, 2016).

- Arizona's precinct-based election day voting regulation requires in-person voters to cast ballots on Election Day at their assigned precinct. If the voter casts a ballot at the wrong precinct, election officials do not count the ballot.[62]

- In 2016, the Arizona made it a crime "for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot either before or after it has been completed."[63] This measure prohibits what is commonly referred to as "ballot harvesting."[64]

The DNC alleged that Arizona's ballot collection restriction and refusal to count out-of-precinct ballots had an "adverse and disparate effect" on Arizona's Native American, Hispanic, and African American citizens in violation of Section 2 of the VRA.[65] The DNC also alleged that Arizona legislators enacted the ballot collection restriction with discriminatory intent in violation of Section 2 and the Fifteenth Amendment.[66]

The Court held that Arizona's laws governing out-of-precinct voting and ballot collection do not violate Section 2 and that the legislature did not enact the ballot collection measure with discriminatory intent.[67] Justice Samuel Alito, writing for the majority, "identif[ied] certain guideposts" that led to the decision.[68] The Court explained that a Section 2 violation is established if:

> [B]ased on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation by members of a class of citizens protected by [Section 2] in that its members have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.[69]

To determine whether political processes leading to nomination and election are equally open to minority and non-minority groups, the VRA already requires courts to consider the

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[62] Syllabus, *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257 at 1 (U.S. 2021).
[63] *Id.*
[64] Republicans are generally opposed to ballot harvesting due to the opportunities for and real-life examples of fraud. *See* Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., Report, *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf; *Top North Carolina election official alleges illegal ballot harvesting effort in key House race*, CNBC (Feb. 18, 2019), https://www.cnbc.com/2019/02/18/north-carolina-9th-district-house-election-saw-ballot-harvesting-official.html; Joseph Choi, *North Carolina political operative pleads guilty to ballot fraud*, THE HILL (June 21, 2021), https://thehill.com/homenews/state-watch/559508-north-carolina-political-operative-pleads-guilty-to-ballot-fraud.
[65] Complaint, *Democratic Nat'l Comm. v. Hobbs*, No. 2:16-cv-01065-DLR at 41 and 42 (D. Ariz. Apr. 15, 2016) *See also Brnovich v. Democratic Nat'l Comm.*, Slip Op., No. 19-1257, 594 U.S. ____ (2021), https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.
[66] *Brnovich* v. *Democratic Nat'l Comm.*, No. 19-1257, 594 U.S. ____ at 9.
[67] *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, 594 U.S. ____.
[68] *Id.* at 13.
[69] Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (1982) (emphasis added).

"totality of circumstances."[70] The Court in *Brnovich* offered five circumstances that courts should consider when evaluating whether Section 2 has been violated:

1. *Size of the Burden.* "[T]he size of the burden imposed by a challenged voting rule is highly relevant."[71] Justice Alito noted that "mere inconvenience is insufficient."[72] He explained that "voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is 'equally open' and that furnishes equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'"[73]

2. *Departure from Standard Practice.* "The degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration."[74] Justice Alito concluded that Congress did not intend for Section 2 to "uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States."[75]

3. *Size of Disparity.* "The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider." A rule that causes a small disparity in its effect on minorities is less likely to indicate that a voting system is not equally open.[76] Justice Alito stated that there must be a "meaningful comparison" between minority and non-minority groups when assessing the size of a disparity and that "[w]hat are at bottom very small differences should not be artificially magnified."[77]

4. *Opportunities Across Entire Voting System.* "Consistent with §2(b)'s reference to a States 'political processes,' courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision."[78] Justice Alito concluded that "where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means."[79]

5. *Strength of State Interest.* "The strength of the state interests—such as the strong and entirely legitimate state interest in preventing election fraud—served by a challenged voting rule is an important factor."[80] If a strong state interest supports a voting rule, it is less likely that the rule violates Section 2.[81] Justice Alito noted that

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[70] Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (1982).
[71] Syllabus, *Brnovich*, 594 U.S. at 3.
[72] *Id.*
[73] *Id.*
[74] Syllabus, *Brnovich*, 594 U.S. at 3.
[75] *Id.* at 18.
[76] *Id.*
[77] *Id.*
[78] Syllabus, *Brnovich*, 594 U.S. at 3-4.
[79] *Id.* at 18-19.
[80] Syllabus, *Brnovich*, 594 U.S. at 3-4.
[81] *Id.* at 19.

states have an important interest in preventing election fraud and ensuring votes are cast without intimidation or undue influence.[82]

II. H.R. 4 Is Unnecessary, Unconstitutional, and a Politically Motivated Power Grab

Under the guise of updating the VRA, H.R. 4 would establish unprecedented federal control over state-administered elections. The VRA "employed extraordinary measures to address" pervasive state resistance to removing racially discriminatory barriers that prevented minorities from exercising their right to vote. In 2013, the U.S. Supreme Court's *Shelby County v. Holder* decision recognized an obvious fact: "things have changed dramatically" since 1965. It is easier to vote today than ever before in our nation's history. Yet Democrats are claiming "sweeping voter suppression" to justify for H.R. 4's radical expansion of the extraordinary measures in the VRA.

On June 24, 2021, Sara Frankenstein, an attorney who litigates VRA cases and the Vice Chair of the South Dakota State Advisory Committee for the U.S. Civil Rights Commission, testified before the Subcommittee on Elections on the prospect of a new preclearance formula. She explained:

> Rep. Steil: Recognizing that the voting access for minorities in 1964 and 1965 was very different than it is today in 2021, and that, thankfully, we've made a lot of progress in righting historic wrongs—is a preclearance formula necessary, in your opinion, Ms. Frankenstein?[125]
>
> Ms. Frankenstein: In my opinion, it is not. I've cited to you the statistics of South Dakota and those laws that sought preclearance in our previously covered counties, as you heard me testify earlier none were—none were not granted preclearance.[126]

The reality is the Democrats' case for adopting H.R. 4 is both a cynical contrivance and politically motivated. While Democrats often allege that Georgia's Republican state officials engage in voter suppression, African Americans in Georgia register to vote and vote in elections at a greater rate than in the Democrat-controlled states of Illinois, New York, and California.[83] Arizona, a target for Democrat-aligned activist litigation for its prohibition on ballot harvesting and out-of-precinct voting,[84] has higher voter turnout for minority groups than neighboring

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[82] *Id.* at 19.

[83] *See*, Table 4b, U.S. Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020).

[84] *See, e.g.*, Brnovich v. Democratic National Committee, No. 19-1257 (S. Ct. Arg. Mar 2, 2021) (challenging Arizona's prohibition of ballot harvesting and out-of-precinct voting).

California where ballot harvesting, out-of-precinct voting, and same-day voter registration are legal.[85]

H.R. 4 is nothing more than a backdoor attempt to have partisan bureaucrats in Washington, D.C., control the elections process. Requiring states to seek federal permission to make any change to election administration is another prime illustration of the Washington, D.C. swamp's desire to take over our country's election system. This very point was highlighted in written testimony by Mark F. (Thor) Hearne, II, at the June 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing. He testified:

> Preclearance empowers partisan bureaucrats in the Voting Section of the Civil Rights Division of the Justice Department to veto or rewrite state election laws. Chief Justice Roberts observed, "the preclearance process at the Department of Justice is famously opaque and usually the States and municipalities have to go through or had to go through several layers of back and forth, ... its sort of a bargaining process." *Wesley Harris v. Arizona Independent Redistricting Comm'n*, 578 U.S. ___, 136 S.Ct. 1301 (2016), oral argument transcript, p. 7. In 2013 the Department of Justice Inspector General found the officials in the Voting Section of the Civil Rights Division hired its lawyers from essentially five left-leaning advocacy groups. The point is this, the preclearance process, in practice, has proven to be an arbitrary, standardless (and now determined to be unconstitutional) intrusion into State's constitutional authority to conduct elections. And, not only that, but the preclearance process has been exploited for partisan and ideological ends that have nothing to do with the goal of protecting every citizen's right to vote irrespective of their race, color of their skin or their language. In short, preclearance devolved into a process that was arbitrary, partisan, and standardless.[86]

Congress would be wise to remember Thomas Jefferson's admonition that "[t]he government governs best that is closest to the people."[87] No state legislature should be compelled to engage in the drastic remedy of seeking the approval of partisan bureaucrats in the Biden

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[85] *See* Editorial Board, *What Was That About Voter Suppression*, WALL ST. J. (May 3, 2021), https://www.wsj.com/articles/what-was-that-about-voter-suppression-11620081220. *See also* Table 4b, U.S. Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020).

[86] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Hearing before Comm. on H. Admin. Subcomm. On Elections (June 24, 2021), written statement of Mark F. (Thor) Hearne, II, at 12-13 (*citing *A Review of the Operations of the Voting Section of the Civil Rights Division,* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT REVIEW DIVISION, March 2013, *p. 203, available at* http//org.justice.gov/reports/2013/s1303.pdf) (internal citations omitted).

[87] Merrill Peterson, The Jefferson Image in the American Mind 79 (1960) (cited in *That government is best which governs least (Spurious Quotation)*, THOS. JEFFERSON ENCYCLOPEDIA, https://www.monticello.org/site/research-and-collections/government-best-which-governs-least-spurious-quotation). Peterson refers to this phrase as a "Jeffersonian maxim". *Id.*

Administration to enact laws or make policy changes that are necessary to ensure the integrity of the elections process.

A. Democrats Manufacture a Crisis to Justify H.R. 4

In *City of Boerne v. Flores*, the Supreme Court held that congressional action pursuant to the 14th Amendment must be congruent and proportional to the harm that Congress seeks to redress or prevent.[88] Specifically, the Court ruled that "there must be a congruence between the means used and the ends to be achieved" and that an act of Congress relying on the 14th Amendment must have "proportion to supposed remedial or preventive object . . . [in order to be] responsive to, or designed to prevent, unconstitutional behavior."[89] The Court stated that this was necessary to prevent Congress from "attempt[ing to enact] a substantive change in constitutional protections" and enacting laws that "pervasively prohibit[] constitutional state action in an effort to remedy or to prevent unconstitutional state action . . . ."[90]

Although the *City of Boerne* case concerned the 14th Amendment, its logic "applies equally" to the 15th Amendment.[91] The 15th Amendment contains an identical enforcement provision to that of the 14th Amendment and "*Boerne* conflates the two amendments throughout."[92] Therefore, when Congress uses its power to enforce the mandates of the 15th Amendment, the use of this power must be congruent and proportional to the harm it seeks to address.

The Court has held that the VRA "imposes current burdens and must be justified by current needs" because "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[93] Congress has previously justified the VRA's Section 5 preclearance requirements as an exercise of its power to "enforce the fifteenth amendment of the Constitution.[94] Historically, the VRA has been upheld by the Court because "[t]he blight of racial discrimination in voting had infected the electoral process in parts of our county for nearly a century."[95] However, "[n]early 50 years later, things have changed dramatically."[96]

Data from recent elections and DOJ enforcement activity under the Obama-Biden Administration suggest that the burdens that H.R. 4 will impose on states far exceed what would be constitutional. For instance, the Census Bureau reports that turnout for the 2020 Election was 66.8% of the eligible voting age population.[97] This level of turnout was just shy of the 67.7%

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[88] *See City of Boerne v. Flores*, 521 U.S. 507, 530-532 (1997).
[89] *Id.*
[90] *Id.* at 532-533.
[91] Honest Elections Project, *Memorandum on Potential Legal Challenges to a New Preclearance Regime* (Aug. 6, 2021) (on file with the U.S. H. of Reps. Comm. on H. Admin.).
[92] *Id.*
[93] *Shelby County v. Holder*, 570 U.S. 529, 542 (2013) (internal citations omitted).
[94] *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).
[95] *Shelby County*570 U.S. at 545 (quotations omitted).
[96] *Id.* at 547.
[97] Press Release, *2020 Presidential Election Voting and Registration Tables Now Available*, Census Bureau, (Apr. 29, 2021).

achieved in 1992, the modern record.[98] Turnout among all races has also increased in recent presidential elections.[99] Racial minorities have also grown as a share of the overall electorate.[100] If there were rampant racial discrimination in voting of the sort necessary to justify the measures in H.R. 4, these statistics would simply not be possible.

Similarly, if the Supreme Court's decision in *Shelby County* had "emboldened states to pass voter suppression laws" as some Democrats like Associate Attorney General Vanita Gupta have claimed, then DOJ would have accordingly increased its enforcement activity utilizing authorities of the VRA and other voting rights laws that were not affected by *Shelby County*.[101] In fact, then-Attorney General Eric Holder announced after the Court issued its decision in *Shelby County* that DOJ would "shift resources to the enforcement of Voting Rights Act provisions that were not affected by the Supreme Court's ruling—including Section 2."[102] Despite this rhetoric, DOJ enforcement activity actually decreased.[103] The Obama-Biden Administration filed just four Section 2 enforcement actions compared to the 16 that were filed during the Bush Administration.[104] The Obama-Biden DOJ similarly filed few or no enforcement actions utilizing other authorities to combat voter suppression,[105] suggesting that there was no flood of voter suppression following the Court's decision in *Shelby County*.

Today, it is clear that the preclearance regime is no longer congruent and proportional to "a pattern of constitutional violations."[106] Instead, to support H.R. 4's exceptional deviation from the principles of federalism and the burdens it imposes on states, Democrats manufacture a crisis in voting rights—one that is unsupported by the data.

B. Democrats Double Down with Overly Broad Practice-Based Preclearance

In addition to the false basis for H.R. 4—that the United States in the midst of Jim Crow-era levels of voter suppression—H.R. 4 violates the basic constitutional principle that states have the primary role of passing election laws and administering elections.[107] H.R. 4 goes beyond the requirements of the original preclearance regime in the VRA by requiring all states to seek Justice Department approval for certain voting laws regardless of whether the laws are discriminatory or

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[98] *See Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2021) (prepared testimony of Hans von Spakovsky).
[99] *See Id.*
[100] *Id.*
[101] Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1158 (2019).
[102] *Id.*
[103] *Id.*
[104] *See Id.* at 1158-1159.
[105] *See Id.* at 1171-1179.
[106] Memorandum from Honest Elections Project on Potential Legal Challenges to a New Preclearance Regime (Aug. 6, 2021).
[107] U.S. Const. Art. 1 § 4. *See also* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

the State has met any threshold for coverage by a preclearance regime. Under the bill, this "practice-based preclearance" would apply immediately and would cover certain election law changes like modifying jurisdictional boundaries or voter ID laws.

Practice-based preclearance is a radical nationalization of elections with no basis in law or reality. According to Heritage Foundation Senior Legal Fellow Hans von Spakovsky, the practices in this provision "are so broad and cover such a wide spectrum of election administration and procedures that election changes made by state legislatures and local governments in virtually every state would now be within federal control."[108] Thus, if implemented, states would be unable to enact commonsense and practical election integrity reform laws—such as voter identification and voter roll maintenance laws—without first obtaining preclearance from the DOJ. The practice-based coverage provision seems to be "designed to target popular voter integrity provisions."[109] As Judicial Watch Senior Attorney Russell Nobile testified at a House Judiciary Subcommittee hearing, "[i]f nationwide registration disparities did not justify nationwide Section 5 coverage during the Jim Crow era, it is hard to see what data from 2020 supports imposing a nationwide preclearance requirement today."[110]

C. Legal Standards and Authorities Favoring Leftist Advocacy Groups Will Inject Confusion into Elections

In addition to creating the unconstitutional practice-based preclearance requirement, H.R. 4 also institutes a number of other problematic changes to existing election law. First, H.R. 4 institutes a new legal standard for courts to grant injunctive relief in VRA-related actions. Currently, the legal standard for granting a preliminary injunction requires the court to determine "whether the plaintiff has shown a substantial likelihood of succeeding on the merits, the plaintiff is likely to suffer irreparable harm without the injunction, the balance of equities and hardships is in the plaintiff's favor, and an injunction is in the public interest."[111] H.R. 4 lowers to the bar, allowing a plaintiff to simply raise a serious question "about a voting change and the 'hardship' imposed on the state by enjoining the change is less than the 'hardship' that would be experienced by the plaintiff if an injunction is not issued . . . ."[112]

Additionally, H.R. 4 will embolden leftist advocacy groups to work hand in hand with partisan bureaucrats within the DOJ to file meritless litigation against states and localities. The bill allows any aggrieved citizen (in addition to the Attorney General) to seek relief under the VRA and related voting laws.

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[108] Hans von Spakovsky, *Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4)*, HERITAGE FOUND. (May 24, 2021).
[109] *Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Hearing before H. Comm. on the Judiciary*. 117th Cong. at 12 (2021) (written statement of Mr. Russell Nobile, Senior Attorney, Judicial Watch).
[110] *Id.*
[111] Hans von Spakovsky, *Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4)*, HERITAGE FOUND. (May 24, 2021), https://www.heritage.org/election-integrity/report/enabling-partisan-federal-bureaucrats-control-state-election-laws-the.
[112] *Id.* The current legal standard for granting a preliminary injunction requires the court to determine "whether the plaintiff has shown a substantial likelihood of succeeding on the merits, the plaintiff is likely to suffer irreparable harm without the injunction, the balance of equities and hardships is in the plaintiff's favor, and an injunction is in the public interest."

Likewise, H.R. 4 contains a new provision that will inject confusion into elections by undermining the *Purcell* principle—a principle that asserts federal "courts should not change election rules during the period of time just prior to an election because doing so could confuse voters and create problems for officials administering the election."[113] In *Purcell v. Gonzalez*, the Supreme Court noted that "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[114]

In April 2020, the Supreme Court relied on this principle in its decision to block a lower court order that extended the absentee ballot deadline for Wisconsin's spring election.[115] In an emergency ruling, the U.S. Supreme Court overruled the district court order that "fundamentally alter[ed] the nature of the election" by unilaterally ordering Wisconsin to count ballots that were mailed and postmarked after the primary election day so long as they arrived at election offices within a week. [116] The Court stated:

> Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election . . . . This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election . . . .[117]

H.R. 4 would fundamentally alter the *Purcell* principle, making it harder for courts to halt last-minute attempts to change election administration laws in the lead-up to an election. For example, H.R. 4 prohibits courts from considering proximity to an election a valid reason to deny, stay, or vacate relief unless the opposing party can prove, by clear and convincing evidence, irreparable harm to the public interest or that the relief would impose a serious burden. Distorting the *Purcell* principle could lead to further chaos and confusion in states and localities when election laws are radically altered so close to an election.

D. H.R. 4 Expands Section 3(c) Bail-In Coverage

H.R. 4 dramatically expands courts' "bail-in" coverage. Section 3(c) of the VRA requires that when a court finds "intentional discrimination" on the part of a state or political subdivision in violation of the 14th and 15th Amendments justifying equitable relief, the court "retain jurisdiction" and require the political subdivision to obtain approval for any electoral change.[118] Under this section, either the court must find or the jurisdiction must admit that the state or political subdivision committed a constitutional violation. Section 3(c) actions are initiated as Section 2

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[113] *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSblog, https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/ (last accessed Aug. 18, 2021).
[114] *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, (2006).
[115] *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, at 2 (2020).
[116] *Id.*
[117] *Id.*
[118] *Id.*

suits, and Section 3 allows the court to use its discretion as to the length of time it retains jurisdiction over the state or political subdivision.

H.R. 4 expands a courts ability to "bail in," or retain jurisdiction over, a state or political subdivision for preclearance coverage not just for violations of the 14th and 15th Amendments, but also allows a court to "bail in" a jurisdiction for "violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group."[119] These provisions would dramatically expand court jurisdiction far beyond what was intended in the VRA.

E. Bifurcation of Section 2 Claims Target States' Interest to Protect Against Fraud

On July 31, 2021, the U.S. Supreme Court issued its decision in *Brnovich v. Democratic National Committee.* Since then, Congressional Democrats vowed to undo the decision, even saying that *Brnovich* made "it far more difficult to challenge" states' voter integrity laws.[120] On August 17, 2021, the Democrats revealed their new H.R. 4 for the 117th Congress, with ten pages of legislative text in response to the *Brnovich* decision.

The *Brnovich* decision halted efforts to further politicize the VRA and usurp authorities rightly reserved to the states. The *Brnovich* decision helped "resolve[] an unsettled question of law" regarding Section 2 VRA challenges.[121] This new section of H.R. 4 is wholly unnecessary and out of line with recent Supreme Court precedent.

H.R. 4 bifurcates Section 2 claims into vote dilution cases, cases relating to time, place, or manner voting rules, and cases related to discriminatory intent.[122] Democrats selectively apply Supreme Court precedent, codifying precedent from *Thornburg v. Gingles* for vote dilution cases but specifically prohibiting prohibit courts reviewing time, place, or manner voting rule claims from taking into account most of the factors identified by Justice Alito in the *Brnovich* decision.[123] In that opinion, Justice Alito specifically noted that the analysis and factors used in vote dilution cases from *Thornburg,* are "plainly inapplicable in a case that involves a challenge to a facially neutral time, place, or manner voting rule."[124]

F. Retrogression Will Make it Almost Impossible to Change States' Election Laws

The new legislative text for H.R. 4 adds a new subsection to Section 2 of the VRA that allows the Attorney General or private parties to stop changes in voting that states enact or seek to administer. Specifically, H.R. 4 states that a violation of Section 2 occurs when a state or political subdivision enacts or seeks to administer any qualification or prerequisite to voting or voting

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[119] H.R. §2(a), 116th Cong. (2019).
[120] Press Release, Rep. Jerry Nadler, Nadler & Cohen Statement on SCOTUS Ruling in *Brnovich v. Democratic National Committee* (Jul 1, 2021).
[121] *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. at 9 (2021) (written statement of Mr. Robert D. Popper, Senior Atty, Judicial Watch, Inc.).
[122] *Id.*
[123] *Id.*
[124] Syllabus, *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257 at 4 (U.S. 2021).

practice for any election that has the purpose, or will have the effect, of diminishing the ability of citizens, on account of race or color, or membership in a language minority group, to participate in the electoral process or elect their preferred candidate. The bill retroactively applies this subsection to "any action" taken by a state or locality after January 1, 2021. Thus, this new provision is a direct attack on the recent election integrity reform efforts undertaken in states such as Georgia.

Further, this provision is all about control. Maureen Riordan, Litigation Counsel at Public Interest Legal Foundation, testified before the Subcommittee on the Constitution of the House Judiciary Committee that a retrogression standard is "lower" than the current "Section 2 evidentiary standard."[125] She explained that "[t]his standard would make it almost impossible for a state to ever make changes to its election laws."[126] This is just another provision of H.R. 4 that attempts to nationalize election administration.

III. H.R. 4 is Part of Democrats' Broader Strategy to Nationalize Elections

Democrats want to radically overhaul the nation's election system. Their goal is to transfer control of the nation's election laws and administration from the states to bureaucrats in the federal government. The Democrats' H.R. 1 and H.R. 4 would prevent states from establishing commonsense election laws, such as voter ID requirements or list maintenance requirements. Instead, these bills would create an onerous regime that would benefit Democrats' partisan goals, perfectly exemplified by their proposed public funding of congressional campaigns.

Throughout the floor debate of H.R. 1, the 18 Committee on House Administration's Subcommittee on Elections hearings, and the six House Judiciary Constitution, Civil Rights, and Civil Liberties Subcommittee hearings leading up to the introduction of H.R. 4, Democrats repeatedly stated numerous false claims in an attempt to justify their unconstitutional bills to nationalize election law.

A. Democrats Claim "Voter Suppression" to Make Permanent Emergency, Temporary Voting Measures Implemented During the COVID-19 Pandemic

Many states adopted temporary voting procedures for the 2020 election to reduce public health risks, despite prominent public health officials saying that in-person voting was safe.[127] These temporary measures, including expanded and universal mail-in voting—of which there are documented examples of abuse[128]—opened the door to election administration errors and harmed

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[125] *Id.* at 8 (written statement of Ms. Maureen Riordan, Litigation Counsel, Public Interest Legal Found.).
[126] *Id.*
[127] Nsikan Akpan, *What Fauci says the U.S. really needs to reopen safely*, NAT'L. GEOGRAPHIC (Aug. 13, 2020).
[128] *See A Sampling of Recent Election Fraud Cases from Across the United States*, HERITAGE FOUND., https://www.heritage.org/voterfraud (last visited Aug. 2, 2021); Ray Van Dusen, *Judge rules for new Aberdeen Ward 1 alderman election*, MONROE JOURNAL (Mar. 1, 2021); Press Release, GA Secretary of State, Election Fraud Cases Sent to Prosecution as Dominion Refutes Disinformation (Feb. 24, 2021); Joseph Curl, *1,000 people Double-Voted in Georgia Primary, Face 10 Years in Prison, $100,000 Fine*, DAILY WIRE (Sept. 8, 2020); Press Release, New Jersey Office of the Attorney General, AG Grewal Announces Fraud Charges Against Paterson Councilman Michael Jackson, Councilman-Elect Alex Mendez, and Two Other Men (Jun. 25, 2020).

election integrity.[129] In addition, some state election officials and state courts bypassed the constitutionally-vested authority of their state's legislature to make unprecedented changes to state election laws.[130]

Recognizing the temporary nature of these voting procedure changes, Attorney General William Barr directed the Civil Rights Division to adopt an enforcement policy that would "presume[] lawful" a state's re-adoption of prior election laws or procedures.[131] However, on July 28, 2021, Attorney General Merrick Garland issued a new guidance that suggests that states may not return to voting laws and procedures that existed prior to the pandemic, saying those laws and procedures may not be "presumptively lawful."[132]

The new Biden Administration guidance is misguided and contrary to Congressional intent. Many of the changes that state and local governments made to voting procedures in 2020 were temporary, emergency changes to "promote both the safety of their citizens and robust democratic participation" during the pandemic.[133] These jurisdictions should be allowed to evaluate the changing circumstances and their experiences in 2020 and make appropriate lawful changes, without the threat of litigation from the federal government. With the new guidance, the Department instead takes the position that these temporary, emergency measures are the new baseline from which to judge compliance with the VRA—contrary to Congress's intention in passing the legislation.[134]

B. There is No Record of Widespread Voter Suppression

Democrat lawmakers have repeatedly pushed to "restore" and revise the VRA, citing the passage of "sweeping voter suppression laws" in several states following the *Shelby County* decision.[135] However, if the Supreme Court's decision in *Shelby County* had "emboldened states to pass voter suppression laws" as some Democrats claimed, then the DOJ would have accordingly increased its enforcement activity utilizing authorities of the VRA and other voting rights—which the Department did not.[136] One commentator called the voter suppression claims "leftovers reheated for the third time."[137] However, in both Committee on House Administration and House Judiciary Subcommittee hearings, Democrats' efforts to demonstrate massive voter suppression fell flat.

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[129] Republican Staff Report, *How Democrats are Attempting to Sow Uncertainty, Inaccuracy, and Delay in the 2020 Election,* H. Comm. on the Judiciary & Comm. on Oversight & Reform, at 1-3 (Sept. 23, 2020).
[130] Mark Levin, *On January 6 we learn whether our constitution will hold,* THE BLAZE (Dec. 30, 2020).
[131] Memorandum from Hon. William P. Barr, Atty Gen., U.S. Dep't of Justice to Assistant Atty Gen. of the Civil Rights Division (Dec. 22, 2020).
[132] U.S. DEP'T OF JUSTICE, GUIDANCE CONCERNING FEDERAL STATUTES AFFECTING METHODS OF VOTING 1 (2021).
[133] *Id.*
[134] *See generally* S. REP. NO. 109-295, at 2 (2006).
[135] Sen. Patrick Leahy, John Lewis Voting Rights Advancement Act, https://www.leahy.senate.gov/imo/media/doc/John%20Lewis%20Voting%20Rights%20Advancement%20Act%20one%20pager.pdf (last visited Apr. 14, 2021).
[136] *Id.*; Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1158 (2019).
[137] Ken Blackwell, *Claiming state voting reforms are racist is ridiculous. I should know,* USA Today (Apr. 8, 2021).

At a May 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing, Democrat witness Dr. Nazita Lajevardi, claiming that voter suppression reduced minority participation in 2016,[138] admitted to using faulty data. Her analysis and model studies relied merely on self-reported voter information from online "YouGov" surveys to reach her conclusions.[139] Furthermore, as Rep. Steil pointed out, her conclusion did not take into account the presence of a historically bad candidate such as Hillary Clinton. Dr. Lajevardi's studies did not control for the differences between a dynamic candidate like Barack Obama and an uninspiring candidate like Hillary Clinton. She admitted "that was not a variable we controlled for . . . we simply looked at the difference in voter turnout in counties between 2012 and 2016."[140]

During an April 22, 2021 hearing for the Judiciary Committee, Republican witness North Carolina Lieutenant Governor Mark Robinson testified that voter discrimination "absolutely is not" occurring in America today.[141] He further opined that "[t]here is no rampant discrimination against voters . . . . [I]t doesn't exist."[142] Further, during a June 29, 2021 hearing, Public Interest Legal Foundation attorney Maureen Riordan testified that "rampant acts of discrimination" do not exist:

> Rep. Johnson: You testified the Voting Rights Act is still working today without the preclearance requirement, which is a dated requirement, as you pointed out. It still clearly prohibits discrimination, but you noted—and I am very interested in this—the DOJ has only brought five section 2 cases since *Shelby County* was handed down 8 years ago? Are they ignoring rampant acts of discrimination out there? What do you think?
>
> Ms. Riordan: I think that the rampant acts of discrimination do not exist.[143]

Regarding H.R. 4, Ms. Riordan further explained that the bill is "looking to reauthorize a provision of the Voting Rights Act that is no longer necessary, because there is no rampant

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[138] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Nazita Lajevardi, Professor, Michigan State University at 3-6), https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-LajevardiN-20210524.pdf).

[139] *Id.*

[140] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Nazita Lajevardi, Professor, Michigan State University).

[141] *Oversight of the Voting Rights Act: The Evolving Landscape of Voting Discrimination: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong., at 35 (2021) (statement of Lt. Gov. Mark Robinson, North Carolina).

[142] *Id.* at 36.

[143] *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong., at 37 (2021) (statement of Ms. Maureen Riordan, Atty, Public Interest Legal Found.).

discrimination in voting."[144] T. Russell Nobile, Senior Attorney with Judicial Watch and a former trial attorney in the Justice Department's Civil Rights Division, also affirmed that there is no widespread voter suppression across the country today.[145]

C. Democrats Want More Money in Politics—Including Taxpayer Dollars

Democrats mislead the public by claiming that they want less money in politics. During the debate on H.R. 1, House Speaker Nancy Pelosi stated at least 13 times that we need to get "big, dark money" out of politics.[146] Repeating this meaningless statement over and over again, apparently unaware of the irony, Democrats' H.R. 1 bill actually increases the amount of money in politics.

Even worse, H.R. 1 puts public money in congressional campaign coffers.[147] H.R. 1 would establish a six-to-one funding match to any small donor contributions of $200 or less in a congressional or presidential campaign, meaning for every $200 spent, the federal government would match it with $1,200 of public funds.[148] Furthermore, H.R. 1 would create a new voucher pilot program that grants eligible voters a $25 voucher to donate to any campaign of their choosing.[149] These provisions would yield the exact opposite of what Democrats claim to seek and instead put more money into politics.

Additionally, at the June 11, 2021 hearing, Democrat witness Ms. Isabel Longoria, Election Administrator of Harris County, Texas, admitted to Ranking Member Steil that Harris County sought grants from the Center for Technology and Civic Life (CTCL), the Facebook CEO Mark Zuckerberg-affiliated nonprofit, received $9,663,446 from the group, and then spent a significant portion of that money on Facebook advertisements.[150] This raises the important question as to how private groups' donations to election administrators may influence how local elections are run.

D. Democrats' Push for Ballot Harvesting Undermines Election Integrity

While ballot harvesting is a relatively new concept, instances of fraud and abuse have already occurred. Last year, the Republicans on the Committee on House Administration released

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[144] *Id.* at 50.

[145] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 55 (2021) (statement of Mr. T. Russell Nobile, Senior Atty, Judicial Watch).

[146] 167 Cong. Rec. 979-980 (2021).

[147] *See, generally*, the For the People Act, H.R. 1 (117th Cong.).

[148] *Id.* at Title V, Subtitle A.

[149] *Id.*

[150] Committee on House Administration Republicans, in response to Administrator Longoria's bombshell admission, made public records requests for complete, unredacted documents, communications, and information in custody of the Harris County Election Administrator's office referring to the grant funding Harris County received from CTCL. Harris County shared the following timeline: On September 24, 2020, Harris County submitted an official application to the CTCL requesting $9,663,446. Included in this request is $343,000 for "voter communications," which is later confirmed by Elections Administrator Isabel Longoria at the Subcommittee hearing to have included Facebook ads. *See Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Isabel Longoria, Elections Administrator, Harris County, TX).

a report on the political weaponization of ballot harvesting in California, stating that "unlimited ballot harvesting led to the defeat of seven Republican candidates in the California 2018 midterm election."[151] In California, ballot harvesting is legal and has almost no restrictions or safeguards.[152]

The report went on to discuss an instance of fraud in North Carolina, in which ballot harvesting is illegal. In 2018, North Carolina's 9th Congressional election was overturned because of practices of ballot harvesting.[153] In the days after the election for North Carolina's 9th Congressional District, affidavits were submitted by voters and by individuals who worked for McRae Dowless, a political consultant to the Republican candidate.[154] One voter attested that she handed her signed absentee ballot over to Dowless but left her ballot blank.[155] One individual hired by Dowless to pick up ballots testified that she was instructed to pick up ballots and deliver them to Dowless's office, where he allegedly had stacks of absentee ballots on his desk.[156] Additionally, an analysis of absentee ballots received over the course of the election concluded that the rate of unreturned absentee ballots was "significantly irregular," probably affecting the outcome of the election.[157] Ultimately, the North Carolina State Board of Elections declined to certify the result of North Carolina's 9th Congressional election "in light of claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters," and ordered a new election be held.[158] The ballot harvesting ban in North Carolina played a key role in catching election fraud and the state passed a law to strengthen protections against its practice.[159]

As Ashlee Titus, Board Member and Corporate Secretary of the Lawyers Democracy Fund, stated in her written testimony at a hearing titled "Voting In America: The Potential For Polling Place Quality And Restrictions On Opportunities To Vote To Interfere With Free And Fair Access To The Ballot" before the Subcommittee on Election of the Committee on House Administration in reference to California's ballot harvesting law:

> This law has since had a dramatic effect on how elections are run in California, demonstrating how such laws can undermine election integrity and voter confidence. Unlimited ballot harvesting can allow paid political operatives to recruit and pressure voters to vote by mail at the behest of campaigns, unions, and special interest groups. Harvesters can influence voters to cast their ballot a particular way and in doing so undermine the secrecy of the ballot

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[151] Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), 117th Cong. (2021). https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf.
[152] *Id.*
[153] *Id.* at 4-5.
[154] *Id.* at 4.
[155] *Id.*
[156] *Id.*
[157] *Id.* at 4-5.
[158] *Id.* at 5.
[159] *Id.* at 4-5.

> box, a long-held essential principle of American elections intended to protect voters.[160]

Ballot harvesting increases the risk of voter fraud, threatens national security, and decreases voter confidence in our elections.[161] Despite these demonstrated risks, Democrats continue to insist it is a safe way to vote and necessary way to vote. When the Democrats succeed in nationalizing elections, liberal California style voting methods like ballot harvesting will be imposed on every state.

E. Democrats Will Stop Voter List Maintenance that Promotes Election Integrity

If enacted into law, H.R. 1 would make it significantly harder for states to ensure their rolls are accurate before an upcoming election. Regular voter list maintenance is an important part of good election administration. Further, list maintenance strengthens voter confidence in the integrity of our elections processes and outcomes by ensuring only eligible persons are registered to vote, such as by removing those who pass away or move to a different precinct or state. H.R. 4 would similarly hinder election integrity measures.

Federal law includes a number of fail-safes to ensure people are not removed improperly from state voter rolls, including by prohibiting states from removing individuals from voter rolls solely for their failure to vote;[162] prohibiting states from performing comprehensive list maintenance within 90 days of a federal election;[163] and allowing individuals who believe they have been improperly removed from the voter list to cast a provisional ballot and address the issue with elections officials.[164]

Before the Subcommittee on Elections of the Committee on House Administration, Kaylan Phillips, an attorney with the Public Interest Legal Foundation (PILF), testified that "chronic inaccuracy and lack of integrity in the voter rolls that list the individuals registered to vote in local, states, and federal elections" is "a significant problem facing America's electoral process."[165] In 2016, PILF found that a Pennsylvania resident "had seven active registrations because a third-party voter drive registered him seven times in the weeks before the 2016 election."[166] PILF also recently settled a lawsuit with Pennsylvania because they found "an excess of 21,000 registered voters positively matched against verifiable death records – some with dates of death dating as far

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[160] *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Ashlee Titus at 5.

[161] Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), 117th Cong. (2021). https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf.

[162] 52 U.S.C § 20507(b).

[163] National Voter Registration Act of 1993 § 8(c)(2)(A), 52 U.S.C. § 20507 (2002).

[164] Help America Vote Act of 2002 § 302, 107 Pub. L. 252, 116 Stat. 1666.

[165] *Voting in America: The Potential for Voter List 'Purges' to Interfere with Free and Fair Access to the Ballot*: Hearing before the Subcomm. On Elections, 117th Cong. (2021), testimony of Kaylan Phillips at 2.

[166] *Id.*

back as the late 1990s."[167] Then in Las Vegas for the 2020 Primary and General Elections, following the decision to send every registered voter a ballot, PILF found "that a total of 223,000 primary ballots and other 92,000 general election ballots were directed to outdated addresses and were returned undeliverable."[168]

Conducting regular voter list maintenance is a commonsense solution to ensure ballot integrity and strengthen voter confidence in elections. In discussing the importance of accurate voter lists, Republican witness Harmeet Dhillon noted in her written testimony at the Subcommittee on Elections May 24, 2021, hearing that former President Obama's bipartisan Presidential Commission on Election Administration also recognized the value of clean and accurate voter lists in its 2014 report:

> Accurate voter lists are essential to the management of elections. . . . The quality of the list can affect the ability of people to vote, of election offices to detect problems, and of courts and others monitoring elections to detect election fraud or irregularities. A list with many incorrect records can slow down the processing of voters at polling places resulting in longer lines. . . . Election officials across the political spectrum recognize the value of accurate and manageable voter rolls.[169]

However, H.R. 4 would prohibit states from conducting effective voter list maintenance to ensure that only eligible citizens are voting in our elections. Under H.R. 4, states would need to preclear when changing procedures for voter roll maintenance.

The main goals of maintaining an accurate voter roll are to ensure that only eligible voters cast ballots, to prevent voters from voting twice, and to speed up voter check-in at polling locations.[170] To maintain accurate voter rolls, state and county election officials must update a precinct's roll of registered voters after residents move away, die, or become ineligible to vote. Democrats oppose cleaning up inaccurate voter roll information and skewed voting numbers, referring to this practice as "purging" and baselessly accusing their opponents of suppressing votes.[171]

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[167] *Id.* at 3.
[168] *Id.*
[169] *Voting In America: The Potential For Voter ID Laws, Proof-Of-Citizenship Laws, And Lack Of Multi-Lingual Support To Interfere With Free And Fair Access To The Ballot, Hearing before H. Comm. on H. Administration Subcomm. On Elections* (May 24, 2021), written statement of Harmeet Dhillon at 2 (citing Presidential Comm'n on Election Admin., *The American Voting Experience:*
Report and Recommendations of the Presidential Commission on Election Administration (Jan. 2014)).
https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.).
[170] Nat'l Conference of State Legislatures, Voter List Accuracy (Mar. 20, 2020),
https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx.
[171] Pam Fessler, *Are states purging or cleaning voter registration rolls,* NPR (Dec. 20, 2019).

In 2012, Pew reported that "[a]pproximately 24 million—one of every eight—voter registrations are no longer valid or are significantly inaccurate."[172] In 2014, the Election Assistance Commission—a nonpartisan, independent federal agency—found that states removed over 14.8 million voters from registration lists that election cycle.[173] These errors are surprisingly common despite the fact that the National Voter Registration Act of 1993 (NVRA) requires jurisdictions to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" if they are deceased or move away.[174]

F. Democrats Want to Get Rid of Voter ID, a Widely Popular Policy

Democrats continue to falsely claim that voter ID laws lead to a decrease in voter turnout, specifically minority voters. On July 10, 2021, Vice President Kamala Harris bizarrely stated that rural Americans cannot photocopy their identification to prove their identity to vote because "there's no Kinkos, there's no OfficeMax near them."[175] However, as Subcommittee on Elections Ranking Member Bryan Steil cleverly noted by appearing for a remote hearing from a Wisconsin corn field, it is quite possible that the Vice President is out of touch with rural America, which has plentiful access to all sorts of scanning equipment, including mobile phones with cameras and internet access.[176] Requiring voter ID is a common-sense safeguard to protect the integrity of and increase confidence in the election process.

There is broad support for requiring ID to vote. A recent Rasmussen poll showed that 75 percent of likely voters surveyed believe voter ID is necessary for "a fair and secure election process."[177] Additionally, a Monmouth poll found that the overwhelming majority of Americans, 81 percent, support voter identification laws—including 62 percent of Democrats who participated in the poll.[178] Further, two polls show broad support for voter ID among African American and other minority communities. Rasmussen found 69 percent of African Americans support voter ID,

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[172] Pew Ctr. on the States, Inaccurate Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade (Feb. 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.

[173] Election Assistance Comm., Fact Sheet: Voter Registration List Maintenance, https://www.eac.gov/sites/default/files/eac_assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf (last visited Jul. 19, 2021).

[174] National Voter Registration Act of 1993 § 8(a)(4), 52 U.S.C. § 20507 (2002).

[175] Kelsey Koberg, *Kamala Harris slammed for claiming rural Americans can't photocopy their IDs,* FOX NEWS (Jul. 10, 2021).

[176] Rep. Bryan Steil, @RepBryanSteil, Twitter (July 12, 2021), https://twitter.com/RepBryanSteil/status/1414660506942689280 ("I visited rural America today for our @HouseAdmnGOP election law hearing and — this might shock Kamala Harris — I found that people have camera phones that they can use to take pictures of their photo IDs. Running water and electricity too! Haven't found a Kinkos yet.").

[177] Rasmussen Reports, *75% Say Voter ID Necessary, Majority Oppose Georgia Boycott* (April 06, 2021), https://www.rasmussenreports.com/public_content/politics/general_politics/april_2021/75_say_voter_id_necessary_majority_oppose_georgia_boycott.

[178] Alison Durkee, *80% of Americans support voter ID rules—but fewer worried about fraud, poll finds,* FORBES (Jun. 1, 2021).

while the *Atlanta Journal-Constitution* found two-thirds of voters in Georgia support it.[179] Contrary to the Democrats' claim that voter ID requirements lower voter turnout, states with voter ID laws saw record turnout in the 2020 elections.[180] Even the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, considered voter ID to be an important safeguard for election integrity. The bipartisan Commission recommended:

> [T]hat states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), and photograph and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to all non-drivers free of charge.[181]

North Carolina Lieutenant Governor Mark Robinson, the Republican witness for the House Judiciary Subcommittee's April 22, 2021, hearing, testified, "[r]equiring an ID to vote is just simple American responsibility."[182] Lt. Gov. Robinson elaborated:

> Why do we look at poor people and Brown people and think that they are less than and that they can't figure out how our systems work, they can't figure out where the DMV is, they can't figure out where this agency is to go down and get this ID that is being offered . . . . The notion is absolutely asinine and ridiculous.[183]

At the House Committee on Administration hearing on May 24, 2021, Democrats continued to make the false claim that voter ID laws suppress minority votes, essentially claiming that voter ID laws are racist. Ranking Member Davis showcased the hypocrisy of Speaker Nancy Pelosi and the Democrats by opposing photo ID for voting, yet violating Americans' First Amendment rights to petition their government by requiring photo ID to enter the Capitol. Ranking Member Davis asked the following question of Republican witness Harmeet Dillon:

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[179] Andrew Mark Miller, *Poll: Sixty-nine percent of black voters and 75% overall support voter ID laws,* Washington Examiner (March 17, 2021), https://www.washingtonexaminer.com/news/poll-75-percent-americans-support-voter-id.
Mark Niesse, *AJC poll: Georgia voters back absentee ID but oppose new restrictions,* The Atlanta Journal-Constitution (Feb. 01, 2021), https://www.ajc.com/politics/ajc-poll-georgia-voters-back-absentee-id-but-%20oppose-new-restrictions/PPV2SLO7FRFUTKI2OOH4JGAQ7A/

[180] Kevin Schaul, Kate Rabinowitz, Ted Millnick, *2020 turnout is the highest in over a century,* The Washington Post (Nov. 05, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/?request-id=c2493dfa-7b4a-4ff5-9c95-b45617d6229b&pml=1.

[181] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting,* Hearing before Comm. on H. Admin. Subcomm. On Elections, 117th Cong. (June 24, 2021), written record document, Commission on Federal Election Reform, Building Confidence in the U.S. Elections 19, 21 (Sept. 2005-https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf

[182] *Oversight of the Voting Rights At: The Evolving Landscape of Voting Discrimination,* Hearing before H. Comm. on the Judiciary, 117th Cong. at 42 (statement of Hon. Mark Robinson, Lieutenant Governor, North Carolina).

[183] *Id.* at 36.

> Rep. Davis: Part of our Constitution specifically relays that our elections should be run at the state and local level. Another very important part of our Constitution is the right of every American to petition their government, right? . . . Part of the First Amendment. Here we are today, having another hearing about voter ID, and at the same time Speaker Pelosi is requiring anyone who visits the United States Capitol to come Petition their Government to show an ID. So, is Speaker Pelosi racist?
>
> Ms. Dillon: I would say that it is very unfortunate that Speaker Pelosi has limited the right of petition, in fact I have a lawsuit pending against Speaker Pelosi and the United States Congress concerning the right of people to pray on Capitol Grounds. So, certainly some Constitutional Rights are more important than others today.[184]

Courts have found state laws that require proof of identification to cast a ballot to be constitutional. As attorney Mark F. (Thor) Hearne, II, who successfully defended the Commonwealth of Virginia's voter ID law, explained in his written testimony before the June 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing:

> Requiring an individual to identify themselves with photo identification before casting a ballot is a commonsense measure to protect the integrity of elections. Of course, the state must provide the photo identification without cost. The constitutionality of requiring photo identification before an individual may cast a ballot has been reviewed by and approved as constitutional by the Supreme Court. See *Crawford*, 553 U.S. at 202. See also *Lee*, 843 F.3d at 607, in which Virginia's voter identification law was upheld against constitutional challenge. In *Lee*, the unanimous Fourth Circuit panel held, "just as Congress in HAVA found it beneficial to the voting process and the public perception of the voting process to require photo IDs, and just as the Carter-Baker Commission found similarly, Virginia found it beneficial to require photo identification in all elections." Virginia's and Indiana's voter identification laws are a model for a constitutional voter identification law that protects the integrity of the election and does not impose an impermissible burden upon any voter. Indeed, in the *Lee v. Virginia* litigation, those challenging Virginia's law could not identify a *single person*

[184] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Harmeet Dhillon, Founding Partner, Dhillon Law Group).

> in the entire Commonwealth who was denied the right to cast a ballot due to Virginia's voter identification law. As the Carter-Baker Commission noted, and as the voter identification laws that have been upheld provide, the required identification must be available to any person who does not possess the required identification without cost.[185]

H.R. 1 prohibits states from requiring ID to vote, and H.R. 4 allows partisan bureaucrats within the DOJ to prohibit commonsense voter ID laws on the state level from ever going into place. Nevertheless, Speaker Pelosi seems to have no problem with requiring photo identification when it comes to Americans entering the United States Capitol to petition their elected representatives. Instead of establishing commonsense solutions to make acquiring an ID a simple, free process, Democrats would prefer to ban the use of them.

Democrats seem to have begun realizing that their views on voter ID are at odds with the views of the American people. Democrats, such as former Georgia gubernatorial candidate Stacey Abrams and House Majority Whip James Clyburn, have now made statements in support of voter ID, seeming to have conveniently forgotten their previous statements against voter ID made just weeks and months before.[186] The *Washington Post* even gave Representative Clyburn "Four Pinocchios" for recently stating, "No Democrat has ever been against voter ID." [187]

IV. Democrats' Effort to Nationalize Elections Undermines the Constitution

Historically, Congress has relied upon its authority under the Fourteenth and Fifteenth Amendments to pass the Voting Rights Act.[188] However, facing multiple, high-profile and

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[185] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing before Comm. on H. Admin. Subcomm. On Elections, 117th Cong. (June 24, 2021), written statement of Mark F. (Thor) Hearne, II, at 15-16 (internal citations omitted).

[186] Aaron Blake, *Stacey Abrams and the Democrats' evolution on voter ID*, Wash. Post (June 21, 2021, 11:58 AM), https://www.washingtonpost.com/politics/2021/06/21/democrats-voter-id/.

[187] Glenn Kessler, Rep. Clyburn's false claim that 'no Democrat' has opposed voter ID laws, Wash. Post (July 15, 2021, 3:00 AM), https://www.washingtonpost.com/politics/2021/07/15/clyburns-false-claim-that-no-democrat-has-opposed-voter-id-laws/.

[188] *See Shelby Co. v. Holder*, 570 U.S. 529, 536 (2013)

> (The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that '[t]he right of citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure . . . . Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act.

(internal quotation marks and citations omitted)). Of course, the Fourteenth Amendment overturned the abominable *Dred Scott v. Sandford* (60 U.S. 393 (1857)) decision, which had held that previously enslaved African Americans were not and could not become "'citizen[s]' within the meaning of the Constitution of the United States." (*Id.* at 1). The Fourteenth Amendment holds that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside."

unfavorable judicial rulings,[189] Democrats adjusted their strategy. In August, Democrats submitted an updated Congressional Authority Statement for this Congress' version of H.R. 4, claiming specifically that the Elections Clause allows Congress to act with *carte blanche* authority over congressional elections, passing whatever legislation it wants, for whatever purpose, with no limitation.[190]

The Constitution reserves to the States the primary authority to set election legislation and administer elections—the "times, places, and manner of holding of elections"—and Congress' power in this space is purely secondary to the States' power.[191] Congress' power is to be employed only in the direst of circumstances.[192] History, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself make this exceedingly clear.[193]

The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had *exclusive* authority over federal elections held within their territory,[194] but

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[189] *See, e.g.*, *Shelby Co. v. Holder*, 570 U.S. 529 (2013) and *Brnovich v. DNC*, Slip. Op., 594 U.S. ____ 2021, https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.

[190] *Compare* Rep. Terri Sewell, Congressional Authority Statement for H.R. 4 (117th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 167, No. 147, available at https://www.congress.gov/117/crec/2021/08/17/167/147/CREC-2021-08-17-pt1-PgH4338-2.pdf *with* Rep. Terri Sewell, Congressional Authority 35 for H.R. 4 (116th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 165, No. 147, https://www.congress.gov/116/crec/2019/02/26/CREC-2019-02-26-pt1-PgH2234-3.pdf. *See also, generally*, Rep. Terri Sewell, *Executive Summary of H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021* (Aug. 17, 2021), *available at* https://twitter.com/sahilkapur/status/1427687717803073546); Elections Subcommittee on Elections Chair G.K. Butterfield (D-NC), *Report on Voting in America: Ensuring Free and Fair Access to the Ballot* 14, U.S. H. of Reps. Comm. on H. Admin, Subcomm. On Elections, 117th Cong. (2021), https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf; Press Release, Speaker Nancy Pelosi, *Pelosi Statement on the Introduction of H.R. 4, the John R. Lewis Voting Rights Advancement Act* (Aug. 17, 2021), https://www.speaker.gov/newsroom/81721. *See also* Voting Rights Act of 1965, 79 Stat. 437, 89 Pub. L. 110 ("An Act To enforce the fifteenth amendment to the Constitution of the United States and for other purposes.").

[191] U.S. CONST., Art. 1 § 4. For a full discussion of this topic, *see* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[192] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010) (describing the origins of the Elections Clause, the meaning of "manner of" versus "manner of holding" elections, the debates leading to its adoption, and the promises made and compromises reached that led the author to conclude quite plainly, "In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed." (*Id.* At 15.))

[193] *See* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[194] ARTS. OF CONFED'N, Art. 5, . § 1.

the national government had experienced difficulties with State cooperation (*e.g.*, the failure of Rhode Island to send delegates to the Confederation Congress).[195]

The Federalists, including Alexander Hamilton,[196] were concerned with the possibility that the States, in an effort to destroy the federal government, simply might *not hold* elections or that an emergency might prevent the operation of a State's government, leaving the Congress without Members and the federal government unable to respond. Quite plainly, Alexander Hamilton, a leading Federalist and proponent of the Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process.[197] Indeed, as staff for the Democrat Members of the Committee on House Administration so keenly observed:

> Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states. Indeed, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[,]" and that ***"the Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'"***[198]

When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4:[199]

> N. Carolina: "An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war)."[200]

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[195] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010) (citing to various historical documents).

[196] The modern legend of the real Alexander Hamilton is not one who finds his home in solely Republican circles. *See* Nancy Isenberg, *Liberals love Alexander Hamilton. But Aaron Burr was a real progressive hero.*, Wash. Post (Mar. 30, 2016), https://www.washingtonpost.com/posteverything/wp/2016/03/30/liberals-love-alexander-hamilton-but-aaron-burr-was-a-real-progressive-hero/. *See also* Adam Gopnik, *"Hamilton" and the hip-hop case for progressive heroism*, New Yorker, (Feb. 5, 2016), https://www.newyorker.com/news/daily-comment/hamilton-and-the-hip-hop-case-for-progressive-heroism.

[197] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 11 (Nov. 2010) (quoting *Federalist* no. 59).

[198] Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609 (2017-2018) (internal citations omitted) (alterations in original).

[199] *See, generally*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010).

[200] *Id.*

> Pennsylvania: "Sir, let it be remembered that this power ***can only operate in a case of necessity***, after the factious or listless disposition of a particular state has rendered an interference essential to the ***salvation*** of the general government."[201]

In fact, at least seven[202] of the original 13 states—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. However, "[l]eading Federalists . . ." assured them, ". . . that, even without amendment, the [Elections] Clause should be construed as limited to emergencies."[203] Some states specifically made their ratification contingent on this understanding being made express.[204] For example,

> New York: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises[.][205]

The Framers designed and the ratifying States understood the Elections Clause to serve solely as a protective backstop to ensure the preservation of the Federal Government,[206] not as a font of limitless power for Congress to wrest control of federal elections from the States. This understanding continued into debate during the first Congress that convened under the Constitution. "During the first session of the First Congress . . . . Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies."[207] But those on both sides of the Burke amendment debate already understood

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[201] *Id.* at 13.

[202] A record of congressional debate of August 21, 1789, as recorded in the *Annals of Congress*, suggests Maryland might also be included, which would bring the total to eight states. 1 Annals of Cong. 799 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=401.

[203] *See supra* n. 7 at 12.

[204] *Id.* at 13.

[205] *Ratification of the Constitution by the State of New York* (July 26, 1788), *available at* https://avalon.law.yale.edu/18th_century/ratny.asp. *See also Id.* at 13 and n. 189.

[206] *See supra* n. 5 ("EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION."). *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).

[207] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 13 (Nov. 2010) (citing 1 Annals of Cong. 797 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=400).

the Elections Clause to limit Federal elections power to emergencies, making the amendment unnecessary.[208]

Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary ". . . authority to provide a complete code for congressional elections."[209] This holding, of course, is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* Court also held that while Congress maintains the authority to " . . . supplement these state regulations or [to] substitute its own[]", such authority remains merely "'a general supervisory power over the whole subject.'"[210]

More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that the fail-safe provision in the Elections Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."[211] The Court explained that the Elections Clause " . . . imposes [upon the States] the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators[.]"[212] The *Inter-Tribal* Court explained, quoting extensively from *The Federalist no. 59*, that it was clear that the congressional fail-safe included in the Elections Clause was intended for governmental self-preservation discussed by the Framers: "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."[213]

The congressional fail-safe described in the Elections Clause vests purely secondary authority over federal elections in the federal legislative branch and the primary authority rests with the States. Congressional authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as matters that might lead to a State not

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[208] For example, the recorded description of opponent Representative Goodhue's comments notes that he believed the Elections Clause as written was intended to prevent ". . . the State Governments [from] oppos[ing] and thwart[ing] the general one to such a degree as finally to overturn it. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence." With any change to the original text therefore unnecessary to achieve Burke's desired goal, Mr. Goodhue voted against the proposed amendment. Similarly, proponent Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government's power over federal elections to emergencies and so thought there would be no harm in supporting an amendment to make that language express. So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over federal elections. (1 Annals of Cong. 801 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=402.)

[209] *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.).

[210] *Id.* (also quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).

[211] *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7-9 (2013).

[212] *Id.* at 8.

[213] *Inter-Tribal*, 285 U.S at 8.

electing representatives to constitute the two Houses of Congress.[214] Unfortunately for Democrats, this clear restriction on congressional authority means that the Elections Clause is an unsuitable substitute authority to support Democrats' plans for H.R. 4. Thankfully, the Framers had the foresight to write our Constitution so as to prevent those bad policies from going into effect and preserve the health of our republic.

[214] *See, e.g., supra* n. 4.

CONCLUSION

H.R. 4—and its companion legislation, H.R. 1—would radically upend American elections as we know them, giving unprecedented authority over state and local election processes to the courts and the federal government. In an attempt to justify this unconstitutional federal power grab, Democrats falsely claim there is "sweeping voter suppression" and that this country is facing a crisis that requires radically changing how we run our nation's elections. But, as this report documents, the facts do not support these arguments.

It is easier to vote today than ever before in our nation's history. The VRA worked. The exceptional conditions that existed in 1965 no longer exist to justify federal intrusion in state election administration. In fact, during the 2018 and 2020 elections there was record voter turnout among Americans from minority communities. In addition, voter registration has increased dramatically.

Americans should celebrate this progress. This advancement is a testament to a uniquely American ideal, envisioned in the Constitution, of always striving toward a "more perfect union." But instead of acknowledging the progress our country has made, Democrats call the United States a systemically racist country and they target Republican-led efforts to make elections more secure.

Congress passed the VRA during a bleak time in our history when widespread discrimination in voting rights justified the exceptional interference of the federal government. Those conditions do not exist today, as even the Supreme Court has recognized. In the absence of these exceptional conditions, state sovereignty and local control must prevail. In *Brnovich v. Democratic National Committee*, the Court explained that "the Voting Rights Act exemplifies our country's commitment to democracy, but there is nothing democratic about [an] attempt to bring about a wholesale transfer of the authority to set voting rules from the States" to the federal government.[215] Congress would be wise to heed this wisdom.

[215] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2343 (2021).

House of Representatives
Judiciary Committee
Ranking Member Jim Jordan

COMMITTEE ON HOUSE ADMINISTRATION
REPUBLICANS
RANKING MEMBER RODNEY DAVIS

H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021
Sponsor: Rep. Terri Sewell (D-AL)
Judiciary & House Administration Republicans Urge Opposition

H.R. 4 is a radical and unprecedented federal power grab over state-administered elections under the guise of updating the Voting Rights Act of 1965 (VRA). The VRA "employed extraordinary measures to address" pervasive state resistance to removing racially discriminatory barriers that prevented minorities from exercising their right to vote. In 2013, the U.S. Supreme Court's *Shelby County v. Holder* decision recognized an obvious fact: "things have changed dramatically" since 1965. Republicans celebrate that the VRA worked: More Americans from minority communities are voting than ever before, and voter registration is high. Thankfully, extreme policies like preclearance are no longer required to protect voters from discrimination. It is easier to vote today than ever before in our nation's history. Yet Democrats are claiming "sweeping voter suppression" to justify H.R. 4's unconstitutional expansion of the extraordinary measures in the VRA.

- **H.R. 4 is an unconstitutional power grab.** The Constitution reserves to the States the primary role in establishing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Congress has a purely secondary role in this space. Yet, under H.R. 4's new coverage formula, Congress would give Biden's Department of Justice and federal courts the power to exert considerable control over state and local election laws without a finding of intentional discrimination. The practice-based preclearance provision is designed to require every state and political subdivision to submit election integrity and voter confidence laws for approval by unaccountable bureaucrats in Washington, D.C.

- **H.R. 4 will give the Biden Administration authority to veto states' voter ID laws.** A recent survey found that 81 percent of Americans support voter identification laws. This bill gives the Biden DOJ authority to designate a voter ID law as a voting rights violation or as evidence of voting discrimination.

- **H.R. 4 furthers Democrat attempts to politicize voting rights.** Democrats assert there is a crisis in voting rights—especially in Republican-led states—requiring forceful Congressional intervention. The facts show otherwise. For example, although Democrats focus obsessively on Georgia's new election law, Georgia has more expansive access to the polls than President Biden's home state of Delaware.

- **The VRA worked.** 2018 and 2020 saw record turnout among Americans from minority communities, and voter registration is also high. 2021 isn't 1965, and Republicans celebrate the progress we've made. Democrats ignore it to justify H.R. 4's unprecedented political power grab, a federal takeover of our elections intended to keep Democrats in power.

- **A new preclearance formula is not necessary.** Preclearance was intended to be a temporary, extreme remedy to ensure Democrat-imposed Jim Crow laws died. It achieved its purpose long ago, and SCOTUS was right to strike down the old formula in 2013. Even without preclearance, federal law protects voters from discrimination.

- **It is easier today for Americans to vote than ever before in our Nation's history.** The exceptional circumstances that warranted the extraordinary departure from federalism in the 1965 VRA no longer exist. Voter registration disparities between minority and non-minority voters in Texas, Florida, North Carolina, Louisiana, and Mississippi — all previously covered under the VRA — are below the national average and lower than Democrat-run states like New York, California, and Delaware.

- **Democrats ignore mounting Biden Administration crises to rush a second attempt to nationalize elections.** Democrats are rushing H.R. 4 to the floor without a committee markup, preventing Republicans from offering amendments, all in yet another attempt to nationalize elections. Democrats are more focused on gaining control over the election processes in Republican-led states than on fixing the unfolding Afghan crisis or the Biden border crisis.



Summary: Once again, Democrats introduced H.R. 1, For the People Act, a partisan and massive congressional overreach designed to keep their Democrat majority by nationalizing our elections. This bill takes some of the worst "pandemic-style" election administration changes of 2020 and makes them permanent.

THE TOP TEN MOST EGREGIOUS PROVISIONS OF H.R. 1

1. **Publicly funds campaigns with federal fines on corporations.** Creates a 6:1 funding match to any small donor contributions of $200 or less in a congressional or presidential campaign – meaning for every $200, the federal government will match $1,200. This funding would come from a surcharge on corporate and high taxpayer settlements with the Federal government. H.R. 1 also establishes a new voucher pilot program that grants eligible voters a $25 voucher to donate to any campaign of their choosing.
2. **Nationalizes elections and centralizes administration in Washington, D.C.** Oversteps the bounds established by the Constitution by impeding the states' ability to determine their registration and voting practices, as protected under Article 1, Section 4 of the Constitution, and mandating ethics standards for the Supreme Court, violating the separation of powers.
3. **Makes "pandemic-style" election changes permanent.** In 2020, states rushed to make changes in the name of COVID-19, like expanding mail-in voting without safeguards to protect ballot integrity, which created chaos, increased irregularities, and undermined public trust in our election process. H.R. 1 makes many of these changes permanent.
4. **Imposes liberal California voting methods on every state.** H.R. 1 would force states to permanently expand mail-in voting, legalize ballot harvesting, and disregard voter ID laws.
5. **Weaponizes the Federal Election Commission (FEC).** Alters the current bipartisan makeup of the six-member commission to a partisan five-member commission and establishes a "Speech Czar", limiting free speech and creating a partisan commission.
6. **Increases vulnerability for foreign election interference.** Weakens the voting system of the American people by centralizing the election system, thereby increasing its vulnerability to foreign interference, and failing to implement the necessary checks and balances regarding who can register to vote. H.R. 1 will force states to implement online voter registration, automatic voter registration, and same-day voter registration with no safeguards.
7. **Destroys the First Amendment**. H.R. 1 would drastically limit free speech and impose vague standards that disadvantage all groups who wish to advocate on behalf of any legislative issue, specifically requiring them to disclose the names of donors who donate above a certain threshold.
8. **Disregards state voter identification laws and provisional ballot rules.** Forces states to allow sworn statements to be used in place of identification and allowing for signature verification, which can be submitted through a photo if the voter registers online. Forces states to count provisional ballots cast outside of the voter's correct precinct.
9. **Removes states' ability to decide how their districts are drawn**. Mandates the use of independent redistricting commissions for creating congressional districts, removing states' flexibility to choose the best systems for the needs of their citizens.
10. **Weaponizes Biden's IRS.** H.R. 1 permits the agency to investigate and consider the political and policy persuasions of organizations before granting tax-exempt status.

Palm Beach County Canvassing Bd. v. Harris

Supreme Court of Florida

December 11, 2000, Decided

Nos. SC00-2346, SC00-2348, SC00-2349

Reporter
772 So. 2d 1273 *; 2000 Fla. LEXIS 2395 **; 26 Fla. L. Weekly S 26

PALM BEACH COUNTY CANVASSING BOARD, Petitioner, vs. KATHERINE HARRIS, etc., et al., Respondents. VOLUSIA COUNTY CANVASSING BOARD, et al., Appellants, vs. KATHERINE HARRIS, etc., et al., Appellees. FLORIDA DEMOCRATIC PARTY, Appellant, vs. KATHERINE HARRIS, etc., et al., Appellees.

Subsequent History: As Corrected January 9, 2001.

Prior History: **[**1]** Three Cases Consolidated: Case No. SC00-2346. Original Proceeding - Prohibition. Case No. SC00-2348, Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 00-2700 - Certified by the District Court of Appeal, First District, Case Nos. 1D00-4467/1D00-4501. Case No. SC00-2349, Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 00-2700 - Certified by the District Court of Appeal, First District, Case Nos. 1D00-4506.

Disposition: Orders of the trial court reversed.

Counsel: Denise D. Dytrych, Palm Beach County Attorney, and James C. Mize, Jr., Andrew J. McMahon and Gordon Selfridge, Assistant Palm Beach County Attorneys, West Palm Beach, Florida; Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Florida; and Robert A. Butterworth, Attorney General, pro se, Paul F. Hancock and Kimberly J. Tucker, Deputy Attorneys General, George Waas and Jason Vail, Assistant Attorneys General, Tallahassee, Florida, and Cecile Luttmer Dykas, Assistant Attorney General, Fort Lauderdale, Florida, for Petitioners.

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, **[**2]** Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley, Cassedy & Jones, P.A., Tallahassee, Florida, for Respondents.

John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Ronald A. Klain, Democratic National Committee, Washington, DC; Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus, c/o Gore/Lieberman Recount Committee, Washington, DC; Laurence Tribe, Cambridge, Massachusetts; and Karen Gievers, of Karen

Gievers, P.A., Tallahassee, Florida, for Albert A. Gore and the Florida Democratic Executive Committee, Intervenors/Petitioners.

Edward A. Dion, County Attorney **[**3]** for Broward County, Norman M. Ostrau, Deputy County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudders and Jose Arrojo, Assistant County Attorneys, Fort Lauderdale, Florida; and Samuel S. Goren, James A. Cherof and Michael D. Cirullo, Jr. of Josias, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, Florida, for The Broward County Canvassing Board and Jane Carroll, as Broward County Supervisor of Elections, Intervenors/Petitioners.

Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida; Jason L. Unger of Gray, Harris & Robinson, Tallahassee, Florida; Michael A. Carvin of Cooper, Carvin & Rosenthal, PLLC, Washington, DC; Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, DC; Alex M. Azar II of Wiley, Rein & Fielding, Washington, DC; George J. Terwilliger, III, and Timothy E. Flanigan of White & Case, LLP, Washington, DC; Marcos D. Jimenez D'Clouet of White & Case, Miami, Florida; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas, for Honorable George W. Bush, Intervenor/Respondent.

Thomas R. Tedcastle, General Counsel, Florida House of Representatives, Tallahassee, Florida; D. Stephen Kahn, General Counsel, The Florida **[**4]** Senate, Tallahassee, Florida; Roger J. Magnuson and James K. Langdon of Dorsey & Whitney LLP, Minneapolis, Minnesota; and Einer Elhauge and Charles Fried, Cambridge, Massachusetts, for the Florida Legislature, Amici Curiae.

Lois Frankel, pro se, Tallahassee, Florida, as a member of the Florida Legislature and as minority leader of the Florida House of Representatives, Amicus Curiae.

Robert G. Kerrigan of Kerrigan, Estess, Rankin & McLeod, Pensacola, Florida, for Senator Thomas E. Rossin, a member of the Florida Legislature and the minority leader of the Florida Senate, Amicus Curiae.

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Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C.

Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, **[**6]** Wiley, Cassedy & Jones, P.A., Tallahassee, Florida, for Appellees.

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Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley, Cassedy & Jones, P.A., Tallahassee, Florida, for Appellees.

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Washington, DC; Marcos D. Jimenez D'Clouet of White & Case, Miami, Florida; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas, for Honorable George W. Bush, Intervenor.

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Robert G. Kerrigan of Kerrigan, Estess, Rankin & McLeod, **[**10]** Pensacola, Florida, for Senator Thomas E. Rossin, a member of the Florida Legislature and the minority leader of the Florida Senate, Amicus Curiae.

Judges: SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur. WELLS, C.J., dissents with an opinion.

Opinion

[*1279] ***CORRECTED OPINION***

PER CURIAM.

This case is before the Court on remand from the United States Supreme Court. [1] We respond to several issues raised by the United States Supreme Court as explained herein. [2]

[11]** I. FACTS

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the nation, conducted a general election for the President of the United States. The Florida Division of Elections ("Division") reported on Wednesday, November 8, that Governor George W. Bush, the Republican candidate, had received 2,909,135 votes and Vice President Albert Gore, Jr., the Democratic candidate, had received

2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than

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[1] *See: Bush v. Palm Beach Canvassing Bd.*, 531 U.S. 70, 148 L. Ed. 2d 366, 2000 U.S. LEXIS 8087, 69 U.S.L.W. 4020, 121 S. Ct. 471 (2000).

[2] In its December 4, 2000, opinion and mandate, the Supreme Court of the United States remanded this case for further proceedings. On December 4, 2000, this Court entered its order authorizing all parties to file supplemental briefs directed to the implementation of the mandate, and briefs were filed on December 5, 2000, and considered by the Court. In the interim, this Court received briefs and conducted oral argument on December 7, 2000, in the case of *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373 (Fla. 2000), which also required immediate attention. We thereafter rendered our decision on December 8, 2000, which is presently under review by the Supreme Court of the United States. While recognizing the dissent in this case does not agree with release of this opinion at this time, we have issued this decision as expeditiously as possible under the foregoing time constraints in order to timely respond to the questions presented by the Supreme Court of the United States in the December 4, 2000, opinion and its remand instructions.

one-half of one percent of the total votes cast for that office, an automatic recount was conducted. [3] The recount resulted in a reduced figure for the overall difference between the two candidates.

A. The Manual Recounts

In light of the closeness of the election, the Florida Democratic Executive Committee, on Thursday, November 9, requested that manual recounts be conducted in Broward, Miami-Dade, Palm Beach, and Volusia Counties. The **[**12]** county canvassing boards ("Boards") of these counties conducted sample manual recounts of at least one percent of the ballots cast. Several of the Boards determined that the manual recounts showed "an error in the vote tabulation which could affect the outcome of the election," and the Boards voted to conduct countywide manual recounts. *See:* § 102.166(5), Fla. Stat. (2000).

Because the Palm Beach County Canvassing Board was concerned that the recounts would not be completed prior to the seven-day deadline set forth in sections 102.111 and 102.112, Florida Statutes (2000), the Board sought an advisory opinion from the Division. The Division issued Advisory Opinion DE 00-10 wherein the Division advised the Board that absent unforeseen circumstances the county's returns must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of statewide results.

Relying on this advisory opinion, the Florida Secretary of State ("Secretary") on Monday, November 13, issued a statement wherein she announced that she would ignore returns of manual recounts received **[**13]** by the Florida Department of State ("Department") after 5 p.m., Tuesday, November 14. The Volusia County Canvassing Board on Monday, November 13, filed suit in circuit court in Leon County, seeking declaratory and injunctive relief; the candidates and the Palm Beach County Canvassing Board were allowed to intervene.

[*1280] B. The Legal Proceedings

The trial court ruled on Tuesday, November 14, that the deadline was mandatory but that the Volusia

Board could amend its returns at a later date and that the Secretary, after "considering all attendant facts and circumstances," could exercise her discretion in determining whether to ignore the amended returns. Later that day, the Volusia Board filed a notice of appeal and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from all counties in the state. The Secretary then instructed Florida's Supervisors of Elections ("Supervisors") that they must submit to her by 2 p.m., Wednesday, November 15, a written statement of "the facts and circumstances" justifying any belief **[**14]** on their part that they should be allowed to amend the certified returns previously filed. After considering the reasons in light of specific criteria, [4] the Secretary, on Wednesday, November 15,

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[3] *See:* § 102.141(4), Fla. Stat. (2000).

[4] The criteria considered by the Secretary are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county she would certify the results on Saturday, November 18.

[15]** On Thursday, November 16, the Florida Democratic Party and Vice President Gore filed a motion in circuit court in Leon County, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17. Both the Democratic Party and Vice President Gore appealed. The First District Court of Appeal certified both of the underlying trial court orders to this Court via the Court's "pass-through" jurisdiction. By orders dated Friday, November 17, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission ("Commission") from certifying **[*1281]** the results of the presidential election until further order of this Court.

This Court on Tuesday, November 21, issued an opinion reversing the trial court's order based on the following analysis: Due to several ambiguities in the Florida Election Code ("Code"), the Court determined that legislative intent as discerned through traditional rules of statutory construction dictated a remedy based on the particular facts of this case. [5] Bush sought certiorari review before the United States Supreme Court **[**16]** and that Court vacated this Court's judgment and remanded for proceedings consistent with its opinion. [6]

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2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the

certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott v. Harris*, slip op., No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("Mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

[5] *See: Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 2000 Fla. LEXIS 2311, 25 Fla. Law W. S 1062 (Fla. 2000).

[6] The United States Supreme Court ruled as follows:

After reviewing the opinion of the Florida Supreme Court, we find "that there is considerable uncertainty as to the precise grounds for the decision." This is sufficient reason for us to decline at this time to review the federal questions asserted to be present. . . . Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

[17]** II. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); and under what circumstances should the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven-day deadline set forth in sections 102.111 and 102.112? [7]

III. THE APPLICABLE LAW

A fundamental principle governing presidential election law in the United States is set forth in article II, section 1, United States Constitution, which confers on state legislatures the power to regulate the appointment of presidential electors:

Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, **[**18]** or Person holding an Office of Trust or profit under the United States shall be appointed an Elector.

U.S. Const. art. II, § 1 (emphasis added). The United States Supreme Court explained the import of this clause vis-a-vis state constitutions:

> The clause under consideration does not read that the people or the citizens shall appoint, but that "each state shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

McPherson v. Blacker, 146 U.S. 1, 25, 36 L. Ed. 869, 13 S. Ct. 3 (1892).

Although the Constitution vested the power to appoint the presidential electors "in such Manner as the Legislature . . . may direct," *McPherson* also made clear that the electors may be chosen by the legislature, or the legislature **[**19]**

> *may provide that they shall* **[*1282]** *be elected by the people of the State at large* . . . and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the state, or any other agent of its will, to appoint these electors.

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 148 L. Ed. 2d 366, 2000 U.S. LEXIS 8087, 69 U.S.L.W. 4020, 4021, 121 S. Ct. 471 (2000) (citation omitted).

[7] None of the parties have raised as an issue on appeal the constitutionality of Florida's election laws.

McPherson, 146 U.S. at 34-35 (emphasis added). In this State, at least since 1847, the right to elect the President of the United States has been firmly vested in the citizens of this State by the Legislature. As section 103.011, Florida Statutes (2000), provides:

> Electors of President and Vice President, known as presidential electors, *shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4*.

(Emphasis added.)

The United States Congress also has provided that where any dispute concerning the appointment of electors is settled at least six days prior to the date set for the meeting of electors and is done so pursuant to state laws enacted prior to the date of election, the state's conclusion concerning the settlement of such disputes is conclusive:

> If any State shall have **[**20]** provided, *by laws enacted prior to the day fixed for the appointment of the electors*, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (1994) (emphasis added). Consistent with the above provisions of federal law and with longstanding principles of state law, the Florida Legislature in 1951 enacted the Florida Election Code, contained in chapters 97-106, Florida Statutes (2000), which sets forth uniform criteria regulating elections in this state and which provides methods and procedures, including judicial methods and procedures, for the final **[**21]** determination of any controversy or contest concerning the appointment of all or any of the electors of this state.

IV. LEGISLATIVE INTENT

Legislative intent-as always-is the polestar that guides a court's inquiry into the provisions of the Florida Election Code. *See: Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997). Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code. *See: Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995). As noted above, however, chapter 102 is unclear and in conflict in several respects. In light of these ambiguities, the Court must resort to traditional rules of statutory construction to determine legislative intent. *See: Capers v. State*, 678 So. 2d 330 (Fla. 1996).

V. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote **[**22]** tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language "error in vote

tabulation" to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

[*1283] Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged with implementing and enforcing. *See: Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994). Florida courts, however, will not defer to an agency's opinion that is contrary to law. *See: Donato*, 767 So. 2d at 1153; *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996). We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports

or opposes an issue that appears on a ballot, or a political party whose **[**23]** candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later. [8] Upon the filing of the written request for a manual recount, the canvassing board may authorize a manual recount. [9] The decision whether to conduct a manual recount is vested in the sound discretion of the Board. [10] If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the recount choosing the precincts to be recounted. [11] If the manual recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board "shall": § 102.166(5)(a)-(c)

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; *or*
(c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) **[**24]** (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an "error in the vote tabulation" only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" **[**25]** in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

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[8] § 102.166(4)(b), Fla. Stat. (2000).

[9] § 102.166(4)(c), Fla. Stat. (2000).

[10] *See: Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

[11] *See:* § 102.166(4)(d), Fla. Stat. (2000).

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "no vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply **[*1284]** errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot **[**26]** and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a vote tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission [12] must accept amended returns filed after the seven-day deadline set forth in sections **[**27]** 102.111 and 102.112 under the circumstances presented.

VI. AMENDED RETURNS

A. Statutory Ambiguity

In regard to this case, the provisions of the Code are ambiguous in the following areas. First, the deadline for submitting county returns to the Department under sections 102.111 and 102.112 is in conflict with the time frame for conducting manual recounts under section 102.166(4). [13] Second, the language in sections 102.111 and 102.112, authorizing the Secretary to **[**28]** ignore amended or late returns submitted by the Boards, is contradictory.

1. *The Recount Conflict*

Section 102.166(1) states that "any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest." The time period for

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[12] The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. *See* § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for President of the United States. Robert Crawford, Florida Commissioner of Agriculture, has been appointed to replace Florida Governor Jeb Bush. *See* § 102.111, Fla. Stat. (2000).

[13] We emphasize that because the certification of the Elections Canvassing Commission and the deadlines in sections 102.111 and 102.112 apply only in the case of statewide and federal elections, the conflict between the two statutes exists only for those elections and not for local or county elections.

Section 102.166(4)(a), the **[**29]** operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section **[*1285]** 102.166(4)(b) further provides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later: [14]

> (4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.
>
> (b) *Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever **[**30]** occurs later.*

§ 102.166, Fla. Stat. (2000) (emphasis added).

[31]** A Board "may" authorize a manual recount [15] and such a recount must include at least three precincts and at least one percent of the total votes cast for the candidate. [16] The following procedure then applies:

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[14] As discussed in *Siegel v. LePore*, 120 F. Supp. 2d 1041, 2000 WL 1687185 at *6 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163, 2000 U.S. App. LEXIS 30780, 2000 WL 1781946 (11th Cir. 2000):

> On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as evidenced by its plain language, is to remedy "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

[15] The statute does not set forth any criteria for determining when a manual recount is appropriate. *See*: § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board may authorize a manual recount.").

[16] § 102.166(4)(d), Fla. Stat. (2000).

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
(a) Correct the error and recount the remaining precincts with the vote tabulation system;
(b) Request the Department of State to verify the tabulation software; or
(c) Manually recount all ballots.
(6) Any manual recount shall be open to the public.
(7) Procedures for a manual recount are as follows:
(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.
§ 102.166, Fla. Stat. (2000).

[32]**

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which **[*1286]** a manual recount must be completed, the time required to complete a manual recount must be reasonable. [17] Otherwise, the recount provision would be, in effect, meaningless. Courts should construe statutes to give effect to all provisions, and not to render any part meaningless. *See: Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996). The recount provision thus conflicts with sections 102.111 and 102.112, which state that the Boards "must" **[**33]** submit their returns to the Elections Canvassing Commission by 5 p.m. of the seventh day following the election or face penalties. For instance, if a party files a precertification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5 p.m. of the seventh day following the election.

[34]** 2. *The "Shall" Versus "May" Conflict*

Section 102.111, which sets forth general criteria governing the Elections Canvassing Commission, was enacted in 1951 as part of the Code and provides that late returns "shall" be ignored:
102.111 Elections Canvassing Commission.-

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has

[17] What is a reasonable time required for completion will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.

been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, **[**35]** all missing counties shall be ignored*, and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that late returns "may" be ignored and that members of the County Board "shall" be fined:

102.112 Deadline for submission of county returns to the Department of State; penalties.-

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored* and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $ 200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines **[**36]** shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32. **[*1287]**

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory (i.e., the Department "shall" ignore late returns), section 102.112 is permissive (i.e., the Department "may" ignore late returns, or the Department "may" certify late returns and fine tardy Board members).

B. Resolving the Ambiguity

1. *The Recount Conflict*

It is well settled that a statute should be construed in its entirety and as a harmonious whole. *See: e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961). Further, where two laws are in conflict, courts should adopt an interpretation that harmonizes the laws, for the Legislature is presumed to have intended that both laws are to operate coextensively and have the fullest possible effect. *See: T.R. v. State*, 677 So. 2d 270 (Fla. 1996). In the present case, whereas sections 102.111 and **[**37]** 102.112 state that County Boards must submit vote returns to the Department by 5 p.m. of the seventh day following an election, section 102.166(4) provides that a manual recount can be requested at any point prior to certification. Manual recounts oftentimes may be incomplete on the seventh day following the election. In such a case, if the seven-day limit were to be strictly enforced, the manual recount provision would be eviscerated and rendered meaningless. The Legislature could not have intended such a result. The seven-day limit thus must be construed in a flexible manner to accommodate the manual recount provision.

2. *The "Shall" Versus "May" Conflict*

First, it is well settled that where two statutory provisions are in conflict, the specific statute controls the general statute. *See*: *e.g.*, *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205 (Fla. 1969). In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for late returns, noting that such returns "shall" be ignored by the Department. Section 102.112, **[**38]** on the other hand, directly addresses in its title and text both the "deadline" for submitting returns and the "penalties" for submitting late returns; the statute expressly states that late returns "may" be ignored and that dilatory Board members "shall" be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing late returns, and section 102.111 constitutes a nonspecific statute in this regard. The specific statute controls the nonspecific statute.

Second, it also is well settled that when two statutes are in conflict, the more recently enacted statute controls the older statute. *See McKendry v. State*, 641 So. 2d 45 (Fla. 1994). In the present case, the provision in section 102.111 stating that the Department "shall" ignore late returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore late returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of **[**39]** legislative intent.

Third, related statutory provisions must be read as a cohesive whole. *See: Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961). A statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision. *See: Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995). As stated in *Forsythe v. Longboat Key Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent **[*1288]** whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another."

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the county canvassing board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a county wide manual recount in certain cases. Thus, if a request is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to **[**40]** submit its returns to the Department by 5 p.m. of the seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize county canvassing boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas

voters; [18] overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do *not* have to be received by 7 p.m. of the day of the election, as provided by state law). In light of the fact that overseas ballots cannot be counted until after the seven-day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section

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[18] *See:* Fla. Admin. Code R.1S-2.013 (1998).

102.112. As reflected in **[**41]** a consent decree between the State of Florida and the United States Government, federal law requires counties to amend their returns to include overseas ballot totals and requires the Department to accept these totals. [19] The overseas ballots must be received by counties up until midnight on the tenth day following the election. In the present election, the earliest the county canvassing boards could have filed amended returns reflecting the overseas ballot totals was Saturday, November 18, 2000. The Secretary indicated that after receiving and totaling these amended returns, the Elections Canvassing Commission would certify the election on Saturday, November 18, 2000.

[42]** VII. THE DEPARTMENT'S DISCRETION

Consistent with the analysis above, we conclude that section 102.112 grants the Department discretion to ignore returns not received by the time specified in the statute. However, a plain reading of section 102.112 does not set forth boundaries of the exercise of this discretion. This case is not about whether there is a 5 p.m. deadline for filing returns. There is such a deadline. The trial court enforced that deadline and all county canvassing boards met that deadline. This case is about the "may ignore" portion of the statute and whether the Department acted within its discretion when the Secretary of State anticipatorily announced that **[*1289]** she would not accept any amendments to the returns which had met the deadline thereby announcing that amended returns filed after the 5 p.m. deadline were to be ignored.

In a statewide or federal election other than a presidential election we can foresee no reason why the Department would refuse to accept amended returns if a county was proceeding in good faith with a manual recount under section 102.166. However, in this case involving a presidential election, the decision as to when amended returns can be **[**43]** excluded from the statewide certification must necessarily be considered in conjunction with the contest provisions of section 102.168 and the deadlines set forth in 3 U.S.C. § 5. Therefore, in this case involving a presidential election, we conclude that the reasoned basis for the exercise of the Department's discretion to ignore amended returns is limited to those instances where failure to ignore the amended returns will: (1) preclude a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; [20] or (2) in the case of a federal election, will result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.

VIII. THE PRESENT CASE

Based on the foregoing, we hold that the trial court below properly concluded that the county canvassing **[**44]** boards were required to submit their returns to the Department by 5 p.m. of the seventh day following the election and that the Department was not required to ignore the amended

seventh day following the election and that the Department was not required to ignore the amended returns but rather could count them. The court, however, erred in holding that the Secretary acted within

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[19] *See: United States v. Florida*, No. TCA-80-1055 (N.D. Fla. Aug. 20, 1984). Accordingly, Florida Administrative Code Rule 1S-2.013 provides in relevant part:

(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

[20] In this case, the parties conceded that the contest provisions contained in section 102.168 apply to presidential elections.

her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

> The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election **[**45]** if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000)(emphasis added).

We conclude that, consistent with the Florida election scheme, the Department may not reject a Board's amended returns that are filed on or before the day after the date that the overseas ballots are due. Such a rejection constitutes a clear abuse of discretion, as the Elections Canvassing Commission cannot certify the election prior to that date. Further, as set forth above, in this case involving a presidential election, the reasoned basis for the exercise of the Department's discretion to **[*1290]** ignore amended returns after November 18, 2000, is limited to those instances where failure to ignore the amended returns **[**46]** will: (1) preclude a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) in the case of a federal election, result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5. In this case, as of the date that the Secretary rejected the amended returns on November 14, 2000, the deadline for receiving overseas ballots had not expired and neither of the circumstances set forth above had been considered.

Further, in this case, the Department applied its discretion in accord with a faulty premise: that an "error

in vote tabulation" does not include a situation where a discrepancy between the original machine return and sample recount is due to the manner in which a ballot has been marked or punched. *See*: Advisory Opinion DE 00-13. Accordingly, the Department did not exercise its discretion within the confines of the law. As a result of this opinion, Palm Beach County, and potentially other counties, were thwarted in their efforts to complete the manual recount. In this Court's original opinion, we granted a remedy which, in effect, put the parties in the same **[**47]** position they would have been at the time the Division issued its advisory opinion on Monday, November 13, 2000. [21] Prior to the Division's opinion, the counties had at least until Saturday, November 18 to complete the manual recounts and certify the amended results. This Court released its original opinion on Tuesday, November 21, 2000. The November 26, 2000, date gave the counties no more time to complete the recount than they would have had if the Division had not forestalled their efforts. The November 26, 2000, date was not a new "deadline" and has no effect in

[21] At oral argument in this case, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request manual recounts in all counties. Neither candidate requested such an opportunity.

future elections. [22] It was simply a date in accordance with the requirements that had been established prior to the election and in order to construe all the provisions of the Code as a consistent whole.

[48]** IX. CONCLUSION

As is evident from the nature of the actual issue certified by the district court as one of great public importance requiring this Court's immediate attention, this Court has at all times been faced with a question of the statutory construction of Florida's election laws in accord with the intent of the Florida Legislature. Our examination of that issue has been limited to a determination of legislative intent as informed by the traditional sources and rules of construction we have long accepted as relevant in determining such intent. Not surprisingly, we have identified the right of Florida's citizens to vote and to have elections determined by the will of Florida's voters as important policy concerns of the Florida Legislature in enacting Florida's election code.

It is important, perhaps, to remind ourselves that the Florida Legislature has expressly vested in the voters of Florida the authority to elect the presidential electors who will ultimately participate in choosing a president:

> Electors of President and Vice President, known as presidential electors, **[*1291]** shall be elected on the first Tuesday after the first Monday in November of each year the number **[**49]** of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

§ 103.011, Fla. Stat. (2000). By providing for the popular election of presidential electors, Florida's

Legislature has also placed that election under Florida's general statutory election scheme. Hence, there is essentially only one statutory election scheme for all elections whether the elections be for local and state officials or for presidential electors. The Legislature has not chosen to have a separate set of election laws for elections for presidential electors. The Legislature has chosen to have a single election code control all elections. So, we must interpret and apply that single election code here.

As a consequence of having a single election code for all elections, it should not be surprising to anyone to learn that these laws will be applied in most instances to elections other than **[**50]** those for presidential electors. For example, it is apparent that the court cases that have previously construed the election laws generally have involved state and local elections. It should not be surprising then that this Court's prior opinions that we have relied on for guidance in resolving the pending issue of statutory construction would have little reference to the Legislature's authority in the selecting of presidential electors or the Legislature's decision to grant Florida voters the right to elect presidential electors. In fact,

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[22] We add that we did not extend the deadline for completion of the manual recounts but made clear only that the date for certification must be set within a reasonable time to allow for the election contest provisions of section 102.168. As always, it is necessary to read all provisions of the elections code in pari materia. In this case, that comprehensive reading required that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.

the parties have provided us no citations to court cases in Florida involving disputes over presidential electors under Florida's election laws. This case may be the first.

In sum, Florida's statutory scheme simply makes no provision for applying its rules one way for presidential elector elections and another way for all other elections. That was a legislative decision that we have accepted. The importance of the single scheme becomes apparent when we consider the issue of the timetable for filing election returns in all elections where returns must be filed according to the statutory schedule. We have construed the provisions providing for **[**51]** a timetable as directory in light of what we perceive to be a clear legislative policy of the importance of an elector's right to vote and of having each vote counted. Hopefully, our unbroken line of cases identifying and relying on these legislative policies has not missed the mark. Further, if anything, more recent legislative changes have been crafted not only to be consistent with these policies, but also to ensure adherence to them.

Hence, based upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential election. This statutory construction reflects our view that the Legislature would not wish to endanger Florida's vote being counted in a presidential election. This ruling is not only consistent with our prior interpretation of the entire statutory election scheme, but also with our identification of the important legislative policies underlying that scheme.

For the reasons stated in this opinion, we reverse the orders of the trial court. Based on this Court's status as the ultimate **[**52]** arbiter of conflicting Florida law, we conclude that our construction of the above statutes results in the formation of no new rules of state law but rather results simply in a narrow reading

and clarification of those statutes, which were enacted long before the present election took place. We decline to rule more expansively in the present case, for to do so would result in **[*1292]** this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it, the Legislature.

No motion for rehearing will be allowed.

It is so ordered.

SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

WELLS, C.J., dissents with an opinion.

Dissent by: WELLS

Dissent

WELLS, C.J., dissenting.

I dissent from issuing a new decision while the United States Supreme Court has under consideration *Bush v. Gore*, 148 L. Ed. 2d 553, 2000 U.S. LEXIS 8277, 121 S. Ct. 512 (U.S. 2000), and I do not concur in the reissued opinion.

End of Document

Gore v. Harris

Supreme Court of Florida

December 22, 2000, Decided

No. SC00-2431

Reporter
773 So. 2d 524 *; 2000 Fla. LEXIS 2474 **; 26 Fla. L. Weekly S 1

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN, Appellants, vs. KATHERINE HARRIS, as Secretary, etc., et al., Appellees.

Prior History: **[**1]** Appeal of Judgment of Circuit Court, in and for Leon County, N. Sanders Sauls, Judge, Case No. CV 00-2808. Certified by the District Court of Appeal, First District, Case No. 1D00-4745.

Disposition: Appellants afforded no relief.

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Judge Robert E. Williams, Supervisor of Elections, Shirley N. King, Marianne P. Marshall, and David Howard, Leonard Berger and Andrew McMahon, Palm Beach County, West Palm Beach, Florida, for Charles Burton, Carol Roberts, and Theresa Lepore, Palm Beach County Canvassing Board.

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LLP, Washington, D. C., and Kirk Van Tine of Baker Botts, LLP, Washington, D. C., for George W. Bush and Dick Cheney, Appellees.

Gary L. Printy of the Law Office of Gary L. Printy, Tallahassee, Florida, for Stephen Cruce, Teresa Cruce, Terry Kelly, and Jeanette K. Seymour, Intervenors.

Terrell C. Madigan, Harold R. Mardenborough, Jr., and Christopher Barkas of McFarlain, Wiley, Cassedy & Jones, P. A., Tallahassee, Florida, for Matt Butler, Intervenor.

W. Robert Vezina, III and Frederick J. Springer of Vezina, Lawrence & Piscitelli, P. A., Tallahassee, Florida, for John E. Thrasher, Intervenor.

William Kemper Jennings, DeFuniak Springs, Florida, for Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, Intervenors.

Judges: SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur. WELLS, C. J., concurs in result only with an opinion. SHAW, J., concurs with an opinion. HARDING, J., concurs in result only. PARIENTE, J., concurs with an opinion.

Opinion

[*526] PER CURIAM.

This case is before the Court on remand from the United States Supreme Court. *See* **[**4]** *Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525 (U.S. Decided Dec. 2000). [1] In our previous opinion, we ordered the Circuit Court of Leon County to tabulate by hand 9000 contested Dade County ballots. *See Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. S 1112, S1117 (Fla. Decided Dec. 8, 2000). This Court further held that relief would require manual recounts in all Florida counties where undervotes existed which had not previously been subject to manual tabulation. *See* 772 So. 2d 1243, 2000 Fla. LEXIS 2373, *4-5, 16-25, 25 Fla. Law W. at S1114, S1117-18. The standard we directed be employed in the manual recount was the standard established by the Legislature in the Florida Election Code, i. e., that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." *See id.* 2000 Fla. LEXIS 2373, *25, 25 Fla. Law W. at S1118 (citing section 101.5614(5), Florida Statutes (2000)). The "intent of the voter" standard adopted by the Legislature was the standard in place as of Decided November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 **[**5]** (1994).

The per curiam opinion of the Supreme Court held that the Florida statutory standard for the manual examination of ballots violates equal protection rights. *See Bush*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, slip op. at 7. Although the Supreme Court found the legislatively prescribed standard to be unobjectionable as an abstract proposition and starting principle, it noted "t he

problem inheres in the absence of specific standards to ensure its equal application." *Id.* The Supreme Court specified that in order for a manual recount to continue:

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[1] This opinion follows our dismissal of this cause by order of December 14, 2000.

> It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment **[**6]** be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000).

531 U.S. 98, 2000 U.S. LEXIS 8430, 121 S. Ct. 525, 148 L. Ed. 2d 388, slip op. at 11-12. The Supreme Court ultimately mandated that any manual recount be concluded by Decided December 12, 2000, as provided in 3 U.S.C. § 5. *See* 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388, 2000 U.S. LEXIS 8430, slip op. at 12. In light of the time of the release of the Supreme Court opinion, these tasks and this deadline could not possibly be met. Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

Accordingly, pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief.

It is so ordered.

SHAW, ANSTEAD, PARIENTE, LEWIS **[**7]** and QUINCE, JJ., concur. **[*527]** WELLS, C. J., concurs in result only with an opinion. SHAW, J., concurs with an opinion. HARDING, J., concurs in result only. PARIENTE, J., concurs with an opinion.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Concur by: WELLS, SHAW, PARIENTE

Concur

WELLS, C. J., concurring in result only.

I concur only in the result which this Court decided in its order on remand in this case, which was that no relief could be granted and the case be dismissed.

SHAW, J., concurring.

This case has torn the nation and the judiciary. It is quintessentially divisive and confounding. The problem, I believe, lies not in the partisan nature of the issues but rather in the deeply rooted, and conflicting, legal principles that are involved.

A. *The General Welfare*

A fundamental principle underlying all legal proceedings is the search for the truth. Once the truth is uncovered, we assume that a remedy can be fashioned. The present case posed a simple question: Who won the presidential election in Florida? The answer, in the eyes of many, also was simple: The truth lies in the vaults and storage rooms throughout the state where the untabulated ballots of thousands of Floridians are sequestered.

[8]** A second deeply rooted principle is the right of suffrage. The right to vote, and to have each vote counted, is a preeminent civil right [2] and has been won at great cost. It was not too far in our nation's past that throngs of citizens marched in the streets to protest the suppression of this right and risked being beaten with nightsticks and set upon with tear gas, fire-hoses, and dogs. Some were jailed. A few- men, women, and children- were killed. The suppression of this right is now anathema to the nation. The right to vote, and to have each vote counted, goes to the very heart of this case. [3]

[9]** Both the search for the truth and the right to vote are of paramount importance, but they are circumscribed by a higher, overarching concern- the general welfare of our democracy. The general welfare is informed by our law. [4]The law infuses the fabric of our society and breathes life into *all* our legal principles. Inherent in the law are the basic concepts of fairness, reliability, and predictability; and the constitutional safeguards of due process and equal protection were designed to promote these interests. Although the pursuit of the **[**10]** truth and the preservation of the right to vote are worthy goals, they cannot be achieved in a manner that contravenes these principles.

B. *The Recount Dilemma*

A unanimous Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220, 2000 Fla. LEXIS 2311, 25 Fla. Law W. S 1062 (Fla. Nov. 21, 2000), applied traditional rules of statutory construction to resolve several conflicts and ambiguities in the Florida Election Code ("Code"). **[*528]** The Court concluded that countywide manual recounts had been improperly cut off in the "protest" phase [5] by an advisory statement issued by the Florida Secretary of State, and we ordered that the counties must be given a commensurate window of opportunity in which to complete the manual

[2] *See, e. g., Yick Wo v. Hopkins*, 118 U.S. 356, 370, 30 L. Ed. 220, 6 S. Ct. 1064 (1886) ("[The right of suffrage] is regarded as a fundamental political right, because preservative of all rights.").

[3] *See generally Reynolds v. Sims*, 377 U.S. 533, 561-62, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) ("The right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

[4] The concern for the general welfare of our democracy is implicit in the United States Constitution, which provides in part:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

[5] *See* § 102.166, Fla. Stat. (2000).

recounts and submit supplemental returns. The United States Supreme Court vacated the judgment, [6] **[**11]** but this Court on remand reaffirmed our prior holding. [7]

In *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. S 1112 (Fla. Dec. 8, 2000), a majority of the Florida Supreme Court authorized a manual recount of untabulated ballots in the "contest" phase. [8] To comport with due process and equal protection concerns, the Court ordered that the recount be conducted statewide and that the results be adjudicated by a single judge. I dissented because I felt that the recount, as formulated, lacked sufficient guidelines and could not be completed promptly and fairly. The United States Supreme Court on the first day of the recount, i. e., December 9, stayed the recount and at 10 p. m., December 12, ruled that additional guidelines were required. The Court further held that December 12 was a mandatory deadline under the Florida Election Code and that any recount extending beyond that date was violative of Florida law, thus foreclosing the possibility of a recount. [9]

[12]**

First, in my opinion, December 12 was not a "drop-dead" date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. **[**13]** [10]

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[6] *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 2000 U.S. LEXIS 8087, 69 U.S.L.W. 4020, 121 S. Ct. 471, 148 L. Ed. 2d 366 (Dec. 4, 2000).

[7] *See Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, 25 Fla. Law W. S 1126 (Fla. Dec. 11, 2000).

[8] *See* § 102.168, Fla. Stat. (2000).

[9] The United States Supreme Court ruled as follows:

Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

...Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy- remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18- contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2000).

Bush v. Gore, 531 U.S. 98, 2000 U.S. LEXIS 8430, *20, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949 (U.S. Dec. 12, 2000).

[10] Title III, section 15, United States Code, provides that regardless of prior dates, Florida is entitled to deliver its electoral votes to Congress prior to January 6 at which time Congress *must* count those votes unless Congress determines that the votes "have [not] been regularly given":

December **[*529]** 12 was simply a *permissive* "safe-harbor" date to which the states could aspire. [11] It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code (i. e., it is not mentioned there) or this Court's prior rulings. [12] Second, regardless of the safe-harbor date, I am not convinced that additional safeguards could have been formulated that would have satisfied the United States Supreme Court. Given the tenor of the opinion in *Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949 (U.S. Dec. 12, 2000), I do not believe that the Florida Supreme Court could have crafted a remedy under these circumstances that would have met the due process, equal protection, and other concerns of the United States Supreme Court.[13]

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day .... And the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States ... *No electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected* ....If more than one return of paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed ...but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

3 U.S.C. § 15 (emphasis added).

[11] Title III, section 5, United States Code, provides that where a dispute concerning the appointment of electors is settled at least six days prior to the date set for the meeting of electors (i. e., at least six days prior to December 18, 2000), the state's decision concerning the settlement is conclusive:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures, and such determination shall have been made *at least six days before the time fixed for the meeting of the electors*, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned. 3 U.S.C. § 5 (emphasis added).

[12] Contrary to the ruling of the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949 (U.S. Dec. 12, 2000), our prior opinions discussed Title III vis-a-vis the Florida Secretary of State's authority to reject late returns arising from a pre-certification *protest* action, not vis-a-vis a court's obligation to stop a recount in a post-certification *contest* action. *See Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 2000 Fla. LEXIS 2311, 25 Fla. Law W. S 1062 (Fla. Nov. 21, 2000), and *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, 25 Fla. Law W. S 1126 (Fla. Dec. 11, 2000). To mix these two actions is to confuse apples and oranges.

[13] The United States Supreme Court summarized the constitutional requirements for a recount:

> [I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for

[14]**

[15]**

[16]**

C. *Human Failings*

Admittedly, the present scenario is surreal: All the king's horses and all the king's men could not get a few thousand ballots counted. The explanation, however, **[*530]** is timeless. We are a nation of men and women and, although we aspire to lofty principles, our methods at times are imperfect.

First, although the untabulated Florida ballots may hold the truth to the presidential election, we still -to this day- cannot agree on how to count those ballots fairly and accurately. In fact, we cannot even agree on *if* they should be counted. Second, although the right to vote is paramount, we routinely installed outdated and defective voting systems and tabulating equipment at our polls prior to the present election. And finally, although the rule of law is supreme, the key legal text in this case- i. e., the Florida Election Code- is fraught with contradictions and ambiguities, and the key legal ruling- i. e., the United States Supreme Court's **[**17]** final decision in *Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949 (U.S. Dec. 12, 2000)- was denigrated and rejected by nearly half the members of that Court.

D. Conclusion

I commend the public officials, employees, and volunteers of this state- each election supervisor, judge, court clerk, board member, and all the others- who worked tirelessly in a star-crossed effort to count every vote. I commend the people of our state and nation who looked faithfully to the courts to interpret and apply the law. I also commend Vice President Gore for persevering in the labor of Sisyphus; each time he

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determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

Bush v. Gore, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949, slip op. at 11 (U.S. Dec. 12, 2000). The Court then adopted the position of the Florida Secretary of State concerning untabulated ballots:

In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary.

Bush, at 532. And finally, the Court construed Florida law to give the Secretary a decisive evaluative role:

Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000).

Bush, at 532-533.

attempted to comply with the Code, he was forced to begin anew. And I commend President-elect Bush for remaining stalwart in the face of charges of suppressing the truth (i. e., of obstructing the counting of ballots) and disenfranchising the voters of this state. And finally, I especially commend the other justices of this Court, each of whom approached this case with a sworn resolve to be objective, honorable, and fair.

Our nation has been through an ordeal, **[**18]** but we have learned from the experience. At this point, I know one thing for certain: The basic principles of our democracy are intact.

PARIENTE, J., concurring.

I concur fully with the majority opinion. However, I write separately to discuss several concerns with Florida's present Election Code and the use of different voting systems in place in Florida's sixty-seven counties, particularly in light of the United States Supreme Court decision in *Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. SC00-949, 2000 WL 1811418 (U.S. Dec. 12, 2000). Just as the lessons learned from the last major presidential election dispute--the election of

1876--prompted substantial reform, so my vision is that the valuable lessons we have learned from the 2000 presidential election will strengthen and reinvigorate our democracy. [14]

[19]** Whatever the reason, we now know that not every vote intended to be cast for a **[*531]** candidate in this November 7, 2000, presidential election in Florida was tabulated and counted as a vote. Further, although manual recounts were completed in several counties, [15] in other counties the ballots for which the machine did not register a vote--the "undervotes"--were never examined manually to ensure that all legal votes were counted. What should concern all of us is not whether the uncounted votes were for President-Elect Bush or for Vice President Gore, but that thousands of voters in Florida did not have their vote included in this State's presidential election.

It is essential to our great democracy that all citizens have **[**20]** confidence in the integrity and reliability of the electoral process. As the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

> Recounts are an integral part of the election process. *For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted* The moment an

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[14] In modern times, we have never experienced a *post-election* court dispute in the election for the President of the United States. The time limits Congress enacted for resolving contests in Presidential elections were established in a far different time, when our country looked far different--and was far less populous than today. Indeed, Congress enacted the safe harbor provision, 3 U.S.C. section 5, and other election-related dates, in 1887, as a result of the Hayes-Tilden post-election dispute. *See Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949, 2000 WL 1811418, at *30 (U.S. Dec. 12, 2000) (Breyer, J., dissenting). The significance of these time limits is not entirely clear. *See id.* at *24 (Ginsburg, J., dissenting) (explaining that "the December 12 'deadline' for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. ...None of these dates has ultimate significance in light of Congress' detailed provisions for determining on 'the sixth day of January, 'the validity of electoral votes. § 15"). Accordingly, although we have become a society accustomed to immediate results--communications delivered via fax with rapid speed and news stories broadcast over the Internet as they occur--perhaps the time has come for Congress to explore whether, in the rare case of a post-election presidential controversy, a thirty-five day time limit for a final resolution of a presidential contest is realistic or reasonable.

[15] Full hand counts were done at the request of the Florida Democratic Executive Committee (" Committee") in Volusia, Broward, and Palm Beach Counties. *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, Nos. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1804707, *4 (Fla. Dec. 11, 2000).

> individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.

Id. at 15 (emphasis supplied) (footnotes omitted). As we have stated most forcefully, this Court remains committed to the principle that:

> the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. *Ours is a government of, by and for the people. Our federal and state constitutions guarantee* **[**21]** *the right of the people to take an active part in the process of that government, which for most of our citizens*

means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So. 2d 259, 262-63 (Fla. 1975) (emphasis supplied). [16] With these principles in mind, I turn to a review of some of the provisions of the Election Code and the voting systems in place at the time of the November 7, 2000, presidential election.

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[16] John Greenleaf Whittier's nineteenth century poem, "The Poor Voter on Election Day," more eloquently echoes the importance of this fundamental right to vote as the great equalizer between all citizens:

To-day, of all the weary year,
A king of men am I.
To-day, alike are great and small,
The nameless and the known;
My palace is the people's hall,
The ballot-box my throne!
The rich is level with the poor,
The weak is strong to-day;
And sleekest broadcloth counts no more
Than homespun frock of gray.
To-day let pomp and vain pretence
My stubborn right abide;
I set a plain man's common sense
Against the pedant's pride.
The wide world has not wealth to buy
The power in my right hand!

[22]** *Statewide manual recounts*: According to the official figures reported on November 8, 2000, the day after the election, out of almost six million votes cast in Florida, the difference between the vote totals for **[*532]** the two candidates was a margin of only 1784 votes--0.0299% of the total Florida vote. *See Siegel v. Lepore*, 234 F.3d 1163, 2000 U.S. App. LEXIS 30780, No. 00-15981, 2000 WL 1781946, *1 (11th Cir. Dec. 6, 2000). Because the margin of victory was less than "one-half of a percent ...of the votes cast," pursuant to Florida's Election Code, an automatic machine recount was conducted in each county in this State. [17] § 102.141(4), Fla. Stat. (2000). However, the Florida Election Code did not provide for an

automatic procedure to allow for the option of one candidate to request a statewide manual recount according to uniform, "objective" standards. [18] Thus, one of the issues that should be considered in any future study of Florida's Election Code is whether such a procedure should have been **[**23]** in place.

[24]** Instead of a procedure for requesting a statewide manual recount, the statutes in place as of November 7, 2000, provided that a candidate had the option pursuant to section 102.166(4), Florida Statutes (2000), to request a manual recount from an individual county canvassing board. Based upon the express language in section 102.166, however, the individual county canvassing board is vested with discretion to conduct the initial manual recount of at least three precincts. [19] Once the initial sampling shows an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board is required to exercise one of three options, with the third option being a manual recount of all ballots. § 102.166(5)(a)-(c), Fla. Stat. (2000). In counting the ballots manually, the statute provides that if the "counting team is unable to determine a voter's intent in casting a ballot, that ballot shall be presented to the county canvassing board for it to determine the voter's intent." § 102.166(7)(b), Fla. Stat. (2000).

[25]** Although in a local or countywide election the discretion of whether to conduct a manual recount may be properly vested in an individual canvassing board, the discretionary nature of the decision raises concerns of uniformity and completeness in a statewide election. In a case where a manual recount is sought in several counties based on the identical assertion, as occurred in this presidential election, there are additional constitutional concerns raised if a manual recount is conducted and completed in some but not all the counties where the recount is requested. [20]

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[17] Although there were assertions made that the votes were counted and recounted, apparently in some counties the votes were not even subjected to a second machine count--only the machines were checked. *See* Phil Long & Dan deVise, *Not All Florida Counties Obeyed Order To Do Recount*, Miami Herald, December 15, 2000. Further, the automatic machine recount in Nassau County actually showed fewer overall votes than the initial machine count. *See Gore*, 2000 WL 1800752, at *2. The fact that the two machine counties showed differing vote totals should raise concerns about the reliability of machine counts in close elections. This disparity shows yet one more reason why "our society has not yet gone so far as to place blind faith in machines." *Palm Beach Canvassing Board*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, 2000 WL 1804707, at *9.

[18] At oral argument on November 20, 2000, "we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request manual recounts in all counties. Neither candidate requested such an opportunity." *Palm Beach Canvassing Bd.*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, Nos. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1804707, at *14 n. 21 (Fla. Dec. 11, 2000).

[19] The current statute does not set forth any criteria to guide the determination of when the decision to conduct a preliminary manual recount is appropriate. *See* § 102.166(4)(c), Fla. Stat. (2000) (" The county canvassing board may authorize a manual recount.").

[20] If manual recounts are requested by a candidate in several counties, and one board conducts a full manual recount and another board does not, then, as the Attorney General noted in his November 14, 2000, opinion letter to the Honorable Charles E. Burton, Chair, Palm Beach County Canvassing Board, an unconstitutional two-tiered system may have been created:

[26]** **[*533]** This concern is demonstrated dramatically in this past election. On November 9, 2000, Vice President Gore requested manual recounts in four counties--Miami-Dade, Broward, Palm Beach and Volusia. *See Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. S 1112, n. 16 (Fla.

Dec. 8, 2000), *rev'd and remanded, Bush v. Gore*, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 2d 388, 121 S. Ct. 525, No. 00-949, 2000 WL 1811418 (U.S. Dec. 12, 2000). The reasons for this request included the extraordinary closeness of the statewide margin, as well as concern as to whether the vote totals reliably reflected the true will of the Florida voters. Of the four counties in which Vice President Gore requested a full manual recount, only the Miami-Dade Canvassing Board did not complete a manual recount. The Miami-Dade Board's failure to complete the recount was attributed to a variety of factors but in the end the Board suspended the full recount, stating as its reason that it determined that it could not meet this Court's certification deadline. *See Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. S 1112, n. 17; *see also Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, 773 So. 2d 1179, 2000 Fla. App. LEXIS 15384, No. 3 D00-3318, 2000 WL 1790424 (Fla. 3d DCA Nov. 22, 2000). [21] This **[**27]** Court ultimately held that the Miami-Dade Canvassing Board had no discretion to stop its full manual recount once it had started. *See Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. at S1116. Nonetheless, the end result was that some voters in Miami-Dade County whose votes were not recorded by machine never had their votes counted in this election. [22] It would thus seem appropriate that any revised statutory scheme should include more specific standards to govern the exercise of county canvassing boards' discretionary authority in a statewide election.

[28]** Further, questions have been raised about the unequal treatment of voters in counties where recounts were not requested. Because section 102.166(4) provides that only a political party or a candidate may request a manual recount under section 102.166(4), there are additional issues regarding the potential

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If hand recounts have already occurred in Seminole County and an unknown number of other counties ...*while similar hand counts are blocked in other counties* ...a two-tier system for reporting votes results.

A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. *A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.*

As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida *includes figures generated from this two-tier system of differing behavior by official canvassing boards, the state will incur a legal jeopardy, under both the U.S. and State constitutions.* This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.

(Emphasis supplied.) It should be noted that the Attorney General's opinion did not address constitutional concerns of manual recounts not being conducted in all counties, but rather specifically addressed constitutional implications if one county canvassing board refused to conduct a manual recount requested by a candidate while other county canvassing boards agreed to conduct a manual recount.

[21] Miami-Dade did not commence the full manual recount until days after Broward and Palm Beach Counties commenced their manual recounts. In fact, the Miami-Dade Canvassing Board had initially decided not to conduct a full manual recount after receiving the results obtained from the sample recount of three precincts. *See Gore*, 2000 WL 1800752, at *11.

[22] When the Miami-Dade Canvassing Board stopped the recount, approximately 20% of the votes had been manually recounted countywide, resulting in 168 net votes for Gore. However, at least 9000 undervotes were never counted. *See Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. at S1116. Further, Palm Beach County did not finish its recount until after 5 p. m. on November 26, 2000, and the Secretary did not include the amended results in the statewide certification. *See id.* at S1117. There have been those that have argued that any manual recount under the Election Code must be completed within seven days of the election. However, as we have seen, that is simply not a realistic time period and operates to the detriment of voters in the more populous counties. This problem, in itself, could raise implications of disparate treatment based solely on the voter's county of residence.

for unequal treatment of voters in those counties in which a **[*534]** manual recount is neither requested by the candidate nor conducted by the canvassing board. Because of our concerns that if some of the undervotes were to be counted in an election contest, all of the undervotes should be counted, we held in *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. at S1117, that in fashioning relief under section 102.168(8), a manual recount should be conducted in all Florida counties where there was an undervote and where no manual recount had been conducted. [23] Our paramount interest was that the "election should be determined by a careful examination of the votes of Florida's citizens" so that the "outcome of elections be determined by the will of the voters," which "forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving **[**29]** elections disputes." *Id.* at 2000 Fla. LEXIS 2373, *21, 25 Fla. Law W. at S1114. Thus, any comprehensive review of the Election Code should address both the scope of the manual recount statute, section 102.166, to allow for statewide manual recounts, and the scope of the contest statute, section 102.168, to fashion appropriate relief on a statewide basis.

In addition, the United States Supreme Court's decision in *Bush v. Gore* has also called into question the constitutionality of any statutory scheme that does not have more specific standards for evaluating votes when conducting manual recounts than the one currently codified by Florida law, which is whether the intent of the voter can be ascertained. [24] *Bush v. Gore*, 2000 WL 1811418 at *4-6. However, before the 2000 presidential election, neither the Legislature nor the Secretary of State had prescribed more explicit criteria to govern the determination of the voter's intent. [25] Although each county canvassing board may be properly vested with discretion to make this determination for a countywide race, the potential for differing substandards utilized by boards in different counties raises questions of unequal treatment among similarly situated voters in statewide races. [26] *See id.* at *4-5. This in turn requires an evaluation of whether there is a need for more specific standards, particularly in statewide elections, to be in place to

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[23] I remain confident that if the recount had continued in a timely manner, any obvious disparity in counting votes would have been reviewed by Judge Terry Lewis whose initial order on December 8, 2000, demonstrated an orderly and objective approach to the recount procedures.

[24] *See Bush*, 2000 WL 1811418, at *15, n. 2 (Stevens, J. dissenting), in which Justice Stevens noted that the "Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. *Id.*

[25] Neither candidate raised the constitutionality of Florida's election laws as an issue on appeal to this Court. *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, 2000 WL 1804707 *n. 7 (Fla. December 11, 2000). Instead, President-Elect Bush chose to bring a separate challenge to the constitutionality of section 102.166 in federal court. *See Siegel v. LePore*, 120 F. Supp. 2d 1041 (S. D. Fla.) (denying a request for a preliminary injunction to stop the recount), *aff'd*, 234 F.3d 1163, 2000 U.S. App. LEXIS 30780, No. 00-15981, 2000 WL 1781946 (11th Cir. Dec. 6, 2000).

[26] For example, although much of the focus has been on the potential disparity in counting votes in punchcard counties, it appears the potential for disparity could exist in counties utilizing optical scanning machines when one county adopts a per se rule and another employs a totality of the circumstances approach to evaluate voter intent. *See* Jeff Kunerth, Scott Maxwell & Maya Bell, *Voter Never Had Chance*, Orlando Sentinel, December 17, 2000 (explaining that in Lake County, the canvassing board decided against counting votes of residents who filled in the circle next to a candidate's name but who also wrote in the same name on the ballot; whereas in Orange County, canvassing officials counted such votes, stating that intent was clear). If a manual recount would have been undertaken in any county using a per se rule, there could be a real potential that legal votes would not have been counted. This potential demonstrates the pitfalls of any per se rule, even while this past election raised concerns about the application of a totality of the circumstances approach to determine voters' intent when employed on a county-to-county basis.

ensure uniformity in the assessment of votes and in the determination of voters' intent when dealing with similar **[*535]** voting systems. [27]

[30]**

[31]**

[32]**

The Failure to Count Undervotes: Throughout this litigation, both the Secretary of State and President-Elect Bush asserted that the manual recount statute, section 102.166, was never intended to apply to allow for the counting of undervotes. [28] Florida's Election Code currently provides for a manual recount where there is an "error in the vote tabulation which could affect the outcome of the election." § 102.166(5). Utilizing traditional methods of **[**33]** statutory construction, we concluded in our decision in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 2000 Fla. LEXIS 2395, 2000 WL 1804707, at *7, that "an error in vote tabulation" triggering a manual recount included the failure of a properly functioning machine to discern the choices of the voters as revealed by the ballots.

Further, in *Gore v. Harris*, we construed the term "legal vote" as used in the contest statute, section 102.168(3)(c), to be one where an examination of the ballot reveals a "clear indication of the intent of the voter." *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, *25, 25 Fla. Law W. at **[**34]** S1116. In defining "legal vote," we looked to the Florida Election Code and once again applied traditional methods of statutory construction as amplified by our prior case law. [29] We found that both the statutes and this Court's jurisprudence have consistently paid homage to the principle that "every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States." *Id.*

The position, however, has been espoused--most specifically by the Secretary of State in an advisory opinion issued after the November 7, 2000, election--that the manual recount statute does not provide for the counting of undervotes. [30] Further, the Secretary of State has taken the position that a "legal vote" is only one where the vote is "properly **[**35]** executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places." *Bush v. Gore*, 2000 WL 1811418, at *18 (Stevens, J., dissenting) (citing Brief of Respondent Harris et al. at p. 10).

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[27] The statutory scheme that stresses local autonomy results from the present administration of all elections in Florida, which includes statewide and local controls. Although the Secretary of State is the chief election officer of the state, *see* section 97.102(1), Florida Statutes (2000), the actual conduct of elections occurs in Florida counties with the county canvassing boards in each county responsible for counting the votes given each county. *See* §§ 102.131(1), § 102.141(2), Fla. Stat. (2000).

[28] Initially, their position in this Court had been that any attack on the problems with punchcard ballots and the increased percentage of undervotes should not be raised under the protest provisions of section 102.166(4), but in the contest provisions of section 102.168. *But see Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, *10, 25 Fla. Law W. at S1113 n. 7 (noting parties' change of position that section 102.168 does not apply to a presidential election).

[29] *See, e. g., State ex rel. Carpenter v. Barber*, 144 Fla. 159, 163-64, 198 So. 49, 50-51 (1940); *Wiggins v. State ex rel. Drane*, 106 Fla. 793, 795-97, 144 So. 62, 63 (1932).

[30] *See* Division of Elections Advisory Opinion, DE 00-13, November 13, 2000.

In other words, according to the positions taken by the Secretary of State in this litigation, if a voter does not completely dislodge the chad or mark the optical scan card in strict accordance with the instructions, resulting in the machine not registering a vote, that vote should not constitute a "legal vote." Under the Secretary's interpretation of the manual recount statute and narrow definition of "legal vote," there would *never* be an opportunity to resort to a manual method of counting the undervotes under *either* the protest or contest provisions of Florida's Election Code. The implication of these dual positions would be that voters who cast votes that **[**36]** were incapable of being read by the machine would not be counted through a manual recount either pursuant to section 102.166 or section 102.168--even if upon a manual review the voter's **[*536]** intent was clearly ascertainable. [31] In short, these votes would not be counted at all.

[37]** There are obviously important implications that flow from the Secretary of State's position that will affect elections long after this one. The Department of State is charged, among other responsibilities, with adopting rules to

> achieve and maintain the maximum degree of correctness, impartiality, and efficiency of the procedures of voting, including write-in voting, and of counting, tabulating, and recording votes by voting systems used in this state. [32]

However, before the November 7, 2000, election, this State had a patchwork of different voting systems and ballots selected on a countywide basis and necessarily approved by the Secretary of State. If the Secretary's restrictive view of "legal votes" and manual recounts is ultimately adopted through amendments to the Election Code, there are potential constitutional implications, especially if the different voting systems continue to remain in operation. Simply put, the failure to allow for a manual recount would have a disparate effect on those counties that employed punchcard systems. [33]

[38]**

[39]** As noted by the trial court in this case, Miami-Dade and Palm Beach Counties have been "aware ...for many years" of the problems with "voter error, and/or, less than total accuracy, in regard to the

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[31] In fact, the Texas statute, as well as the statutes in many other states, clearly anticipates that in a manual recount all punchcard ballots would be reviewed even where the chad is not completely detached, with the overarching concern being the "clearly ascertainable intent of the voter." The Texas statute provides in pertinent part: (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless: (1) at least two corners of the chad are detached; (2) light is visible through the hole; (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote. (e) Subsection (d) does not supersede any clearly ascertainable intent of the voter. Tex. Elec. Code Ann. § 127.130 (Vernon Supp. 2001).

[32] Further, pursuant to section 101.015(2), "each odd-numbered year the Department of State shall review the rules governing standards and certification of voting systems to determine the adequacy and effectiveness of such rules in assuring that elections are fair and impartial."

[33] As Justice Stevens points out, carried to its logical conclusion "Florida's decision to leave to each county the determination of what balloting system to employ--*despite enormous differences in accuracy*--might run afoul of equal protection." *Bush*, 2000 WL 1811418, at *15 (Stevens, J., dissenting) (emphasis supplied). Justice Stevens notes that "the percentage of nonvotes in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan system was only 1.43%. Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems." *Id.* at *14, n. 4 (citations omitted). In fact, in the 1996 presidential election, in Brevard County and Volusia County, votes tallied on punch cards showed twenty-six of every 1000 voters failed to cast a valid presidential vote. In 2000, after both counties switched to optical scanning, the proportion fell to fewer than two of every 1000 presidential votes in Brevard County and three of every 1000 in Volusia County. *See* Peter Whoriskey & Joseph Tanfani, *Punch Card Problems Were Ignored for Years*, Miami Herald, December 17, 2000.

punchcard voting devices utilized. *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, *39, 25 Fla. Law W. at S1116. As the United States Supreme Court noted in *Gore v. Bush*, 2000 WL 1811418, at *3, "this case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter."

For a variety of reasons ranging from the voter's failure to precisely follow directions to difficulties with the machine itself, punchcard systems have a higher percentage of ballots that the machine **[*537]** does not register as a vote as compared to the optical scanner system. Therefore, if the safeguard of a manual recount is not available to protect the integrity and reliability of the electoral process or if a "legal vote" is narrowly defined, voters in punchcard counties would be treated unequally as compared to voters in counties that utilize more reliable voting machinery, such as optical scanning technology. [34] Until there is modernization and **[**40]** uniformity of voting systems that will minimize the likelihood of a vote not being recorded and until punchcard systems are retired from use, statewide disparity in voting systems could operate to disenfranchise a number of otherwise eligible voters based upon their county of residency. [35] This disparity, based only on one's county of residence, might have constitutional implications. [36]

[41]**

[42]** *Conclusion*: The realities of this past election have indeed "demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts." *Gore v. Harris*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, *48, 25 Fla. Law W. at S1117 n. 20. I thus applaud Governor Jeb Bush's creation of a Task Force that will study the state's elections process and recommend improvements to "ensure the fairness of our system" and to fully modernize our voting and counting mechanisms. [37] As we enter the twenty-first century, we must strive to ensure that our Election Code and system of voting

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[34] As reported, prior studies have shown various problems with the punchcard system and the fact that it has a higher failure rate than more modern systems. In fact, a 1988 National Bureau of Standards report recommended their elimination. *See* Peter Whoriskey & Joseph Tanfani, *Punch Card Problems Were Ignored for Years*, Miami Herald, December 17, 2000; Brooks Jackson, *Punch-Card Ballots Notorious for Inaccuracies*, http://www. cnn. com/2000/ALLPOLITICS/stories/*1115*/ jackson. punchcards/index. html; *see also* Rafeal Lorente, *'96 Analysis: Minority Votes for President More Likely to Go Uncounted*, Sun Sentinel, December 7, 2000 (explaining that in 1996, twenty-six out of every 1000 votes cast using the punchcard system were disqualified, versus only seventeen of every 1000 votes using the optical scanning system); Scott Maxwell, *Palm Beach Has Had Trouble Before*, Orlando Sentinel, December 5, 2000 (explaining that Palm Beach County's elections supervisor reported in 1996 that faulty voting machines led to an unusually high number of ballots for which there was no vote for President).

[35] It does appear that a significant part of the problems have resulted from the outmoded voting systems in place in many counties in this State

It does appear that a significant part of the problems have resulted from the outmoded voting systems in place in many counties in this State and nationwide. This is in contrast with what appears to be the use in other countries of more modern, uniform and efficient methods of making sure that every vote is counted. *See* Mary McGrory, *Just Fine Without a Chad*, Washington Post, December 10, 2000, at B1 (describing the voting systems in Mexico, Canada and India); Stephen Buckley, *Brazilians' Pride Grows in Electronic Voting System*, Washington Post, December 2, 2000, at A18 (explaining Brazil's electronic voting system, which includes the use of a machine that looks like a miniature ATM).

[36] *See Moore v. Ogilvie*, 394 U.S. 814, 23 L. Ed. 2d 1, 89 S. Ct. 1493(1969) (invalidating a county-based procedure that diluted the influence of citizens in larger counties in the nominating process).

[37] *See Jeb Bush Appoints Task Force to Recommend Improvements in the Way Florida Votes*, CNN. com (Dec. 14, 2000), http://www. cnn. com/2000/ALLPOLITICS/stories/12/14/fla. elections/. As Governor Jeb Bush recently stated: "Real electoral reform is not only updating our technology and clarifying our standards. It also means reaffirming our commitment to making sure every citizen has faith and confidence in our electoral system --even when the margin of victory in a race is very close." Mary Ellen Klas, *Panel to Ensure Vote Debacle Won't Recur*, The Palm Beach Post (Dec. 15, 2000), http://www. gopbi. com/partners/pbpost/epaper/editions/ today/news_ 3. html.

operates so that in all future elections, each eligible voter both has the opportunity to cast a vote and that every vote intended to be cast for a candidate will be counted. [38]

[43]**

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[38] Although much of the discussion herein has been focused upon problems with the present election code and the actual voting systems, it is clear that the subject of election and voting reform will be far broader. Issues ranging from the difficulty with the actual form of the ballot in certain counties to concerns with the practices surrounding the casting of absentee ballots, and even concerns over whether voters were denied access to the polls, have opened our collective eyes to see that meaningful and comprehensive reform in many areas may be required.

Gore v. Harris

Supreme Court of Florida

December 14, 2000, Decided

Case No. SC00-2431

Reporter
2000 Fla. LEXIS 2569 *; 779 So. 2d 270

ALBERT GORE, JR., ET AL., Appellants vs. KATHERINE HARRIS, ETC., ET AL., Appellees

Prior History: **[*1]** DCA Case No. 1D00-4745. Circuit Court Case No. 00-2808.

Judges: WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

Opinion

ORDER ON REMAND

This case is before the Court on remand from the United States Supreme Court. *See Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (U.S. 2000). The per curiam opinion of the Supreme Court majority specified that in order for a manual recount to continue:

> It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000). **[*2]**

Id., 121 S. Ct. at 532-533. The Supreme Court majority ultimately concluded that:

> Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reversed the judgment of the Supreme Court of Florida ordering a recount to proceed.

Id., 121 S. Ct. at 533.

On the date of the subject election, the Florida Election Code did not provide the elements necessary for a resolution of the disputed issues, based on the constitutional parameters expressed by the United States Supreme Court. Accordingly, relief cannot be granted, and this case is dismissed. Opinion may follow.

No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RUCHO ET AL. *v.* COMMON CAUSE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 18–422. Argued March 26, 2019—Decided June 27, 2019*

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State's districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State's plan discriminated against Republicans. The plaintiffs alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 6–34.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court "must find that the question is presented in a 'case' or 'controversy' that is . . . 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342. While it is "the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable "political question," *Baker* v. *Carr*, 369 U. S. 186, 217. Among the political question cases this Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.* This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* princi-

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*Together with No. 18–726, *Lamone et al.* v. *Benisek et al.*, on appeal from the United States District Court for the District of Maryland.

ples, or political questions that must find their resolution elsewhere. See *Gill* v. *Whitford*, 585 U. S. ___, ___.

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, §4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas—one-person, one-vote and racial gerrymandering—this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker* v. *Carr*, for example, could be decided under basic equal protection principles. 369 U. S., at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is "determining when political gerrymandering has gone too far." *Vieth* v. *Jubelirer*, 541 U. S. 267, 296 (plurality opinion). Despite considerable efforts in *Gaffney* v. *Cummings*, 412 U. S. 735, 753; *Davis* v. *Bandemer*, 478 U. S. 109, 116–117; *Vieth,* 541 U. S., at 272–273; and *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 414 (*LULAC*), this Court's prior cases have left "unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering," *Gill,* 585 U. S., at ___. Two "threshold questions" remained: standing, which was addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.* Pp. 6–14.

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(b) Any standard for resolving partisan gerrymandering claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Vieth,* 541 U. S., at 306–308 (Kennedy, J., concurring in judgment). The question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its "appropriate" share of "safe" seats. Or perhaps it should be measured by adherence to "traditional" districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: "How much is too much?"

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 15–21.

(c) None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 22–30.

(1) The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Demo-

crats. It applied a three-part test, examining intent, effects, and causation. The District Court's "predominant intent" prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is "inherently suspect," *Miller* v. *Johnson*, 515 U. S. 900, 915, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The *Common Cause* District Court also required the plaintiffs to show that vote dilution is "likely to persist" to such a degree that the elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court's third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a "legitimate redistricting objective"—just restates the question asked at the "predominant intent" prong. Pp. 22–25.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. Pp. 25–27.

(3) Using a State's own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 27–29.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, §2, and the Elections Clause, Art. I, §4, cl. 1. But the *Vieth* plurality concluded—without objection from any other Justice—that neither §2 nor §4 "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U. S., at 305. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded that the Guarantee Clause does not pro-

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vide the basis for a justiciable claim. See, *e.g., Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118. Pp. 29–30.

(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause. That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 30–34.

318 F. Supp. 3d 777 and 348 F. Supp. 3d 493, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Nos. 18–422, 18–726

ROBERT A. RUCHO, ET AL., APPELLANTS
18–422 *v.*
COMMON CAUSE, ET AL.; AND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL., APPELLANTS
18–726 *v.*
O. JOHN BENISEK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[June 27, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2, of the Constitution. The District Courts in both cases ruled in favor

of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho* v. *Common Cause*, No. 18–422. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F. Supp. 3d 777, 807–808 (MDNC 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic con-

gressional candidates had received more votes on a statewide basis than Republican candidates." *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, §2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times,

Places and Manner of holding Elections" for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. *Common Cause* v. *Rucho*, 279 F. Supp. 3d 587 (MDNC 2018). The defendants appealed directly to this Court under 28 U. S. C. §1253.

While that appeal was pending, we decided *Gill* v. *Whitford*, 585 U. S. ___ (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly "cracked" or "packed" district. *Id.*, at ___ (slip op., at 17). A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Id.*, at ___–___ (slip op., at 3–4).

After deciding *Gill*, we remanded the present case for further consideration by the District Court. 585 U. S. ___ (2018). On remand, the District Court again struck down the 2016 Plan. 318 F. Supp. 3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that "the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates," and to "entrench Republican candidates" through widespread cracking and packing of Democratic voters. *Id.*, at 883–884. The court rejected the defendants' arguments that the distribution of Republican and Democratic voters throughout North Carolina and the

interest in protecting incumbents neutrally explained the 2016 Plan's discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*, at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, §2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U. S. ___ (2019).

B

The second case before us is *Lamone* v. *Benisek*, No. 18–726. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F. Supp. 3d 493, 502 (Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. *Ibid.* "[A] decision was made to go for the Sixth," *ibid.*, which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000

voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. *Id.*, at 499–501. The map was adopted by a party-line vote. *Id.*, at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, §2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F. Supp. 3d 493. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. *Id.*, at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Id.*, at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. *Id.*, at 525. The defendants appealed directly to this Court under 28 U. S. C. §1253. We postponed jurisdiction. 586 U. S. ___ (2019).

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of

resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth* v. *Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

Last Term in *Gill* v. *Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." 585 U. S., at ___ (slip op., at 13). This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Ibid.* The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Id.*, at ___ (slip op., at 8).

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U. S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U. S., at 274 (plurality opinion); E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, §4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elec-

tions" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

> "[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself "omnipotent," setting the "time" of elections as never or the "place" in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, The Framers' Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-

member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, §3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, §2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U. S. C. §2c.) See *Vieth*, 541 U. S., at 276 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U. S. C. §10101 *et seq.*

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U. S., at 217. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Shaw* v. *Reno*, 509 U. S. 630 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could

have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood* v. *Broom*, 287 U. S. 1 (1932); *Colegrove* v. *Green*, 328 U. S. 549 (1946).

In the leading case of *Baker* v. *Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*. *Baker* v. *Carr*, 179 F. Supp. 824, 825, 826 (MD Tenn. 1959). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U. S., at 217. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226. In *Wesberry* v. *Sanders*,

the Court extended its ruling to malapportionment of congressional districts, holding that Article I, §2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U. S., at 8.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion* v. *Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U. S. 339, 340 (1960). In *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), the Court extended the reasoning of *Gomillion* to congressional districting. See *Shaw I*, 509 U. S., at 645.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999) (citing *Bush* v. *Vera*, 517 U. S. 952, 968 (1996); *Shaw* v. *Hunt*, 517 U. S. 899, 905 (1996) (*Shaw II*); *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995); *Shaw I*, 509 U. S., at 646). See also *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerry-

mandering has gone too far." *Vieth*, 541 U. S., at 296 (plurality opinion). See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 420 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

We first considered a partisan gerrymandering claim in *Gaffney* v. *Cummings* in 1973. There we rejected an equal protection challenge to Connecticut's redistricting plan, which "aimed at a rough scheme of proportional representation of the two major political parties" by "wiggl[ing] and joggl[ing] boundary lines" to create the appropriate number of safe seats for each party. 412 U. S., at 738, 752, n. 18 (internal quotation marks omitted). In upholding the State's plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 753.

Thirteen years later, in *Davis* v. *Bandemer*, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause. 478 U. S. 109, 116–117 (1986) (plurality opinion). A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127. Two Justices would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147 (O'Connor, J., concurring in judgment). At the end of the day, there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting

plan is an unconstitutional partisan political gerrymander." *Id.*, at 185, n. 25 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania's legislature "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to benefit Republican congressional candidates. 541 U. S., at 272–273 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" for deciding them. *Id.*, at 306. Justice Kennedy, concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." *Id.*, at 306–307. He nonetheless left open the possibility that "in another case a standard might emerge." *Id.*, at 312. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs' partisan gerrymandering claims. See 548 U. S., at 414 (noting that the "disagreement over what substantive standard to apply" that was evident in *Bandemer* "persists").

As we summed up last Term in *Gill*, our "considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." 585 U. S., at ___ (slip op., at 13). Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.*

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U. S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.). See *Gaffney*, 412 U. S., at 749 (observing that districting implicates "fundamental 'choices about the nature of representation'" (quoting *Burns* v. *Richardson*, 384 U. S. 73, 92 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U. S., at 306 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U. S., at 307 (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differen-

tiate unconstitutional from "constitutional political gerrymandering." *Cromartie*, 526 U. S., at 551.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U. S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion). See *Mobile* v. *Bolden*, 446 U. S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy

43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> "'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U. S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and

cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U. S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. See *id.*, at 130–131 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U. S., at 735–738. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality

when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U. S., at 308–309 (opinion concurring in judgment). See *id.*, at 298 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal

number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U. S., at 296 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influen-

tial in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." 585 U. S., at ___ (slip op., at 21). See also *Bandemer*, 478 U. S., at 150 (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' . . . can be traced to the one person, one vote principle." (quoting *Bolden*, 446 U. S., at 77)).*

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U. S., at 650 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

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*The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic" *post*, at 9, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F. Supp. 3d, at 923. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" *Id.*, at 865 (quoting *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. ___, ___ (2015) (slip op., at 1)). The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." 318 F. Supp. 3d, at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.*, at 868.

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant

intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U. S., at 915. See *Bush*, 517 U. S., at 959 (principal opinion). But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F. Supp. 3d, at 867. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U. S., at 160 (opinion of O'Connor, J.). See *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that "the persistence of a

party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Brief for Appellees League of Women Voters of North Carolina et al. in No. 18–422, p. 55. See also 318 F. Supp. 3d, at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different

points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. 318 F. Supp. 3d, at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See *Common Cause*, 318 F. Supp. 3d, at 929; *Benisek*, 348 F. Supp. 3d, at 522. Both District Courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." 318 F. Supp. 3d, at 932. Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating inter-

est in voting." 348 F. Supp. 3d, at 523–524.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U. S., at 752. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. 318 F. Supp. 3d, at 930. The court went on to rule that there would be an adverse effect "even if the speech of [the plaintiffs] was not *in fact* chilled"; it was enough that the districting plan "makes it

easier for supporters of Republican candidates to translate their votes into seats," thereby "enhanc[ing] the[ir] relative voice." *Id.*, at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering." *Id.*, at 851. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U. S., at 294, contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *Post*, at 18–19, 25 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It

is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U. S., at 296–297 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see *post*, at 22, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." *Post*, at 25–26. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See *post*, at 27. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. *Post*, at 27 (citing *Ohio* v. *American Express Co.*, 585 U. S. ___ (2018)). That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the adoption of the [A]ct." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 51 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experi-

ence gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, §4, cl. 1.

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, §2. We are unconvinced by that novel approach.

Article I, §2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, §4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F. Supp. 3d, at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither §2 nor §4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into

account when districting." 541 U. S., at 305.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, §2, "namely, that the voters should choose their representatives, not the other way around." 318 F. Supp. 3d, at 940 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 35); internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U. S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court

can address the problem of partisan gerrymandering because it *must*." 585 U. S., at ___ (slip op., at 12). That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 4).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See *post*, at 32–33.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). The dissent wonders why we can't do the same. See *post*, at 31. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall

be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See *post*, at 31, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, §3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, §3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections

Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., §2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., §4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of

the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 18–422, 18–726

ROBERT A. RUCHO, ET AL., APPELLANTS
18–422 *v.*
COMMON CAUSE, ET AL.; AND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL., APPELLANTS
18–726 *v.*
O. JOHN BENISEK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[June 27, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted parti-

sanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan

gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris* v. *McCrory*, 159 F. Supp. 3d 600 (MDNC 2016), aff'd *sub nom. Cooper* v. *Harris*, 581 U. S. ___ (2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and

precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen. See *Common Cause* v. *Rucho,* 318 F. Supp. 3d 777, 805–806 (MDNC 2018).

- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed—including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10–3] partisan makeup" of the State's congressional delegation. *Id.,* at 807.

- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.,* at 808 (internal quotation marks omitted).

- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See *id.,* at 809.

- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Ibid.* (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Repub-

lican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O'Malley, who oversaw the process, decided (in his own later words) "to create a map that was more favorable for Democrats over the next ten years." Because flipping the First District was geographically next-to-impossible, "a decision was made to go for the Sixth." *Benisek* v. *Lamone*, 348 F. Supp. 3d 493, 502 (Md. 2018) (quoting O'Malley; emphasis deleted).

- O'Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described "serial gerrymanderer," to hire and direct a mapmaker. *Id.,* at 502. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See *id.,* at 502–503.

- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic

seats, and to protect all Democratic incumbents. See *id.,* at 503.

- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and another 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See *id.,* at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly's Democratic caucuses about the new map's aims. Miller told his colleagues that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity." *Id.,* at 506 (internal quotation marks omitted).

- The General Assembly adopted the plan on a party-line vote. See *id.,* at 506.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8

House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.,* No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.,* Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth* v. *Jubelirer*, 541 U. S. 267, 317 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. ___, ___ (2015) (slip op., at 35) (internal quotation marks omitted). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante,* at 30 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1)). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See *ante,* at 31–33*; infra,* at 29–31. The other is that political gerrymanders have always been with us. See *ante,* at 8, 24. To its credit, the majority does not frame that point as an originalist constitutional argument.

After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See *ante,* at 10.[1] The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici Curiae* 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.,* at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting tradi-

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[1] And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and "symptom[s] of disease in the body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

tional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I've already recounted the results from North Carolina and Maryland, and you'll hear even more about those. See *supra,* at 4–6; *infra,* at 19–20. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State's original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See *League of Women Voters* v. *Pennsylvania,* ___ Pa. ___, ___, 178 A. 3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See *Ohio A. Philip Randolph Inst.* v. *Householder,* 373 F. Supp. 3d 978, 1074 (SD Ohio 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See *infra,* at 15, 31.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. See generally *Gill* v. *Whitford*, 585 U. S. ___, ___–___ (2018) (slip op., at 14–16). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. See *id.*, at ___ (KAGAN, J., concurring) (slip op., at 4). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds* v. *Sims*, 377 U. S. 533, 566 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.*, at 566. The constitutional injury in a

partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[]." *Id.,* at 565. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U. S., at 312. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation." *Reynolds*, 377 U. S., at 566; see *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications").

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U. S., at ___ (KAGAN, J., concurring) (slip op., at 9) ("Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their

policy objectives"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod* v. *Burns*, 427 U. S. 347, 357 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, *e.g., Vieth*, 541 U. S., at 293 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.*, at 316 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.*, at 362 (BREYER, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.*, at 165 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes"). Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." *Ante,* at 20. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic

governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See *ante,* at 15–19. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Ante,* at 16. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. *Ante,* at 17. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." *Ibid.* (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?'" *Ante,* at 19. No "discernible and manageable" standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. *Ante,* at 20; see *ante,* at 15–16.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not

be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d 978; *League of Women Voters of Michigan* v. *Benson*, 373 F. Supp. 3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts' analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority's more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.'" *Ante,* at 22; see *ante,* at 22–30. But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra,* at 11, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. *Rucho,* 318 F. Supp. 3d, at 864 (quoting *Arizona State Legislature,* 576 U. S., at ___ (slip op., at 1)). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Lamone,* 348 F. Supp. 3d, at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho,* 318 F. Supp. 3d, at 867.[2] If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant

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[2]Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante,* at 25, I therefore pass quickly over this part of the test.

purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra,* at 4–6: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. *Ante,* at 23. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney* v. *Cummings,* 412 U. S. 735 (1973), for example, we thought it nonproblematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth,* 541 U. S., at 286 (plurality opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes

too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (*i.e.,* make count for as little as possible) the votes going to a rival party. See *supra,* at 12. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See *supra,* at 13.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See *ante,* at 23–24. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See *Vieth*, 541 U. S., at 312–313 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses

actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7–22.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. See *Rucho,* 318 F. Supp. 3d, at 875–876, 894; App.

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[3] As I'll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan. See *ante,* at 16–19; *supra,* at 14; *infra,* at 22–25. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?

276. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.,* compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See *Rucho,* 318 F. Supp. 3d, at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.[4]

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You've heard some of the numbers before. See *supra,* at 6. The 2010 census required only a minimal change in the Sixth District's population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for

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[4]The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." See *Rucho,* 318 F. Supp. 3d, at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See *Rucho,* 318 F. Supp. 3d, at 886–887, 892–893.

Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. See *Lamone,* 348 F. Supp. 3d, at 519–520.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." *Ante,* at 23 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O'Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante,* at 24–25; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America's future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." *Ante,* at 19; see *supra,* at 14. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See *ante,* at 16–19. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?"—that is, how much deviation from the chosen "touchstone" to allow? *Ante,* at 19–20. In answering that question, the majority surmises, they will likely go far too far. See *ante,* at 15. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. See *ante,* at 19–20.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you've already heard enough to know, is the latter. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own

characteristics and judgments. The effects evidence in these cases accepted as a given the State's physical geography (*e.g.,* where does the Chesapeake run?) and political geography (*e.g.,* where do the Democrats live on top of each other?). So the courts did not, in the majority's words, try to "counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party." *Ante,* at 19. Still more, the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[] outlier." *Rucho,* 318 F. Supp. 3d, at 852 (internal quotation marks omitted); see *supra,* at 18–20. Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See *Rucho,* 318 F. Supp. 3d, at 896–897. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See *supra,* at 19–20. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as *Amici Curiae* 19–20. The point is that the assemblage of maps, reflecting the characteristics and

judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland's partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial

ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." *Ante,* at 27. But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. *Ante,* at 28. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.,* must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See *ante,* at 16–17. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By

any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. See *Lamone,* 348 F. Supp. 3d, at 519. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Ante,* at 27. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see *ante,* at 28, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante,* at 19–20 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, *e.g., Miller* v. *Johnson,* 515 U. S. 900, 916 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520, 533 (1993); *Washington* v. *Davis,* 426 U. S. 229, 239 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly . . . some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson* v. *United States*, 576 U. S. ___, ___ (2015) (slip op., at 12) (internal quotation marks omitted); see, *e.g., Ohio* v. *American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 9) (determining "substantial anticompetitive effect[s]" when applying the Sherman Act); *United States* v. *Davis*, *ante,* at 7–10 (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a "substantial" risk of harm). The majority is wrong to think that these laws typically (let alone uniformly) further "confine[] and guide[]" judicial decisionmaking. *Ante,* at 28. They do not, either in themselves or through "statutory context." *Ibid.* To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra,* at 13.

Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See *Rucho,* 318 F. Supp. 3d, at 808 (quoting Lewis's statements to that effect). They therefore felt free to openly proclaim their intent to entrench their party in office. See *supra,* at 4–6. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders,[5] they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or nonpartisan districting objective) could explain the districting plan's vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." *Ante,* at 16, 21. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is

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[5]A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, *e.g.,* Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court's prohibition of racial gerrymanders affected districting).

not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U. S., at 566. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U. S., at ___ (KAGAN, J., concurring) (slip op., at 14). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. *Ante,* at 33. One was "introduced in 2005 and has been reintroduced in every Congress since." *Ibid.*

And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other nonpartisan actors. See *ante,* at 32. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature,* 576 U. S., at ___ (ROBERTS, C. J., dissenting) (slip op., at 1). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. See *ante,* at 32. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019). I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. *Ante,* at 30. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution.

Ante, at 31; see *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See *League of Women Voters*, ___ Pa., at ___, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?[6]

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They

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[6] Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. *Ante*, at 31. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "elections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." *League of Women Voters*, ___ Pa., at ___–___, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, §5). And even the Florida "Free Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." Fla. Const., Art. III, §20(a). If the majority wants the kind of guidance that will keep courts from intervening too far in the political sphere, see *ante,* at 15, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida's, so the majority's state-court solution does not go far.

evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante,* at 34, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.,* at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as *Amicus Curiae* in *Gill* v. *Whitford,* O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra,* at 7–8. In our government, "all political power flows from the people." *Arizona State Legislature,* 576 U. S., at ___ (slip op., at 35). And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10

Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

No. ___

In The Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

Applicants,

v.

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK, GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETER; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Respondents,

&

REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

Applicants,

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTER, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND

DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE,

Respondents,

&

COMMON CAUSE,

Intervenor-Respondent.

APPENDIX

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No. 413PA21 TENTH DISTRICT

Supreme Court of North Carolina

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN

v

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNOS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

From N.C. Court of Appeals
(P21-525)
From Wake
(21CVS015426 21CVS500085)

ORDER

The following order has been entered on the motion filed on the 23rd of February 2022 by Plaintiffs (Harper, et al.) for Temporary Stay:

"Motion Denied by order of the Court in conference, this the 23rd of February 2022."

s/ Hudson, J.
For the Court

Upon consideration of the petition filed by Plaintiffs (Harper, et al.) on the 23rd of February 2022 for Writ of Supersedeas, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 23rd of February 2022."

s/ Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of February 2022.

Grant E. Buckner
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Narendra K. Ghosh, Attorney at Law, For Harper, Rebecca, et al. - (By Email)
Mr. Terence Steed, Assistant Attorney General, For State Board of Elections, et al. - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, For State Board of Elections, et al. - (By Email)
Ms. Stephanie A. Brennan, Special Deputy Attorney General, For State Board of Elections, et al. - (By Email)
Mr. Burton Craige, Attorney at Law, For Harper, Rebecca, et al. - (By Email)
Mr. Paul E. Smith, Attorney at Law, For Harper, Rebecca, et al. - (By Email)
Mr. Phillip J. Strach, Attorney at Law, For Hall, Destin, et al. - (By Email)
Ms. Alyssa Riggins, Attorney at Law, For Hall, Destin, et al. - (By Email)
Mr. John E. Branch, III, Attorney at Law, For Hall, Destin, et al. - (By Email)
Mr. Thomas A. Farr, Attorney at law, For Hall, Destin, et al. - (By Email)
Mr. Stephen D. Feldman, Attorney at Law, For N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Adam K. Doerr, Attorney at Law, For N.C. League of Conservation Voters, Inc., et al. - (By Email)
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Mr. Ryan Y. Park, Solicitor General, For Gov. Cooper and AG Stein - (By Email)
Mr. James W. Doggett, Deputy Solicitor General, For Gov. Cooper and AG Stein - (By Email)
Mr. Zachary W. Ezor, Solicitor General Fellow, For Gov. Cooper and AG Stein - (By Email)
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Mr. Sean F. Perrin, Attorney at Law, For NC Sheriffs' Association, et al. - (By Email)
Mr. Edmond W. Caldwell, Jr., Executive Vice President and General Counsel, For NC Sheriffs' Association, et al. - (By Email)
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Lexis-Nexis - (By Email)

No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * *

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; and DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS;	)	

YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

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ORDER

Pursuant to Appellate Rule 32(b), it is HEREBY ORDERED, that the clerk shall enter judgment in this matter and issue the mandate of the Court, on 24 February 2022.

By order of the Court in conference, this the 15th day of February 2022.

Robin E. Hudson

For the Court

Chief Justice NEWBY and Justices BERGER and BARRINGER dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of February 2022.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Narendra K. Ghosh, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Terence Steed, Assistant Attorney General, for State Board of Elections, et al. - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, for State Board of Elections, et al. - (By Email)
Ms. Stephanie A. Brennan, Special Deputy Attorney General, for State Board of Elections, et al. - (By Email)

Mr. Burton Craige, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Paul E. Smith, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Phillip J. Strach, Attorney at Law, for Hall, Destin, et al. - (By Email)
Ms. Alyssa Riggins, Attorney at Law, for Hall, Destin, et al. - (By Email)
Mr. John E. Branch, III, Attorney at Law, for Hall, Destin, et al. - (By Email)
Mr. Thomas A. Farr, Attorney at law, for Hall, Destin, et al. - (By Email)
Mr. Stephen D. Feldman, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Adam K. Doerr, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Erik R. Zimmerman, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Ryan Y. Park, Solicitor General, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Mr. James W. Doggett, Deputy Solicitor General, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Mr. Zachary W. Ezor, Solicitor General Fellow, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Ms. Kellie Z. Myers, Trial Court Administrator - (By Email)
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No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

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ORDER

This matter was heard on direct appeal from an order of a three-judge panel of the Superior Court in Wake County, filed 11 January 2022. The case was fully briefed and argued before this Court on 2 February 2022 and is ready for decision. Because time is pressing, the Court enters the following order, to be followed by an opinion; based on the matters presented to the Court, including the findings of fact of the three-judge panel, it is ordered:

1. "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." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). The North Carolina General Assembly, in turn, has the duty to reapportion North Carolina's congressional and state legislative districts; however, exercise of this power is subject to limitations imposed by other constitutional provisions, including the Declaration of Rights. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," including the free elections clause, N.C. Const. art. I, § 10, the equal protection clause, N.C. Const. art. I, § 19, the free speech clause, N.C. Const. art. I, § 14, and the freedom of assembly clause, N.C. Const. art. I, § 12, "are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782. It is the duty of this Court "to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," *id.* at 783, including the legislative power

of apportionment. *See Stephenson v. Bartlett*, 355 N.C. 354, 380–81 (2002). We conclude that claims asserting that congressional and state legislative districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights in article I, sections 10, 19, 14, and 12, respectively, of the North Carolina Constitution are, consistent with the text and structure of our State's constitution and our system of separation of powers, justiciable in North Carolina courts.

2. This Court concludes that, to the extent Legislative Defendants have challenged any of the trial court's findings of fact, these findings are supported by competent evidence and are therefore not clearly erroneous. Accordingly, all of the trial court's factual findings are binding on appeal and we adopt them in full.

3. Based on the trial court's factual findings, we conclude that the congressional and legislative maps enacted in S.L. 2021-175 ("An Act to Realign North Carolina House of Representatives Districts Following the Return of the 2020 Federal Decennial Census"), S.L. 2021-173 ("An Act to Realign the Districts of the North Carolina State Senate Following the Return of the 2020 Federal Decennial Census"), and S.L. 2021-174 ("An Act to Realign the Congressional Districts Following the Return of the 2020 Federal Decennial Census") are unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North

Carolina Constitution. We hereby enjoin the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on **24 February 2022** for elections in 2022, including primaries scheduled to take place on **17 May 2022**.

4. To comply with the limitations contained in the North Carolina Constitution which are applicable to redistricting plans, the General Assembly must not diminish or dilute any individual's vote on the basis of partisan affiliation. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. This encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental right to vote.

5. The General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation. Showing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters—

which can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions—suffices to establish the diminishment or dilution of a voter's voting power on the basis of his or her views. Here, the trial court specifically found that the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation. *See, e.g., N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *29 (N.C. Super. Ct. Jan. 11, 2022) (¶¶ 140, 142). Such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest.

6. There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew

necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional. The General Assembly shall submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.

7. Federal law does not prohibit consideration of partisanship and incumbency protection in the redistricting process. *Stephenson*, 355 N.C. at 371. The federal Constitution does not prohibit reliance on partisan criteria in an effort to "achieve 'political fairness' between the political parties." *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973). Incumbency protection may be a permissible redistricting criterion if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.

8. To comply with this Order, redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria. Traditional neutral districting criteria as enumerated in the North Carolina Constitution and this Court's precedents include the drawing of single-member districts which are as nearly equal in population as is practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties. N.C. Const.

art. II, §§ 3, 5. The "Whole County Provision" must be applied in a manner consonant with the requirements of the Voting Rights Act and federal "one-person, one-vote" principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters. Partisan advantage is not a traditional neutral districting criterion under state law.

9. In accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution. The General Assembly shall submit such plans for review to the trial court on or before **18 February 2022** at 5:00 p.m. Should the General Assembly choose not to submit new congressional and state legislative districting plans on or before this deadline, the trial court will select a plan which comports with constitutional requirements based upon the findings it entered in its prior order. Regardless, all parties to this proceeding and intervenors may submit to the trial court proposed remedial districting plans by **18 February 2022** at 5:00 p.m., and comments on any maps submitted shall be filed with the trial court by **21 February 2022** at 5:00 p.m. The trial court will approve or adopt compliant congressional and state legislative districting plans no later than noon on **23 February 2022**. Any emergency application for a stay pending appeal

must be filed no later than **23 February 2022** at 5:00 p.m.

10. State Defendants are advised to anticipate that new districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives will be available by **23 February 2022** and are directed to take all necessary measures to ensure that the **17 May 2022** primary election and all subsequent elections occur as scheduled using the remedial districting plans. Further, all ballot items, including referenda, that would have appeared on the **8 March 2022** ballot prior to this Court's prior Order enjoining elections for public office shall appear on the **17 May 2022** ballot; municipal elections in circumstances where a second primary is not required under N.C.G.S. § 163-111 will be conducted on **26 July 2022**.

Opinion to follow.

Remanded to the trial court for remedial proceedings.

By order of the Court in conference, this the 4th day of February 2022.

Robin E. Hudson
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4 day of February 2022.



Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

Chief Justice NEWBY dissenting.

I dissent from the decision of the Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in an "unprecedented expansion of judicial power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). " '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." *Id.* (alteration and emphases in original) (citation omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279, 124 S. Ct. 1769, 1777 (2004) (plurality opinion)) (noting that the Supreme Court of United States has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years"). By choosing to hold that partisan gerrymandering violates the North Carolina Constitution and by devising its own remedies, there appears to be no limit to this Court's power.

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Our state constitution is our foundational document for government; its text reflects the express will of the people. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The will of the people is best served, and everyone's rights are best protected, when the

plain language of the constitution is followed. Recognizing special rights to one favored person or group invariably diminishes the rights of others.

Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). The people act through the General Assembly. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. Since the General Assembly serves as the "agent of the people for enacting laws," *id.*, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be *express and proven beyond a reasonable doubt*. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[A]s essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), a court should not review questions better suited for the political branches. This Court must refuse to resolve a dispute "(1) when the Constitution commits [the] issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599

S.E.2d 365, 391 (2004) (emphasis omitted) (citing *Baker*, 369 U.S. at 210, 82 S. Ct. at 706). The issue before us—partisan consideration in redistricting—is both constitutionally committed to another branch of government, the General Assembly, and lacking in satisfactory legal standards. Thus, a claim for partisan gerrymandering presents a nonjusticiable political question.

The North Carolina Constitution expressly acknowledges that the authority to redistrict belongs to the General Assembly. *See* N.C. Const. art. II, §§ 3, 5; U.S. Const. art. I, § 4, cl. 1. In a system based upon popular sovereignty, this structure makes sense because legislators, as opposed to judges, are in the best position to address the people's interests. *See Vieth*, 541 U.S. at 358, 124 S. Ct. at 1824 (Breyer, J., dissenting) ("It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.").

The General Assembly's redistricting authority is checked by the people through express constitutional provisions as interpreted by this Court. Our constitution subjects redistricting by the General Assembly to only four express limitations. *See* N.C. Const. art. II, §§ 3, 5. Since these limitations say nothing about the permissibility of partisan gerrymandering, the issue has only two legitimate avenues for reform: a statute or a constitutional amendment that imposes a restraint for the Court to apply. As such, unless and until the people alter the law to either limit or prohibit the practice of partisan gerrymandering, this Court is without any satisfactory or manageable legal standard and thus must refuse to resolve such a claim.

A majority of this Court, however, tosses judicial restraint aside, seizing the opportunity to advance its agenda. There is no express provision of the constitution supporting the decision of the majority; there is no showing that the enacted redistricting plans are unconstitutional beyond a reasonable doubt. A summary pronouncement by the majority to the contrary does not make it so. In the majority's view, it is this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting arising from complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority alone to amend their constitution. *See* N.C. Const. art. XIII, §§ 2, 3, 4.

In essence, the majority rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. It seeks to support this view with various provisions of our Declaration of Rights that are designed to protect individual and personal rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In doing so, it magically transforms the protection of individual rights into the creation of a protected class for members of a political party, subjecting a redistricting plan to strict scrutiny review. The majority presents various views about what constitutes unconstitutional partisan gerrymandering. *See* Order, ¶¶ 4–6 (providing a variety of observations about what the constitution requires). Absent from the order is any mention of "extreme partisan gerrymandering," which was the issue presented to the Court. Perhaps the sentence best characterizing the majority's

holding is that "[t]he General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation." Order, ¶ 5. The question of *how much* partisan consideration is unconstitutional remains a mystery, as does what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process have now been transferred to the Court.

In seeking to hide its partisan bias, the majority states that "redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria." Order, ¶ 8. Ironically, the majority claims the General Assembly should not subordinate traditional neutral districting criteria to partisan considerations, but its litmus test of constitutionality *requires* a satisfactory partisanship analysis. In fact, only a satisfactory partisanship analysis makes a plan constitutional. But, the Court provides no guidance as to what constitutes an acceptable partisanship analysis. The Court further says that the constitution requires the use of various political science techniques of voting analysis. In addition to the remedial maps, the Court requires the General Assembly to report "an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." Order, ¶ 6. Glaringly, it fails to mention which data or methods are acceptable or what results would be satisfactory. Apparently, the majority alone

knows what would be constitutional. Further, the Court allows other groups to submit alternate plans but does not mandate the same disclosures.

In rejecting the notion that claims of partisan gerrymandering present a justiciable issue, the Supreme Court of the United States noted the unreliability of political science models:

> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Rucho, 139 S. Ct. at 2503–04.

Nonetheless, the Court mandates a political-science-based approach without complying with the direct statutory requirements triggered when a redistricting plan is found unconstitutional. North Carolina law requires that

> [e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.3 (2021). The majority's order today provides no specificity—only a vague and undefined ambition of "political fairness"—which ultimately only the majority can measure and determine if its desired result is accomplished.

In 2019 the trial court required the General Assembly to redraw the districts. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). The 2020 election took place under these constitutionally compliant districts. The people have expressed their will by electing the current members of the General Assembly. The people were aware that the legislators elected in 2020 would be tasked with drawing new districts according to the census, *see* N.C. Const. art. II, §§ 3, 5, and by any standard, the process used by the General Assembly to follow the nonpartisan criteria meets the requirements of the 2019 trial court order. Thus, the General Assembly and any neutral observer would have to inquire what about our constitutional text has changed from 2019 to 2022 resulting in this newfound constitutional requirement.

The 2019 remedial order required that for a plan to be constitutional, "[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *136 (N.C. Super. Ct. Sept. 3, 2019) (emphasis added). The order today contradicts this directive by requiring partisan data be used. Similarly, the court-approved constitutional districts drawn in 2019 provided that Voting Rights Act districts are not required anywhere in North Carolina. The majority today also

contradicts that finding. It should be noted that the trial court here also found that no Voting Rights Act districts are necessary in North Carolina.

Finally, the majority's managed timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority follows the Governor's lead in mandating a May primary. No reason is given, nor does one exist—except for perceived partisan advantage—for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

To avoid the "smothering of freedom beneath the robes of a judicial despotism," *Dilday v. Beaufort Cnty. Bd. of Educ.*, 267 N.C. 438, 455, 149 S.E.2d 345, 347 (1966) (Lake, J., concurring), this Court should respect the constitutional role of the General Assembly. Further, the Court must provide a manageable standard to determine when a proposed redistricting plan is constitutional. The Court has failed to do so. The majority's requirements are so vague as to only allow this Court to ultimately determine a plan's constitutionality. With this ruling, the majority moves beyond traditional judicial decision-making in favor of judicially amending the constitution. I respectfully dissent.

Dissenting opinion to follow.

Justices BERGER and BARRINGER join in this dissenting opinion.

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IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-17

No. 413PA21

Filed 14 February 2022

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v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of

Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from the unanimous decision of a three-judge panel of the Superior Court in Wake County, denying plaintiffs' claims and requests for Declaratory Judgment and Permanent Injunctive Relief. On 8 December 2021, pursuant to N.C.G.S. § 7A-31 and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed plaintiffs' petitions for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2022.

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Poyner Spruill LLP, by Caroline P. Mackie, for Professor Charles Fried, amicus curiae.

HUDSON, Justice.

¶ 1 Today, we answer this question: does our state constitution recognize that the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter.

¶ 2 In North Carolina, we have long understood that our constitution's promise that "[a]ll elections shall be free" means that every vote must count equally. N.C. Const. art. I, § 10. As early as 1875, this Court declared it "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles."[1] *People ex rel. Van Bokkelen, v. Canaday,* 73 N.C. 198, 225 (1875). Likewise, this Court has previously held that judicial review

[1] Even earlier, in 1787, this Court held that the courts must interpret the constitution and invalidate laws that violate it. *Bayard v. Singleton,* 1 N.C. (Mart.) 5, 7 (1787).

was appropriate in legislative redistricting cases to enforce the requirements of the state constitution, even when doing so means interpreting state constitutional provisions more expansively than their federal counterparts. *See Stephenson v. Bartlett*, 355 N.C. 354, 379–82 (2002).

¶ 3 "A system of fair elections is foundational to self-government." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 86 (Newby, C.J., concurring in the result). While partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, "with almost surgical precision,"[2] undermine our constitutional system of government.[3] Indeed, the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter

[2] We note this expression was coined to describe the precision with which the North Carolina General Assembly targeted African American voters through the identification and exclusion of various forms of voter photo identification. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). We believe it is equally apt as a description of the technical proficiency with which legislators across the country dilute the power of votes through the drawing of district lines.

[3] In fact, the term "gerrymander" was coined in 1812 after the redrawing of Massachusetts Senate election districts to ensure the advantage of the Democratic-Republican Party under then-Governor Elbridge Gerry, in reference to a district drawn in a manner so contrived that it was said to resemble a salamander. The gerrymander was successful, as although the Federalist Party ousted Governor Gerry and flipped the Massachusetts House in the 1812 election, the Democratic-Republicans retained control of the state senate under this map. *See* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 73–77 (1907).

preferences shift. Fortunately, the technology that makes such extreme gerrymanders possible likewise makes it possible to reliably evaluate the partisan asymmetry of such plans and review the extent to which they depart from and subordinate traditional neutral redistricting principles.

¶ 4 Partisan gerrymandering creates the same harm as malapportionment, which has previously been held to violate the state constitution: some peoples' votes have more power than others. But a legislative body can only reflect the will of the people if it is elected from districts that provide one person's vote with substantially the same power as every other person's vote. In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution.

¶ 5 Here, the General Assembly enacted districting maps for the United State Congress, the North Carolina House of Representatives, and the North Carolina Senate that subordinated traditional neutral redistricting criteria in favor of extreme

partisan advantage by diluting the power of certain people's votes.[4] Despite finding that these maps were "extreme partisan outliers[,]" "highly non-responsive" to the will of the people, and "incompatible with democratic principles[,]" the three-judge panel below allowed the maps to stand because it concluded that judicial action "would be usurping the political power and prerogatives" of the General Assembly.

¶ 6 We emphatically disagree. Although the task of redistricting is primarily delegated to the legislature, it must be performed "in conformity with the State Constitution." *Stephenson*, 355 N.C. at 371. It is thus the solemn duty of this Court to review the legislature's work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by "condemn[ing] complaints about districting to echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Today, we hold that the enacted maps violate several rights guaranteed to the people by our state constitution. Accordingly, we reverse the judgment of the trial court below and remand this case back to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court.

¶ 7 Our dissenting colleagues have overlooked the fundamental reality of this case. Rather than stepping outside of our role as judicial officers and into the policymaking realm, here we are carrying out the most fundamental of our sacred duties: protecting

[4] The 2021 enacted plans for Congress, the North Carolina House of Representatives, and the North Carolina Senate have been attached in an appendix for ease of reference.

the constitutional rights of the people of North Carolina from overreach by the General Assembly. Rather than passively deferring to the legislature, our responsibility is to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state. Here, our responsibility is to determine whether challenged apportionment maps encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power. This role of the courts is not counter to precedent but was one of the earliest recognized. In 1787, in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), in a passage quoted by the dissenters, the Court held that it must step in to keep the General Assembly from taking away the state constitutional rights of the people, and "if the members of the General Assembly could do this, they might with equal authority . . . render themselves the Legislators of the State for life, without any further election of the people[,]" *id.* at 7. This we cannot countenance.

¶ 8 The dissenters here do not challenge in any way, as Legislative Defendants presented no evidence at trial to disprove, the extensive findings of fact of the trial court, to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others. Instead, they attempt at some length to justify our taking no action to correct the constitutional violations or to ignore them altogether. For example, while acknowledging that the "right to vote *on equal terms*

is a fundamental right," citing *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990) (emphasis by the dissent), the dissent asserts, contrary to the findings and the extensive evidence at the trial and with no citation to the record or other authority, that "partisan gerrymandering has no significant impact upon the right to vote on equal terms."

¶ 9 Our contrary view is the beating heart of this case. Accordingly, we must act as a Court to make sure that the rights of the people are treated with proper respect. In so doing, we are protecting the individual rights of voters to cast votes that matter equally, as guaranteed by our constitution in article I, sections 10, 12, 14, and 19:

> Sec. 10. Free elections.
> All elections shall be free.
>
> Sec. 12. Right of assembly and petition.
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; . . . .
>
> Sec. 14. Freedom of speech and press.
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.
>
> Sec. 19. Law of the land; equal protection of the laws.
> . . . No person shall be denied the equal protection of the laws; . . . .

N.C. Const. art. I, §§ 10, 12, 14, 19. We ground our decision in the text, structure, history, and intent of these provisions from the Declaration of Rights.

¶ 10 Despite the dissenters' repeated assertions, we seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group. We are only upholding the rights of individual voters as guaranteed by our state constitution. As the dissenters have noted, in *Deminski* and *Corum*, this Court has recently recognized and even expanded the role of the Court to interpret and protect individual rights enumerated in the state constitution.

¶ 11 In this opinion, we give as much direction as appropriate to the General Assembly while fully respecting their authority to proceed first in the effort to draw maps that meet constitutional standards. Should they be unable to do so or if they produce maps that fail to protect the constitutional rights of the people, the trial court may select maps by the process it deems best, subject to our review, in accordance with the timeline already set out in our order of 4 February 2022.

I. Factual and Procedural Background

A. Redistricting Process

¶ 12 Article II, sections 3 and 5 of the North Carolina Constitution require that "[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the [legislative] districts and the apportionment of Senators [and Representatives] among those districts, subject to [certain] requirements[.]" N.C. Const. art. II § 3, 5. This redistricting authority is subject to limitations contained in the North Carolina

Constitution, including both in the provisions allocating the initial redistricting responsibility to the General Assembly and in other provisions which have been interpreted by this Court to be applicable to the redistricting process. *See, e.g.*, *Stephenson*, 355 N.C. 354*; Blankenship v. Bartlett*, 363 N.C. 518 (2009). Additionally, the General Assembly must comply with all applicable provisions of federal law, including federal one-person-one-vote requirements and the Voting Rights Act, under Article I, sections 3 and 5 of the North Carolina Constitution. *See id.*

¶ 13 On 12 February 2021, the United States Census Bureau announced that its release of the 2020 census data would be delayed by the COVID-19 pandemic and would not be released until the fall of 2021. On 24 February 2021, North Carolina State Board of Elections Executive Director Karen Brinson Bell recommended to the House Elections Law and Campaign Finance Reform Committee that the 2022 primary elections be delayed to a 3 May primary, 12 July second primary, and 8 November general election. The Committee, however, "did not follow the Board's recommendations to delay the primaries and provide more time for the redistricting cycle." The full census data was ultimately released to the states on 12 August 2021.

¶ 14 On 5 August 2021, the General Assembly's Senate Committee on Redistricting and Elections and House Redistricting Committee convened a Joint Meeting to begin the discussion on the redistricting process. On 9 August 2021, the chairs of the Joint Redistricting Committee released its "2021 Joint Redistricting Committee Proposed

Criteria." During the subsequent public comment period and committee debate, several citizens (including counsel for plaintiff Common Cause) and legislators (including Senate Minority Leader Dan Blue Jr.) urged the committee to change the criteria, which mandated a "race-blind" approach, to allow for the consideration of racial data in order to ensure compliance with the Voting Rights Act (VRA). The Joint Committee rejected these proposals. On 12 August 2021, the Joint Committee adopted the final redistricting criteria (Adopted Criteria), which were as follows:

> **Equal Population.** The Committees will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2021 Congressional, House, and Senate plans. The number of persons in each legislative district shall be within plus or minus 5% of the ideal district population, as determined under the most recent federal decennial census. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.
>
> **Contiguity.** No point contiguity shall be permitted in any 2021 Congressional, House, and Senate plan. Congressional, House, and Senate districts shall be compromised of contiguous territory. Contiguity by water is sufficient.
>
> **Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county

lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking. If a county is of sufficient population size to contain an entire congressional district within the county's boundaries, the Committees shall construct a district entirely within that county.

Racial Data. Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

VTDs. Voting districts ("VTDs") should be split only when necessary.

Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2021 Congressional, House and Senate plans that are compact. In doing so, the Committee may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("permitter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

Municipal Boundaries. The Committees may consider municipal boundaries when drawing districts in the 2021 Congressional, House, and Senate plans.

Election Data. Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

> **Member Residence.** Member residence may be considered in the formation of legislative and congressional districts.
>
> **Community Consideration.** So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

¶ 15 On 5 October 2021, after thirteen public hearings across the state during the month of September, the House and Senate redistricting committees convened separately to begin the redistricting process. The committee chairs announced that beginning on 6 October 2021, computer stations would be available in two rooms for legislators to draw potential maps. These stations would be open during business hours, and both the rooms and the screens of the station computers would be live-streamed and available for public viewing while the stations were open. In an apparent effort to show transparency and instill public confidence in the redistricting process, Legislative Defendants "requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. That software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software." "According to Representative [Destin] Hall, [Chair of the House Standing Committee on Redistricting,] the Committee and 'the House as a whole' would 'only consider maps that are drawn in this committee room, on one of the four stations.' "

¶ 16 However, "[w]hile the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data." For instance, between sessions at the public computer terminals, Representative Hall, who "personally drew nearly all of the House map [later] enacted[,] . . . met with his then-General Counsel . . . and others about the map-drawing in a private room adjacent to the public map-drawing room." During these meetings, and sometimes while sitting at the public terminals, Representative Hall viewed "concept maps" created on an unknown computer and using unknown software and data.[5] Further, "Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced."

¶ 17 Proposed versions of the congressional and House maps were filed on 28 and 29 October 2021 and then passed several readings in each chamber without alteration. A proposed version of the Senate map was filed on 29 October 2021. On 1 November 2021 the Senate Redistricting Committee adopted a substitute map. On 2

[5] On 21 December 2021, during trial, the court ordered Legislative Defendants to produce these "concept maps" and related materials. Legislative Defendants never did so. Instead, Legislative Defendants asserted in verified interrogatory responses that "the concept maps that were created were not saved, are currently lost[,] and no longer exist."

November 2021, the Committee adopted two amendments offered by Senator Natasha Marcus and Senator Ben Clark, respectively. On 3 and 4 November 2021, the final versions of each map passed several readings in each chamber without further alteration.

¶ 18 On 4 November 2021, the congressional, House, and Senate reapportionment maps were ratified into law as S.L. 2021-174, S.L. 2021-175, and S.L. 2021-173, respectively. Each map passed along strict party-line votes in each chamber.

B. Litigation

¶ 19 On 16 November 2021, plaintiffs North Carolina League of Conservation Voters, Inc., Henry M. Michaux Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernos, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George (NCLCV Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure. NCLCV Plaintiffs' complaint alleged

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech

> and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

¶ 20 On 18 November 2021, plaintiffs Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, Virginia Walters Brien, Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Floor, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, Kristiann Herring, and David Dwight Brown (Harper Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 500085) and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485. On 13 December 2021, Harper Plaintiffs amended their complaint. Harper Plaintiffs' complaint "allege[d] that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14."

¶ 21 On 19 and 22 November 2021, "the NCLCV and Harper actions, respectively, were assigned to [a] three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1." On 3 December 2021, the panel consolidated the two cases

pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' motions for preliminary injunction. On 3 December 2021, "after considering the extensive briefing and oral arguments on the motions, the [panel] denied [the parties'] Motion for Preliminary Injunction."

¶ 22 NCLCV Plaintiffs and Harper Plaintiffs subsequently filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, "[a]fter initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay." NCLCV Plaintiffs and Harper Plaintiffs subsequently filed several items with this Court: two petitions for discretionary review prior to determination by the Court of Appeals; a motion to suspend appellate rules to expedite a decision; and a motion to suspend appellate rules and expedite schedule. On 8 December 2021, this Court granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." "The Order further directed [the panel] to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before [11 January 2022]."

¶ 23 On 13 December 2021, the panel "entered a scheduling order . . . expediting discovery and scheduling [a] trial to commence on [3 January 2022]." That same day,

"Common Cause moved to intervene in the[ ] consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals." On 15 December 2021, the panel granted plaintiff Common Cause's motion. On 16 December 2021, plaintiff Common Cause filed its complaint, alleging

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

¶ 24 On 17 December 2021 "Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter "Legislative Defendants") filed their Answer to NCLCV Plaintiffs' Complaint." Legislative Defendants asserted numerous affirmative defenses, including, *inter alia*, that: (1) granting the requested relief will violate the

VRA and the Constitution of the United States; (2) granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; (3) the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; (4) plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; (5) plaintiffs' claims are barred by the doctrine of laches; (6) plaintiffs have failed to state claims upon which relief can be granted; (7) plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; (8) the only limitations on redistricting legislation are found in article II, sections 2, 3, 4, and 5 of the North Carolina Constitution; (9) plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; (10) plaintiffs' claims are nonjusticiable and fail to provide judicially manageable standards; (11) plaintiffs lack standing; and (12) plaintiffs have unclean hands and therefore are not entitled to equitable relief.

¶ 25 On 17 December 2021, defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their answer to Harper

Plaintiffs' amended complaint. That same day, these same defendants along with defendant State of North Carolina and defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their answer to NCLCV Plaintiffs' complaint.

¶ 26 "Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the [c]ourt expeditiously ruled upon over ten discovery-related motions . . . ." "Plaintiffs collectively designated eight individuals as expert witnesses and submitted accompanying reports[, and] Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports." The parties' discovery period closed on 31 December 2021, and a three-and-one-half day trial commenced on 3 January 2022.

C. Trial Court's Judgment

1. Findings of Fact

¶ 27 First, the trial court made extensive factual findings based on the evidence presented at trial. In short, these factual findings confirmed plaintiffs' assertions that each of the three enacted maps were "extreme partisan outliers" and the product of "intentional, pro-Republican partisan redistricting."

a. Plaintiffs' Extreme Partisan Gerrymandering Claims

¶ 28 After reviewing the factual and procedural history summarized above, the trial court made factual findings regarding plaintiffs' constitutional claims of extreme

partisan gerrymandering. First, the court considered whether the evidence presented showed partisan intent and effects. Addressing direct evidence, the court found that "[t]here is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans" and noted that "[t]he Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans." Further, the court noted that "[n]o elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans." However, the lack of direct evidence of intent did not stop the trial court from determining that the enacted plans were intentionally constructed to yield a consistent partisan advantage for Republicans in a range of electoral environments.

¶ 29 Instead, the trial court turned to circumstantial evidence of partisan intent and effects. After surveying the recent history of partisan redistricting litigation and legislation and the neutral districting criteria Legislative Defendants claimed they had adhered to, the court reviewed plaintiffs' and Legislative Defendants' expert analyses of the enacted plans. The court's extensive factual findings regarding each expert's analysis are summarized below.

¶ 30 ***Harper Plaintiffs' Expert Dr. Jowei Chen.*** "Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems." "Dr. Chen analyzed the

partisan bias of the enacted congressional plan on a statewide and district-by-district basis." Specifically, Dr. Chen analyzed the congressional plans using

> various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. Specifically, by holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations.

¶ 31 "Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan cannot be explained by North Carolina's political geography or adherence to the Adopted Criteria."

¶ 32 ***Harper Plaintiffs' Expert Dr. Christopher Cooper***. "Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina." Using

statewide voting data from the 2020 election, "Dr. Cooper analyzed the 2021 Congressional Plan [and] the partisan effects of each district's boundaries." Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 33 After reviewing Dr. Cooper's maps showing these redistricted congressional lines as compared to county boundaries and VTD boundaries, the court noted that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.' "

¶ 34 Reviewing Dr. Cooper's analysis of a few specific congressional districts within the new map as exemplars, the court noted that "[t]he 2021 Congressional Plan places

the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 35 The court then found that the 2021 North Carolina House and Senate Plans "similarly benefit the Republican party." The court noted that "Legislative Defendants' exercise of . . . discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent." Finally, the court noted Dr. Cooper's finding that the "partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly."

¶ 36 ***Harper Plaintiffs and Plaintiff Common Cause's Expert Dr. Jonathan Mattingly.***

> Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability.
>
> . . . Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo ("MCMC") Algorithm to create a representative set, or "ensemble," of 100,000 maps for the

> state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. The algorithm produced maps that accorded with traditional districting criteria. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits.

"After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans."

¶ 37 The trial court found, "based upon Dr. Mattingly's analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting." The court further determined that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' "

¶ 38 Regarding the North Carolina legislative districts, the court likewise found, "based upon Dr. Mattingly's analysis, that the State House and Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.' " The court found that "[t]he intentional partisan redistricting in both chambers is especially effective in

preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it."

¶ 39 Regarding the North Carolina House map, the court further found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the North Carolina House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " The court determined that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. In every election scenario, Republicans won more individual seats tha[n] they statistically should under nonpartisan maps.
>
> . . . The 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 democratic seats or fewer, even in situations where virtually all of the plans in the

> nonpartisan ensemble would elect 49 Democratic seats or more.

¶ 40 Regarding the North Carolina Senate, the court found that

> the results are the same: the enacted plan is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a [Republican] supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

¶ 41 The court then considered Dr. Mattingly's "cracking and packing" analysis of the congressional, House, and Senate maps. Here, the court found

> that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates, as shown in [Dr. Mattingly's] charts. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 42 The trial court found similar "cracking and packing" in the House maps, noting that "the enacted maps, as compared to the sample maps, there is an

overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts." The court found that "the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps." In contrast, the court found that

> [i]n the middle districts—between the 60th most Democratic seat and the 80th most democratic seat—the Democratic vote fraction in the enacted plan is far below the . . . nonpartisan plans. These are the seats that determine the supermajority line and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The [c]ourt [found] that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map's partisan outlier behavior. Those Democrat[ic] votes are instead placed in the 90th to 105th most Democratic district[s], where they are wasted because those seats are already comfortably Democratic.

¶ 43 Regarding cracking and packing in the Senate maps, the court found that "the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats."

¶ 44 Next, the court determined that "a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan."

¶ 45 The court also observed that the General Assembly selectively prioritized preserving municipalities within the maps, choosing to do so "only when doing so advantaged Republicans." "Put differently, prioritizing municipality preservation in

the Senate plans appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, . . . prioritizing municipalities would not have favored the Republican party in comparison."

¶ 46 Finally, the court found that "[t]he partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble could not be explained by political geography or natural packing."

¶ 47 ***Harper Plaintiffs' Expert Dr. Wesley Pegden.*** "Dr. Pegden was qualified and accepted as an expert at trial in probability."

> In this case, Dr. Pegden used . . . outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan constraints, and then evaluated the partisan characteristics of the resulting comparison maps.

The trial court noted that "Dr. Pegden applied these constraints in a 'conservative' way, to 'avoid second-guessing the mapmakers' choices in how they implemented the districting criteria." The court observed that Dr. Pegden's algorithm repeated this process "billions or trillions of times": "begin[ning] with the enacted map, mak[ing] a small random change complying with certain constraints, and us[ing] historical voting data to evaluate the partisan characteristics of the resulting map."

¶ 48 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm." In every "run" of the analysis, the court found, "the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated by making tiny random changes to the district's boundaries." "[I]f the districting had not been drawn to carefully optimize its partisan bias," the court stated, "we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect."

¶ 49 The court found similar extremes regarding North Carolina's legislative districts. Regarding the North Carolina House, the court determined based on Dr. Pegden's analysis that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." Regarding the North Carolina Senate, the court determined "that the

enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." "These results," the court determined, "cannot be explained by North Carolina's political geography."

¶ 50 ***NCLCV Plaintiffs' Expert Dr. Moon Duchin***. "Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting." The trial court noted that Dr. Duchin's analysis "uses a Close-Votes-Close-Seats principle, [in which] 'an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split.' " The trial court observed that "Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where 'a party or group with more than half of the votes should be able to secure more than half of the seats.' "

¶ 51 Based on Dr. Duchin's analysis, the trial court found "that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates." The results of Dr. Duchin's analysis, the court found, "reveal a partisan skew in close elections." For instance, the court determined that in a recent

statewide election in which the Republican candidate won by less than 500 total votes,

> [t]he Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina's congressional districts, 28 (56%) of North Carolina's Senate districts, and 68 (57%) of North Carolina's House districts. Nor is that election unusual.

In fact, the court found "that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state's congressional delegation, the State House, and the State Senate." "This is true[,]" the court noted, "even when Democrats win statewide by clear margins." Or, more plainly, "more Democratic votes usually do not mean more [D]emocratic seats." Accordingly, the trial court determined that "[t]he Enacted Plans resiliently safeguard electoral advantage for Republican candidates. This skewed result is not an inevitable feature of North Carolina's political geography." Rather, the court found, "[t]he plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins."

¶ 52 Next, the court specified that these findings were consistent across all three of the enacted maps. First, regarding the enacted congressional plan, the court found that "a clear majority of Democratic votes does not translate into a majority of seats."

The court determined "that the Enacted Congressional Plan achieves these results by the familiar means of 'packing' and 'cracking' Democratic voters across the state."

¶ 53 Second, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 54 Third, the court likewise determined that

> the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates.

"As with the Enacted Congressional Plan and the Enacted Senate Plan, the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 55 ***Plaintiff Common Cause's Expert Dr. Daniel Magleby.*** "Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering." Like plaintiffs' previous experts, Dr. Magleby "used a peer-reviewed algorithm . . . to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps." "Dr. Magleby . . . used this algorithm to develop a set of between 20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature's 2021 criteria for drawing districts." Using voting data from statewide races between 2016 and 2020, Dr. Magleby compared expected performance under the enacted maps with performance in the neutral sample maps. More specifically, Dr. Magleby's analysis utilized "median-mean" calculations. Median-mean calculations compare "the average Democratic vote share" in districts statewide with "the median Democratic vote share" in those districts "by lining up the enacted . . . districts from least Democratic to most Democratic and identifying the districts that fell in the middle. In a nonpartisan map, a low median-mean difference is expected."

¶ 56 Based on Dr. Magleby's analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined

"that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 57 ***Legislative Defendants' Expert Dr. Michael Barber.***

> Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting.
>
> . . . Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs' Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts.
>
> . . . Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. In Dr. Barber's simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries, minimization of county traversals within clusters, and geographic compactness. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed . . . .

¶ 58 Although Dr. Barber was qualified as an expert, the trial court found that "Dr. Barber's method is not without limitations." "Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals[,]" the court noted, "differences between the range of his simulated plans and the 2021 Plans may

be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals." The court observed that "under Dr. Barber's analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations." The court noted Dr. Barber's subsequent conclusion that "the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers." Notably, the court did not adopt Dr. Barber's findings as its own as it did for plaintiffs' experts and later explicitly rejected his conclusions regarding the impact of political geography on the enacted maps.

¶ 59 ***Legislative Defendants' Expert Dr. Andrew Taylor.*** "Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina[ ] and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions." The trial court reviewed Dr. Taylor's analysis of the enacted maps under political science principles, including noting that "in political science, an election is generally regarded as 'equal' so long as '[e]ach person has one vote to elect one legislator who has one vote in the legislature,' and departures even from that ideal are tolerated." Likewise, the court noted Dr. Taylor's opinion that "[i]n political science, equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual

participation as a citizen." The court further noted Dr. Taylor's opinion that "purportedly 'fair' redistricting plans are not understood in the political-science field as germane to free speech, [because free speech] can occur regardless of the shapes and sizes of districts." "For many of these reasons," the court noted, "measuring gerrymanders can be elusive, problematic, and beyond the consensus of political scientists."

¶ 60 The trial court also noted Dr. Taylor's opinion that the "significant change in North Carolina's political geography over the past thirty years . . . 'is not the result of redistricting[,]' " but is instead "a function of slow social and economic forces, changes in the state's citizenry, and party ideology." As with Dr. Barber's similar conclusion noted above, the trial court again later explicitly rejected Dr. Taylor's conclusions regarding the impact of political geography on the enacted maps.

¶ 61 ***Legislative Defendants' Rebuttal Expert Sean Trende.*** "Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps[,] and analyzing redistricting maps." The trial court noted that Mr. Trende used color-coded maps of North Carolina counties "noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally." It is unclear

how, if at all, the trial court considered Mr. Trende's testimony. This concluded the trial court's review of the expert testimony.

¶ 62 After considering the analysis of each expert, the trial court engaged in a district-by-district analysis of each of the three enacted maps: those for the North Carolina Senate, North Carolina House, and Congress, respectively.

¶ 63 ***North Carolina Senate Districts.*** The trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the Senate district groupings to not be the result of intentional, pro-Republican redistricting through packing and cracking.

¶ 64 ***North Carolina House of Representatives District.*** The trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Notably, however, the trial court found the Duplin-Wayne House County Grouping and the Onslow-Pender House County Grouping "to not be the result of intentional, pro-Republican partisan redistricting."

¶ 65 ***North Carolina Congressional Districts.*** Next, the trial court found "that the 2021 Congressional plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found

> that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be

> under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

Further, "when compared to the 1,000 computer-simulated plans[,]" the court found that "the enacted congressional plan is a statistical outlier" in regard to the total number of Republican-favoring districts it creates.

¶ 66 Next, the court noted four types of analyses in particular that confirm the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria": (1) "mean-median difference" analysis ; (2) "efficiency gap" analysis ("measur[ing] . . . the degree to which more Democratic or Republican votes are wasted across an entire districting plan"); (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis. Based on these methods, the trial court found "that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage."

¶ 67 Next, the trial court considered "whether the congressional plan is a statistical partisan outlier at the regional level." Here, the court found "that the enacted congressional plan's districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions." These included the Piedmont Triad area, the Research Triangle area, and the Mecklenburg County area. "The [c]ourt [found] that the packing and cracking of Democrats in [these

regions] could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria." "The enacted congressional map[,]" the court determined, "was therefore designed in order to accomplish the legislature's predominant partisan goals." Later, the court again confirmed "that the enacted congressional plan's partisan bias goes beyond any 'natural' level of electoral bias caused by North Carolina's political geography or the political composition of the state's voters, and this additional level of partisan bias . . . can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party."

¶ 68 Next, as it did for the North Carolina House and Senate districts, the trial court engaged in a district-by-district analysis of all fourteen enacted congressional districts. After individual analysis, the court found all fourteen districts "to be the result of intentional, pro-Republican partisan redistricting."

¶ 69 Finally, the trial court noted that "elections are decided by any number of factors." Statistical analyses, the court observed, "treat the candidates as inanimate objects" and "assume that voters will vote along party lines." In essence, the court doubted that a computer analysis could ever "take the human element out of the human." "Notwithstanding these doubts," though, the court "conclude[d] based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting." This concluded the court's factual findings regarding plaintiffs' partisan gerrymandering claims.

b. Plaintiffs' Intentional Racial Discrimination and Racial Vote Dilution Claims

¶ 70 Second, the trial court considered plaintiffs' intentional racial discrimination and racial vote dilution claims. Beginning with intentional racial discrimination, the court found that "[t]here is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans." Next, the court noted plaintiffs' circumstantial evidence of racial discrimination, including testimony from plaintiff Common Cause's expert James Leloudis II, regarding the historical connection between North Carolina's past racial gerrymandering practices and the current plans.

¶ 71 The trial court then considered plaintiffs' racial vote dilution claims. After reviewing the evidence presented by plaintiffs' and Legislative Defendants' experts on this matter, the court found that "[r]ace was not the predominant, overriding factor in drawing the districts in the Enacted Plans." The court found that "[t]he General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations." Accordingly, the court found that a district-by-district analysis of racial vote dilution, as it had previously performed for the extreme partisan gerrymandering claim, was not necessary. This concluded the trial court's findings regarding plaintiffs' intentional racial discrimination and racial vote dilution claims.

c. Plaintiffs' Whole County Provision Claims

¶ 72 Finally, the court made findings regarding plaintiffs' whole county provision claim. Here, the court noted that under the enacted plans, 35 senate districts and 107 North Carolina House districts split counties. The court observed that the Senate districts divided 15 total counties, while the House districts divided 37 total counties. The court noted that in instances where "multiple county groupings were possible under the Supreme Court's interpretation of the Whole County Provision[,] . . . groupings were chosen from the range of legally possible groupings." "Within each remaining county grouping containing a district challenged under the Whole County Provision," the court found, "the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria."

2. Trial Court's Conclusions of Law

¶ 73 After making these extensive findings of fact, the trial court concluded as a matter of law that claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. Accordingly, the court concluded that the enacted maps are not unconstitutional as a result of partisan gerrymandering.

a. Standing

¶ 74 First, the court addressed plaintiffs' standing to bring their various claims. Because "[i]ndividual private citizens and voters of a county have standing to sue to

seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5[,]" the court held, "the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing." However, based on its legal conclusion that "Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution[,]" the court concluded that all plaintiffs lack standing for these claims.

¶ 75 Finally, the court addressed NCLCV Plaintiffs' and Common Cause Plaintiffs' standing to bring claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because the court found "there to be no factual basis underlying these asserted claims," it concluded that "there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, [the court concluded that] these Plaintiffs do not have standing for these claims." Similarly, the court concluded that "Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment . . . directing the legislative process to be undertaken in redistricting."

b. Partisan Gerrymandering Claims

¶ 76 Next, the court addressed plaintiffs' partisan gerrymandering claims under various provisions of the North Carolina Constitution. Here, the court determined that plaintiffs' claims amounted to political questions that are nonjusticiable under the North Carolina Constitution. Specifically, after surveying the history of the

constitutional provisions under which plaintiffs brought their claims, the court concluded that "redistricting is an inherently political process" that "is left to the General Assembly."

¶ 77 The court then addressed each of plaintiffs' constitutional claims. First, the court held that the enacted maps do not violate the free elections clause, which mandates that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The court noted that "[w]hile the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause." Based on a survey of the clause's history, the court "conclude[d] that the Free Elections Clause does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage."

¶ 78 Second, the trial court addressed plaintiffs' claims under the free speech clause and the equal protection clause. After reviewing the historical background of the addition of these clauses to the constitution in 1971, the court concluded that "the incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 was not intended to bring about a fundamental change to the power of the General Assembly." Accordingly, the court refused to "assume that . . . the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting."

¶ 79 From this historical foundation, the court concluded that "the Enacted Maps do not violate the Equal Protection Clause." The court concluded that although "[i]t is true that there is a fundamental right to vote[,] . . . [r]edistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person's right to cast a vote." Accordingly, and because political affiliation is not a suspect class, the court concluded that "[a]ny impingement is limited and distant and as such is subject to rational basis review." The court then concluded "that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause."

¶ 80 Third, the court likewise concluded that "the Enacted Plans do not violate the Free Speech Clause." Specifically, the court concluded that "plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district."

¶ 81 Fourth, the trial court concluded that "the Enacted Plans do not violate the Right of Assembly Clause." Specifically, the court noted that "Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district."

¶ 82 In total, the trial court concluded that "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech[,] or Freedom of Assembly

Clauses found in Article I of the 1971 Constitution." "Therefore, the [c]ourt conclude[d] that our Constitution does not address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs' claims on the basis of 'extreme partisan advantage' fail."

c. Justiciability

¶ 83 Next, the court again addressed justiciability. First, the court considered whether the North Carolina Constitution delegates the responsibility and oversight of redistricting exclusively to the General Assembly. Citing article II, sections 3, 5, and 20, the court concluded that "[t]he constitutional provisions relevant to the issue before [it] establish that redistricting is in the exclusive province of the legislature."

¶ 84 Second, the court considered "whether satisfactory and manageable criteria or standards exist for judicial determination of the issue." Here, relying on its analysis of the Supreme Court of the United States in *Rucho*, 139 S. Ct. at 2506–07, regarding the justiciability of partisan gerrymandering claims in *federal* courts, the trial court "determine[d] that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach."

¶ 85 In reaching this conclusion, the court noted that it

> agree[s] with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. *Rucho*, 139 S. Ct[.] at 2504. Furthermore, it has the potential to violate

> "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 567 U.S. 787, 824 . . . (2015). Also, it can represent "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *LULAC v. Perry*, 548 U.S. 399, 456 . . . (2006) (Stevens, J.[,] concurring in part and dissenting in part) (quotation and citation omitted)).

The Court then added that it "neither condones the enacted maps nor their anticipated potential results" and that it has a "disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule." Nevertheless, the court concluded that because redistricting "is one of the purest political questions which the legislature alone is allowed to answer[,]" judicial action "in the manner requested . . . would be usurping the political power and prerogatives of an equal branch of government." Accordingly, the trial court concluded that plaintiffs' partisan gerrymandering claims are nonjusticiable.

d. Intentional Racial Discrimination and Racial Vote Dilution

¶ 86 Next, the trial court addressed plaintiffs' claims of intentional racial discrimination and racial vote dilution. The court "conclude[d] that based upon the record before [it], Plaintiffs have failed to prove the merit of their claim."

¶ 87 Here, the court noted that "[t]he North Carolina Constitution's guarantees of 'substantially equal voting power' and 'substantially equal legislative representation' are violated when a redistricting plan deprives minority voters of 'a fair number of

districts in which their votes can be effective,' measured based on 'the minority's rough proportion of the relevant population[,]' " quoting *Bartlett v. Strickland*, 556 U.S. 1, 28–29 (2009) (Souter, J., dissenting). The court then stated that "[a]n act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was 'a motivating factor.' " "And whether discriminatory purpose was a motivating factor[,]" the court observed, "can be 'inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' " "To determine whether this is true," the court stated, "the court may weigh the law's historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law's disproportionate impact."

¶ 88 Based upon these standards, the court then concluded that "NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn." The court first reached this conclusion based on plaintiffs' "fail[ure] to show a predominant racial motive through direct [or circumstantial] evidence." Second, the court concluded, "Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*." Third, the court concluded that "Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength

of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group." Although the court agreed with plaintiffs' showing "that a substantial number of Black voters are affiliated with the Democratic Party[,]" it nevertheless concluded that plaintiffs had not shown

> how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before th[e] [c]ourt showing that race *and* partisanship were *coincident* goals predominating over all other factors in redistricting.

Accordingly, the court rejected plaintiffs' claims of intentional racial discrimination within the enacted plans.

¶ 89 Second, the court addressed plaintiffs' claims of racial vote dilution in violation of the free elections clause. Having previously concluded that the free elections clause should be narrowly interpreted to not apply in the redistricting context, the court concluded that "NCLCV Plaintiffs' claim that the Enacted Plans unnecessarily dilute the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis." Accordingly, the court rejected this claim.

e. Whole-County Provision Claims

¶ 90 Next, the trial court addressed plaintiffs' claims under the whole county provision of article II, sections 3 and 5 of the North Carolina Constitution. Although the boundaries of certain legislative districts under the enacted plans indeed crossed county lines, the court "conclude[d] that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383[–]84 . . . (2002)." Accordingly, the court "conclude[d] that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting."

f. Declaratory Judgment Claim

¶ 91 Finally, the trial court addressed plaintiff Common Cause's declaratory judgment claim regarding the redistricting process laid out in *Stephenson* and *Dickson v. Rucho*, 368 N.C. 481 (2015). On this issue, the court stated that "[t]he requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WPC and VRA." But, the court noted, "[t]here is nothing in *Stephenson* that requires any particular analysis

prior to making a decision as to whether VRA districts are necessary." Accordingly, the court concluded that "[t]he fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required." The court then stated that, in this situation, "[w]hat Plaintiff Common Cause asks of this [c]ourt is to impose a judicially-mandated preclearance requirement . . . [that] does not exist in *Stephenson*." Therefore, the court concluded as a matter of law "that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief."

3. Trial Court's Decree

¶ 92 Following these extensive factual findings and conclusions of law, the trial court issued its ultimate decree. Specifically, the trial court ordered that (1) plaintiffs' requests for declaratory judgment are denied; (2) plaintiffs' requests for permanent injunctive relief are denied; (3) the court's judgment fully and finally resolves all claims of plaintiffs, judgment is entered in favor of Legislative Defendants, and plaintiffs' claims are dismissed with prejudice; and (4) the candidate filing period for the 2022 primary and municipal elections is set to resume at 8:00 a.m. on Thursday, 24 February 2022, and shall continue through and end at 12:00 noon on Friday, 4 March 2022.

D. Present Appeal

¶ 93 Pursuant to this Court's 8 December 2021 order certifying the case for discretionary review prior to determination by the Court of Appeals, all plaintiffs filed

notices of appeal to this Court from the trial court's final judgment on 11 and 12 January 2022. The parties' briefs and arguments before this Court largely echoed the arguments made before the trial court. Namely, plaintiffs asserted that the enacted plans constitute extreme partisan gerrymandering in violation of the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the North Carolina Constitution and that these state constitutional claims were justiciable in state court. Legislative Defendants argued that plaintiffs' claims presented nonjusticiable political questions and therefore did not violate any of the asserted state constitutional provisions. The Court also accepted amicus briefs from several interested parties. Due to the time-sensitive nature of this case, oral arguments were calendared and heard in a special session on 2 February 2022.

II. Legal Analysis

¶ 94 Now, this Court must determine whether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution. After careful consideration, we conclude that partisan gerrymandering claims are justiciable under the North Carolina Constitution and that Legislative Defendants' enacted plans violate each of these provisions of the North Carolina Constitution beyond a reasonable doubt.

A. Standing

¶ 95 As a threshold issue, we must determine whether plaintiffs have standing to bring their claims. As noted above, the trial court ruled that individual NCLCV Plaintiffs had standing to challenge the enacted plans under the whole county provision but that plaintiffs lacked standing to bring their partisan gerrymandering claims because they had "not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution." The court further determined that NCLCV Plaintiffs and plaintiff Common Cause likewise lacked standing to bring their intentional racial discrimination and racial vote dilution claims under the North Carolina Constitution. Specifically, the court ruled that "[b]ecause . . . there [is] no factual basis underlying these asserted claims, there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right."

¶ 96 We cannot agree. As this Court held in *Committee to Elect Dan Forest v. Employees Political Action Committee*, "the federal injury-in-fact requirement has no place in the text or history of our Constitution." 376 N.C. 558, 2021-NCSC-6, ¶ 73. Rather, in the case of direct constitutional challenges to statutes or other acts of government, we require only the requisite "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* ¶ 64 (quoting *Stanley v. Dep't of Cons. and Dev.*,

284 N.C. 15, 28 (1973)). Accordingly, as a "prudential principle of judicial self-restraint" and not as a limitation on the judicial power, we have required that a person challenging government action be directly injured or adversely affected by it. *Id.* ¶ 63. This prudential requirement that the person challenging a statute be directly injured or adversely affected thereby is purely to ensure that the putative injury belongs to them and not another, and hence that they "can be trusted to battle the issue." *Id.* ¶ 64 (citing *Stanley*, 284 N.C. at 28). Accordingly, "[t]he 'direct injury' required in this context could be, *but is not necessarily limited to*, 'deprivation of a constitutionally guaranteed right or an invasion of his property rights,' " *id.* ¶ 62 (emphasis added), and "[w]hen a person alleges the infringement of a legal right . . . *arising under* . . . the North Carolina Constitution, . . . the legal injury itself gives rise to standing," *id.* ¶ 82 (emphasis added). This direct injury requirement does not require a showing that a party will in fact prevail under the constitutional theory they advance. Rather, alleging the violation of a legal right which belongs to them, even if widely shared with others and even if they are not entitled to relief under their theory of the legal right, is sufficient to show the requisite "concrete adverseness" in our courts which we, for purely pragmatic reasons, require in the resolution of constitutional questions. To hold otherwise would resuscitate an injury-in-fact requirement as a barrier to remedy by the courts in another form.

¶ 97 The trial court contravened the concrete adverseness rationale for the direct injury requirement by concluding that plaintiffs lacked standing because their partisan gerrymandering claims, which they contended violated their constitutional rights under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause, were not "cognizable."[6] The allegation of violations of these constitutional rights was sufficient to generate an actual controversy and hence concrete adverseness, whether or not their theory of the violation ultimately prevailed in the courts. For example, in *Baker v. Carr*, from which this Court in part derived its concrete adverseness rationale, *see Comm. to Elect Dan Forest*, ¶ 64, the Supreme Court of the United States announced for the first time that claims of vote dilution were cognizable and justiciable under the Equal Protection Clause. *See generally Baker v. Carr*, 369 U.S. 186 (1962); *see also Comm. to Elect Dan Forest*, ¶ 46 ("[T]he only injury asserted [in *Baker*] is the impairment of a constitutional right broadly shared and divorced from any 'factual' harm experienced by the plaintiffs"). The constitutional right to equal protection of the laws existed although the *Baker* Court had not yet extended it to the precise theory the plaintiffs advanced. Similarly, here, the plaintiffs all had standing to challenge the maps based on their allegation of violations of their constitutional rights under the free elections clause, equal

[6] The trial court also conflated the existence of a "cognizable" claim under the state constitution with one that is justiciable. A claim may violate the constitution yet not be justiciable because it is a political question.

protection clause, free speech clause, and freedom of assembly clause of our Declaration of Rights, which are injuries to legal rights that they directly suffered, irrespective of whether courts previously or the court below determined their particular theory under those rights ultimately entitled them to prevail.

¶ 98 Finally, the court also determined that "the organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution" and that "organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." We agree.

¶ 99 Taken together, the trial court's findings are sufficient to establish that each individual and organizational plaintiff here meets the standing requirements under the North Carolina Constitution as summarized above. Accordingly, the trial court erred in ruling to the contrary.

B. The Political Question Doctrine

¶ 100 We next address Legislative Defendants' contention that plaintiffs' claims present only nonjusticiable political questions. Whether partisan gerrymandering claims present a nonjusticiable "purely political question" under North Carolina law is a question of first impression. We have held that certain claims raising "purely

political question[s]" are "nonjusticiable under separation of powers principles." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 618 (2004). Purely political questions are those questions which have been wholly committed to the "sole discretion" of a coordinate branch of government, and those questions which can be resolved only by making "policy choices and value determinations." *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 638–39 (declining to reach the merits after concluding that "the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly").

¶ 101 The trial court and Legislative Defendants rely in part on *Rucho* and other federal cases. These cases may be instructive, but they are certainly not controlling. We have previously held that "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35 (2006). This principle extends to all justiciability doctrines. "Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text,

but are the fruit of judicial interpretation of Article III's extension of the 'judicial Power' to certain 'Cases' or 'Controversies.' " *Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 35. Originally, federal courts showed great reluctance to involve themselves in policing redistricting practices at all. The result was both the grossly unequal apportionment of representation of legislative and congressional seats and the drawing of district lines in pursuit of partisan advantage.[7] The judicial repudiation of any role in redistricting was summarized in *Colegrove v. Green*, where the Supreme Court declared a challenge to the drawing of congressional districting lines in Illinois nonjusticiable under the Fourteenth Amendment. 328 U.S. 549, 556 (1946). Writing for the Court, Justice Frankfurter reasoned that "effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not [fit] for judicial determination." *Id.* at 552. "Authority for dealing with such problems resides elsewhere." *Id.* at 554. The Court concluded, revealing the prudential basis of its reasoning, that "[c]ourts *ought not* to enter this political

[7] Before the "reapportionment revolution" of *Baker v. Carr* and its progeny in the 1960s, "states had much more leeway over when, and even if, to redraw district boundaries. One result was that in many states, district lines remained frozen for decades—often leading to gross inequalities in district populations and substantial partisan biases." Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 13 (2013). "Connecticut, for instance, kept the exact same congressional district lines for 70 years (1842–1912)." *Id.* at 8. Other state legislatures redrew maps whenever they wanted. "In every year from 1862 to 1896, with one exception, at least one state redrew its congressional district boundaries. Ohio, for example, redrew its congressional district boundaries six times between 1878 and 1890." *Id.* Moreover, "parties were willing to push partisan advantage to the edge. To do so, partisan mapmakers carved states into districts with narrow, yet winnable, margins." *Id.*

thicket." *Id.* at 556 (emphasis added).

¶ 102 In the landmark decision of *Baker v. Carr*, the Supreme Court reversed course and held in a case involving claims that malapportionment violates the Equal Protection Clause of the Fourteenth Amendment that such claims are justiciable since they do not present political questions. 369 U.S. 186, 209 (1962). The *Baker* Court began its justiciability analysis by noting that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words." *Id.* (cleaned up). After reviewing cases to discern the threads that, in various formulations, comprise a nonjusticiable political question, the Court identified what has become the standard definition of the political question doctrine under federal law:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court in *Baker* held that the plaintiffs' claim under the Equal Protection Clause, unlike prior claims under the Guaranty Clause, was justiciable

because it presented, *inter alia*, "no question decided, or to be decided, by a political branch of government coequal with th[e] Court" and no "policy determinations for which judicially manageable standards are lacking," as "[j]udicial standards under the Equal Protection Clause are well developed and familiar," which are "that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* at 226. Accordingly, over a dissent written by Justice Frankfurter and joined by Justice Harlan, the Court entered the political thicket. The Court did not in that decision announce a remedy for the violation of the Equal Protection Clause but in later cases held that the principle of "one person, one vote" required as close to mathematical equality as practicable in the drawing of congressional districts and "substantial equality" in the drawing of legislative districts. *Cf. Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.").

¶ 103 Although federal courts concluded that malapportionment claims were justiciable, the Supreme Court of the United States did not expressly hold that a

partisan gerrymandering claim was justiciable until *Davis v. Bandemer*, where it held that a partisan gerrymandering claim existed under the Fourteenth Amendment that did not present a nonjusticiable political question.[8] 478 U.S. 109, 124 (1986) (plurality opinion), *abrogated by Rucho*, 139 S. Ct. 2484. The plurality opinion in *Bandemer* identified the claim as being "that each political group in a State should have the same chance to elect representatives of its choice as any other political group," and although the claim was distinct from that in *Reynolds* involving districts of unequal size, "[n]evertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable." *Id.* The plurality adopted as a test that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. Justice O'Connor concurred in the judgment, arguing in part that the Court's decision would result in a requirement for "roughly proportional representation."[9] *Id.* at 147 (O'Connor, J., concurring in the judgment).

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[8] As noted in the plurality opinion in *Bandemer*, the Supreme Court did address a partisan gerrymandering claim in *Gaffney v. Cummings*, by holding that a districting plan which incorporated a "political fairness principle" across the plan did not violate the Equal Protection Clause; however, no concern about justiciability was raised in *Gaffney*. 412 U.S. 735, 751–52 (1973).

[9] The plurality responded that their decision did not reflect "a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status." *Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986).

¶ 104 Eighteen years later the Supreme Court overruled *Bandemer* in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a challenge to Pennsylvania's 2001 congressional redistricting plan on the grounds that it was a political gerrymander. Justice Scalia wrote the plurality opinion, in which three other justices joined, and would have also held partisan gerrymandering claims to be nonjusticiable political questions because they lack a "judicially discernable and manageable standard[,]" *id.* at 306—"judicially discernible in the sense of being relevant to some constitutional violation[,]" *id.* at 288. Justice Kennedy concurred in the judgment but refused to hold partisan gerrymandering nonjusticiable because "in another case a standard might emerge." *Id.* at 312 (Kennedy, J., concurring in the judgment).

¶ 105 In *Rucho*, completing its retreat from *Bandemer*, the Supreme Court of the United States abandoned the field in policing partisan gerrymandering claims. The Supreme Court held that claims alleging that North Carolina's and Maryland's congressional districts were unconstitutionally gerrymandered for partisan gain were nonjusticiable in federal court. *Rucho*, 139 S. Ct. at 2493–2508. It reached this conclusion because it could find "no legal standards discernible in the [United States] Constitution for" resolving partisan gerrymandering claims, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500.

¶ 106 Three concerns appear to have motivated the Court in *Rucho*. The first premise which concerned the Court in *Rucho* was the absence of a "judicially discernable"

standard, that is, one that is "relevant to some constitutional violation." *Vieth*, 541 U.S. at 288; *see Rucho*, 139 S. Ct. at 2507 (" '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' founded in the [United States] Constitution or laws." (first alteration in original) (quoting *Vieth*, 541 U.S. at 278)). In essence, the Supreme Court concluded that no provision of the United States Constitution supplied a cognizable legal basis for challenging the practice of partisan gerrymandering. *See, e.g.*, *Rucho*, 139 S. Ct. at 2501 ("[T]he one-person, one-vote . . . requirement does not extend to political parties."); *id.* at 2502 ("[O]ur racial gerrymandering cases [do not] provide an appropriate standard for assessing partisan gerrymandering."); *id.* at 2504 ("[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue."); *id.* at 2506 ("The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.").

¶ 107 The second premise underpinning *Rucho*'s political-question holding was the absence of a standard that the Court deemed to be "clear, manageable[,] and politically neutral." *Id.* at 2500. This rationale was particularly pressing because, "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering' " under federal law. *Id.* at 2497 (quoting

Hunt v. Cromartie, 526 U.S. 541, 551 (1999)). According to the Court, "the question is one of degree," and "it is vital in such circumstances that the Court act only in accord with especially clear standards." *Id.* at 2498. However, the Court held the plaintiffs had not supplied standards to answer the question, "At what point does permissible partisanship become unconstitutional?" *Id.* at 2501. Moreover, the tests adopted by the lower courts were unsatisfactory because they failed to articulate such a standard that was sufficiently "clear" and "manageable." *Id.* at 2503–05. Finally, the dissent's proposed test, using "a State's own districting criteria as a neutral baseline" was unmanageable because "it does not make sense to use criteria that will vary from State to State and year to year." *Id.* at 2505.

¶ 108 A third consideration animating the Court's decision was a prudential evaluation of the role of federal courts in the constitutional system. *Rucho*, 139 S. Ct. at 2494 (framing the question presented as "whether there is an 'appropriate role for the *Federal Judiciary*' in remedying the problem of partisan gerrymandering" (emphasis added) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018))); *id.* at 2507 ("Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."); *id.* (advocating action through states, including by state supreme courts on state law grounds); *id.* at 2508 (suggesting Congress could act); *id.* at 2499 ("But federal courts

are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.").

¶ 109 In summary, federal courts initially forswore virtually any role in the "political thicket" of apportionment. *See Colegrove*, 328 U.S. at 556. However, in *Baker* and its progeny, the Supreme Court of the United States entered that thicket at least to the extent of policing malapportionment. *See Baker*, 369 U.S. 186. The Court's reasons for entering the thicket are relevant today: the Supreme Court recognized that absent its intervention to enforce constitutional rights, our system of self-governance would be representative and responsive to the people's will in name only. The Court entered the political thicket for a time as well to review partisan gerrymandering claims in *Bandemer*, but ultimately rejected that decision in *Vieth*, and in *Rucho*, the Court removed such claims from the purview of federal courts altogether. The premises that animated the Court in *Rucho* are substantially the same as those that kept it from policing malapportionment claims in the first place: the perception that there is no "discernable" right to such claims cognizable in the federal Constitution, a prudential evaluation that courts are ill-equipped to hear such claims, and a belief that courts should not involve themselves in "political" matters.

¶ 110 However, simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts, as Chief Justice Roberts himself

noted in *Rucho*. *Rucho*, 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."). First, our state constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783 (1992). Second, state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require our court system to consider fifty separate sets of criteria, as would federal court involvement. Finally, *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level. The role of state courts in our constitutional system differs in important respects from the role of federal courts.

¶ 111 Having canvassed relevant federal decisions, we now consider whether as a matter of state law plaintiffs' partisan gerrymandering claims are justiciable under the North Carolina Constitution. We conclude that they are.

C. The Question Presented Is Not Committed to the "Sole Discretion" of the General Assembly

¶ 112 Under North Carolina law, courts will not hear "purely political questions." This Court has recognized two criteria of political questions: (1) where there is "a textually demonstrable constitutional commitment of the issue" to the "sole

discretion" of a "coordinate political department[,]" *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); and (2) those questions that can be resolved only by making "policy choices and value determinations[,]" *id.* (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

¶ 113 We first consider the issue of whether there is a textually demonstrable commitment of the issue to the "sole discretion" of a coordinate branch of government. The constitution vests the responsibility for apportionment of legislative districts in the General Assembly under article II of our state constitution. Article II provides: "The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts." N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5 (stating the same requirement for the North Carolina House). Legislative Defendants contend that "a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task" and that these provisions evidence such a textual commitment. They argue that this Court "has repeatedly acknowledged that this constitutional text is a grant of unreviewable political discretion to the legislative branch." This argument—that gerrymandering claims are categorically nonjusticiable because reapportionment is committed to the sole discretion of the General Assembly—is flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority. We have interpreted and applied both the

expressly enumerated limitations contained in article II, sections 3 and 5, and the limitations contained in other constitutional provisions such as the equal protection clause. *Stephenson v. Bartlett*, 355 N.C. 354, 370–71, 378–81 (2002) (determining whether the General Assembly's use of its article II power to apportion legislative districts complied with federal law in accordance with article I, sections 3 and 5 of our constitution, and our state's equal protection clause in article I, section 19); *Blankenship v. Bartlett*, 363 N.C. 518, 525–26 (2009) (holding that General Assembly's exercise of its power under article IV, section 9 to establish the election of superior court judges in judicial districts must comport with our state's equal protection clause in article I, section 19). Legislative defendants' argument is, essentially, an effort to turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*. Yet, as the facts of this case demonstrate, the need for this Court to continue to enforce North Carolinians' constitutional rights has certainly not diminished in the intervening years.

¶ 114 Relatedly, but more specifically, Legislative Defendants argue that even if certain gerrymandering claims may be justiciable, claims alleging partisan gerrymandering in violation of state constitutional provisions are nonjusticiable because this Court has endorsed the consideration of partisan advantage in the redistricting process. In support of this proposition, Legislative Defendants cite to our decision in *Stephenson*, where we stated the following in full:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina imposed on legislative redistricting and reapportionment in the State Constitution.

355 N.C. at 371. Legislative Defendants misread this statement. We did not conclude that the text of our state constitution permits the General Assembly to "consider partisan advantage and incumbency protection"; we concluded that *federal law* permitted that consideration by citing to the decision of *Gaffney v. Cummings*, 412 U.S. 735 (1973). *See Stephenson*, 355 N.C. at 371. Moreover, *Gaffney* in no way supports Legislative Defendants' argument that we have endorsed their interest in securing partisan advantage to any extent and which results in systematically disfavoring voters of one political party. In *Gaffney*, the Supreme Court of the United States rejected a partisan gerrymandering claim to an apportionment plan that pursued a principle of "political fairness" in order to "allocate political power to the parties *in accordance with their voting strength*." *Gaffney*, 412 U.S. at 754 (emphasis added). We expressly reserved the question of whether the General Assembly could consider such criteria "in conformity with the State Constitution," while also affirming the applicability of "constitutional limitations" that the people imposed on the legislative redistricting process in other provisions of the North Carolina

Constitution, such as the equal protection clause. *Stephenson*, 355 N.C. at 371. Simply put, resolving *Stephenson* did not require us to decide the legality of partisan gerrymandering under the North Carolina Constitution.

¶ 115 The commitment of responsibility for apportionment to the General Assembly in article II provides no support for the Legislative Defendants' argument. First, the list of criteria the General Assembly is required to consider by that section does *not* include "partisan advantage." *See* N.C. Const. art. II, § 3. Furthermore, we cannot infer the non-justiciability of partisan gerrymandering purely from the structural fact that the decennial apportionment of legislative districts is committed to a "political" branch. The General Assembly has the legislative power of apportionment under article II, but exercise of that power is subject to other "constitutional limitations." *Stephenson*, 355 N.C. at 371. Put another way, the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review. That startling proposition is, again, entirely inconsistent with our modern redistricting precedents and, on a more fundamental level, inconsistent with this Court's obligation to enforce the provisions of the North Carolina Constitution dating to 1787.

¶ 116 *Stephenson* itself is incompatible with Legislative Defendants' argument. *Stephenson* was a vote-dilution challenge under the equal protection clause of our

state constitution. If *Stephenson* concluded that redistricting decisions were exclusively constitutionally committed to the General Assembly because of article II, then no other constitutional limitations would be applicable. Plainly they are. *See id.* at 379.

¶ 117 This case does not ask us to remove all discretion from the redistricting process. The General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts in accordance with traditional neutral districting criteria that will require legislators to exercise their judgment. Rather, this case asks how constitutional limitations in our Declaration of Rights limit the General Assembly's power to apportion districts under article II. It is thus analogous to *Cooper v. Berger*, 370 N.C. 392 (2018), in that it "involves a conflict between two competing constitutional provisions," and it "involves an issue of constitutional interpretation, which this Court has a duty to decide." *Id.* at 412.

¶ 118 More fundamentally, Legislative Defendants' argument that the textual grant of a power to a "political" branch is sufficient to render exercise of that power unreviewable strikes at the foundation stone of our state's constitutional caselaw—*Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). In *Bayard*, the courts of North Carolina first asserted the power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith. *Id.* at 7. In holding that we had the power of judicial review we specifically

reasoned that if "members of the General Assembly" could violate some constitutional rights, "they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, [but] from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.* It was out of concern for the very possibility that the legislature might intercede in the elections for their own office, which our constitution delegates the legislature power over, in contravention of the constitutional rights of the people to elect their own representatives that led this Court to assert the power of judicial review. To conclude that the mere commitment of the apportionment power in article II to the General Assembly renders its apportionment decisions unreviewable would require us to betray our most fundamental constitutional duty. "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." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992).

¶ 119 The General Assembly has the power to apportion legislative and congressional districts under article II and state law, but exercise of that power is subject to other "constitutional limitations," including the Declaration of Rights. The question is whether the General Assembly complied with provisions of the Declaration of Rights in its exercise of the apportionment power. There is no textually demonstrable commitment of that issue to the legislative branch.

¶ 120 In determining whether plaintiffs' claims would require the court to make "policy choices and value determinations," *Bacon*, 353 N.C. at 717, we must determine whether, as plaintiffs argue, the Declaration of Rights of the North Carolina Constitution prohibits partisan gerrymandering and, if so, whether the application of those claims would require such determinations. As we long ago established and have since repeatedly affirmed, "[t]his Court is the ultimate interpreter of our State Constitution." *Corum*, 330 N.C. at 783 (citing *Bayard*, 1 N.C. (Mart.) 5). So too when it comes to reapportionment. *Stephenson*, 355 N.C. at 370–71, 378–81; *Blankenship*, 363 N.C. at 525–26.

D. Partisan Gerrymandering Violates the Declaration of Rights in the North Carolina Constitution and Is Justiciable

¶ 121 Plaintiffs argue that Legislative Defendants' districting plans violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution's Declaration of Rights. Accordingly, we must examine the text and structure of the Declaration of Rights as well as the intent and history of these constitutional provisions to determine whether the rights plaintiffs allege are protected by the Declaration of Rights and whether this Court is empowered by the constitution to guarantee those rights.

¶ 122 Before examining specific provisions in detail, we make some general observations about the Declaration of Rights in article I of our constitution. First, "[t]he Declaration of Rights was passed by the Constitutional Convention on 17

December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers."[10] *Corum*, 330 N.C. at 782. The Declaration of Rights preceded the constitution, and hence the rights reserved by the people preceded the division of power among the branches therein. "The relationship is not that exhibited by the U.S. Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the basic institutions of government. Instead, North Carolina's declaration of rights . . . is logically, as well as chronologically, prior to the constitutional text." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 5–6 (2d ed. 2013). That logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the constitution itself as article I.

¶ 123 Second, early in this Court's history we "recognized the supremacy of rights protected in Article I and indicated that [we] would only apply the rules of decision

[10] The primacy of the Declaration of Rights over the powers allocated in the constitutional text in the minds of the framers is fitting for a people so opposed to government tyranny coalesced in any source. North Carolinians preceded the Revolution by ten years through the Regulator Movement opposing the Royal Governor William Tryon. They preceded the Declaration of Independence with the Halifax Resolves. After the Revolution they only belatedly approved by convention the federal Constitution because of its failure to include a Bill of Rights, an implicit rejection of the notion that structural protections of rights, like the separation and division of powers, would suffice. It is worth noting that a leading argument for the adoption of a federal Bill of Rights, in the words of Thomas Jefferson, was "the legal check which [such a Bill would put] into the hands of the judiciary," as "a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." Laurence H. Tribe, *American Constitutional Law* 8 & n.8 (3d ed. 2000) (quoting 14 The Papers of Thomas Jefferson 659 (Julian P. Boyd ed., 1958)).

derived from the common law and such acts of the legislature that are consistent with the Constitution." *Corum*, 330 N.C. at 783 (citing *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 57 (1805)). In tying judicial review to the primacy of the Declaration of Rights, we recognized that

> [t]he fundamental purpose for [the Declaration's] adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

Id. at 782–83 (citing *State v. Manuel*, 20 N.C. 144 (1838)); *see also id.* at 782 ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . .").

¶ 124 Finally, the framers of our Declaration of Rights and constitution guarded against not only abuses of executive power but also the tyrannical accumulation of power that subverts democracy in the legislative branch. William Hooper, a North Carolina delegate to the Continental Congress, urged that the state constitution prevent legislators from making "their own political existence perpetual." Letter from William Hooper to the Provincial Congress of North Carolina (Oct. 26, 1776), *in* 10 *Colonial and State Records of North Carolina* 867–68, *available at* https://docsouth.unc.edu/csr/index.php/document/csr10-0407. John Adams, "already

a renowned authority on constitutionalism," Orth & Newby at 5, submitted two letters of advice to the Convention, recommending that to prevent the legislature from "vot[ing] itself perpetual" the constitution must divide the General Assembly into two chambers so each could check the other. Essay by John Adams on "Thoughts on Government" (March 1776), *in* 11 *Colonial and State Records of North Carolina* 321, 324, *available at* https://docsouth.unc.edu/csr/index.php/document/csr11-0189. And so the framers did create two chambers, and we have maintained that division to this day. *See* N.C. Const. of 1776, § 1; N.C. Const. art. II, § 1.

¶ 125 Despite these protections, the primacy of the Declaration of Rights suggests that our framers did not believe that division of power alone would be sufficient to protect their civil and political rights and prevent tyranny. Accordingly, they enshrined their rights in the Declaration of Rights. They also created a state judiciary invested with the "judicial power." *See* N.C. Const. of 1776, § 1; N.C. Const. art. IV, § 1. This independent judiciary was another structural protection. In *Bayard*, we concluded that our courts have the power, and indeed the obligation, to review legislative enactments for compliance with the North Carolina Constitution and to strike down unconstitutional laws. 1 N.C. (Mart.) at 7. The Court reasoned that if we abdicated this power and obligation, legislators could make themselves "Legislators of the State for life" and insulate themselves from "any further election of the people." *Id.* Giving effect to the will of the people through popular sovereignty and the rights

protected by the Declaration of Rights, including the rights to free and frequent elections, were central to our recognition of the necessity of judicial review.

¶ 126 Having reviewed these structural and historical aspects of the Declaration of Rights, we now turn to the text to analyze whether plaintiffs' partisan gerrymandering claims have a discernible basis therein. Indeed, the very text of the Declaration of Rights calls us back time and again to itself, the source of constitutional meaning, by providing that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.[11] In a leading case from Virginia, construing a cognate provision of the Virginia Declaration of Rights, Judge Roane defined "fundamental principles" as

> those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.

Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (1793); *see* Orth & Newby at 92 (discussing same). These "landmarks" serve as an important backdrop to aid in interpreting the "spirit" of the North Carolina Constitution and the scope of the

[11] By this text, "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 91 (2d ed. 2013).

sweeping provisions of its Declaration of Rights.

¶ 127 North Carolina's Declaration of Rights as it exists today in article I was forged not only out of the revolutionary spirit of 1776 but also the reconstruction spirit of 1868. *See* John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/documents/guides/legal/North_Carolina_Constitution_Historical.pdf ("Drafted and put through the convention by a combination of native Republicans and a few carpetbaggers, . . . [f]or its time, [the Constitution of 1868] was a progressive and democratic instrument of government."); *id.* ("The Constitution of 1868 incorporated the 1776 Declaration of Rights into the Constitution as Article I and added several important guarantees."); *id.* ("[T]he Constitution of 1971 brought forward much of the 1868 language with little or no change."). Our Declaration of Rights begins with the declaration of two fundamental principles, the costly fruit paid in the blood of the Civil War and Revolutionary War, respectively: equality of persons and the democratic principle of popular sovereignty.[12] Article I, sections 1 and 2 provide:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

[12] Article I, section 1 originates from the 1868 constitution, while article I, section 2, originates from the 1776 constitution.

> Sec[tion] 2. Sovereignty of the people.
>
> All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, §§ 1–2.

¶ 128 Under article I, section 1, equality logically precedes sovereignty, as equality is "self-evident." Article I, section 1 recognizes the self-evident fundamental principle of equality; however, that does not mean it is not a source of cognizable rights by its own terms as well. *See, e.g., Tully v. City of Wilmington*, 370 N.C. 527, 533, 536 (2018) (holding each person's "inalienable right" to the "enjoyment of the fruits of their own labor" protects the fundamental right to "pursue his chosen profession free from" unreasonable government interference). This section deliberately borrowed the language of the Declaration of Independence, which was quoted and expanded upon in the Gettysburg Address just a few years prior to the 1868 Reconstruction Convention. Article I, section 1's recognition of the first principle that "all persons are created equal" is universal.

¶ 129 Article I, section 2 locates the source of all "political power" under the Declaration of Rights in "the people." N.C. Const. art. I, § 2. It specifies that "all government of right" can only "originate[ ] from the people." *Id.* This "government of right" is only established when it is "founded upon [the people's] will only," and "instituted solely for the good of the whole." *Id.* Section 2 of the Declaration of Rights

can fruitfully be read together with the first clause of section 3. N.C. Const. art. I, § 3, cl. 1 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof . . . ."). "These two sections contain both a general and a specific *assertion of democratic theory*." Orth & Newby at 48 (emphasis added). Section 2's declaration that "[a]ll political power is vested in and derived from the people" is an "abstract statement of principle." *Id.* Meanwhile, section 3's declaration that "the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof," is "a specific local application of the general rule." *Id.* These sections "now serve as a fuller theoretical statement" of the core democratic principle: "the revolutionary faith in popular sovereignty." *Id.*; *see Thrift v. Bd. of Comm'rs*, 122 N.C. 31, 37 (1898) ("Our theory of government, *proceeding directly from the people, and resting upon their will*, is essentially different — at least, in principle — from that of England . . . ." (emphasis added)). Under popular sovereignty, the democratic theory of our Declaration of Rights, the "political power" of the people which is "vested in and derives from [them]," is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be "founded upon their will only." *Id.*

¶ 130 The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights. N.C. Const. art. I, §§ 1–2. The principle of equality, adopted into our Declaration of Rights from the Declaration of Independence and the Gettysburg Address, provides that "all persons are created equal." N.C. Const. art. I, § 1. Meanwhile, under the principle of popular sovereignty, the "political power" of the people is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty. *See* Abraham Lincoln, "On Slavery and Democracy," *I Speeches and Writings*, 484 (1989) ("As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."); "Address at Gettysburg, Pennsylvania," *II Speeches and Writings* at 536 (connecting "the proposition that all men are created equal" to "government of the people, by the people, for the people"). Consequently, sections 1 and 2 of our Declaration of Rights, when read together, declare a commitment to a fundamental principle of democratic and political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights

today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our democratic constitutional system is violated. N.C. Const. art. I, §§ 1, 2; *see Bayard*, 1 N.C. (Mart.) at 7 (recognizing this principle in holding that judicial review is needed to prevent legislators from permanently insulating themselves from popular will); *see also* John Hart Ely, *Democracy and Distrust* 103 (1980) ("In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking of the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 131 In *Dickson v. Rucho*, we held a partisan gerrymandering challenge that legislative reapportionment plans violated the "Good of the Whole" clause failed because that argument "is not based upon a justiciable standard." 368 N.C. 481, 534 (2015). Of course, the judgment in *Dickson* was vacated on federal law grounds, 137 S. Ct. 2186 (2017). However, taken as a valid proposition of state law, it does not

follow that sections 1 and 2 *in toto* provide no guidance for determining the constitutionality and justiciability of partisan gerrymandering or do not aid in construing other constitutional provisions. The principle of political equality which we have articulated is a fundamental principle of our Declaration of Rights. *See* N.C. Const. art. I, § 35. Such fundamental principles guide us in part through the light they throw on other constitutional provisions. Accordingly, interpreting article I, section 2, we have held that "[t]his is a government of the people, by the people, and for the people, founded upon the will of the people, and in which the will of the people, legally expressed, must control" and reasoned that "[i]n construing [other] provisions of the constitution, we should keep in mind" this fundamental principle. *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428–29 (1897). While plaintiffs do not contend the enacted plans constitute partisan gerrymanders in violation of article I, sections 1 and 2, the fundamental principle of political equality underpinning those sections guides our interpretation of other provisions of the Declaration of Rights.

¶ 132 Plaintiffs allege Legislative Defendants' enacted plans violate the free elections clause under section 10, the free speech clause under section 14, the freedom of assembly clause under section 12, and the equal protection clause under section 19 of the Declaration of Rights as partisan gerrymanders. Along with guidance from the fundamental principles described above, in construing these provisions in the Declaration of Rights, we are mindful that:

> 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, 330 N.C. at 783 (cleaned up). More broadly, "a Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. Gardner*, 203 N.C. 749, 753 (1932). In interpreting these provisions, we remain mindful of our "duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes." *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002).

I. Free Elections Clause

¶ 133 Plaintiffs first argue that partisan gerrymandering violates the free elections clause in section 10 of our Declaration of Rights. The free elections clause has no analogue in the federal Constitution and is, accordingly, a provision that makes the state 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 clause provides, in laconic terms, "[a]ll elections shall be free." N.C. Const. art. I, § 10.

¶ 134 We turn to the history of the free elections clause. *See Sneed v. Greensboro City*

Bd. of Educ., 299 N.C. 609, 613 (1980) (noting in constitutional interpretation we consider "the history of the . . . provision and its antecedents"). The free elections clause was included in the 1776 Declaration of Rights. It was modeled on a nearly identical clause in Virginia's declaration of rights. *See* Va. Const. of 1776, Declaration of Rights, § 6 (1776); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929). The Virginia clause was derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. at 221. That provision provided "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). This provision of the 1689 English Bill of Rights was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution. J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007). Avoiding the manipulation of districts that diluted votes for electoral gain was, accordingly, a key principle of the reforms following the Glorious Revolution.

¶ 135 North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia. *See* John V.

Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992). Pennsylvania's free elections clause was enacted in response to laws that manipulated elections for representatives to Pennsylvania's colonial assembly. *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 804 (2018). Pennsylvania's version of the free elections clause was intended to end "the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs," *League of Women Voters of Pa.*, 645 Pa. at 108, 178 A.3d 737 at 808, and to codify an "explicit provision[ ] to establish protections of the right of the people to fair and equal representation in the governance of their affairs[.]" *id.* at 104, 178 A.3d 737 at 806.

¶ 136 Under North Carolina law, our free elections clause was also intended for that purpose. This clause was enacted with the preceding clause requiring "frequent elections," which provides that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. I, § 9. Construing these provisions *in pari materia*, it follows that the "elections" which the prefatory clause of section 9 calls for must be "free" as well as "frequent." As a matter of fundamental principle, these sections "concern[ ] the application of the principle of popular sovereignty, first stated in Section 2." Orth & Newby at 55. The free elections clause, accordingly, provides "free elections" as the most fundamental democratic process by which the principle of popular sovereignty is applied, and the government

"derive[s]" its power from the people and is "founded upon their will only." N.C. Const. art. I, § 2; *see also Quinn*, 120 N.C. at 426.

¶ 137 The free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain "electoral advantage" through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be "free and lawful." De Krey, *Restoration and Revolution in Britain* at 250. Legislative Defendants argue and the trial court concluded that the free elections clause could not be read to speak on partisan gerrymandering because Patrick Henry, one of the drafters of the Virginia free elections clause on which ours was based, engaged in the practice of partisan gerrymandering "to the detriment of James Madison" at the time of that clause's drafting.

¶ 138 We are unpersuaded by this evidence. First, the framers of our constitution did not establish fixed rules preemptively attempting to address every possible contingency. Thus, Legislative Defendants' attempt to fix the meaning of these provisions by sole reference to the practices thought permissible at the time they were enacted is not only inconsistent with hundreds of years of constitutional development, but it is also inconsistent with the intent of the people as expressed in their choice to espouse broad principles rather than narrow rules. Furthermore, the framers of North Carolina's constitution repeatedly articulated their intent to make the North Carolina Constitution responsive to the broader principles of the Glorious

Revolution.[13] The framers of North Carolina's constitution, such as James Iredell, believed that the American Revolution represented the fulfillment of the same principles vindicated by England's Glorious Revolution. *See generally* Speech by James Iredell to the Edenton District Superior Court Grand Jury (May 1778), *in* 13 *Colonial and State Records of North Carolina* 434–36, *available at* https://docsouth.unc.edu/csr/index.php/document/csr13-0498. And in 1775, prior to the drafting of the state constitution, North Carolina's delegates to the Continental Congress urged North Carolina to fight British attempts to infringe "those glorious Revolution principles." Circular letter from William Hooper, Joseph Hewes, and Richard Caswell to the inhabitants of North Carolina, *in* 10 *Colonial and State Records of North Carolina* 23. Finally, North Carolina's leaders demanded the election of delegates to the Provincial Congress "be free and impartial." Minutes of the North Carolina Council of Safety (Aug. 22, 1776), *in* 10 *Colonial and State Records of North Carolina* 702. These primary sources indicate that our founders did not hold the limited view that the only requirement for an election to be a "free" election was that those qualified had access to the ballot box, although that is also within the

[13] The trial court concluded the free elections clause in our Declaration of Rights "does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage," based in part on the history of the free elections clauses in the Virginia Declaration of Rights and the English Bill of Rights. But based on the history we have recounted, the perceived unfairness of drawing of borough lines for partisan advantage was a central concern of the Glorious Revolution, and the framers of the North Carolina Declaration of Rights and Constitution in 1776 expressed a strong commitment to the principles of the Glorious Revolution, including an insistence on elections being "impartial."

ambit of the clause; rather, they adhered to the broad principles of the Glorious Revolution—that all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the "rotten boroughs" of England, would be prohibited. Such a reading is consonant with section 2, which adopts the principle of popular sovereignty in order that the government be "founded upon [the people's] will only." N.C. Const. art. I, § 2.

¶ 139 Moreover, the precise wording of the free elections clause has changed over time. It originally read, "[E]lections of Members to serve as Representatives in General Assembly ought to be free." In 1868, in concert with its adoption of the equality principle in section 1, the Reconstruction Convention amended the free elections clause to read "[a]ll elections ought to be free." In 1971, the present version was adopted, changing "ought to" to the command "shall." This change was intended to "make it clear" that the free elections clause, along with other "rights secured to the people by the Declaration of Rights[,] are commands and not mere admonitions to proper conduct on the part of government." *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982) (quoting John L. Sanders, "The Constitutional Development of North Carolina," in *North Carolina Manual* 87, 94 (1979)). Accordingly, though those in power during the early history of our state may have viewed the free elections clause as a mere "admonition" to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement.

¶ 140 Finally, from the earliest language, the framers evidenced an intent to enshrine a broad principle of "free" elections, and this language is a direct application of the principle of popular sovereignty in section 2. *See* N.C. Const. art. 1, § 2. Since the Reconstruction Convention of 1868, it must also be textually read in concord with—and as giving effect to—the fundamental principle of equality, that "all persons are created equal," announced in section 1. *See* N.C. Const. art. 1, § 1. Therefore, even if "free" originally meant the electoral process would be available for some, at least since 1868, it must also mean that voters must not be denied voting power on an equal basis in harmony with this fundamental principle. Although our understanding of what is required to maintain free elections has evolved over time, there is no doubt these fundamental principles establish that elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government. When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters' partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people. This violates the free elections clause as interpreted against the backdrop of the fundamental principles in our Declaration of Rights. Accordingly, for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis.

¶ 141 Thus, partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. Partisan gerrymandering prevents election outcomes from reflecting the will of the people and such a claim is cognizable under the free elections clause.

2. Equal Protection Clause

¶ 142 Plaintiffs also argue that partisan gerrymandering is cognizable under the equal protection clause because partisan gerrymandering may violate every individual voter's fundamental right to vote on equal terms and the fundamental right to substantially equal voting power. We agree.

¶ 143 The equal protection clause provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. This clause was added to our Declaration of Rights with the adoption of the 1971 constitution. Although the language of this provision mirrors the federal Equal Protection Clause, "[i]t is beyond dispute that this Court 'ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' " *Stephenson*, 355 N.C. at 381 n.6

(second alteration in original) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). Our state constitution provides greater protection of voting rights than the federal Constitution. *Blankenship v. Bartlett*, 363 N.C. 518, 522–24 (2009); *Stephenson*, 355 N.C. at 376, 380–81, 381 n.6.

¶ 144 The equal protection clause in section 19 of our Declaration of Rights requires that if a government classification "impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990).

¶ 145 We have held that under our equal protection clause, "the right to vote on equal terms is a fundamental right." *Stephenson*, 355 N.C. at 378 (quoting *Northampton*, 326 N.C. at 747). In *Stephenson*, we further held that our equal protection clause protects "the fundamental right of each North Carolinian to substantially equal voting power." 355 N.C. at 379. Under our state constitution, the fundamental right to vote in elections, which is the central democratic process in our constitutional system through which the "political power" that inheres in the people under the fundamental principles of our Declaration of Rights is channeled to the people's representatives in government, encompasses "the principles of substantially equal voting power and substantially equal legislative representation." *Id.* at 382.

¶ 146 Accordingly, our state constitution's equal protection clause in article I, section 19 provides greater protections in redistricting cases than the federal constitution. In

Stephenson, we also held that the use of single-member and multi-member districts in a redistricting plan violated our state's equal protection clause. It did so because voters in multi-member districts had a greater opportunity to influence representatives, as "those living in [multi-member] districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative." *Id.* at 379. This "classification of voters" between single-member districts and multi-member districts created an "impermissible distinction among similarly situated citizens[,]" implicated "the fundamental right to vote on equal terms," *id.* at 378, and restricted the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. Accordingly, the redistricting plan triggered strict scrutiny, not because the government drew a distinction on the basis of a protected classification, but because the distinction the government drew implicated a fundamental right. *Id.* at 378. Under *Stephenson*, the fundamental right to substantially equal voting power is more expansive than any analogous fundamental right under the Equal Protection Clause of the Fourteenth Amendment, since that provision does not prohibit the use of single-member and multi-member legislative districts in one map. *See Fortson v. Dorsey*, 379 U.S. 433, 437 (1965) (holding that the use of multi-member and single-member districts in the same legislative map did not violate the Equal Protection Clause where there was "no mathematical disparity"

between voters).

¶ 147 Furthermore, the equal protection clause in article I, section 19 applies in circumstances where the federal Equal Protection Clause is silent. In *Blankenship v. Bartlett*, we held that our state's equal protection clause "requires a heightened level of scrutiny of judicial election districts," because it implicates the fundamental "right to vote on equal terms in representative elections," although federal courts have held the one-person, one-vote standard of the federal Equal Protection Clause is inapplicable to state judicial elections. *Blankenship*, 363 N.C. at 522–23 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)).

¶ 148 We hold here that partisan gerrymandering claims are cognizable under the equal protection clause of our Declaration of Rights. "[T]he fundamental right to vote on equal terms[,]" *Stephenson*, 355 N.C. at 378, includes the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. This necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority. Like the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power

diminishes the "representational influence" of voters. *Id.* at 377. Except, in the case of partisan gerrymandering, the effect on the representational influence is more severe because those who have been deprived equal voting power lack the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner voters of the favored party a governing majority. Accordingly, those voters have far fewer legislators who are "responsive" to their concerns and who can together "press their interests." *Id.* at 379.

¶ 149 Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality. *See* N.C. Const. art. I, §§ 1, 2. Popular sovereignty requires that for a government to be "of right" it must be "founded upon [the people's] will only." N.C. Const. art. I, § 2. In a statewide election, ascertaining the will of the people is straightforward. But in legislative elections, voters only have equal "representational influence" if results fairly reflect the will of the people not only district by district, but in aggregate, and on equal terms. *See Stephenson*, 355 N.C. at 377 (examining the effect of single-member and multi-member districts across the state). Otherwise, the "will" on which the government "is founded" is not that of the people of this state but that of the ruling party.

¶ 150 We conclude that when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate

with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power. Classifying voters on the basis of partisan affiliation so as to dilute their votes in this manner is subject to strict scrutiny because it burdens a fundamental right and is presumed unconstitutional unless narrowly tailored to a compelling governmental interest. *See Northampton*, 326 N.C. at 746 ("[I]f a classification impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification. Under the strict scrutiny test the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.").

3. Free Speech Clause and Freedom of Assembly Clause

¶ 151 Finally, plaintiffs argue that partisan gerrymandering is cognizable under the free speech clause under section 14 and the freedom of assembly clause under section 12 of our Declaration of Rights. We agree.

¶ 152 Our free speech clause provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14. Our freedom of assembly clause provides, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to

instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* § 12. These provisions textually differ from their federal analogues, and we have construed them to provide greater protection than those provisions.

¶ 153 In *Corum*, this Court construed the free speech clause in our Declaration of Rights. 330 N.C. at 781. The plaintiff alleged "retaliation against plaintiff for his exercise of certain free speech rights." *Id.* at 766. He brought a claim for, *inter alia*, a direct cause of action under article I, section 14 of the state constitution. *Id.* We reasoned that "[t]he words 'shall never be restrained' are a direct personal guarantee of each citizen's right of freedom of speech[,]" *id.* at 781; that this provision "is self-executing[,]" *id.* at 782; and, accordingly, "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right[,]" *id.* We observed concerning the free speech clause that

> [t]his great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. A direct action against the State for its violations of free speech is essential to the preservation of free speech.

Id. (cleaned up). Under the Court's decision in *Corum*, government action that burdens people because of disfavored speech or association violates the free speech clause. *Id.* at 766. The retaliation in *Corum* involved the allegation that government

actors conditioned the plaintiff's public employment (in that case, through demotion) on limitations upon the plaintiff's free speech and expression. *See id.* at 776. In essence, by allegedly conditioning a public right or benefit (the plaintiff's employment) on speech, the government accomplished indirectly what it could not have accomplished directly, and it penalized plaintiff's protected free speech rights based on his views.

¶ 154 In recognizing a direct cause of action for plaintiff's retaliation claim under the free speech clause, we construed the clause more expansively than the Supreme Court of the United States has construed the Free Speech Clause of the First Amendment, since that Court has not recognized a comparable direct constitutional claim under that provision for retaliation. Even when federal free speech principles are persuasive, we reserve the right to extend the reach of our free speech clause beyond the scope of the First Amendment. *See Libertarian Party v. State*, 365 N.C. 41, 47 (2011).

¶ 155 Free speech and freedom of assembly rights are essential to the preservation of our constitutional system. We have held that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party*, 365 N.C. at 49. In *Libertarian Party*, we reasoned that "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Id.* at 49.

¶ 156 The role of free speech is also central in our democratic system. As one scholar has noted:

> Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970). Since 1776, the people of North Carolina have founded our constitutional system on the premise that "[a]ll political power is vested in and derived from the people" and that "government of right" must "originate[ ] from the people" and be "founded upon their will only." N.C. Const. art. I, § 2. Since 1868, they have recognized that "all persons are created equal." N.C. Const. art. I, § 1. And since 1971, they have recognized that "[f]reedom of speech" is one "of the great bulwarks of liberty" and therefore "shall never be restrained." N.C. Const. art. I, § 14.

¶ 157 Partisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system. In *Corum*, we recognized that under the free speech clause, state officials may not penalize people for the exercise of their protected rights. But partisan gerrymandering does just that. When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting

power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny. *See State v. Petersilie*, 334 N.C. 169, 182 (1993). This practice subjects certain voters to disfavored status based on their views, undermines the role of free speech and association in formation of the common judgment, and distorts the expression of the people's will and the channeling of the political power derived from them to their representatives in government based on viewpoint.

4. The Declaration of Rights and the Law of Partisan Gerrymandering Summarized

¶ 158 In summary, the two most fundamental principles of our Declaration of Rights are equality and popular sovereignty. N.C. Const. art. I, §§ 1, 2. Together, they reflect the democratic theory of our constitutional system: the principle of political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of

political equality that is fundamental to our Declaration of Rights and our constitutionally enacted representative system of government is violated.

¶ 159 This principle is reflected in various provisions of our Declaration of Rights. The free elections clause under section 10 guarantees the central democratic process by which the people's political power is transferred to their representatives. The equal protection clause prohibits government from burdening on the basis of partisan affiliation the fundamental right to equal voting power. And the free speech clause and the freedom of assembly clause prohibit discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity.

¶ 160 Partisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights. To comply with the constitutional limitations contained in the Declaration of Rights which are applicable to redistricting plans, the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. The right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens

to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.

¶ 161 This diminution or dilution of a voter's voting power on the basis of his or her views can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions. Similarly, the diminution or dilution of voting power based of partisan affiliation in this way suffices to show a burden on that voter's speech and associational rights. Accordingly, such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenso*n, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental

interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government as secured in the above provisions in the Declaration of Rights.

¶ 162 Here, the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district.[14] Certainly it is possible, as the plaintiffs and the trial court demonstrated, to identify which individual districts in the state legislative maps ignore traditional redistricting principles to achieve a partisan outcome that otherwise would not occur. It is possible to identify the most gerrymandered individual districts. But here the violation is statewide because of the evidence that on the whole, the districts have been drawn such that voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party. The effect is stark and even more severe than what this Court identified in *Stephenson* as the equal protection clause violation arising from the use of both single-member and multi-member districts in a redistricting plan. *See Stephenson*, 355 N.C. at 379–82.

¶ 163 We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively

[14] This is not to rule out the possibility that under an equal protection theory or a free speech theory there may be a circumstance where a single district is a partisan gerrymander but that is not the situation here.

demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment."). As in *Reynolds*, "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* However, as the trial court's findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography.[15] If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across

[15] Further, while adherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest, the disregarding of neutral criteria such as compactness, contiguity, and respect for political subdivisions, particularly when the effect of the map subordinates those criteria to pursuit of partisan advantage, may also be some evidence a map burdens the fundamental right to equal voting power.

the plan, then the plan is presumptively constitutional.

¶ 164 To be sure, the evidence in this case and in prior partisan gerrymandering cases provides ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders. There is such a thing as a plan that creates a level playing field for all voters. Indeed, historically, there is evidence indicating that most redistricting plans actually have provided for partisan fairness instead of partisan advantage. *See, e.g., Common Cause v. Rucho*, 318 F. Supp. 3d 777, 886–87 (M.D.N.C. 2018), *rev'd on other grounds* 139 S. Ct. 2484 (2019) (finding that North Carolina's efficiency gap of 19.4% was the largest of all states studied and that between 1972 and 2016, the distribution of efficiency gaps centered on zero "meaning that, on average, the districting plans in [t]his sample did not tend to favor either party"). Those who deny such standards exist ignore what the public sees and experiences and what political scientists have demonstrated.

¶ 165 Several possible bright-line standards have emerged in the political science literature and in the parties' briefing before this Court. For example, Dr. Duchin testified at the trial to having analyzed North Carolina historical election data over a period of years, by using a simple overlay method, overlaying the maps onto data from all 52 of the statewide elections since 2012 to determine whether "close votes" resulted in "close seats," as one would see in all of the alternative maps to the enacted

plans. Under this method, which Dr. Duchin has written about extensively, a plan which persistently resulted in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional. As Dr. Duchin noted, "I don't think you get that large and durable [an effect of partisan skew] by accident."

¶ 166 Second, at the trial court below, Dr. Daniel Magleby presented a report in rebuttal of the testimony of Dr. Barber, in which he proposed using the measurement of the mean-median difference to determine the degree of partisan skew in a particular instance. His report described the method as follows:

> One of the simplest measures of symmetry we can apply to redistricting scenarios is the median-mean difference (see Katz, King and Rosenblatt 2020; MacDonald and Best 2015; Best et al. 2017) . . . We find [the median-mean difference] by taking the mean (average) of the district-level vote share and comparing it to the median district-level vote-share, the district-level vote share for which there are an equal number of districts with higher vote shares as there are districts with lower vote shares. When the median and mean are equal, the distribution of districts is symmetrical and the map will treat the parties with symmetry. If the median-mean is not zero, it means the map will not treat vote cast for the parties equally.

Thus, based on Dr. Magelby's testimony, any mean-median difference that is not zero could be treated as presumptively unconstitutional. However, using the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina's congressional redistricting plans was 1%. *Common Cause*, 318 F.

Supp. 3d at 893. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.

¶ 167 With regard to the efficiency gap measure, courts have found "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Whitford v. Gill,* 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev'd on other grounds* 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional. The efficiency gap, like other measures of partisan symmetry, "is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner's bonus should be approximately the same for both parties." *Common Cause*, 318 F. Supp. 3d at 889.

¶ 168 Other manageable standards appear in the evidence before the trial court as well. Legislative Defendants' own expert witness proposed using computer simulations to draw redistricting plans solely on the basis of traditional redistricting criteria, with any adopted redistricting plan with a partisan bias that fell within the middle 50% of simulation results being presumptively constitutional. It was also suggested that the legislature could be required to draw districts "within 5% of the median outcome expected from nonpartisan redistricting criteria, at a statewide

level, across a range of electoral circumstances." The development of such metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context. *See, e.g., Brown v. Thomson,* 462 U.S. 835, 842–43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." (citations omitted)).

¶ 169 There may be other standards the parties wish to suggest to the trial court. These are primarily questions of what evidence might be relevant to prove a redistricting plan's discriminatory effect under the free elections and equal protection clauses and a discriminatory burden to a right or benefit on the basis of protected political activity amounting to viewpoint discrimination and retaliation under the free speech and freedom of assembly clauses of the state constitution. Because this is not a strict proportionality requirement, there is no magic number of Democratic or Republican districts that is required, nor is there any constitutional requirement that a particular district be competitive or safe. To be clear, the fact that one party commands fifty-nine percent of the statewide vote share in a given election does not entitle the voters of that party to have representatives of its party comprise fifty-nine percent of the North Carolina House, North Carolina Senate, or North Carolina

congressional delegation. But those voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised fifty-nine percent of the statewide vote share in that same election. What matters here, as in the one-person, one-vote context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.

¶ 170 Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and "the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." *Northampton*, 326 N.C. at 746. As noted above, partisan advantage—that is, achieving a political party's advantage across a map incommensurate with its level of statewide voter support—is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative

government.[16] Rather, compelling governmental interests in the redistricting context include the traditional neutral districting criteria expressed in article II, sections 3 and 5 of the North Carolina Constitution. Incumbency protection may ordinarily be a permissible governmental interest if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution; however, incumbency protection is not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power under the North Carolina Constitution. Other widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests. If the General Assembly has created a map that infringes on individual voter's fundamental right to equal voting power and cannot show that the map is narrowly tailored to a compelling governmental interest, courts must conclude the map is unconstitutional and forbid its use.

¶ 171 The dissent contends that the partisan gerrymandering claims we recognize as violating both fundamental principles and particular provisions of our Declaration of Rights are not cognizable claims under that document. Our fundamental

[16] Political fairness, or the effort to apportion to each political party a share of seats commensurate with its level of statewide support, is a permissible redistricting criterion. *See Gaffney*, 412 U.S. at 736. However, achieving such a goal involves a government's prioritization of, rather than diminution and dilution of, each person's right to substantially equal voting power.

disagreement stems in one respect from a difference in method. Here, we have "recurre[d]" to those "fundamental principles" by which "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and [to] rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." Orth & Newby, at 91. In this light, the dissenters insist that the only way to discern the meaning of provisions of the North Carolina Constitution is to adhere to their own assessment of historical practice. In so doing, they interpret the state constitution in a manner the Framers and the constitution they enacted firmly rejected. If constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the dissent's view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people. Fortunately, the Framers and the people of North Carolina chose to adopt a constitution containing provisions which "provide[s] the elasticity which ensures the responsive operation of government." *State ex rel. Martin v. Preston*, 325 N.C. 438, 458 (1989).

¶ 172 Second, our disagreement with the dissenting opinion is compelled in part by our divergent views of the role of the courts in conducting judicial review for constitutionality. The justification for judicial review in North Carolina is motivated

by the concern for securing both the fundamental rights contained in our Declaration of Rights and our constitution, and for ensuring the effective functioning of the democratic system of government established by the same. In North Carolina, we presume the legislature has complied with the constitution. Where legislation does not violate a particular constitutional limitation, and particularly where it does not violate the rights protected by the Declaration of Rights, the presumption that the issue will be resolved through the ordinary political process is justified, and legislation will be upheld if there is a rational basis supporting it. However, in *Bayard v. Singleton* and since, we have identified two circumstances justifying judicial review by this Court. First, we will protect constitutional rights and, although they are by no means the only enforceable provisions of our constitution, the "civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," in particular. *Corum*, 330 N.C. at 782. "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," including the General Assembly. *Id.* at 783. Accordingly, "[w]e 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." *Id.* Fundamentally, "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of [its people]; this obligation

to protect the fundamental rights of individuals is as old as the State." *Id.* Indeed, we have recognized this duty since *Bayard*, where we held that legislation violated the right to a trial by jury. 1 N.C. (Mart.) at 7. *Bayard* justified review of all such rights on the ground that any erosion of rights endangered other rights. *See id.* (justifying review of "right to a decision of his property by a trial by jury" on the grounds that "if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all").

¶ 173 Further this court has recognized an even greater justification for judicial review of acts that restrict the democratic processes through which the "political power" is channeled to the people's representatives, and which undermine the very democratic system created by our constitution. In *Bayard*, this Court justified judicial review of acts of the coordinate branches not only because without it they might violate fundamental rights, but also on the grounds of an even greater harm that without judicial review "the members of the General Assembly . . . might with equal authority, . . . render themselves the Legislators of the State for life, without any further election of the people." *Id.* Just as it is the duty of this Court under *Bayard* to guarantee constitutional rights protecting liberty, person, and property, it is the duty of this Court under *Bayard* to protect the democratic processes through which the

"political power" of the people is exercised, and that each person's voice is heard on "equal" terms through the vote. N.C. Const. art. I, §§ 2, 1; *see, e.g., Stephenson* 355 N.C. at 379 (recognizing "the fundamental right of each North Carolinian to substantially equal voting power"); *Northampton*, 326 N.C. at 747 (holding the "right to vote on equal terms is a fundamental right"); *People ex rel. Van Bokkelen*, 73 N.C. at 225 (holding it to be "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles"); Ely, *Democracy and Distrust* at 103 ("Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 174 Partisan gerrymandering claims do not require the making of "policy choices and value determinations." *Bacon*, 353 N.C. at 717. As we have discussed, such claims are discernable under the North Carolina Constitution and precedent. Moreover, we have described several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation. Accordingly, we hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights.

E. Legislative Defendants' Elections Clause Argument

¶ 175 Legislative Defendants also argue that "the federal constitution bars

plaintiffs['] claims against the congressional plan" under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, because the word "Legislature" in that clause forbids state courts from reviewing a congressional districting plan violates the state's own constitution. We disagree. This argument, which was not presented at the trial court, is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015. It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.

¶ 176 First, this theory contradicts the holding of *Rucho*, where the Supreme Court of the United States, in an opinion authored by Chief Justice Roberts, said that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in a case addressing the justiciability of partisan gerrymandering claims in *congressional* plans. 139 S. Ct. at 2507 (emphases added).

¶ 177 Second, a long line of decisions by the Supreme Court of the United States confirm the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided" (emphasis added)). The state legislature's enactment of election laws reflects an exercise of the lawmaking power;

accordingly, the legislature must comply with all of "the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369; *see also Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Growe v. Emison*, 507 U.S. 25, 33–34 (1993) (emphasizing "[t]he power of the judiciary of a State to require valid reapportionment" of congressional districts and rejecting the federal district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts").

F. The 2021 Enacted Plans Violate the Declaration of Rights as Partisan Gerrymanders

¶ 178 Now, we must apply these legal principles to the 2021 enacted plans in order to determine if the current maps constitute partisan gerrymanders in violation of the North Carolina Constitution's Declaration of Rights. We conclude that they do and therefore enjoin the enacted plans from use in any future elections and, in accordance with N.C.G.S. § 120-2.4(a), provide the General Assembly the opportunity to submit new redistricting plans that satisfy all provisions of the North Carolina Constitution.

¶ 179 As discussed above, the General Assembly triggers strict scrutiny under the free elections clause and the equal protection clause of the North Carolina

Constitution when, on the basis of partisan affiliation, it deprives a voter of his or her fundamental right to substantially equal voting power. This fundamental right encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly infringes upon that voter's fundamental right to vote. Similarly, this action is subject to strict scrutiny under the free speech clause and freedom of assembly clause because it burdens voters on the basis of protected political activity.

¶ 180 To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views. Such a demonstration can be made using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can

plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

¶ 181 The right to vote on equal terms is a fundamental right in this state and thus when a challenging party demonstrates that a redistricting plan, on the basis of partisan affiliation, infringes upon his or her fundamental right to substantially equal voting power, strict scrutiny is the appropriate standard for reviewing that act. *See Stephenson*, 355 N.C. at 377 ("Strict scrutiny . . . applies when the classification impermissibly interferes with the exercise of a fundamental right . . . ." (cleaned up)). Strict scrutiny is "this Court's highest tier of review." *Id.* "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* Within the redistricting context, compliance with traditional neutral districting principles, including those enumerated in article II, sections 3 and 5 of the North Carolina Constitution, may constitute a compelling governmental interest. Partisan advantage, however, is not a compelling governmental interest.

¶ 182 Here, we apply this standard to each of the three 2021 enacted maps: the congressional map, the North Carolina House map, and the North Carolina Senate map. As noted previously, we have adopted in full the extensive and detailed factual findings of the trial court summarized above and have attached the maps themselves to this opinion.

1. Congressional Map

¶ 183 First, we apply this constitutional standard to the 2021 congressional map. Based on the trial court's factual findings, we conclude that the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 184 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found "that the Congressional Map is the product of intentional, pro-Republican partisan redistricting. Indeed, the court found that

> [a]cross [the] 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 185 Accordingly, the court found that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' " The

court found that this high non-responsiveness was a product of "cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts," which the court described as "the key signature of intentional partisan redistricting."

¶ 186 Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 187 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the [billions or trillions of] comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm."

¶ 188 Based on Dr. Duchin's analysis, the trial court found "that the political

geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates."

¶ 189 Based on Dr. Cooper's close-votes-close-seats analysis, the trial court found that individual congressional districts were drawn to favor certain current or future Republican representatives. For instance, the court found that the congressional map "places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 190 The trial court found that the congressional map constituted a statistical partisan outlier on the regional level, as well. Specifically, the court found that "that the enacted congressional plan[s] districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions."

¶ 191 More broadly, though, the trial court found that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a

particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in [larger urban] counties has 'ripple effects throughout the map.' "

¶ 192 The trial court considered several different types of statistical analysis in confirming that the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria." These included: (1) "mean-median difference" analysis; (2) "efficiency gap" analysis; (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis.

¶ 193 In sum, the trial court found "that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found "that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness." Ultimately, the court "concluded based upon a

careful review of all the evidence that the [congressional map is] a result of intentional, pro-Republican partisan redistricting."

¶ 194 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 congressional map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally. Accordingly, we must review the congressional map under strict scrutiny.

¶ 195 Defendants have not shown the 2021 congressional map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted above, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of plaintiffs' fundamental right to substantially equal voting power, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable

neutral principles. Here, the General Assembly has failed to make that showing. Indeed, the trial court explicitly found that the congressional maps demonstrate a *subordination* of traditional neutral criteria, including compactness and minimizing county and VTD splits, in favor of partisan advantage. We conclude that the General Assembly has not demonstrated that the congressional map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. Accordingly, the congressional map fails strict scrutiny and must be rejected.

2. State House Map

¶ 196 Next, we apply this constitutional standard to the 2021 North Carolina State House map. Based on the trial court's factual findings, we conclude that the 2021 State House map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 197 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the

> partisan results were more extreme than what would be seen from nonpartisan maps.

¶ 198 Indeed, the court found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the state House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " Further, the court found that the mapmakers' selective failure to preserve municipalities in the House map, when they did preserve them in the Senate map, was based solely on considerations of partisan advantage.

¶ 199 Based on Dr. Pegden's analysis, the court found that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 200 Based on Dr. Cooper's analysis, the trial court found that "Legislative Defendants' exercise of . . . discretion in the . . . House 2021 Plans resulted in . . . House district boundaries that enhanced the Republican candidates' partisan

advantage, and this finding is consistent with a finding of partisan intent."

¶ 201 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that the House map is "designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates." "As with the Enacted Congressional Plan . . . , the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 202 Based on Dr. Magleby's median-mean differential analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined "that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 203 Finally, based on all of the evidence presented, the trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan

redistricting": the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Ultimately, the court "conclude[d] based upon a careful review of all the evidence that the [House map is] a result of intentional, pro-Republican partisan redistricting."

¶ 204 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina House map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the House map under strict scrutiny.

¶ 205 Defendants have not shown the 2021 House map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted already, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those

expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional map above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria in the creation of the House map, the General Assembly has not demonstrated that the House map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some neutral priority. Indeed, the evidence establishes that the General Assembly subordinated these neutral priorities, such as preserving municipalities, in favor of partisan advantage. Accordingly, the North Carolina House map fails strict scrutiny and must be rejected.

3. State Senate Map

¶ 206 Third and finally, we apply this constitutional standard to the 2021 North Carolina State Senate map. Based on the trial court's factual findings, we conclude that the 2021 State Senate map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 207 As with the two previous maps, numerous factual findings compel our conclusion. For instance, based on Dr. Cooper's analysis, the court found that "Legislative Defendants' exercise of . . . discretion in the Senate . . . Plans resulted in . . . district boundaries that enhanced the Republican candidates' partisan advantage,

and this finding is consistent with a finding of partisan intent."

¶ 208 Based on Dr. Mattingly's ensemble analysis, the court found "that the State . . . Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.' " The court found that this intentional partisan redistricting in the Senate "is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it." Specifically, the court found that the Senate plan "is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority."

¶ 209 Based on Dr. Pegden's analysis, the court determined "that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 210 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a

> majority in the Senate even when Democrats win more votes. Even in an essentially tied election or in a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 211 Finally, based on all of the evidence presented at trial, the trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the

Senate district groupings it considered to not be the result of intentional, pro-Republican redistricting through packing and cracking. Ultimately, the court "concluded based upon a careful review of all the evidence that the [Senate map is] a result of intentional, pro-Republican partisan redistricting.

¶ 212 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina Senate map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the Senate map under strict scrutiny.

¶ 213 Conducting that review, we conclude that defendants have not shown the 2021 Senate map is narrowly tailored to a compelling governmental interest and therefore the map fails strict scrutiny. Partisan advantage is not a compelling governmental interest. Rather, the General Assembly must show that the Senate map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional and House maps above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that

partisan advantage predominated over any traditional neutral districting criteria in the creation of the Senate map, the General Assembly has not demonstrated that the Senate map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. To the contrary, the evidence demonstrates that the Senate map prioritized considerations of partisan advantage above traditional neutral districting principles. Accordingly, the North Carolina Senate map fails strict scrutiny and must be rejected.

G. Compliance with *Stephenson* requirements

¶ 214 Finally, we further hold that under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines. Notably, the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law. In *Stephenson*, this Court sought to harmonize several sections of our state constitution—namely the whole county provision of article II, sections 3(3) and 5(3) and the supremacy clause of article I, section 3— in light of the federal requirements established by Section 5 and Section 2 of the VRA. 355 N.C. at 359. Of course, since the 2013 decision of the Supreme Court of the United States in *Shelby County v. Holder*, 570 U.S. 529 (2013), in which it held that the coverage formula for the preclearance requirement under Section 5 of the VRA was no longer justified under

the Fourteenth Amendment and held that section was unconstitutional, North Carolina has not been subject to that preclearance requirement.

¶ 215 Nevertheless, the *Stephenson* Court ruling relied exclusively on interpretation of the North Carolina Constitution. Indeed, after the *Stephenson* defendants initially removed the case to federal district court, the district court remanded the case, stating that "the redistricting process was a matter primarily within the province of the states, that plaintiffs have challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions, that the complaint 'only raises issues of state law,' and that defendants' removal of th[e] suit from state court was inappropriate." *Stephenson*, 355 N.C. at 358. Further, when the *Stephenson* defendants "subsequently filed a notice of appeal from the District Court's order with the United States Court of Appeals for the Fourth Circuit[,] . . . [t]he Fourth Circuit denied defendants' motion to stay the District Court's order of remand." *Id.*

¶ 216 Here, as in *Stephenson*, plaintiffs' claims arise under the same provisions of the North Carolina Constitution implicated in *Stephenson*—namely article I, sections 3 and 5 and article II, sections 3 and 5. Here, as in *Stephenson*, this Court serves as the highest and final authority in interpreting those state constitutional provisions. And here, as in *Stephenson*, we hold that compliance with those provisions, when read in harmony, requires the General Assembly to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any

steps must be taken to avoid the dilution of minority voting strength.

III. Conclusion

¶ 217 Article I, section 2 of the North Carolina Constitution establishes that "[a]ll political power is vested in and derived from the people," that "all government of rights originates from the people," and "is founded upon their will only." N.C. Const. art I, § 2. Furthermore, article I, section 1 of the constitution provides that "all persons are created equal." N.C. Const. art I, § 1. Subsequent constitutional provisions within the Declaration of Rights, including the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, protect fundamental rights of the people in order to ensure, among other things, that their government is indeed "founded upon their will only." *See id.*

¶ 218 When North Carolinians claim that acts of their government violate these fundamental rights, and particularly when those acts choke off the democratic processes that channel political power from the people to their representatives, it is the solemn duty of this Court to review those acts to enforce the guarantees of our constitution. *See Corum*, 330 N.C. at 783. Such judicial review ensures that despite present day challenges our constitution's most fundamental principles are preserved. Indeed, "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.

¶ 219 Today, this Court recurs to those fundamental principles. Specifically, we have

considered whether partisan gerrymandering claims present a justiciable question, whether constitutional provisions supply administrable standards, and whether, having applied these standards, the General Assembly's 2021 enacted plans constitute such a violation of plaintiffs' constitutional rights.

¶ 220 First, we hold that claims of partisan gerrymandering are justiciable under the North Carolina Constitution. Although the primary responsibility for redistricting is constitutionally delegated to the General Assembly, this is not a delegation of unlimited power; the exercise of this power is subject to restrictions imposed by other constitutional provisions, including the Declaration of Rights. Further, as demonstrated through our analysis of the constitutional provisions at issue and the extensive factual findings of the trial court, claims of partisan gerrymandering can be carefully discerned and governed by manageable judicial standards.

¶ 221 Second, we hold that the General Assembly infringes upon voters' fundamental rights when, on the basis of partisan affiliation, it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights. We hold it also constitutes viewpoint discrimination and retaliation based on protected political activity in violation of the free speech clause and the freedom of assembly clause in our Declaration of Rights. When a redistricting plan creates such an infringement of fundamental rights, strict scrutiny must be applied to determine whether the plan is

nevertheless narrowly tailored to advance a compelling governmental interest.

¶ 222 Here, we hold that the General Assembly's 2021 enacted plans are partisan gerrymanders that on the basis of partisan affiliation substantially infringe upon plaintiffs' fundamental right to equal voting power. Finally, we hold that the enacted plans fail strict scrutiny and must therefore be struck down.

¶ 223 We reverse the trial court's judgment and remand this case to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court. In accordance with our 4 February 2022 order and our decision today, the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution.[17] It is the sincere hope of this Court that these new maps ensure that the channeling of "political power" from the people to their representatives in government through elections, the central democratic process envisioned by our constitutional system, is done on equal terms so that ours is a "government of right" that "originates from the people" and speaks with their voice.

REVERSED AND REMANDED.

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[17] In doing so, we hold they must also conduct racially polarized voting analysis to comply with the constitutional requirements under *Stephenson*. As we have reversed the judgment of the trial court based on its conclusions about the partisan gerrymandering claims, we decline to determine whether NCLCV Plaintiffs could also prevail on their minority vote dilution claim or whether plaintiff Common Cause could prevail on its intentional racial discrimination claim at this time.

Justice MORGAN concurring.

¶ 224 While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed. The substantive construction of the constitutional provision is buttressed by the contextual construction of the brief, yet potent, directive.

¶ 225 The entirety of article I, section 10 of the North Carolina Constitution states: "All elections shall be free." N.C. Const. art. I, § 10. The dissenting view of this Court, the order of the trial court, and the presentations of Legislative Defendants have largely declined the opportunity to address the manner in which the term "free" should be interpreted as compared to plaintiffs' significant reliance on the applicability of the Free Elections Clause. In this regard, plaintiffs' invocation of the constitutional provision has either been cast as inapplicable to this case or relegable to a diminished role. To the extent that the word "free" in article I, section 10 has been construed here by Legislative Defendants, they conflate the right to a free election with the right to be free to participate in the election process, stating "there is no barrier between any voter and a ballot or a ballot box, no restriction on the candidates the voter may select, and no bar on a person's ability to seek candidacy for any office" and also citing the proposition that "[t]he meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation," quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed.

2013). And curiously, instead of focusing on how elections *must* be free, the dissent chooses to focus on how the General Assembly should be free to create legislative election maps admittedly based on politically partisan considerations.

¶ 226 In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination. Commensurate with the General Assembly's constitutional authority to draw legislative maps is one's constitutional right to participate in legislative elections which shall be free of actions—such as the General Assembly's creation of the legislative redistricting maps here—which are tantamount to the predetermination of elections and, hence, constitute constitutional abridgement.

Justice EARLS joins in this concurring opinion.

Chief Justice NEWBY dissenting.

¶ 227 How should a constitution be interpreted? Should its meaning be fixed or changing? If changing, to whom have the people given the task of changing it? When judges change the meaning of a constitution, does this undermine public trust and confidence in the judicial process? Traditionally, honoring the constitutional role assigned to the legislative branch, this Court has stated that acts of the General Assembly are presumed constitutional and deserving of the most deferential standard of review: To be unconstitutional, an act of the General Assembly must violate an explicit provision of our constitution beyond a reasonable doubt. We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by its text. This approach of having a fixed meaning and a deferential standard of review ensures a judge will perform his or her assigned role and not become a policymaker.

¶ 228 With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting. They change the time-honored meaning of various portions of our constitution by inserting their interpretation to reach their desired outcome. They justify this activism because their understanding of certain constitutional provisions has "evolved over time." They lament that the people have not placed a provision in our constitution for a "citizen referendum" and use the absence of such a provision to justify their judicial activism to amend our constitution. The majority

says courts must protect constitutional rights. This is true. Courts are not, however, to judicially amend the constitution to create those rights. As explicitly stated in our constitution, the people alone have the authority to alter our foundational document, and the people have the final say.

¶ 229 In its analysis, the majority misstates the history, the case law of this Court, and the meaning of various portions of our Declaration of Rights. In its remedy the majority replaces established principles with ambiguity, basically saying that judges alone know which redistricting plan will be constitutional and accepted by this Court based on analysis by political scientists. This approach ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences.

¶ 230 Generally, the majority takes a sweeping brush and enacts its own policy preferences of achieving statewide proportionality as determined by political scientists and approved by judges. While mentioning traditional, neutral redistricting criteria, its primary focus is instead on the final partisanship analysis to achieve statewide parity.

¶ 231 The majority requires the General Assembly to finalize corrected maps within two weeks of the 4 February 2022 order along with an accompanying political science analysis. The majority invites others, who have not been elected by the people, to provide alternative maps without that same required analysis, thus inviting private

parties to usurp legislative authority to make the laws with respect to redistricting without explanation. The majority forces this directive into an artificial timeline which could support the majority's adopting its own maps.

¶ 232 A recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations. N.C. Comm'n on the Admin. of L. & Just., *Final Report* 67 (2017). Today's decision, which dramatically departs from our time-honored standard of requiring proof that an explicit provision of the constitution is violated beyond a reasonable doubt, will solidify this belief.[1]

¶ 233 The people speak through the express language of their constitution. They have assigned specific tasks to each branch of government. When each branch stays within its lane of authority, the will of the people is achieved. When a branch grasps a task assigned to another, that incursion violates separation of powers and thwarts the will of the people. This decision, with its various policy determinations, judicially amends the constitution. Furthermore, it places redistricting squarely in the hands of four justices and not the legislature as expressly assigned by the constitution. The

[1] It does not help public confidence that in an unprecedented act, a member of the majority used social media to publicize this Court's initial order when it was released, despite the fact that the case was still pending. *See* Anita Earls (@Anita_Earls), Twitter (Feb. 4, 2022, 6:28 PM), https://twitter.com/Anita_Earls/status/1489742665356910596 ("Based on the trial court's factual findings, we conclude that the congressional and legislative maps . . . are unconstitutional beyond a reasonable doubt." (alteration in original)).

majority's determinations violate the will of the people, making us a government of judges, not of the people. I respectfully dissent.

I. Standard of Review

¶ 234 The question presented here is whether the enacted plans violate the North Carolina Constitution. While the standard of review is significant in all cases, it is particularly important in cases challenging the constitutionality of a statute.

> The idea of one branch of government, the judiciary, preventing another branch of government, the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) ("[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation."), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805) (Hall, J., dissenting) ("A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another's error of judgment . . . when he reflects that each has given the same pledges to support the Constitution."). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336–37, 410 S.E.2d 887, 890 (1991).

State ex rel. McCrory v. Berger, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part) (footnote omitted).

¶ 235 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *Baker*, 330 N.C. at 337, 410 S.E.2d at 891. Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* at 515, 119 S.E.2d at 891 (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). Because the General Assembly serves as "the agent of the people for enacting laws," *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), the General Assembly has plenary power, and a restriction on the General Assembly is in fact a restriction on the people themselves, *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be (1) express and (2) proved beyond a reasonable doubt. *Id.* at 334, 410 S.E.2d at 889. When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution.[2]

[2] Furthermore, "[i]ssues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.'" *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d

¶ 236 This standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the nation's first reported case of judicial review. The majority cites *Bayard* in an effort to support its contention that judicial interference is necessary here "to prevent legislators from permanently insulating themselves from popular will." But *Bayard*, rightly understood, was simply about the authority of the Court to declare unconstitutional a law which violated an *express* provision of the constitution. It was not about limiting the General Assembly's authority to make discretionary political decisions within its express authority. *Bayard* involved a pointed assault on a clearly expressed and easily discernible *individual* right in the 1776 constitution, the right to a trial by jury "in all controversies at Law respecting Property." N.C. Const. of 1776, § XIV. There the court weighed the General Assembly's ability to enact a statute that abolished the right to a jury trial for property disputes—for some citizens in some instances—in direct contradiction of the express text of the constitution, the fundamental law of the land:

> That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General

473, 478 (1989)). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Id.* (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479).

> Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

Bayard, 1 N.C. at 7. Thus, the holding of *Bayard v. Singleton* is easily understood: A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and express will of the people; it is the role of the judiciary to perform this judicial review. The *Bayard* holding, however, does not support the proposition that this Court has the authority to involve itself in a matter that is both constitutionally committed to the General Assembly and lacking in manageable legal standards. Thus, plainly stated and as applied to this case, the uncontroverted standard of review asks whether plaintiffs have shown that the challenged statutes, presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt.

II. Justiciability

¶ 237 The Supreme Court of the United States has explained that "as essentially a function of the separation of powers," courts must refuse to review issues that are better suited for the political branches; these issues are nonjusticiable.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is

> found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962); *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Thus, respect for separation of powers requires a court to refrain from entertaining a claim if any of the following are shown: (1) a textually demonstrable commitment of the matter to another political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution of a matter without expressing lack of the respect due to a coordinate branch of government. Often the second, third, and fourth factors are collectively referred to as lacking a manageable standard.

A. Manageable Standards

¶ 238 In addressing the manageable standards analysis, the Supreme Court recently held that partisan gerrymandering claims present nonjusticiable political questions, and it warned of the pitfalls inherent in such claims. *See Rucho v. Common Cause*,

139 S. Ct. 2484, 2506–07 (2019).[3] In *Rucho* "[v]oters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders." *Id.* at 2491. "The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution." *Id.* As such, the Supreme Court was tasked with deciding "whether claims of excessive partisanship in districting are 'justiciable'—that is, properly suited for resolution by the federal courts." *Id.*

¶ 239 In seeking to answer this question, the Court provided the following historical background:

> Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. . . .
>
> . . . .
>
> . . . The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over

[3] It should be noted that several of the attorneys in *Rucho* are also litigating this case. Similar claims are presented here and similar remedies requested, only this time based on our state constitution, not the Federal Constitution. Neither the Federal Constitution nor the state constitution have explicit provisions addressing partisan gerrymandering. Likewise, some of the plaintiffs' experts in *Rucho* are the same experts as used here.

> elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

Id. at 2494–96 (alteration in original). The Court then noted that "[i]n two areas—[equal voting power defined as] one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495–96. It specified, however, that

> [p]artisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw* [*v. Reno*], 509 U.S. [630,] 646, 113 S.Ct. 2816[, 125 L.Ed. 2d 511 (1993)]). *See also Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

Id. at 2497 (last alteration in original). Thus, the Court reasoned that

> [t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* [*v. Jubelirer*], 541 U.S. [267,] 296, 124 S.Ct. 1769 [(2004)] (plurality opinion). *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

Id. The Court then highlighted its "mindful[ness] of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment)." *Id.* at 2498. The Court further clarified that

> [a]n important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis v.*] *Bandemer*, 478 U.S. [109,] 145, 106 S.Ct. 2797 [(1986)] (opinion of O'Connor, J.). *See Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

Id. (first alteration in original). As such, the Supreme Court concluded that "[i]f federal courts are to 'inject [themselves] into the most heated partisan issues' by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. at 2797 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (second alteration in original) (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1545).

¶ 240 The Court also explained that partisan gerrymandering claims are effectively requests for courts to allocate political power based upon a principle of proportionality:

> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." [*Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797.] "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").
>
> The Founders certainly did not think proportional representation was required. For more than 50 years after

> ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.
>
> Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.

Id. at 2499. The Court thus determined that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* (quoting *Vieth*, 541 U.S. at 291, 124 S.Ct. 1769 (plurality opinion) (stating that: " 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.")).

¶ 241 The Court also explained that the Federal Constitution is devoid of any metric for measuring political fairness:

> Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Id. at 2501. The Court then turned to the shortcomings of the political science-based tests that the plaintiffs proposed for determining the permissibility of partisan gerrymandering:

> The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and

> Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.
>
> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Id. at 2503–04 (citations omitted).

¶ 242 The Supreme Court concluded "that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2506–07. The Court's discussion in *Rucho* of its previous decision in *Bandemer,* especially its reference to Justice O'Connor's concurring opinion, serves as a cautionary tale for the dangers that loom when a court thrusts

itself into the political thicket guided by nothing more than a "nebulous standard." *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring). The Supreme Court did state that some state constitutions might provide the explicit guidance necessary to adjudicate partisan gerrymandering claims.

¶ 243 For specific guidance, the Court mentioned a case in which "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Rucho,* 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015)). Notably, in *Detzner* the state court was directed by the following express constitutional provision:

> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not

> be read to establish any priority of one standard over the other within that subsection.

Fla. Const. art. III, § 20 (footnotes omitted). When the Supreme Court referenced the use of state constitutions to address claims of partisan gerrymandering, it was referring to explicit prohibitions found in state constitutions, not to those created by judges as this Court does today. When asked by the dissent why the majority did not follow the Florida court's lead, the majority said, "The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution." *Rucho*, 139 S. Ct. at 2507.

¶ 244 Here the majority opinion confirms the truth of all the warnings given by the Supreme Court that there is no manageable standard for adjudicating claims of partisan gerrymandering. The will of the people of Florida is fully and clearly expressed in their constitution. Like the Federal Constitution, there is no provision in our state constitution remotely comparable to this express provision in the Florida Constitution. As the Supreme Court said, with an express provision, states are better "armed with a standard that can reliably differentiate" between constitutional and unconstitutional political gerrymandering. *See Rucho,* 139 S. Ct. at 2499. Instead, the majority inexplicably takes the Court's statement that the "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," *id.* at 2507, as an unrestricted license to judicially amend our constitution. In doing so, the majority wholly ignores the fact that the Court in *Rucho* identified several state constitutional provisions and statutes that are clear, manageable, and

express as examples of workable standards for assessing political gerrymandering. *See id.* at 2507–08.

¶ 245 The North Carolina Constitution could have a provision like the Florida Constitution. But, to do so properly requires the amendment process authorized in the constitution itself, allowing the people to determine the wisdom of this new policy. Instead of following the constitutionally required process for properly amending the constitution, the majority now does so by judicial fiat, effectively placing in the constitution that any redistricting plan cannot "on the basis of partisan affiliation . . . deprive[ ] a voter of his or her fundamental right to substantially equal voting power" as determined by certain political science tests. Would the people have adopted this constitutional amendment? We do not know, and the majority does not care.

¶ 246 The plaintiffs in *Rucho* presented arguments and evidence similar to what was presented here—that the use of certain political science theories could provide a manageable standard. The Supreme Court disagreed. *See id.* at 2503–04. Here the majority's new constitutional standard requires litigants and courts to utilize those rejected approaches to predict the electoral outcomes that various proposed plans would produce. In doing so, the majority adopts various policies. First, the majority makes the initial policy determination that the constitution mandates a statewide proportionality standard. Next, it determines that the constitution requires the use of political science tests to adhere to this standard and designates which political

science tests should be used. But, the majority refuses to identity how the standard can be met: "We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." "[B]asing [its] constitutional holdings on unstable ground outside judicial expertise," *Rucho*, 139 S. Ct. at 2504, the majority's decision effectively results in the creation of a redistricting commission comprised of selected political scientists and judges.

¶ 247 The majority simply fails to recognize that its political science-based approach involves policy decisions and that these are the same policy determinations about which the Supreme Court warned in *Rucho*. *See id.* at 2503–04; *id.* at 2504 ("For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). Why did the majority choose this approach and these specific tests instead of others? The expert witnesses in this case looked to selected past statewide elections results for data, and the majority approves such a practice. Left unanswered is which past elections' results are germane to predicting future ones. Moreover, what if the experts approved by the majority tend to favor one political party over the other as shown by their trial testimony in various cases? Could such experts be considered politically neutral?

¶ 248 As found by the trial court, "[t]he experts' analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible." The trial court also found that the "statewide races [used by plaintiffs' experts] have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina."

¶ 249 The majority inserts a requirement of "partisan fairness" into our constitution. Under the majority's newly created policy, any redistricting that diminishes or dilutes an individual's vote on the basis of partisanship is unconstitutional. This outcome results, as predicted by the Court in *Rucho*, in a statewide proportionality standard. According to the majority, when groups of voters of "equal size" exist within a state, elections should result in an equal amount of representatives. Again, this vague notion of fairness does not answer how to measure whether groups of voters are of equal size or how to predict the results an election would produce.

¶ 250 The majority also bases its reasoning on several false assumptions. First, plaintiffs' experts and now the majority appear to assume that voters will vote along party lines in future elections. This assumption is especially troubling considering that in 2020 over eight percent of North Carolinians voted for both a Republican candidate for president and a Democratic candidate for governor on the same ballot.

Though individuals self-select their party affiliation, the views can often differ from one individual to another within that affiliation. Second, in equating partisan affiliation to an immutable characteristic and then elevating its protection to strict scrutiny, the majority also fails to consider that party affiliation can change at any point or be absent altogether. How can the General Assembly forecast the appropriate protections for the unaffiliated voter, a group growing by rapid number in the state? What is the standard for that group's fair representation? The majority certainly provides no answer for these important questions.

¶ 251 Third, the majority's policy decision erroneously assumes that a voter's interests can never be adequately represented by someone from a different party. Representative government is grounded in the concept of geographic representation. Though partisanship may influence the representative's attention to certain political issues, the representative is likely to attend to numerous other issues important to the shared community interests that affect his or her constituents. The constitution cannot guarantee that a representative will have the same political objectives as a given constituent because it is an impossible requirement. Representatives are *individuals* with their own beliefs and who pursue their own motivations, often in opposition to other members of their own party. As the trial court correctly found, plaintiffs' experts, and now the majority, treat candidates and representatives "as inanimate objects in that they do not consider the personality or qualifications of each

candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate." Not only does the majority assume that voters will vote along party lines, but it also likewise transforms the individual representatives into partisan robots. Such reasoning is divorced from reality but nonetheless is the expected result when a court involves itself in a "policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. As in this case, the plaintiffs in *Rucho* argued that addressing concerns of partisan gerrymandering was comparable to the process used in the one-person, one-vote legal analysis. Again, the Supreme Court of the United States disagreed. *See Rucho*, 139 S. Ct. at 2501. The one-person, one-vote rule is just "a matter of math." *Id.* But the Constitution does not provide an "objective measure" of how to determine if a political party is treated "fairly." *Id.* Again, rejecting the Supreme Court's guidance, the majority holds that one-person, one-vote and partisan gerrymandering use comparable assessments and even asserts that violations related to partisan gerrymandering are more egregious than violations of one-person, one-vote. In sum, there is no judicially discernible manageable standard. As thoroughly discussed in *Rucho*, the majority's approach is replete with policy determinations. Thus, the case is nonjusticiable.

B. Textual Commitment

¶ 252 In addition to the fact that partisan gerrymandering claims are lacking in manageable standards, the issue is textually committed to the General Assembly. Under our state constitution, the General Assembly possesses plenary power as well as responsibilities explicitly recognized in the text. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. Both the Federal Constitution and the North Carolina Constitution textually assign redistricting authority to the legislature. The Federal Constitution commits the drawing of congressional districts to the state legislatures subject to oversight by the Congress of the United States. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Our constitution also plainly commits redistricting responsibility to the General Assembly. *See* N.C. Const. art. II, § 3 ("The General Assembly . . . *shall* revise the senate districts and the apportionment of Senators among those districts . . . ." (emphasis added)); *id.* § 5 ("The General Assembly . . . *shall* revise the representative districts and the apportionment of Representatives among those districts . . . ." (emphasis added)). The governor has no role in the redistricting process because the

constitution explicitly exempts redistricting legislation from the governor's veto power. *Id.* § 22(5)(b)–(d).

¶ 253 The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law. Under our historic standard of review, the Court should not venture beyond the express language of the constitution. This Court is simply not constitutionally empowered nor equipped to formulate policy or develop standards for matters of a political, rather than legal, nature.

¶ 254 Our constitution places only the following four enumerated objective limitations on the General Assembly's redistricting authority:

> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;
>
> (3) No county shall be divided in the formation of a senate district;
>
> (4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Id. § 3; *see id.* § 5 (setting the same limitations for the state House of Representatives). These express limitations neither restrict nor prohibit the General Assembly's presumptively constitutional discretion to engage in partisan gerrymandering. *See Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478. The majority seriously errs by suggesting the General Assembly needs an express grant of authority to redistrict for partisan advantage. Under our state constitution, the opposite is true; absent an express prohibition, the General Assembly can proceed.

¶ 255 In a landmark case this Court considered the explicit limitations in Article II, Sections 3 and 5 and concluded that these objective restraints remain valid and can be applied consistently with federal law. In *Stephenson* the plaintiffs challenged the 2001 state legislative redistricting plans as unconstitutional in violation of the Whole County Provisions (WCP) of Article II, Sections 3 and 5. *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002). The defendants argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act [(VRA)]." *Id.* at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the Whole County Provisions, this Court first had to address "whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not

preempted or otherwise superseded by federal law." *Id.* at 369, 562 S.E.2d at 388. In doing so, we explained that

> an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.
>
> . . . . The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, [93 S. Ct. 2321,] 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Id. at 371–72, 562 S.E.2d at 389–90. Thus, we referred to the Whole County Provisions and the other explicit limitations of Article II, Sections 3 and 5 as the "objective constraints" that the people have imposed upon the General Assembly's redistricting authority. We then concluded that "the WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law." *Id.* at 372, 562 S.E.2d at 390. Having decided that the Whole County Provisions remained enforceable to the extent not preempted or otherwise superseded by federal law, we held that the 2001

redistricting plans violated the Whole County Provisions because "the 2001 Senate redistricting plan divide[d] 51 of 100 counties into different Senate Districts," and "[t]he 2001 House redistricting plan divide[d] 70 out of 100 counties into different House districts." *Id.* at 371, 562 S.E.2d at 390.

¶ 256 Having found that the maps violated the still valid Whole County Provisions, out of respect for the legislative branch, we then sought to give the General Assembly detailed criteria for fashioning remedial maps. The plaintiffs "contend[ed] that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected 'at-large.' " *Id.* at 376, 562 S.E.2d at 392. As such, we "turn[ed] to address the constitutional propriety of such districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant case." *Id.* at 377, 562 S.E.2d at 393. In doing so, we noted that "[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms." *Id.* at 378, 562 S.E.2d at 393. We explained that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added). Thus, we concluded that the use of both single-member and multi-member districts within the same redistricting plan

infringes upon "the fundamental right of each North Carolinian to substantially equal voting power." *Id.* at 379, 562 S.E.2d at 394. In other words, "substantially equal voting power" meant that each legislator should represent a similar number of constituents. This is an application of the one-person, one-vote concept. Here the majority changes the concept of "substantially equal voting power" of one-person, one-vote to apply now to "party affiliation."

¶ 257 We did not discuss the political party of the constituents in *Stephenson* but provided the following remedial directive:

> [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting plans, and the VRA districts contained therein, on 11 February 2002.[4] This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

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[4] North Carolina is no longer subject to this requirement of Section 5 of the Voting Rights Act. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215–16 (4th Cir. 2016) ("[I]n late June 2013, the Supreme Court issued its opinion in *Shelby County*. In it, the Court invalidated the preclearance coverage formula, finding it based on outdated data. *Shelby* [*Cnty. v. Holder*], [570 U.S. 529, 556–57,] 133 S. Ct. [2612,] 2631 [(2013)]. Consequently, as of that date, North Carolina no longer needed to preclear changes in its election laws.").

In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by

> any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.
>
> Because multi-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

Id. at 383–84, 562 S.E.2d at 396–97.

¶ 258 The majority attempts to analogize the classification of voters in *Stephenson* that were placed into both single and multi-member districts to the classification of voters based upon partisan affiliation. It does so by concluding, without any citation or other reference to legal support or any explanation, that the right to vote on equal terms "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those

citizens' views." The majority thus reasons that "[l]ike the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power diminishes the 'representational influence' of voters" because "those voters have far fewer legislators who are 'responsive' to their concerns and who can together 'press their interests.' "

¶ 259 The majority, however, fails to recognize that at least some partisan considerations are permitted under *Stephenson*. *Id.* at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution." (internal citation omitted)); *Rucho*, 139 S. Ct. at 2497 (recognizing that legislators must be permitted to take some "partisan interests into account when drawing district lines"). Furthermore, our *Stephenson* decision thus directs that the Whole County Provisions of Article II, Sections 3 and 5 are still enforceable to the extent that they are compatible with the VRA and one-person, one-vote principles. When understanding *Stephenson* in context, it becomes clear that the Court's statement—that the General Assembly's practice of partisan gerrymandering must still conform with the constitution—refers to the express objective limitations present in Article II, Sections 3 and 5. The Court in *Stephenson* did not identify any other restrictions on the General Assembly's redistricting

authority arising from the state constitution; the Court only recognized the express limitations, which deal exclusively with geographic and population-based measures.

¶ 260 The majority's misunderstanding of *Stephenson* is further expressed through its requirement from the 4 February 2022 order that "[t]he General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters."[5] Contrarily, *Stephenson* in no way requires the General Assembly to conduct an independent analysis under Section 2 of the VRA before enacting a redistricting plan. Similarly, federal precedent does not have this requirement.[6]

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[5] Interestingly, the language in the majority's opinion now attempts to contextualize this requirement, noting that "the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law." But this attempted contextualization is senseless considering the directive from the majority's order specifically instructed the General Assembly to apply the federal VRA.

[6] "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Thus, absent a "sufficient justification," a state is prevented from "separat[ing] its citizens into different voting districts on the basis of race." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911, 115 S. Ct. 2475, 2486 (1995)). A plaintiff must first "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.' " *Cooper*, 137 S. Ct. at 1463–64 (citation omitted) (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488).

¶ 261 In *Stephenson* we explained that "Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 2762 (1986)). We then stated that "[o]n remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Id.* at 383, 562 S.E.2d at 396–97. We provided this approach to alleviate the tension between the Whole County Provisions and the VRA because the legislative defendants in *Stephenson* argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act." *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson* was not forcing the legislative defendants to conduct a VRA analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the Whole County Provisions.

¶ 262 Legislative defendants here made the decision not to draw any VRA districts. As the trial court correctly noted, "[i]f the [l]egislative [d]efendants are incorrect that no VRA Districts are required, [p]laintiff Common Cause has an adequate remedy at

law and that is to bring a claim under Section 2 of the VRA." There is no requirement under the North Carolina Constitution or federal law that the General Assembly must conduct a racially polarized voting analysis before enacting a redistricting plan. Here the trial court found that there was no showing that race was the predominant factor in drawing the districts. Similarly, the trial court concluded that the state legislative district plans did not violate the Whole County Provisions because the plans contained the minimum number of county traversals necessary to comply with one-person, one-vote principles and because the traversals were done predominantly in pursuit of traditional redistricting principles. Since the trial court formed these conclusions based upon findings of fact supported by competent evidence, its conclusions should be upheld.

¶ 263 Similar to our holding in *Stephenson* is *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875). There the General Assembly divided the City of Wilmington into three wards, with three aldermen elected in each ward. While the first and second wards each had about 400 voters, the third ward had 2800. *Id.* at 225. While the first and second wards each consisted of one precinct for registration and voting, the third ward had four precincts divided by a "meets and bounds" description which omitted a portion of the city. *Id.* at 223. To be eligible to vote, voters needed to register to vote in their assigned precincts. Lastly, the act required a ninety-day residency in the ward, whereas the constitution provided for thirty days. *Id.* at 216, 221. The Court

held that these obstacles to voting amounted to "the disfranchisement of the voters." *Id.* at 223. Furthermore, it observed that the great disparity of voters in the third ward as compared to the others meant that a third ward voter's vote was not equal. *Id.* at 225. The vote in the two wards "counts as much as seven votes in the third ward." *Id.* This malapportionment was "a plain violation of fundamental principles." *Id.* The "fundamental principle" is that representation shall be apportioned to the popular vote as near as may be. In other words, the Court recognized a basic one-person, one-vote principle. This case has no application to partisan gerrymandering. Notably, for the more than one hundred years since this case was decided, it has never been cited for the proposition for which the majority seeks to use it here.

¶ 264 Since 1776 this Court has exercised restraint absent an express limitation on the authority of the General Assembly. Moreover, this Court has long recognized that responsibilities reserved for the legislature are not reviewable by this Court because they raise political questions. In *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909), the board of education in Haywood County created a school district and then held a vote to enable those in the district to determine whether a special tax should be imposed. *Id.* at 575–76, 66 S.E. at 572. A majority of the qualified voters in the newly drawn district voted in favor of the tax. *Id.* at 576, 66 S.E. at 572. The plaintiffs, who were taxpayers within that district, brought an action to annul creation of the special-tax school district and to enjoin collection of the tax. *Id.* at 575, 66 S.E. at 572. The

plaintiffs argued that the district was neither compact nor convenient, indicating to them that the district had been gerrymandered based on political views to ensure that a majority would vote in favor of the tax. *Id.* at 575–76, 66 S.E. at 572.

¶ 265 This Court, however, recognized that the creation of a special-tax school district was a legislative task, which at that time the legislature had delegated to local boards of education by a special act. *Id.* at 581, 66 S.E. at 572; *see also* Atwell C. McIntosh, *Special Tax School Districts in North Carolina*, 1 N.C. L. Rev. 88, 88–89 (1922). As such, the Court noted that the board's creation of the district was "no more subject to review than the act of the Legislature itself." *Howell,* 151 N.C. at 581, 66 S.E. at 574. Because "questions of compactness and convenience must be addressed to somebody's judgment and discretion," and because the duty to create districts at that time was "unequivocally delegate[d] . . . to the county board of education," the plaintiffs' challenge to the district's creation and composition raised a political question. *Id.* at 578, 66 S.E. at 573. The Court also noted that "[f]or the courts to undertake to pass upon such matters would be manifestly unwise." *Id.* at 578, 66 S.E. at 573. Moreover, the Court stated: "There is no principle better established than that *the courts will not interfere* to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 578, 66 S.E. at 573 (emphasis added).

¶ 266 The Court expressed its concern about the politically motivated gerrymandering of special-tax districts to produce a favorable result and commented that perhaps "the overzealous overstep[ped] the limitations of prudence." *Id.* at 582, 66 S.E. at 574. Nonetheless, the Court recognized that a question about the creation of districts, even when a court disagrees with the district's creation, raises a political question "to be fought out on the hustings"—or, through the political process—not through the judiciary. *Id.* at 581, 66 S.E. at 574. In recognition of the constitutionally assigned authority to the General Assembly, the Court held it was prohibited from interfering.

¶ 267 In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government or there is not a manageable standard by which to decide it, including whether the matter involves a policy determination. Both elements are present here. In addition to the legislature's plenary power, the constitution expressly assigns the General Assembly redistricting authority subject only to express limitations. The decision to implement a political fairness requirement in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard. Here this Court's intrusion is a violation of separation of powers. By striking down the enacted plans as unconstitutional partisan gerrymanders, the majority today wholeheartedly ushers this Court into a new

chapter of judicial activism, severing ties with over two hundred years of judicial restraint in this area. The majority seizes this opportunity to advance its agenda by grafting a prohibition of partisan gerrymandering onto several provisions of the Declaration of Rights. A review of these provisions, however, demonstrates that none specifically address redistricting. They are designed to protect only "individual and personal rights" rather than a group's right to have a party's preferred candidate placed in office. The majority seems to concede that there is no express provision of the constitution which addresses partisan gerrymandering. Undeterred, it untethers itself from history and case law in this case to apply an evolving understanding to these rights.

III. Declaration of Rights

¶ 268 To properly understand what the drafters meant when they included various rights in the Declaration of Rights, and particularly the application, if any, they may have in structuring voting districts, the historical context of our apportionment and elections process is significant. As recognized by the trial court, North Carolina has had some form of elected, representative body since 1665.[7] Leading up to the

[7] As early as 1663, the Lords Proprietors could enact laws in consultation with the freeman settled in their province. Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina (Mar. 24, 1663), *in* 1 *Colonial and State Records of North Carolina* 23 (William L. Sanders ed., 1886). In 1665 certain "concessions" by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freeman representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), *in* 1 *Colonial and State*

enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress were elected by geographic location, by county or town. *See* Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of North Carolina Annotated* xii–xiv (1911). The text of the 1776 constitution established the General Assembly as the Senate and the House of Commons. N.C. Const. of 1776, § I. Senators were elected annually by county without regard to the population size of that county, *id.* § II, and representatives were also elected annually but with two representatives per county or specified town, *id.* § III. Only certain towns were included in the representation, *id.* but other towns were later added.[8] This apportionment was done at the same time certain Declaration of Rights provisions, namely the popular sovereignty provision, N.C. Const. of 1776, Declaration of Rights, § I, the free elections clause, *id.* at § VI,

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Records of North Carolina 81 (William L. Sanders ed., 1886). The 1669 Fundamental Constitutions of Carolina divided those representatives into counties, divided again into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), *in* 1 *Colonial and State Records of North Carolina* 188 (William L. Sanders ed., 1886). The assembly met every two years and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the people in Carolina were electing their representatives in districts.

Later under the Royal Governor, the bicameral assembly consisted of an upper house to advise the Royal Governor and a lower house that represented the people and their interests. *See* Charles Lee Raper, *North Carolina, A Study in English Colonial Government* 71–100 (1904) [hereinafter *English Colonial Government*]. The lower house consisted of freeman elected by county and certain towns. *Id.* at 89–91.

[8] The towns represented initially were Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax, while others were added over the years. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1769 (1992) (discussing Article III of the 1776 constitution and including that Fayetteville, for example, was added to that list in 1789).

and the right to assembly and petition, *id.* at § XVIII, were enacted. Given the apportionment provisions, clearly these clauses did not mean "equal voting power," even based on population. Furthermore, partisan gerrymandering was well known to the framers, yet none of these provisions were crafted to address it. *See Rucho*, 139 S. Ct. at 2496.

¶ 269 Through the years, the population of the state shifted radically from the east to the piedmont and west. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1770–71 (1992). Nonetheless, the eastern region received additional representation. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, tipping the numbers of representatives in favor of the east despite population growth trends in other areas. *Id.* at 1770–71. This county-town approach, combined with the power of the General Assembly to divide existing counties to create new ones, resulted in superior political power in the east despite the shift in population. *See id.* This malapportionment led to civil unrest and a crisis which culminated with the 1835 constitutional convention. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 3, 13 (2d ed. 2013) [hereinafter *State Constitution*]. No one argued that the provisions of the Declaration of Rights made the legislative apportionment acts unconstitutional.

¶ 270 In 1835 a constitutional convention met to, among other things, adjust the representative system to better address differences in population. *See id.* That

convention resulted in amendments that required senatorial districts to be drawn by the General Assembly based on the taxes paid by each county, N.C. Const. of 1776, amends. of 1835, art. I, § 1, and included the predecessor of the Whole County Provisions, *see* N.C. Const. art. II, § 3(3), that prohibited a county from being divided to create the senatorial districts, N.C. Const. of 1776, amends. of 1835, art. I, § 1. House seats were allotted based on population, allowing the more populated counties to have additional representatives. *Id.* art. I, § 2. Like today, the General Assembly was instructed to reconsider the apportionment of the counties based on population according to the census taken by order of Congress. *Id.* art. I, § 3. Each county was required to have at least one House representative. *Id.* art. I, § 2. Likewise, the convention implemented other changes to representation such as lengthening legislative terms from one year to two years, *id.* art. I, §§ 1–2, and allowing the voters to elect the governor, *id.* art. II, § 1.

¶ 271 The constitutional convention of 1868 placed the Declaration of Rights in Article I, the forefront of the constitution. *See* N.C. Const. of 1868, art. I. The convention added Article I, Section 1, incorporating the provision from the Declaration of Independence that acknowledged our God-given, equal rights. *See id.* art. I, § 1. Significant here, the Senate became apportioned by population. *Id.* art. II, § 5. Along with the express limitation imposed by the Whole County Provisions, the 1868 amendments required senatorial districts to be contiguous and only be redrawn

in connection with the decennial census. *Id.* The convention lengthened the term of the governor to four years, *id.* art. III, § 1, and constitutionally created a separate judicial branch, *see id.* art. IV, with judges being elected by the voters for eight-year terms, *id.* art. IV, § 26.

¶ 272 For almost one hundred years, apportionment remained unchanged until the 1960s. During that time, the Speaker of the House received the authority to apportion the House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Also, to comply with a federal lawsuit and the decision in *Baker v. Carr*, the constitution was amended in 1968 to reflect the one-person, one-vote requirement. *State Constitution* 31. This change affected the structure of the House of Representatives in particular. *Id.* Significantly, the number of House members remained at 120, but the representatives were no longer apportioned by county; instead, the 120 representatives were allotted among districts now drawn based on equal population. N.C. Const. of 1868, amends. of 1961, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the Whole County Provisions, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See* N.C. Const. of 1868, amends. of 1967, art. II, §§ 4, 6.

¶ 273 The current version of our constitution, ratified by the people at the ballot box in 1971 along with five new amendments, came about as a "good government

measure," *State Constitution* 32–33, or, in other words, an attempt to consolidate the 1868 constitution and its subsequent amendments along with editorial and organizational revisions and amendment proposals. *See, e.g.*, N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968).

¶ 274 Based upon our history and the constitutional structure, when the people had concerns about ineffective political representation, they addressed those concerns by amending the constitution itself, rather than relying on judicial amendment through litigation. Each of the provisions relevant to the claims here have existed since 1971, with some dating back to the 1776 constitution. They are all housed in Article I of our constitution, the Declaration of Rights. None of those clauses have been interpreted as a restriction on partisan considerations in redistricting—even after hundreds of years of apportionments and decades of redistricting litigation—until today.

¶ 275 The Declaration of Rights is an expressive yet nonexhaustive list of protections afforded to *individual* citizens against government intrusion, along with "the ideological premises that underlie the structure of government." *State Constitution* 46. The Declaration of Rights sets out "[b]asic principles, such as popular sovereignty and separation of powers," which are "given specific application in later articles." *Id.* As such, each provision within the Declaration of Rights must be considered with the related, more specific provisions of the constitution that outline the practical

workings for governance. That understanding comports with the general principles for interpreting all legal documents, treating statutes and constitutional text alike.[9]

¶ 276 The frequent elections provision provides a classic example of when a general principle set forth in the Declaration of Rights is practically developed by other constitutional text. Article I, Section 9 states: "For redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. I, § 9. This provision appeared in the original Declaration of Rights, *see* N.C. Const. of 1776, Declaration of Rights, § XX, and in 1776 "often" meant annual elections, *see, e.g.*, N.C. Const. of 1776, §§ V, VI, XV. The frequency of elections changed in 1835 through amendments providing for biannual legislative elections. N.C. Const. of 1776, amends. of 1835, art. I, §§ 1, 2. Even though it changed the frequency of elections from one to two years, this constitutional amendment did not violate the stated goal to have frequent elections as a timely means of holding accountable an unresponsive elected legislature. The concept of frequent elections remained embodied in the biannual election cycle.

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[9] *Compare Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177–78 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling."), *with Preston*, 325 N.C. at 449, 385 S.E.2d at 478 ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

¶ 277 Similarly, the 1868 constitution for the first time set the three branches on different election cycles. For example, in recognition of its policymaking authority, the General Assembly stayed on a biannual election cycle, *see* N.C. Const. of 1868, art. II, §§ 3, 6; however, the executive officers received four-year terms, *id.* art. III, § 1, and the Justices of the Supreme Court received eight-year terms, *id.* art. IV, § 26. Did this change violate the frequent elections provision? The answer is no—the principle of "often" elections in the Declaration of Rights is defined by other provisions of the constitution.

¶ 278 This Court recently read a provision of the Declaration of Rights in Article I, Section 15 together with a more specific and applicable provision in Article IX, Section 2. *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. Article I, Section 15 acknowledges the "right to the privilege of education" and the State's duty "to guard and maintain that right." N.C. Const. art. I, § 15. Placed in the working articles of the constitution, Article IX, entitled "Education," *see id.* art. IX, actually "implements the right to education as provided in Article I," *Deminski*, ¶ 14. This Court explained that "these two provisions work in tandem," *id.* in that

> "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro* [*v. State*], 346 N.C. [336], 347, 488 S.E.2d [249,] 255 [(1997).] . . . .
>
> Further, Article I, Section 15 places an affirmative duty on the government "to guard and maintain that

> right." N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

Id. ¶¶ 14–15. Thus, to arrive at a proper and harmonious interpretation of the constitutional text, the Court read the principles regarding the privilege of education enshrined in our Declaration of Rights in conjunction with the specific application given to education in a later article. As done in *Deminiski*, this Court should construe the general provisions of the Declaration of Rights in harmony with the more specific provisions addressing redistricting.

¶ 279 Moreover, "[t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution *are individual and personal rights* entitled to protection against state action." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added); *id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees *plaintiff* a direct action under the State Constitution for alleged violations of *his* constitutional freedom of speech rights." (emphases added)).

¶ 280 Finding no explicit constitutional provision prohibiting partisan gerrymandering, the majority creatively attempts to mine the Declaration of Rights to find or create some protection for a political group's right to their preferred form of representation and a "fair" share of the "voting power." The majority seems to say

that this entitlement is based on the political party registrants associated with that group. Under a *Corum* analysis, however, an *individual* plaintiff has a direct cause of action against state officials who, acting in their official capacity, violate his constitutional rights as protected by the Declaration of Rights. *Id.* at 783–84, 413 S.E.2d at 290; *see Deminski*, ¶¶ 16–18 (outlining the *Corum* framework as the legal mechanism for bringing a proper claim under the Declaration of Rights).[10] Even when considering a self-identified class of individuals, such as self-selection of political affiliation, the Court has concluded that the Declaration of Rights protects the individual's rights, not the political group's rights. *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204–05 (2011) (explaining that casting votes in alignment with political beliefs implicates "*individual* associational rights" (emphasis added)). This principle rings true even when alleging a violation of an associational right such as those implicated in the free speech and assembly clauses. *Id.* at 49, 707 S.E.2d at 204–05 ("In North Carolina, statutes governing ballot access by political parties implicate *individual* associational rights rooted in the free speech and assembly clauses of the state constitution." (emphasis added) (citing N.C. Const. art. I, §§ 12, 14)). Nonetheless, in the majority's view, "political equality" based on a

[10] The holdings in *Corum* and *Deminiski* did not expand the role of the Court in remedying violations of constitutional rights as protected by the Declaration of Rights. Rather, like in *Bayard*, those cases involved the Court's interpretation of express provisions within the text of the constitution.

group's party affiliation is a fundamental, albeit unwritten, principle of the Declaration of Rights akin to an immutable characteristic that deserves the highest form of protection under the state constitution.

¶ 281 Contrary to the majority's assertion, even a cursory review of the applicable history and case law supports the basic understanding that the Declaration of Rights protects individual rights such as the freedom of an individual to vote his conscience in an election which is free from fraud. The individual right to participate in a "free election" does not include the right to have one's preferred candidate elected or a political group's right to proportional representation. Moreover, because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, this Court must construe Article II, Sections 3 and 5 and the provisions that the majority relies upon—Article I, Sections 10, 12, 14, and 19—harmoniously. We address each provision in turn.

A. Free Elections Clause

¶ 282 Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appears in the 1776 constitution, providing that "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI.[11] The 1868 constitution restated the free elections clause

[11] Under the 1776 constitution, the members of the General Assembly were the only elected officials. The General Assembly thus had the exclusive power to: (1) elect the

as "[a]ll elections ought to be free." N.C. Const. of 1868, art. I, § 10. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971 constitution, this change is not a substantive revision to the free elections clause. *See Report of the North Carolina State Constitution Study Commission* 73–75; *see also Smith v. Campbell*, 10 N.C. (3 Hawks) 590, 598 (1825) (declaring that "ought" is synonymous with "shall," noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively"). "Free" means having political and legal rights of a personal nature or enjoying personal freedom, a "free citizen," or having "free will" or choice, as opposed to compulsion, force, constraint, or restraint. *See Free*, *Black's Law Dictionary* (11th ed. 2019). As a verb, "free" means to liberate or remove a constraint or burden. *Id.* Therefore, giving the provision its plain meaning, "free" means "free from interference or intimidation." *State Constitution* 56.[12]

¶ 283 While the provision protects the voter, it also protects candidates; however, there are limits. The terms "elections" and "free," N.C. Const. art. I, § 10, must be

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Governor, N.C. Const. of 1776, § XV; (2) appoint the Attorney-General, *id.* § XIII; (3) appoint Judges of the Supreme Courts of Law and Equity and Judges of Admiralty, *id.*; (4) appoint the general and field officers of the militia, *id.* § XIV; (5) elect the council of State, *id.* § XVI; (6) appoint a treasurer or treasurers of the State, *id.* § XXII; (7) appoint the Secretary of State, *id.* § XXIV; and (8) recommend the appointment of Justices of the Peace to the Governor who shall commission them accordingly, *id.* § XXXIII.

[12] The full text of the Virginia Declaration of Rights, from which the North Carolina free elections clause was taken, provides a clearer idea of the intention behind the text.

read, for example, in the context of Article VI, entitled "Suffrage and Eligibility to Office," *see id.* art. VI. Even though "elections shall be free," they are nonetheless restricted in certain ways in Article VI. *See, e.g.*, N.C. Const. art. VI, § 1 (requiring a North Carolina voter to be a citizen of the United States and at least 18 years old); *id.* § 2(1)–(2) (placing residency requirements on voters); *id.* § 2(3) (placing restrictions on felons' voting rights); *id.* § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* § 5 (requiring that votes by the people be by ballot); *id.* § 7 (requiring public officials to take an oath before assuming office); *id.* § 8 (outlining certain disqualifications from holding public office); *id.* § 9 (prohibiting dual office holding); *id.* § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

¶ 284 Based on our constitution's plain language and history, the framers had a specific meaning of the free elections clause. With respect to the history of the clause, the trial court found that inclusion of the clause was intended to protect against abuses of executive power, not to protect the people from their representatives who

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> That elections of members to serve as representatives of the people, in Assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. of 1776, Declaration of Rights, § 6.

frequently face election by the people.[13] For the same reason, the 1776 constitution allowed the General Assembly to elect the Governor. N.C. Const. of 1776, § XV. The trial court found in part:

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[13] The trial court found in part:

> . . . [T]he words as originally used in the English Bill of Rights ([1689]) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England*, 148 (1972). . . . Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.
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> . . . At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed. After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.
>
> . . . The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to

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the elected members of parliament from interference by the Crown.

. . . By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.

. . . Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. [*English Colonial Government*], at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.

. . . No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly. This remained in effect until 1754 when the legislation was repealed by the Crown. [*English Colonial Government*, at] 90–91.

. . . .

. . . At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the

> Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. . . .
>
> . . . The circumstances under which the English Free Election Clause was written were far different than those which caused the same language to be used in the 1776 Constitution.
>
> . . . .
>
> . . . Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. . . .
>
> . . . Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

As noted by the trial court, under the 1776 constitution, voters did not vote for any executive branch members, including the governor, nor did voters elect judges. The General Assembly selected the members of the executive and judicial branches. *See* N.C. Const. of 1776, §§ XIII, XV, XXII, XXIV. Despite the existence of the free elections clause, under this constitutional structure, the voter did not have the right

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> authority, but the House believed they had a role in the process in the creation of counties. [*English Colonial Government,*] at 89–90.

As the trial court found, aside from disputes over representation, the lower house fought the Royal Governor over a myriad of issues, including the right to establish a quorum for the legislature and, most seriously, over fiscal matters and the appointment of judges.

to vote for these offices at all and certainly was not entitled to see his *preferred* candidate in office.

¶ 285 Because of its plain meaning, this Court has issued few opinions interpreting the free elections clause though it has been part of our constitution since 1776. The first instance was in *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), in which the plaintiff, a candidate who ostensibly lost an election for the office of county commissioner of Wilkes County, brought a quo warranto action, alleging that the Wilkes County Board of Elections fraudulently deprived him of the office by altering the vote count. *Id.* at 700–01, 191 S.E. at 746. In response, the defendant argued the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. *Id.* at 701, 191 S.E. at 746. After the trial court rejected the defendant's argument, the defendant appealed, arguing that it was the sole duty of the County Board of Elections, rather than the judiciary, "to judicially determine the result of the election from the report and tabulation made by the precinct officials." *Id.* at 701, 191 S.E.2d at 747. In affirming the trial court's decision, we provided the following rationale:

> One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers

or other officers of an election.

> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Constitution of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Id. at 702, 191 S.E. at 747 (internal citations omitted) (quoting N.C. Const. of 1868, art. I, § 10). Therefore, we interpreted "free" to mean the right to an honest vote count, free from fraud.

¶ 286 The next time we addressed the merits of a free election claim was in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964). The plaintiff in *Clark* challenged a statute that required voters wishing to change their party affiliation to first take an oath with the following language: "I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law." *Id.* at 140, 134 S.E.2d at 169. We held that the provision in the statute requiring certain provisions of the oath was invalid, explaining that:

> Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a *deterrent to his exercising a free choice among available candidates at the election*—even by casting a write-in ballot. His membership in his party and

> his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.
>
> When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of *freedom of conscience*. It denies a free ballot—*one that is cast according to the dictates of the voter's judgment*. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. at 142–43, 134 S.E.2d at 170 (emphases added) (citing N.C. Const. of 1868, art. I, § 10). Thus, we interpreted "free" to mean freedom to vote one's conscience. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

¶ 287 The majority judicially amends the free elections clause to read "elections shall be free from depriving a voter of substantially equal voting power on the basis of party affiliation" with the voting power to be measured by modern political science analysis. To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had this unbounded meaning is absurd. The mandated political science methods did not

even exist. Our hundreds of years of constitutional history confirms that this creative idea has no support in our history or case law.

¶ 288 Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a "free" election if (1) the election is subject to a fraudulent vote count, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747, or (2) a law prevents a voter from voting according to one's judgment, *see Clark*, 261 N.C. at 142, 134 S.E.2d at 170. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation. The free elections clause was not meant to restrict the General Assembly's presumptively constitutional ability to engage in partisan gerrymandering.

B. Equal Protection Clause

¶ 289 Next, the majority claims its decision is supported by the equal protection clause. Article I, Section 19 provides, in relevant part, that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. With respect to the history of this clause, the trial court found as follows:

> The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution . . . . The addition of the Equal Protection Clause, while a substantive change, was not meant to "bring about a fundamental change" to

> the power of the General Assembly. Report of Study Comm'n at 10.

This Court reviews claims brought under the equal protection clause as follows:

> Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made.
>
> When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.
>
> When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.
>
> For strict scrutiny to be properly applied in evaluating an equal protection claim, it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right. It has been held that a class is deemed "suspect" when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary. The underlying rationale of the theory of suspect classification is that where legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down.

Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980)

(internal citations omitted).

¶ 290 Classification based upon affiliation with one of the two major political parties in the United States—especially the Democratic Party in North Carolina[14]—does not trigger heightened scrutiny because neither party has historically been relegated to a position of political powerlessness. Allegations of partisan gerrymandering likewise do not trigger heightened scrutiny because the practice of partisan gerrymandering alone does not constitute "an infringement of a fundamental right." *Id.* at 11, 269 S.E.2d at 149.

¶ 291 This Court has explained that "[t]he right to vote *on equal terms* is a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added). The fundamental right to vote on equal terms simply means that each vote should have the same weight. This is a simple mathematical calculation. *Rucho*, 139 S. Ct. at 2501. The historic understanding of equal voting power is stated in Article II, Sections 3(1) and 5(1), requiring that legislators "represent, as nearly as may be, an equal number of inhabitants." Party affiliation is not mentioned. This understanding of equal voting power meaning one-person, one-vote is supported by our cases such as *Stephenson*

[14] The trial court found that "[b]etween 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly." This finding, which is binding on appeal, demonstrates that throughout North Carolina's history, members of the Democratic Party certainly have not been relegated to a position of political powerlessness.

and *Canaday*. To reach its approved application of the equal protection clause, the majority begins by radically changing the meaning of the fundamental right to vote. It takes this individual right and transforms it into a right to "substantially equal voting power on the basis of party affiliation" and then declares a right to statewide proportional representation. In its unparalleled distortion of the right to vote, it singles out equal representation based on political affiliation, i.e., the two major political parties. What about the unaffiliated voters or voters in "non-partisan," issue-focused groups organized for political influence? Of course, nothing about this approach is supported by the constitutional text or case law.

¶ 292 Only when a redistricting enactment infringes upon the "right to vote on equal terms for representatives" does heightened scrutiny apply. *See Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 ("The classification of voters into both single-member and multi-member districts within [the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard."); *Blankenship v. Bartlett*, 363 N.C. 518, 518, 523–24, 681 S.E.2d 759, 763–64, 766 (2009) (applying heightened scrutiny where the plaintiffs showed a "gross disparity in voting power" because some judicial districts had five times the population of others). The "right to vote on equal terms" has been carefully defined in our case law.

¶ 293 In *Stephenson* this Court explained that "[t]he classification of voters into both single-member and multi-member districts [in the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms." 355 N.C. at 378, 562 S.E.2d at 393. We reasoned that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added).

¶ 294 Likewise, in *Blankenship* the plaintiffs demonstrated a "gross disparity in voting power between similarly situated residents of Wake County" by making the following showing:

> In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D.

363 N.C. at 527, 681 S.E.2d at 766. We explained that the above showing implicated the fundamental "right to vote on equal terms in representative elections—a one-person, one-vote standard," and we thus employed a heightened scrutiny analysis. *Id.* at 522, 681 S.E.2d at 762–63.

¶ 295 Unlike the classifications in *Stephenson* and *Blankenship*, partisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard. In other words, an effort to gerrymander districts to favor a political party does not alter *voting power* so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts. Therefore, because partisan gerrymandering does not infringe upon a fundamental right, rational basis review applies. As such, read in harmony with Article II, Sections 3 and 5, Article I, Section 19 only prohibits redistricting plans that fail to "bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.[15] Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Rucho*, 139 S Ct. at 2506–07 (finding no manageable standards for assessing partisan considerations in redistricting despite claims that the federal Equal Protection Clause had been violated). The plan here does not violate the equal protection clause.

[15] Here the enacted plans pass rational basis review because they are rationally related to the General Assembly's legitimate purpose of redrawing the legislative districts after each decennial census.

C. Freedom of Assembly and Freedom of Speech Clauses

¶ 296 The majority also engrafts new meaning into Article I, Sections 12 and 14. These sections provide as follows:

> **Sec. 12. Right of assembly and petition.**
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.
>
> . . . .
>
> **Sec. 14. Freedom of speech and press.**
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, §§ 12, 14. The trial court made the following findings with respect to the history of these clauses:

> Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution . . . . The addition of the Free Speech Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.
>
> . . . .
>
> . . . The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that "the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the

> Legislature, for redress of grievances." 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause "that." 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution . . . . The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10.

¶ 297 The right to free speech is violated when "restrictions are placed on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by the contents of an individual's speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 477–78, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing "that the plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities), *appeal dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999) (determining "there was no forecast of evidence" to support a retaliation claim).

¶ 298 Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint. Rather, redistricting enactments in North Carolina are subject to the typical policymaking customs of open debate and

compromise. *See Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (noting that the structure of the legislature "ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise"). As such, opponents of a redistricting plan are free to voice their opposition.

¶ 299 Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout our state's history. *See Rucho*, 139 S. Ct. at 2494 ("Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.") As such, it is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party. *See Toomer*, 155 N.C. App. at 477–78, 574 S.E.2d at 89. It is plausible that an individual may be less inclined to voice his political opinions if he is unable to find someone who will listen. Article I, Sections 12 and 14, however, guarantee the rights to speak and assemble without government intervention, rather than the right to be provided a receptive audience. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286, 104 S. Ct. 1058, 1066 (1984) (stating that individuals "have no constitutional right as members of the public to a government audience for their policy views"); *Johnson v. Wisc. Elections Comm'n*, 967 N.W.2d 469, 487 (Wis. 2021) ("Associational rights guarantee

the freedom to *participate in* the political process; they do not guarantee a favorable outcome." (emphasis added)).

¶ 300 This Court and the Court of Appeals have interpreted speech and assembly rights in alignment with federal case law under the First Amendment. *See Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841; *Feltman v. City of Wilson*, 238 N.C. App. 246, 252–53, 767 S.E.2d 615, 620 (2014); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite having the similar express protections of speech and assembly rights. *Rucho*, 139 S. Ct. at 2505–07. Therefore, when interpreted in harmony with Article II, Sections 3 and 5, it is clear that Article I, Sections 12 and 14 do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. As with the prior Declaration of Rights clauses, there is nothing in the history of the clauses nor the applicable case law that supports the majority's expanded use of them.

D. Summary

¶ 301 In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each must be read in harmony with the more specific provisions that outline the practical workings for governance. Notably, Article II, Sections 3 and 5 outline the practical workings of the General Assembly's

redistricting authority. These provisions contain only four express limitations on the General Assembly's otherwise plenary power, none of which address partisan gerrymandering. Therefore, because the constitution expressly assigns to the General Assembly the authority to redistrict, and this Court is without any satisfactory or manageable standards to assess redistricting decisions by the legislative branch, we should not and cannot adjudicate partisan gerrymandering claims. The claims here present a nonjusticiable political question, and this Court's intrusion violates separation of powers.

¶ 302 Recognizing that there is no explicit constitutional provision supporting its position, the majority resorts to an evolving understanding to support its expansive approach. The majority cites Article I, Sections 1 and 2 as supporting its statewide proportionality argument. *See* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *id.* § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."). Undoubtedly, Article I, Sections 1 and 2, are bedrock constitutional principles, recognizing that all are created equal and endowed with God-given rights and acknowledging that all political power originates and is derived from the people.

Neither provision speaks expressly to limitations on the General Assembly's authority to redistrict. Undeterred, however, the majority reads into our constitution a proportionality requirement which appears to be more akin to the European parliamentary system, rather than the American system. Furthermore, the "will of the people" is expressed in the words of our constitution. The best way to honor the "will of the people" is to interpret the constitution as written and as the drafters intended. At no point in 1776, 1835, 1868, or 1971 did the drafters or refiners intend for the selected provisions of the Declaration of Rights to limit the legislature's authority to redistrict. The limitations the people placed upon the General Assembly regarding redistricting are expressly stated in Article II, Sections 3 and 5.

¶ 303 The people expressed their will in the 2020 election, which utilized constitutionally compliant maps. Knowing that the 2021 General Assembly would be tasked with redistricting, the people elected them. Nonetheless, the majority says it is simply "recur[ing] to fundamental principles." Its analysis and remedies, however, are new, not fundamental. Judicially modified constitutional provisions and judicial intrusion into areas specifically reserved for the legislative branch are not a "recurrence to fundamental principles." Rather, the decisions of the majority are a significant departure threatening "the blessings of liberty."

IV. Remedy

¶ 304 The majority's remedy mandates its approved political scientists and their approaches. Apparently, the majority's policy decisions guide these selections. The majority's required timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority mandates a May 2022 primary. No reason is given, nor does one exist for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

¶ 305 The majority defines "partisan advantage" as "achieving a political party's advantage across a map incommensurate with its level of statewide voter support." The majority also defines "political fairness" as "the effort to apportion to each political party a share of seats commensurate with its level of statewide support." These definitions demonstrate the majority's desire to judicially amend our constitution to include a requirement of statewide proportional representation. *See Proportional representation*, *Black's Law Dictionary* (11th ed. 2014) ("An electoral system that allocates legislative seats to each political group in proportion to its actual voting strength in the electorate.") Just as there is no proportionality requirement in our constitution, there is none in the Federal Constitution: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional

representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Rucho*, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

¶ 306 The majority asserts that

> [i]f constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the majority's [sic] view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people.

This claim is wholly unfounded. Slavery was officially abolished by the Thirteenth Amendment to the United States Constitution ratified in 1865. Article I, Section 17, of the 1868 state constitution explicitly prohibits slavery. N.C. Const. of 1868, art. I, § 17. Similarly, the Nineteenth Amendment to the United States Constitution gave women the right to vote. The state constitution was modified accordingly. *See* N.C. Const. art. VI, § 1. As discussed elsewhere, the free election and assembly clauses were enacted in 1776 and were never applied to voter qualifications. Free speech and equal protection clauses were added to the state constitution in 1971, after equal voting qualifications were established. In sum, the issues raised by the majority are specifically addressed in the Federal Constitution and the state constitution.

V. Conclusion

¶ 307 Historically, to prove an act of the General Assembly is unconstitutional we have required a showing that, beyond a reasonable doubt, an express provision of the constitution is violated. No express provision of our constitution has been violated here. Nonetheless, in the majority's view, it is the members of this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting when met with complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority to amend their constitution. As explicitly stated in our constitution, the people alone have the authority to alter this foundational document. N.C. Const. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of . . . altering . . . their Constitution . . . ."); *see also id.* art. XIII, § 2. Under our constitution's expressed process, the people have the final say. *Id.* art. XIII, §§ 3–4.

¶ 308 The majority asserts that its holding somehow adheres to "the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights." It cannot point to any text or case law to support its deciphering of the "spirits and intent" of the document because there is nothing in the text of the constitution, its history, or our case law that supports the majority's position. The majority simply rules that the North Carolina Constitution now has a statewide

proportionality requirement for redistricting. In doing so, the conclusion magically transforms the protection of individual rights into the creation of a protected class consisting of members of a political party, thereby subjecting a redistricting plan to strict scrutiny review. The majority presents various general views about what constitutes unconstitutional partisan gerrymandering and provides a variety of observations about what the constitution requires. Absent from the opinion is what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process seem to have been transferred to the Court.

¶ 309 The vagaries within the opinion and the order only reinforce the holding of the Supreme Court in *Rucho* that there is no neutral, manageable standard. The four members of this Court alone will approve a redistricting plan which meets their test of constitutionality. This case substantiates the observations of the Supreme Court of the United States as to the many reasons why partisan gerrymandering claims are nonjusticiable. The Court observed that redistricting invariably involves numerous policy decisions. It noted that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation," *Rucho*, 139 S. Ct. at 2499, and that "plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end," *id.* In

other words, plaintiffs ask the courts "to reallocate political power between the two major political parties." *Id.* at 2507. Despite these well-reasoned warnings, the majority of this Court proceeds, and in the process, proves the Supreme Court's point.

¶ 310 The Supreme Court also warned of the need for courts to provide a clear standard so legislatures could "reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551). It observed that:

> "Fairness" does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.

Id. at 2499–500 (alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (opinion of Scalia, J.)). The majority ignores all these warnings, fails to articulate a manageable standard, and seems content to have the discretion to determine when a redistricting plan is constitutional. This approach is radically inconsistent with our historic standard of review, which employs a presumption that acts of the General Assembly are constitutional, requiring identification of an express constitutional provision and a showing of a violation of that provision beyond a reasonable doubt.

¶ 311 The Supreme Court cautioned that embroiling courts in cases involving partisan gerrymandering claims by applying an "expansive standard" would amount to an "unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306, 124 S. Ct. at 1793 (opinion of Kennedy, J.)). Sadly, the majority does just that. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

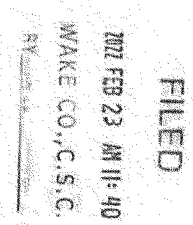
NORTH CAROLINA LEAGUE, OF CONSERVATION VOTERS, INC., *et al.*,
Plaintiffs,

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426



STATE OF NORTH CAROLINA

COUNTY OF WAKE

REBECCA HARPER, *et al.*,
Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

ORDER ON REMEDIAL PLANS

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THIS MATTER comes before the undersigned three-judge panel pursuant to the February 4, 2022, Order of the Supreme Court of North Carolina ("Supreme Court Remedial Order) for review of Remedial Redistricting Plans to apportion the state legislative and congressional districts within North Carolina (hereinafter collectively referred to as the "Remedial Plans") enacted by the North Carolina General Assembly on February 17, 2022. 2022 N.C. Sess. Laws. 2 (also known as Senate Bill 744 and hereafter referred to as "Remedial Senate Plan"); 2022 N.C. Sess. Laws. 4 (also known as House Bill 980 and hereafter referred to as "Remedial House Plan"); 2022 N.C. Sess. Laws. 3 (also known as Senate Bill 745 and hereafter referred to as "Remedial Congressional Plan").

The Remedial Plans were enacted following entry of the Supreme Court Remedial Order. This Court entered a Judgment on January 11, 2022, wherein the Court upheld the constitutionality of the 2021 Enacted State Legislative and Congressional redistricting plans (hereinafter "Enacted Plans"). Thereafter, Harper Plaintiffs, North Carolina League of Conservation Voters Plaintiffs, and Plaintiff-Intervenor Common Cause (hereinafter collectively referred to as "Plaintiffs") appealed this Court's Judgment directly to the Supreme Court of North Carolina. On February 4, 2022, the Supreme Court of North Carolina entered its Remedial Order, with opinion to follow, adopting in full this Court's findings of fact in the January 11, 2022, Judgment; however, the Supreme Court concluded that the Enacted Plans are unconstitutional under N.C. Const., art. I, §§ 10, 12, 14, and 19 and remanded the action to this Court for remedial proceedings. On February 14, 2022, the Supreme

Court filed its full opinion in this action. *Harper v. Hall*, 2022-NCSC-17 (Feb. 14, 2022).

Pursuant to the Supreme Court Remedial Order and full opinion, and after reviewing all remedial and alternative plans submitted to this Court, as well as additional documents, materials, and information pertaining to the submitted plans, including the report of this Court's appointed Special Masters and comments received from the parties, this Court sets out the following:

FINDINGS OF FACT

I. Summary of Requirements for Remedial Process

1. The Supreme Court's Order required the submission to this Court of remedial state legislative and congressional redistricting plans that "satisfy all provisions of the North Carolina Constitution"; both the General Assembly, and any parties to this action who chose to submit proposed remedial plans for this Court's consideration, were required to submit such plans, and additional information, on or before February 18, 2022, at 5:00 p.m.

2. The Supreme Court's Order also provided for a comment period in which parties to these consolidated cases were permitted to file and submit to this Court comments on any plans submitted for this Court's consideration by February 21, 2022 at 5:00 p.m.

3. The Supreme Court's Order also mandated that this Court must approve or adopt constitutionally compliant remedial plans by noon on February 23, 2022.

4. This Court subsequently entered an order on February 8, 2022, providing initial guidance on the remedial phase of the litigation before this Court,

requiring written submissions containing the information the Supreme Court set forth in its Order pertaining to redistricting plans in general and the ordered Remedial Plans specifically. The written submissions were required to provide an explanation of the data and other considerations the mapmaker relied upon to create any submitted proposed remedial plan and to determine that the proposed remedial plan was constitutional—*i.e.*, compliant with the Supreme Court Remedial Order. The full opinion of the Supreme Court, *Harper v. Hall*, 2022-NCSC-17, thereafter provided further guidance for the Remedial Plans.

5. On February 16, 2022, this Court entered an Order appointing three former jurists of our State appellate and trial courts—Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross—to serve as Special Masters for the purposes of: 1) assisting this Court in reviewing any Proposed Remedial Plans enacted and submitted by the General Assembly or otherwise submitted to the Court by a party in these consolidated cases; and, 2) assisting this Court in fulfilling the Supreme Court's directive to this Court to develop remedial plans based upon the findings in this Court's January 11, 2022, Judgment should the General Assembly fail to enact and submit Proposed Remedial Plans compliant with the Supreme Court's Order within the time allowed. This Appointment Order also required the submission of additional information, data, and materials for review by the Court, the parties, and the Special Masters.

6. The Appointment Order further provided that the Special Masters were authorized to hire assistants and advisors reasonably necessary to complete their

work. Pursuant to this authorization, the Special Masters hired the following advisors to assist in evaluating the Remedial Plans:

a. Bernard Grofman: PhD in political science from the University of Chicago, and currently the Jack W. Peltason Endowed Chair and Distinguished Professor at the University of California, Irvine, School of Social Sciences;

b. Tyler Jarvis: PhD in mathematics from Princeton University, and currently a Professor at Brigham Young University's College of Physical and Mathematical Sciences;

c. Eric McGhee: PhD in political science from the University of California, Berkeley, and currently a Senior Fellow at Public Policy Institute of California, a non-partisan, non-profit think tank; and,

d. Samuel Wang: PhD in Neurosciences from Stanford University, and currently a Professor of neuroscience at Princeton University and Director of the Electoral Innovation Lab.

7. The Court finds that these advisors were reasonably necessary to facilitate the work of the Special Masters to provide this Court with an analysis of the Remedial Plans.[1]

II. The General Assembly's Remedial Plans as a Whole

8. Pursuant to the Supreme Court's directive, the General Assembly enacted Remedial Plans and, through the Legislative Defendants, timely submitted the Remedial Plans to this Court on February 18, 2022.

[1] On February 20, 2022, counsel for Harper Plaintiffs submitted a notice of communications wherein the Court was informed that Dr. Wang and Dr. Jarvis had contacted some of Harper Plaintiffs' retained experts by email regarding their algorithms and analysis models. Legislative Defendants subsequently filed a motion to disqualify Dr. Wang and Dr. Jarvis from assisting the Special Masters. The Special Masters have provided additional review of the issues presented in this motion, as noted in the Report attached to this Order, and the Court will address the Motion in a separate order that will be filed contemporaneously herewith.

A. Participants in the General Assembly's Drawing of Remedial Plans

9. The House participants involved in the drawing of the Remedial Plans consisted of twenty-one Republican members and one Democratic member, with five Republican staff members and two Democratic staff members.

10. The Senate participants involved in the drawing of the Remedial Plans consisted of four Republican members and five Democratic members, with four Republican staff members and one Democratic staff member.

11. The General Assembly members were also supported by fifteen Legislative Analysis and Bill Drafting Division staff members, as well as four Information Systems Division staff members.

12. Legislative Defendants, through counsel, also relied for limited purposes on their experts and non-testifying experts in this case, including Clark Bensen and Sean Trende for statistical analysis, Dr. Jeffrey Lewis to conduct a Racially Polarized Voting Analysis for both the 2021 and the 2022 districts, and Dr. Michael Barber for statistical analyses of the Remedial Plans and other BVAP-related information.

B. The General Assembly's Remedial Criteria for Drawing the Remedial Plans

13. The General Assembly's Remedial Criteria governing the remedial map drawing process were those neutral and traditional redistricting criteria adopted by the Joint Redistricting Committees on August 12, 2021, (received into evidence at trial as exhibit LDTX15) unless the criteria conflicted with the Supreme Court Remedial Order and full opinion.

14. Although expressly forbidden by the previously-used August 2021 Criteria, the General Assembly as part of its Remedial Criteria intentionally used partisan election data as directed by the Supreme Court's Remedial Order. The General Assembly did so by loading such data into Maptitude, the map drawing software utilized by the General Assembly in creating districting plans. The elections used by the General Assembly to evaluate the projected partisan effects of district lines were as follows: Lt. Gov 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lt. Gov. 2020, US Senate 2020, Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, and Governor 2020.

15. The Court finds that the General Assembly's use of partisan data in this manner comported with the Supreme Court Remedial Order.

C. The General Assembly's Racially Polarized Voting Analysis

16. Paragraph 8 of the Supreme Court Remedial Order required the General Assembly to "assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters."

17. The General Assembly conducted an abbreviated racially polarized voting ("RPV") analysis to determine whether racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act *requires* the drawing of a district to avoid diluting the voting strength of African American voters during the remedial process. Legislative Defendants' expert Dr. Jeffery B.

Lewis ran an analysis and concluded that all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice.

18. The Court finds that the General Assembly satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act.

D. Plaintiffs' Objections and Comments to the Plans

19. Pursuant to the Supreme Court's directive, Plaintiffs timely submitted comments on and objections to the Remedial Plans on February 21, 2022.

20. NCLCV Plaintiffs object to the Remedial Senate and Congressional Plans. NCLCV Plaintiffs do not specifically object to the Remedial House Plan but instead request the Court conduct its own analysis of the Remedial House Plan.

21. Harper Plaintiffs object to the Remedial Congressional Plan and Remedial Senate Plan. Harper Plaintiffs do not object to the Remedial House Plan.

22. Plaintiff Common Cause objects to all three Remedial Plans in general and specifically contends the Remedial Senate and House Plans must be redrawn for Senate District 4 and House District 10.

E. Report of Special Masters

23. Pursuant to this Court's Appointment Order, the Special Masters prepared a Report containing their analysis and submitted that Report to this Court for its consideration. The Report is attached to this Order as an exhibit and has been filed with the Court.

24. The Special Masters, and their advisors, conducted an analysis of the Remedial Plans using a variety of metrics to determine whether the submitted maps

meet the requirements of the North Carolina Constitution as set out by the Supreme Court of North Carolina in its Remedial Order and full opinion.

25. The Special Masters' findings demonstrate that the Remedial House and Senate Plans meet the requirements of the Supreme Court's Remedial Order and full opinion.

26. The Special Masters' findings demonstrate that the Remedial Congressional Plan does not meet the requirements of the Supreme Court's Remedial Order and full opinion.

27. This Court adopts in full the findings of the Special Masters and sets out additional specific findings on the Remedial Plans' compliance with the Supreme Court Remedial Order below.

III. Remedial Congressional Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

28. In determining the base map for the Congressional Districts in the Remedial Congressional Plan that was eventually enacted, the Senate started from scratch.

29. There was a House Draft of a remedial congressional plan that was never voted on and therefore never considered by a committee or the full General Assembly.

30. Senator Clark offered one amendment to the Remedial Congressional Plan, a statewide plan, that was tabled.

31. The Remedial Congressional Plans passed the Senate by a vote of 25-19. The "aye" votes in the Senate were solely by members of the Republican party, while the "no" votes in the Senate were solely by members of the Democratic Party. The Remedial Congressional Plan passed the House by voice vote along party lines.

B. Analysis of Partisanship Reflected in the Remedial Congressional Plan

32. The Remedial Congressional Plan reflects key differences from the 2021 Enacted Congressional Plan in the projected partisan makeup of certain districts.

a. Four congressional districts are some of the most politically competitive in the country (*i.e.*, presidential election differences of less than 5%): District 6, District 7, District 13, and District 14.

b. Wake and Mecklenburg Counties are only split across two districts unlike in the 2021 Enacted Congressional Plan when each county was split across three districts.

33. The Supreme Court Remedial Order stated that a combination of different methods could be used to evaluate the partisan fairness of a districting plan; of those methods, the General Assembly used the "mean-median" test and the "efficiency gap" test to analyze the partisan fairness of the Remedial Plans.

34. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Congressional Plan is not satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

35. The Court finds that the partisan skew in the Remedial Congressional Plan is not explained by the political geography of North Carolina.

IV. Remedial Senate Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

36. In determining the base map for the State Senate Districts, the Senate also started from scratch. The Senate altered two county groupings and adopted groupings for Senate Districts 1 and 2 that were preferred by Common Cause Plaintiffs. The remaining county groupings remained the same. As a result, the 13 wholly-contained single district county groupings in the Remedial Plan were kept from the Enacted Plan.

37. Alternative county groupings were proposed but not adopted.

a. The Senate considered the Democratic members' preferred alternate grouping for Forsyth County, which pairs it with Yadkin instead of Stokes County, but it was determined that the resulting districts in Alexander, Wilkes, Surry, and Stokes Counties would have been less compact. Additionally, Yadkin County is more Republican than Stokes County.

b. Alternative county groupings around Buncombe County were considered as well, but the Senate determined that any change from the chosen grouping would have resulted in districts that would have been significantly less compact.

38. The Remedial Senate Plan passed the Senate by a vote of 26-19. The "aye" votes in the Senate were solely by members of the Republican party, while the "no" votes in the Senate were solely by members of the Democratic Party. The Remedial Senate Plan passed the House by voice vote along party lines.

B. Analysis of Partisanship Reflected in the Remedial Senate Plan

39. The process for the development of the Remedial Senate Plan began with separate maps being drawn by the Senate Democratic Caucus and the Republican Redistricting and Election Committee members, respectively. The plans were then exchanged and discussed; however, after the two groups could not come to a resolution, the plan proposed by the Republican Redistricting and Election Committee members was then put to a vote by the Senate Committee and advanced to the full chamber.

40. The Remedial Senate Plan includes ten districts that were within ten points in the 2020 presidential race.

41. The Remedial Senate Plan reflects key differences from the 2021 Enacted Senate Plan in the projected partisan makeup of districts in certain county groupings.

a. In the Cumberland-Moore County grouping, Senate District 21 is now more competitive.

b. In the Iredell-Mecklenburg County grouping, one district is more competitive.

c. In New Hanover County, the districts were made more competitive, resulting in a Senate District 7 that leans Democratic.

d. In Wake County, Senate Districts 17 and 18 are more Democratic leaning.

42. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Senate Plan is satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

43. The Court finds that to the extent there remains a partisan skew in the Remedial Senate Plan, that partisan skew is explained by the political geography of North Carolina.

C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria

44. For the Remedial Senate Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as "incumbents."

45. In the Senate, incumbency was considered evenly. No Senators are double bunked unless as a result of the mandatory county groupings, and no Democratic members are double bunked with other incumbents.

46. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan were applied evenhandedly.

47. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis* and, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

48. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan do not perpetuate a prior unconstitutional redistricting plan.

49. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan are consistent with the equal voting power requirements of the North Carolina Constitution.

50. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial Senate Plan.

V. Remedial House Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

51. In determining the base map for the State House Districts, the House started from scratch after keeping only the 14 districts that were the product of single district county groupings.

52. The Remedial House Plan was ultimately amended by six amendments offered by Democratic Representatives.

a. Three amendments, drawn by Representative Reives, redrew certain districts in Wake, Mecklenburg, and Buncombe, which were already Democratic leaning, to be more Democratic leaning.

b. An additional amendment, also drawn by Representative Reives, added an additional district in Cabarrus County that is more Democratic leaning.

c. An amendment offered by Representative Meyer swapped two precincts in Orange County in order to keep Carrboro whole.

d. An amendment offered by Representative Hawkins adjusted district lines in Durham County in order to better follow educational district lines.

53. The Remedial House Plan passed the House by a vote of 115-5 and was passed by the Senate by a vote of 41-3. The "aye" votes in the House and Senate were by members of both political parties. The "no" votes in the House and Senate were solely by members of the Democratic Party.

B. Analysis of Partisanship Reflected in the Remedial House Plan

54. The Remedial House Plan reflects key differences from the 2021 Enacted House Plan in the projected partisan makeup of districts in certain county groupings.

a. Buncombe County, which consisted of 1 Republican and 2 Democratic districts in the Enacted Plan, consists of 3 Democratic districts in the Remedial House Plan.

b. Pitt County, which consisted of 1 Republican and 1 Democratic district in the Enacted Plan, consists of 2 Democratic districts in the Remedial House Plan.

c. Guilford County now consists of 6 Democratic leaning districts.

d. Cumberland County now consists of 3 Democratic districts and 1 competitive district.

e. Mecklenburg and Wake Counties now consist of 13 Democratic leaning districts each.

f. New Hanover, Cabarrus, and Robeson Counties now contain an additional competitive district each.

55. The Court finds, based upon and confirmed by the analysis of the Special Masters and their advisors, that the Remedial House Plans are satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

56. The Court finds that to the extent there remains a partisan skew in the Remedial House Plan, that partisan skew is explained by the political geography of North Carolina.

C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria

57. For the Remedial House Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as "incumbents."

58. In the House, incumbency was considered evenly. The only discretionary double bunking in the Remedial House Plan pairs two Republican members. There was no discretionary double bunking of Democratic members. The few double bunked members are double bunked solely as a result of the mandatory county groupings.

59. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan were applied evenhandedly.

60. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis* and, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

61. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan do not perpetuate a prior unconstitutional redistricting plan.

62. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan are consistent with the equal voting power requirements of the North Carolina Constitution.

63. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial House Plan.

VI. Plaintiffs' Alternative Remedial Plans

64. The following alternative remedial plans for the Court's consideration were submitted by NCLCV Plaintiffs, Harper Plaintiffs, and Plaintiff-Intervenor Common Cause on February 18, 2022 (hereinafter referred to as "NCLCV Alternative Plans"; "Harper Alternative Plans"; "Common Cause Alternative Plans"; or collectively, "Alternative Plans").

65. Although Plaintiffs submitted Alternative Plans, because the Court is satisfied with the Remedial House and Senate Plans, the Court did not need to consider an alternative plan for adoption.

66. Furthermore, the Court, in following N.C.G.S. § 120-2.4(a1), has chosen to order the use of an interim districting plan for the 2022 North Carolina Congressional election that differs from the Remedial Congressional Plan to the extent necessary to remedy the defects identified by the Court.

VII. Special Masters' Interim Congressional Plan

67. As part of their Report, the Special Masters have developed a recommended congressional plan ("Interim Congressional Plan") for this Court to consider due to their findings, which the Court has adopted, that the Remedial Congressional Plan does not satisfy the requirements of the Supreme Court Remedial Order and full opinion.

68. The Court finds that the Interim Congressional Plan recommended by the Special Masters was developed in an appropriate fashion[2], is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion.

Based upon the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. In *Harper v. Hall*, 2022-NCSC-17, the Supreme Court stated:

> We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment."). As in *Reynolds*, "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* However, as the trial court's findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional.

Id. at ¶163.

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[2] The data files (e.g., block equivalency, shape files, population deviation results) are included in the court file with this order in native format. The equivalent of the "stat pack" has been requested from the Special Masters' advisor and will be placed in the court file and provided to the parties as soon as available.

2. Plaintiffs have urged upon this court that we must adopt plans that "treat voters of both political parties fairly." They argue that the "LD Congressional and Senate Plans are not fair." Further, they argue that the Supreme Court ordered "fair maps" and that "[b]ecause the LD Congressional and Senate Plans are not fair maps, . . . the Court should adopt one of the fairer maps before it – such as the NCLCV Maps." We see Plaintiffs' arguments as tantamount to urging this Court to adopt a proportional representation standard, which the Supreme Court, in its order, specifically disavowed. *Id.* at ¶169.

3. The Court concludes that the Remedial Senate Plan satisfies the Supreme Court's standards.

4. The Court concludes that the Remedial House Plan satisfies the Supreme Court's standards.

5. Because the Court concludes that the enacted Remedial Senate and House Plans meet the Supreme Court's standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Senate and House Plans are presumptively constitutional.

6. Furthermore, no evidence presented to the Court is sufficient to overcome this presumption for the Remedial Senate and House Plans, and those plans are therefore constitutional and will be approved.

7. The Court concludes that the Remedial Congressional Plan does not satisfy the Supreme Court's standards.

8. Plaintiffs suggest that if we conclude that a Remedial Plan passed by the General Assembly does not satisfy the Supreme Court's standards, we should simply jettison that plan and adopt one of their plans. We do not believe that our conclusion on the Remedial Congressional Plan—that it fails to satisfy the Supreme Court's standards—automatically results in the adoption of an alternate plan proposed by Plaintiffs. Given that the ultimate authority and directive is given to the Legislature to draw redistricting maps, we conclude that the appropriate remedy is to modify the Legislative Remedial Congressional Plan to bring it into compliance with the Supreme Court's order. *See* N.C.G.S. § 120-2.4(a1).

9. Because the Court concludes that the enacted Remedial Congressional Plan does not meet the Supreme Court's standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Congressional Plan is not presumptively constitutional and is therefore subject to strict scrutiny.

10. The General Assembly has failed to demonstrate that their proposed Congressional map is narrowly tailored to a compelling governmental interest, and we therefore must conclude that the Remedial Congressional Map is unconstitutional.

11. The Interim Congressional Plan as proposed by the Special Masters satisfies the Supreme Court's standards and should be adopted by this Court for the 2022 North Carolina Congressional elections.

DECREE

BASED UPON THE FOREGOING findings and conclusions, the Court here by ORDERS the following:

1. The Remedial Senate Plan and Remedial House Plan, enacted into law by the General Assembly on February 17, 2022, are hereby APPROVED by the Court.

2. The Remedial Congressional Plan, enacted into law by the General Assembly on February 17, 2022, is hereby NOT APPROVED by the Court.

3. The Interim Congressional Plan as recommended by the Special Masters is hereby ADOPTED by the Court and approved for the 2022 North Carolina Congressional elections.

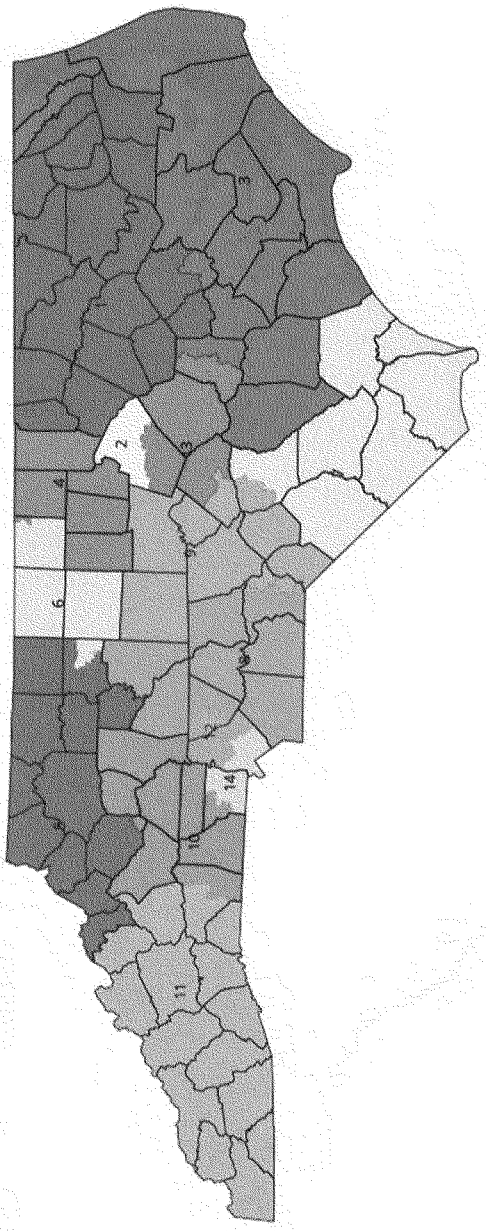
4. As the Special Masters and their retained experts may be called upon to assist this Court in this matter should the need arise in the future, the prohibition in this Court's prior order appointing the Special Masters against contacting the Special Masters or their experts remains in full force and effect.

SO ORDERED, this the 23rd day of February, 2022.

A. Graham Shirley, Superior Court Judge

Nathaniel J. Poovey, Superior Court Judge

Dawn M. Layton, Superior Court Judge



Interim Congressional Plan

TO: Judges Shirley, Poovey, and Layton

FROM: Special Masters

DATE: February 23, 2022

SUBJECT: Special Masters' Report – Analysis and Recommendations

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Introduction

Pursuant to the trial court's "Order Appointing Special Masters" on February 16, 2022, ¶ 6, the undersigned now file the following report with the three-judge panel in this case.

Motion for Disqualification

In its Order Appointing the three Special Masters, the Court authorized the undersigned Special Masters (hereinafter "Special Masters") to "hire research and technical assistants and advisors reasonably necessary to facilitate [our] work." We subsequently retained Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang to assist us in satisfying our duties as Special Masters. The Curriculum Vitae for each of these individuals (hereinafter referred to as "advisors") is attached to this report. In this same Order, this Court also ordered the "parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." *Id.*

We have been informed that Legislative Defendants have filed a motion in this case requesting that this Court disqualify Dr. Wang and Dr. Jarvis as advisors to the Special Masters and take further steps to destroy any work product completed by them and otherwise prohibit the undersigned from considering any information or materials obtained from them. We have investigated this matter and below is a detailed review of our findings.

On February 18, 2022, at 1:01 pm, Dr. Wang emailed Dr. Mattingly requesting the underlying data utilized in his analysis of the 2021 redistricting plans. On this same date at 1:57 p.m., Dr. Mattingly responded, and correspondence between Dr. Wang and Dr. Mattingly continued through February 20, 2022 at 10:23 a.m.

On February 18, 2022, at 1:21 p.m., Dr. Wang emailed Dr. Pedgen, expert for Harper Plaintiffs, seeking the underlying data Dr. Pedgen utilized in his analysis of the 2021 redistricting plans. On this same date at 2:31 p.m., Dr. Pedgen responded to Dr. Wang's inquiry, directing him to use the method utilized by Dr. Mattingly, expert for Harper Plaintiffs and Plaintiff Common Cause. On February 19, 2022, at 6:59 a.m., Dr. Wang responded to Dr. Mattingly's correspondence.

On February 19, 2022, at 4:46 p.m., Dr. Jarvis contacted Dr. Mattingly to request clarification on Dr. Mattingly's analysis and underlying data. Later that day, at 8:13 p.m., Dr. Jarvis contacted Dr. Herschlag, Dr. Mattingly's colleague at Duke University, regarding Dr. Herschlag's analysis and underlying data supporting his analysis of the 2021 redistricting plans to which Dr. Herschlag responded on that same date. All email correspondence between Dr. Wang and Dr. Jarvis and the plaintiff experts Mattingly and Pegden is attached to this report and the email correspondence attached is all of the communication that occurred between the advisors and any of the experts of the parties.

The undersigned acknowledge the technical breach of this Court's mandate that no *ex parte* communication occur between parties and non-parties with the Special Masters. The undersigned, however, respectfully recommend that the Court deny the motion for the following reasons:

- First, these communications between the advisors and Drs. Mattingly and Herschlag do not appear to have been made in bad faith and constitute the only communications between them, written or otherwise. The advisors immediately ceased contact with Drs. Mattingly and Herschlag, and have provided copies of the communications. Therefore, all parties are privy to the extent of the communications.
- Second, their communications directed at experts for Harper Plaintiffs were solely for the purpose of proceeding as quickly as possible within the abbreviated time frame allotted for the remedial process.
- Third, the Special Masters emphasize that, while the communications were in the context of the advisors' preliminary steps to evaluate the 2022 Remedial Plans, the communications sought background information pertaining to the earlier analysis of the 2021 Redistricting Plans performed by Drs. Pegden, Mattingly, and Herschlag in the merits stage of this case that was ultimately received and relied upon by the Court at trial. Additionally, as was later determined, the information sought by Dr. Wang and by Dr. Jarvis was publicly available on Dr. Hershlag's website at the time of the communications questioned herein by the Legislative Defendants.
- Finally, though the analysis provided by Drs. Wang and Jarvis was helpful and consistent with the analysis of our other expert advisors, it was not determinative of any recommendations made by the Special Masters to the court.

Review of Proposed Remedial Plans

Pursuant to the North Carolina Supreme Court's opinion, any plan with a mean-median difference of 1% or less (*Harper*, 2022-NCSC-17 at ¶ 166) and an efficiency gap below 7% (*Harper*, 2022-NCSC-17 at ¶ 167) should be considered presumptively constitutional. Additionally, as the Supreme Court recognized, other metrics may be instructive (*Harper*, 2022-NCSC-17 at ¶ 168). The Special Masters considered the full Order and Opinion of the North Carolina Supreme Court along with, the submissions from all of the parties as well as the reports of the advisors and reached the following conclusions:

I. Proposed Remedial House Plan

The advisors as well as the experts of the parties ("experts") all found the efficiency gap of the proposed remedial House plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial House plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court that the proposed remedial House plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial House plan.

II. Proposed Remedial Senate Plan

All of the advisors and experts found the efficiency gap of the proposed remedial Senate plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court the remedial Senate plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial Senate plan.

III. Proposed Remedial Congressional Plan

Unlike the proposed remedial House and Senate plans, there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%. The Special Masters considered this evidence along with the advisors' findings on the partisan symmetry analysis and the declination metrics. There is disagreement among the parties as to whether the proposed remedial congressional plan meets the presumptively constitutional thresholds suggested by the Supreme Court. The Special Masters, considering the reports of their advisors and the experts of the parties while giving appropriate deference to the General Assembly, are of the opinion that the proposed remedial congressional plan fails to meet the threshold of constitutionality and recommend that the Trial Court reject the proposed remedial congressional plan as being unconstitutional.

Given the recommendation that the Trial Court reject the proposed remedial congressional plan, and consistent with the instructions from the three-judge panel and the Order of the Supreme Court of North Carolina, the Special Masters have submitted a modified version of the proposed remedial congressional plan submitted by the Legislative Defendants. It is our opinion that the attached plan satisfies the requirements of the Supreme Court.

The following data files for the modified congressional plan are included with this report:

1. Block equivalency files in .CSV format for each district and the plan as a whole;
2. Environmental Systems Research Institute, Inc. (ESRI) shapefiles for each district and the plans as a whole;
3. Color maps in .PDF format of the plan as a whole;
4. Population totals and deviations for each district based on the 2020 Census P.L. 94-171 dataset; and
5. Note: due to time constraints, the functional equivalent of what the General Assembly includes in its "stat pack" is not included with this report; however, if requested we will endeavor to obtain this from Dr. Grofman.

In redrawing certain district lines, the undersigned considered all of the submitted plans and related commentary. Being mindful that the Constitution of North Carolina provides that the General Assembly has the responsibility of redistricting, we focused on the proposed remedial congressional plan submitted by the Legislative Defendants. On that basis, the Special Masters worked solely with Dr. Bernard Grofman and his assistant to amend the Legislative Defendants' plan to

enhance its consistency with the opinion of the Supreme Court of North Carolina, the Constitutions of the United States and of North Carolina, and the expressed will of the General Assembly.

Dr. Grofman prepared a preliminary exemplar map at the Special Masters' request and thereafter at the instruction of the Special Masters prepared three maps for consideration. One of these maps raised potential VRA concerns and so was discarded. A second map did not meet the 1% threshold for mean-median difference and so was likewise discarded. The Special Masters then modified the third prepared map in order to improve the efficiency gap and mean-median difference scores as well as compactness and contiguity measures.

The following parties were involved in the process of redrawing the plans:

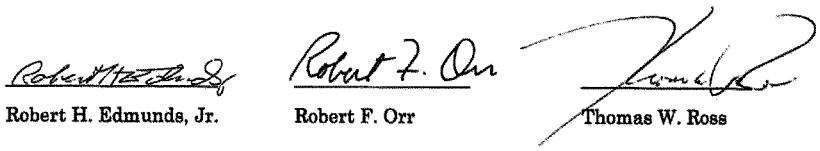
a. Robert F. Orr
b. Robert H. Edmunds, Jr.
c. Thomas W. Ross
d. Dr. Bernard N. Grofman
e. Zachary R. Griggy (Research Assistant to Dr. Grofman)
f. Adam H. Steele, Senior Judicial Fellow (for administrative purposes only)
g. Alison J. Rossi, Judicial Fellow (for administrative purposes only)
h. Danielle Smith, Judicial Fellow (for administrative purposes only)

Dave's Redistricting App was used in the redrawing of the plan.

The Special Masters believe the modified congressional plan recommended for adoption to the Trial Court achieves the partisan fairness and "substantially equal voting power" required by the Supreme Court of North Carolina without diluting votes under the Voting Rights Act while maintaining the number of county splits, retaining equal population, compactness, and contiguity, as well as respecting municipal boundaries. Dr. Grofman's analysis of the modified congressional plan recommended by the Special Masters indicates that the plan has an efficiency gap of 0.63%, a mean-median difference of 0.69%, seat bias of 0.28%, and vote bias of 0.10%. According to Dr. Grofman, "this is the most non-dilutive plan in partisan terms of any map that has been submitted to the Court."

Accordingly, the Special Masters recommend to the Trial Court that it order the State of North Carolina to utilize the modified congressional plan prepared by the Special Masters in the 2022 Congressional election.

This the 23rd day of February 2022.



Robert H. Edmunds, Jr. Robert F. Orr Thomas W. Ross

Acknowledgement

We would like to thank the advisors, Dr. Grofman, Dr. Jarvis, Dr. McGhee, and Dr. Wang for their analysis and advice in the extremely compressed timeframe. Additionally, we would like to thank the Judicial Fellows, Adam Steele, Alison Rossi, and Danielle Smith for their administrative support and assistance in preparing this report and for the long hours of work in bringing this matter to a conclusion.

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 23rd day of February 2022.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

FILED
2022 FEB 23 AM 11:01
WAKE CO., C.S.C.
BY

STATE OF NORTH CAROLINA

COUNTY OF WAKE

REBECCA HARPER, *et al.*,
Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

ORDER DENYING LEGISLATIVE DEFENDANT'S MOTION TO DISQUALIFY

THIS MATTER comes before the undersigned three-judge panel upon Legislative Defendant's Motion to Disqualify Dr. Samuel Wang and Dr. Tyler Jarvis as Assistants to the Special Masters, filed February 21, 2022.

Legislative Defendants, through the present Motion, request this Court to disqualify Dr. Wang and Dr. Jarvis as assistants or advisors to the Special Masters, requiring any work

product completed by them to be immediately destroyed, prohibiting the Special Masters from considering any information or materials obtained from Dr. Wang or Dr. Jarvis, and requiring the Special Masters and their assistants to produce any communications had with third parties related to North Carolina redistricting.

In the Report of the Special Masters, filed contemporaneously with this Order as part of this Court's Remedial Order, the Special Masters set forth multiple reasons why Drs. Wang and Jarvis should not be disqualified from serving as their advisors. This Court agrees and, for the reasons expressed in the Special Masters' Report, will deny Legislative Defendant's Motion to Disqualify.

BASED UPON THE FOREGOING and in the exercise of the Court's discretion, the Court ORDERS that Legislative Defendant's Motion is DENIED.

SO ORDERED, this the 23 day of February 2022.

A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 23rd day of February 2022.

Kellie Z. Myers
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426
21 CVS 500085

2022 FEB 21 A 11:13

WAKE CO., C.S.C.

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

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.

Defendants.

LEGISLATIVE DEFENDANTS' MOTION TO DISQUALIFY SAM WANG AND TYLER JARVIS AS ASSISTANTS TO THE SPECIAL MASTERS

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore (collectively, "Legislative Defendants"), by and through undersigned counsel, and pursuant to Rule 7 of the North Carolina Rules of Civil Procedure and the Court's inherent authority, move this Court for an order (1) disqualifying Sam Wang and Tyler Jarvis as assistants to the Special Masters; (2) requiring any work product completed by Wang or Jarvis to be immediately destroyed; (3) prohibiting the Special Masters from considering any information or materials obtained from Wang or Jarvis; and (4) requiring the Special Masters and their assistants to immediately produce any other communications they have had with third parties related to North Carolina redistricting. In support of this motion, Legislative Defendants respectfully submit the following:

1. On February 16, 2022, this Court entered an Order appointing three Special Masters to aid the Court in the remedial process: Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W.

Ross. The Order also authorized the Special Masters "to hire research and technical assistants and advisors reasonably necessary to facilitate their work." (February 16 Order at ¶ 3). Of specific import, the Order stressed that "Parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." (February 16 Order at ¶ 5(b)). The Order also required all parties submitting Proposed Remedial Plans to timely submit them by 5:00 p.m. on Friday, February 18, 2022.

2. On Friday, February 18 at 5:54 p.m., the parties were informed via email that the Special Masters would utilize four assistants in this process: Bernard Grofman, Tyler Jarvis, Eric McGhee, and Sam Wang.

3. On Sunday, February 20, 2022 at 3:12 p.m., Legislative Defendants were informed by counsel for *Harper* Plaintiffs for the first time that two of the appointed assistants, Tyler Jarvis and Sam Wang, engaged in substantive *ex parte* communications with Plaintiffs' experts, Drs. Mattingly, Herschlag, and Pegden, both prior to and following their formal appointments as assistants, seeking advice regarding the data and information relating to this remedial phase.

4. First, on February 18, 2022 at 1:21 p.m., Sam Wang emailed Dr. Pegden disclosing that he had "been approached to evaluate the remedial plans for North Carolina" and sought data and information underlying Dr. Pegden's analysis in the above-captioned case. Approximately one hour later, Dr. Pegden actively engaged Wang and provided substantive advice for Wang to use Dr. Mattingly's method as a benchmark. A copy of the correspondence between Dr. Pegden and Wang is attached hereto as **Exhibit A**, including Wang's follow up email seeking additional advice as to cluster-by-cluster analysis.

5. Similarly, on Friday, February 18 at 1:01 p.m., Wang reached out to Dr. Mattingly seeking advice regarding the underlying data supporting his report in the above-captioned matter.

Dr. Mattingly quickly responded within the hour, and gave his opinion as to the Court's remedial order. The correspondence continued through the weekend, with Dr. Mattingly acknowledging that "the court order forbids [him] from engaging with the special masters team," but then went on to clarify an "error" in his initial correspondence. A copy of the correspondence between Dr. Mattingly and Wang is attached hereto as **Exhibit B**.

6. Lastly, Tyler Jarvis contacted Dr. Herschlag on Saturday, February 19 and engaged in substantive conversations regarding Dr. Herschlag's analysis and underlying data supporting his report in the above-captioned matter. A copy of the correspondence between Dr. Herschlag and Jarvis is attached hereto as **Exhibit C**.

7. Wang and Jarvis did not copy any counsel of record or the parties in their correspondence with Drs. Pegden, Mattingly, and Herschlag.

8. To the best of Legislative Defendants knowledge, Wang and Jarvis only reached out to Plaintiffs' experts.

9. Special Masters were prohibited from having *ex parte* communications with the parties. (*See* February 16 Order at ¶ 5(b)). This prohibition would be meaningless if it did not also apply to their "agents." Certainly, a Special Master who is prohibited from having *ex parte* communications cannot evade the requirements of this rule by directing his assistant to make those communications for him. And if the assistant made *ex parte* communications without the permission of the Special Master, this would indicate that the assistant had exercised his own discretion to have *ex parte* communications, a procedure that the Special Master cannot directly make without violating the court's Order. Moreover, the reasons to prohibit *ex parte* communications includes the need for transparency and equal treatment of the parties. The communications disclosed by the *Harper* Plaintiffs' counsel already show that the process is

tainted and that the Special Master's assistants intend to rely on Plaintiffs' experts for privately conveyed information as opposed to public flings that are available to the parties and the public.

10. Courts routinely rely on Special Masters in redistricting litigation to provide impartial guidance on complex, public issues. Allowing Wang and Jarvis to engage in *ex parte* communications here would be the equivalent of the *Covington* court relying on Dr. Persily's Report if his research assistants had directly reached out to either Plaintiffs or Defendants experts to assist in writing the Report that the court relied upon. That did not happen in *Covington*, and should not happen here.

11. Allowing Wang and Jarvis to continue as assistants to the Special Masters would prejudice Legislative Defendants. Specifically, seeking information only from Plaintiffs' experts in a one-sided *ex parte* project will bias the assistants, the Special Masters, and possibly the Court. This conduct is inappropriate for individuals appointed by the Court to assist their impartial review.[1]

12. Keeping Wang and Jarvis on as assistants to the Special Masters will cast a pall on the impartiality of these proceedings. Nor would it be the first time that Professor Wang's actions raised issues as to transparency and impartiality. For example, just recently Professor Wang and his Princeton Gerrymandering Project were the subject of allegations in a lawsuit alleging improper contact and with a member of the New Jersey Redistricting Commission.[2]

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[1] In fact, Wang displayed prejudice before his appointment as an assistant to the Special Masters against Legislative Defendants as he tweeted a criticism of Legislative Defendants' expert Dr. Barber during trial in this verry matter. *See* https://twitter.com/SamWangPhD/status/1478192492432535558.

[2] *See In re Establishment of Congressional Districts by the New Jersey Redistricting Commission*, No. 086587, ¶ 34 (Feb. 3, 2022), https://www.njcourts.gov/courts/assets/supreme/R3-21.pdf?c=1SK; *Claiming partisan fairness models are proprietary, Princeton Gerrymandering Project won't show their work*, New Jersey Globe (Jan. 27, 2022), https://newjerseyglobe.com/redistricing/claiming-partisan-fairness-models-are-proprietary-princeton-gerrymandering-project-wont-show-their-work/; *see also New congressional voting map reignites calls for redistricting reform*, NJ Spotlight News (Feb. 1, 2022), https://www.njspotlightnews.org/2022/02/nj-new-congressional-voting-map-redistricting-reform-new-jersey-supreme-court-republicans-object/ .

13. The interests of justice require disqualification of Wang and Jarvis in this pending matter of public interest.

WHEREFORE, for the foregoing reasons, Legislative Defendants move the Court to enter an Order:

1. Disqualifying Sam Wang and Tyler Jarvis as assistants to the Special Masters;
2. Requiring any work product completed by Wang or Jarvis to be immediately destroyed;
3. Prohibiting the Special Masters from considering any information or materials obtained from Wang or Jarvis;
4. Requiring the Special Masters and their assistants to immediately produce any other communications they have had with third parties related to North Carolina redistricting; and
5. Granting any further relief as this Court deems necessary and just.

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

/s/ Phillip J. Strach

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Exhibit A

From: "Samuel S. Wang" <sswang@princeton.edu>
Sent: February 19, 2022 6:59:24 AM EST
To: Wesley Pegden <wes@math.cmu.edu>
Subject: Re: North Carolina ensemble analysis

Dear Wes,

That's a good point. I forgot that what you do is explore the space around a specific plan. Sorry to be spacey that way.

I am requested to evaluate the remedial plans, focusing on the eight statewide plans from Harper plaintiffs, NCLCV, and the Legislative Defendants. I think Common Cause's single districts and the Democrats' single-cluster alternatives are secondary, though I am pondering them.

I wrote Mattingly too. He thinks ensembles are not at the heart of the court's thinking. If the court wants partisan-fairness metrics (mean-median difference, efficiency gap, etc.) that is certainly easier for me to write about. It's more in the territory of turning measures and statistical tests into legally comprehensible concepts, which is more in my usual zone. I am kind of old-fashioned that way.

Cluster-by-cluster analysis...the statistical measures aren't suited for that, right? I wonder what I would do there. Maybe just a simple table of safe D/competitive/safe R?

Best,
Sam

>>>
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Neuroscience: synapse.princeton.edu
Election analytics: election.princeton.edu

From: Wesley Pegden <wes@math.cmu.edu>
Sent: Friday, February 18, 2022 2:31 PM
To: Samuel S. Wang <sswang@princeton.edu>
Subject: Re: North Carolina ensemble analysis

Hi Sam!
I can certainly send you a bunch of histograms (and in any case all of the reports from that case are a matter of public record), but I think as a benchmark to compare to, it is more sensible to compare to a method like Mattingly's which has the design goal of generating a representative sample.

(Since my method is aimed instead at detecting optimization by testing sensitivity to pertubation, it is not actually a design goal of the algorithm that the distribution of partisan outcomes of the comparison districtings are globally representative of the distribution of all maps, and for various reasons you expect that if you used my histograms as proxies for a representative sample, you would underestimate the extent to which the enacted map is truly gerrymandered; i.e., my comparison maps tend to me more similar to the map they are being used to evaluate than a truly random map would be).

For example, in my reports, I even caution against making comparative statements about one cluster vs another of the same districting, i.e., I discourage concluding, e.g., that cluster A is more gerrymandered than cluster B because A is a more statistically significant outlier; instead, the right interpretation is that my method is better able to generate rigorous evidence that A is an outlier.

So generally I would use caution using the results in this way (especially in an analysis that was not using the same implementation of the Markov chain). For example, I have testified multiple times that my method is not an appropriate way to demonstrate that a districting is not gerrymandered.

(Have you been asked to analyze the districting cluster-by-cluster or just at the whole state level?)

-Wes

On 2/18/22 13:21, Samuel S. Wang wrote:
> Hi, Wes. I wonder if you can help me out.
>
> I've been approached to evaluate the remedial plans for North Carolina.
> A very useful benchmark would be the analysis you have done. Is it
> possible to get the histograms of the analysis you've done? That would
> allow a direct apples to apples comparison, which the court might like.
>
> Best,
> Sam

>
> >>>>
>
> Prof. Samuel S.-H. Wang
>
> Neuroscience Institute, Washington Road
>
> Princeton University
>
> Princeton, NJ 08544
>
> Office: (609) 258-0388 <tel:(609)%20258-0388>
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>
> Neuroscience: synapse.princeton.edu <http://synapse.princeton.edu/>
>
> Redistricting: gerrymander.princeton.edu <http://gerrymander.princeton.edu/>
>
> Sam's election analytics:election.princeton.edu
> <http://election.princeton.edu/>
>
>
> Sent from my iPhone

--
Sent from my Android device with K-9 Mail. Please excuse my brevity.

Exhibit B

From: "Samuel S. Wang" <sswang@princeton.edu>
Date: February 20, 2022 at 10:23:45 AM EST
To: Jonathan Mattingly <jonm@math.duke.edu>
Subject: Re: Histogram data

In light of this, I will not write about ensembles at all. For the record, I feel that mainly you pointed me towards publicly posted files.

>>>>
Prof. Samuel S.-H. Wang
Neuroscience Institute, Washington Road
Princeton University

Princeton, NJ 08544
Office: (609) 258-0388
Virtual office: http://princeton.zoom.us/my/samwang

Neuroscience: synapse.princeton.edu
Redistricting: gerrymander.princeton.edu
Sam's election analytics: election.princeton.edu

Sent from my iPhone

On Feb 20, 2022, at 9:59 AM, Jonathan Mattingly <jonm@math.duke.edu> wrote:

Sam,

I did not know you were working with the special master. I have been told that the court order forbids me and greg from engaging with the special maters team. It makes sense as you are to be at arms-length znd we are associated with the plaintiffs.

I will clarify one error I made in my first email. I meant to point you to the "No Municipality"ensemble not the incumbency plots. This is the primary for the house and the secondary for the Senate.

If we have been miss informed about interacting with the special master, please let us know. This is what counsel has told us.

Jonathan

On Feb 19, 2022, at 7:10 AM, Samuel S. Wang <sswang@princeton.edu> wrote:

Hi, Jonathan.

Thinking about one of your points, I will mostly focus on scalar statistical measures such as mean-median difference and so on. There is plenty to think about there. The special masters have also contacted Tyler Jarvis to work on ensemble analysis, which is a more natural fit.

My group has generated its own histograms. We have our own ensembles, based on 2020 election data. It is a small fraction of what you and Herschlag have done, but maybe it will do for my purposes.

I am going through your Github today. If you can point me toward a file in there that corresponds to the histograms in Figures 5.1.1 and 5.2.1, that would be helpful. It would also orient me inside your Github!

Best,
Sam

From: Jonathan Mattingly <jonm@math.duke.edu>
Sent: Friday, February 18, 2022 1:57 PM
To: Samuel S. Wang <sswang@princeton.edu>
Subject: Re: Histogram data

Hi sam,

Which histograms in particular ?Do you mean like page 19 ? there are a lot of histograms.

Notice there are two different ensembles for the house and senate. One which is more strict about preserving municipalities. The court order don't seem to valorize that one as much.
In general it is not clear that comparing the ensembles is as relevant given that the court asked about partisan symmetry and other measure which the ensemble should be judged. A new ensemble could/should be generated or the old one could be filtered (maybe)

Here is most of our data is here:

https://git.math.duke.edu/gitlab/gjh/ncanalysis2020

Jonathan

From: "Samuel S. Wang" <sswang@princeton.edu>
Date: Friday, February 18, 2022 at 1:01 PM
To: Jonathan Mattingly <jonm@math.duke.edu>
Subject: Histogram data

Hi, Jonathan. How are you?

I have been asked to help evaluate the remedial maps produced by the North Carolina General Assembly. I wonder if you are willing to share the outputs of the ensemble analysis that went into your expert report. Specifically, I seek the numbers that went into the histograms. Is that possible?

I have read your report (and the other reports) with interest, and am studying up to make sure I do not miss anything. There is a lot of expert testimony here, which is good.

Best,
Sam

Prof. Samuel S.-H. Wang
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Virtual office: http://princeton.zoom.us/my/samwang

Neuroscience: synapse.princeton.edu
Election analytics: election.princeton.edu

Exhibit C

---------- Forwarded message ---------
From: **Tyler Jarvis** <jarvis@math.byu.edu>
Date: Sat, Feb 19, 2022, 9:33 PM
Subject: Re: quick question about data
To: Gregory Herschlag <gjherschlag@gmail.com>

Thank you! I really appreciate your taking time to answer so quickly.

On Sat, Feb 19, 2022 at 7:26 PM Gregory Herschlag <gjherschlag@gmail.com> wrote:
1. Primary in the senate: mcd_on_1
Secondary in the senate mcd_on_0

Primary in the house: primary
Secondary in the house: mcd_on_1

2. Convergence study was the same in the congressional. Only a subset of the full convergence study was shown in the report

On Sat, Feb 19, 2022, 9:04 PM Tyler Jarvis <jarvis@math.byu.edu> wrote:
Thank you so much! This is very helpful.

I have two more quick follow-up questions, if you have time:

1. Jonathan talks about a "primary" and a "secondary" ensemble in his expert report. It sounds like the mcd_on_1 is what he called "primary" and mcd_on_0 is what he called "secondary"? And the third tuned ensemble for the house is the one in the directory called `primary`?

2. I couldn't see anything in Jonathan's expert report about convergence of the congressional ensemble--there's a section header, but I see no text or plots. Can you tell me anything about the convergence of that ensemble? I assume you also used parallel tempering with an independent sample reservoir. Were results similar to the convergence of the legislative ensemble?

Best,
Tyler

On Sat, Feb 19, 2022 at 6:47 PM Gregory Herschlag <gjherschlag@gmail.com> wrote:
Hi Tyler,

Nice to hear from you. To answer your question, the mcd_on_0 and mcd_on_1 ensembles refer to whether or not municipalities were considered when drawing the ensembles. These ensembles were developed before the now-overturned maps came out. We found that the mcd_on_1 ensemble had similar municipal splitting to the senate map, but the house plan split municipalities more than our mcd_on_1 ensemble but less than our mcd_on_0 ensemble, so we tuned a third ensemble here to reflect the amount of municipal splitting seen in the house map.

Hope this helps! Let me know if not or if you have other questions,
Greg

On Sat, Feb 19, 2022 at 8:13 PM Tyler Jarvis <jarvis@math.byu.edu> wrote:
Dear Greg,

I am sorry to bother you on a long weekend, but I have been asked to help evaluate the remedial maps for the North Carolina special masters on a very short deadline.

Because there is no time for my team to generate large ensembles that meet the clustering and other criteria specific to North Carolina, I was directed by the masters to your ensemble data and to Jonathan's expert report.

I would be extremely grateful if you could help clarify one thing about the data.

From Jonathan's report I understand that you ran both a Primary and a Secondary ensemble with different properties, especially in regard to splitting municipalities. Sam Wang tells me that Jonathan thinks the court didn't really valorize the secondary ensemble, so it might make sense to focus on the primary ensemble.

I assume that both these ensembles are in the directory `observables/electionResults/`, but I am not sure which subfolder corresponds to which ensemble. Specifically, in the senate you have just two directories: `mcd_on_0` and `mcd_on_1`, whereas in the house you have three directories: `mcd_on_0`, `mcd_on_1`, and `primary`, so it is not entirely clear which is primary and secondary of these three.

Thanks again for any help you can provide.

Best,
Tyler

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

FILED
2022 JAN 11 PM 3:08
WAKE CO., C.S.C.
BY

STATE OF NORTH CAROLINA

COUNTY OF WAKE

REBECCA HARPER, *et al.*,
Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

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INTRODUCTION

These consolidated cases present this Court with the unique challenge of balancing the competing interests of fairness, the role of the judiciary, statutory and constitutional construction, the interpretation of prior court rulings, and good old fashion common sense. Sometimes, courts are required to make decisions that are not popular, but because judges take an oath to uphold the law, those rulings are mandated. And sometimes, redress of a perceived wrong does not lie with the judiciary, but rather, with one of the other co-equal branches of government.

All of Plaintiffs' claims in these lawsuits, in essence, stem from the basic argument that the 2021 redistricting maps passed by the North Carolina General Assembly are unconstitutional under the North Carolina Constitution. We have taken great lengths to examine that document. At the end of the day, after carefully and fully conducting our analysis, it is clear that Plaintiffs' claims must fail. Judges, just like many of the citizens they serve, do not always like the results they reach. That fact notwithstanding, judges have a solemn duty to uphold the law. We have done our best to perform that duty, regardless of the consequences. Our complete ruling is more fully set forth in the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. Summary of Relevant Procedural History

1. Plaintiffs North Carolina League of Conservation Voters, Inc.; Henry M. Michaux, Jr.; Dandrielle Lewis; Timothy Chartier; Talia Fernos; Katherine Newhall; R. Jason Parsley; Edna Scott; Roberta Scott; Yvette Roberts; Jereann King Johnson; Reverend Reginald Wells; Yarbrough Williams, Jr.; Reverend Deloris L. Jerman; Viola Ryals Figueroa; and Cosmos George (hereinafter "NCLCV Plaintiffs") filed their Complaint (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to

Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure on November 16, 2021. The NCLCV Plaintiffs' Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

2. Plaintiffs Rebecca Harper; Amy Clare Oseroff; Donald Rumph; John Anthony Balla; Richard R. Crews; Lily Nicole Quick; Gettys Cohen Jr.; Shawn Rush; Mark S. Peters; Kathleen Barnes; Virginia Walters Brien; Eileen Stephens; Barbara Proffitt; Mary Elizabeth Voss; Chenita Barber Johnson; Sarah Taber; Joshua Perry Brown; Laureen Floor; Donald M. MacKinnon; Ron Osborne; Ann Butzner; Sondra Stein; Bobby Jones; Kristiann Herring; and David Dwight Brown (hereinafter "Harper Plaintiffs") filed their Complaint (Civil Action No. 21 CVS 500085) on November 18, 20211, and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485 on November 30, 2021. Harper Plaintiffs amended their Complaint on December 13, 2021, and the Harper Plaintiffs' operative Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14.

[1] Plaintiffs Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Flood, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, and Kristiann Herring were added as Plaintiffs upon the filing of Harper Plaintiffs' Amended Complaint.

3. On November 19, 2021, and November 22, 2021, the NCLCV and Harper actions, respectively, were assigned to the undersigned three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1.

4. On December 3, 2021, the undersigned consolidated these respective cases pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' Motions for Preliminary Injunction. On December 3, 2021, after considering the extensive briefing and oral arguments on the motions, the undersigned denied NCLCV Plaintiffs' and Harper Plaintiffs' Motions for Preliminary Injunction.

5. NCLCV Plaintiffs and Harper Plaintiffs thereafter filed a notice of appeal with the North Carolina Court of Appeals. After initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay on December 6, 2021.

6. On December 8, 2021, on NCLCV Plaintiffs' and Harper Plaintiffs' Petitions for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule, the Supreme Court of North Carolina granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." SCONC order on Pls motion p. 3. The Order further directed this Court to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before January 11, 2022.

7. In light of our Supreme Court's directive and the history of redistricting litigation in our state courts, including the Common Cause v. Lewis action in 2019 in which a final judgment was not entered until almost a year after the filing of the plaintiffs' complaint and an extensive discovery period culminated in a two-week trial, this Court

entered a scheduling order on December 13, 2021, expediting discovery and scheduling trial to commence on January 3, 2022. This Case Scheduling Order was thereafter supplemented on December 28, 2021, and December 30, 2021.

8. On December 13, 2021, Common Cause moved to intervene in these consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals. On December 15, 2021, this Court granted Common Cause's motion to intervene as a plaintiff in these consolidated cases, and Plaintiff-Intervenor Common Cause filed its Complaint on December 16, 2021.2 Plaintiff Common Cause's Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

9. The North Carolina Congressional Districts challenged by Plaintiffs collectively include all fourteen enacted Congressional Districts.

10. The North Carolina Senate Districts challenged by Plaintiffs collectively include Senate Districts 1, 2, 13, 14, 15, 16, 17, 18, 19, 21, 26, 27, 28, 31, 32, 37, 38, 39, 40, 41, 42, 46, 47, 49, 50.

11. The North Carolina House of Representatives Districts challenged by Plaintiffs collectively include House Districts 2, 4, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 29, 30, 31,

[2] Unless specifically designated otherwise in the remainder of this Judgment, "Plaintiffs" collectively refers to NCLCV Plaintiffs, Harper Plaintiffs, and Plaintiff Common Cause.

33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 57, 58, 59, 60, 61, 62, 71, 72, 74, 75, 88, 91, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 112, 114, 115, and 116.

12. On December 15, 2021, this Court entered a Protective Order to govern the production and exchange of the parties' documents, and any testimony at deposition relating to such documents, that reflect the parties' confidential information.

13. On December 17, 2021, Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter "Legislative Defendants") filed their Answer to NCLCV Plaintiffs' Complaint, asserting seventeen affirmative defenses, and Harper Plaintiffs' Amended Complaint, asserting fifteen affirmative defenses.

14. Affirmative defenses raised by Legislative Defendants include inter alia that granting the requested relief will violate the Voting Rights Act and the United States Constitution; that granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; that the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; that Plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; that Plaintiffs' claims are barred by the doctrine of laches; that Plaintiffs have failed to state claims upon which relief can be granted; that Plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; that the only limitations on redistricting legislation are found in Article II, Sections 2, 3, 4,

and 5 of the North Carolina Constitution; that Plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; that Plaintiffs' claims are non-justiciable and fail to provide judicially manageable standards; that Plaintiffs lack standing; and, that Plaintiffs have unclean hands and therefore are not entitled to equitable relief.

15. Defendant Ralph E. Hise, Jr. is a Republican member of the North Carolina Senate, representing Senate District 47, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Hise is sued in his official capacity only. Defendant Hise resides in Senate District 47 in the 2021 districting plan.

16. Defendant Warren Daniel is a Republican member of the North Carolina Senate, representing Senate District 46, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Daniel is sued in his official capacity only. Defendant Daniel resides in Senate District 46 in the 2021 districting plan.

17. Defendant Paul Newton is a Republican member of the North Carolina Senate, representing Senate District 36, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Newton is sued in his official capacity only. Defendant Newton resides in Senate District 34 in the 2021 districting plan.

18. Representative Destin Hall is Republican member of the North Carolina House of Representatives, representing House District 87, and the Chairman of the House Standing Committee on Redistricting. Defendant Hall is sued in his official capacity only. Defendant Hall resides in House District 87 in the 2021 districting plan.

19. Defendant Timothy K. Moore is a Republican member and the Speaker of the North Carolina House of Representatives, representing House District 111. Defendant Moore is sued in his official capacity only. Defendant Moore resides in House District 111 in the 2021 districting plan.

20. Defendant Philip E. Berger is a Republican member and the President Pro Tempore of the North Carolina Senate, representing Senate District 30. Defendant Berger is sued in his official capacity only. Defendant Berger resides in Senate District 26 in the 2021 districting plan.

21. On December 17, 2021, Defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their Answer to Harper Plaintiffs' Amended Complaint. Also on December 17, 2021, these same Defendants along with Defendant State of North Carolina and Defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their Answer to NCLCV Plaintiffs' Complaint.[3]

22. Legislative Defendants and State Defendants did not file an answer to Plaintiff Common Cause's Complaint. Pursuant to this Court's order granting Common Cause's intervention, however, the allegations and requested relief in Plaintiff Common Cause's Complaint are deemed denied by all Defendants.

23. Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the Court expeditiously ruled upon over ten discovery-related motions—a number far exceeding the number of such motions filed in Common Cause v. Lewis, in which discovery spanned a period of over five months.

24. Pursuant to the Court's Case Scheduling Order, pre-trial submissions began with the exchange and submission of initial expert reports on December 23, 2021. Plaintiffs

[3] For simplicity, unless specifically designated otherwise in the remainder of this Judgment, "State Defendants" refers to the State Board of Elections-related Defendants as well as Defendant State of North Carolina.

collectively designated eight individuals as expert witnesses and submitted accompanying reports. Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports. The initial reports and accompanying materials submitted on behalf of the expert witnesses for all parties exceeded a collective 900 pages of materials.

25. Rebuttal expert reports were exchanged and submitted on December 28, 2021. Plaintiffs collectively submitted five rebuttal reports. Legislative Defendants submitted three rebuttal reports. The rebuttal reports and accompanying materials submitted on behalf of the expert witnesses for all parties exceeded a collective 100 pages of materials.

26. The discovery period closed on December 31, 2021—the date upon which all fact and expert witness depositions were to be conducted pursuant to the Case Scheduling Order. The parties thereafter submitted, in lieu of pre-trial briefs, an initial stipulation of facts and initial proposed findings of fact and conclusions of law. The parties collectively listed approximately 1,200 pre-marked exhibits for trial.

27. Commencing on January 3, 2022, this Court conducted a three-and-one-half day trial, receiving testimony from numerous fact and expert witnesses and receiving approximately 1,000 exhibits into evidence. The following findings of fact are made upon this voluminous record.[4]

II. The Challenged Redistricting Legislation

A. Background on Decennial Redistricting

28. Following each decennial census, the North Carolina General Assembly must redraw the districts for the North Carolina House of Representatives, the North Carolina Senate, and the North Carolina Congressional map.

[4] Due to the time limitations between the conclusion of trial and the entry of this Final Judgment, and to avoid confusion when reviewing the finalized trial transcript, citations to the trial transcript are only to a specific day on which a witness testified and are denominated as "Trial Tr. [Date of Testimony]."

29. In North Carolina, legislative redistricting is performed exclusively by the General Assembly. The Governor of North Carolina has no power to veto redistricting bills.

30. The State Constitution specifically enumerates four limitations upon the redistricting and reapportionment authority of the General Assembly, including that:

> a. Each Senator and Representative shall represent, as nearly as possible, an equal number of inhabitants;
>
> b. Each senate and representative district shall at all times consist of contiguous territory;
>
> c. No county shall be divided in the formation of senator or representative districts (the "Whole County Provision"); and
>
> d. Once established, the senate and representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress.

31. Between 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly.

32. After the 2010 election, for the first time since 1870, Republicans constituted a majority of both the North Carolina House of Representatives and the North Carolina Senate.

33. Republicans have constituted a majority in both the North Carolina House of Representatives and the North Carolina Senate from 2010 to present day and have therefore controlled each of the last two cycles of redistricting in North Carolina.

B. 2020 Census Data for the 2021 Redistricting Process

34. On February 12, 2021, the U.S. Census Bureau announced that its release of P.L. 94-171 redistricting data would be delayed by the COVID-19 pandemic, and would not be released until the fall of 2021, and specifically that it would deliver the Public Law 94-171 redistricting data to all states by September 30, 2021. PX131.

35. On March 15, 2021, the United States Census Bureau announced that it would release a "legacy" format summary redistricting data file to all states by mid-to-late August 2021, in addition to the "tabulated" P.L. 94-171 block-level data released before September 30, 2021, "[i]n recognition of the difficulties this timeline creates for states with redistricting and election deadlines prior to Sept. 30." PX132.

36. On April 26, 2021, the United States Census Bureau released data indicating that North Carolina's population increased from 9,535,483 residents in 2010 to 10,439,388 residents in 2020. PX142; PX133; PX143. This 9.5 percent population increase resulted in North Carolina being given an additional Congressional seat following the 2020 Census, resulting in North Carolina's congressional delegation growing from 13 to 14 members. PX144.

37. On August 12, 2021, the U.S. Census Bureau released the 2020 Census Redistricting Data (Public Law 94-171) Summary File for all states, including North Carolina, in "legacy" format. PX134.

C. Adoption of the 2021 Redistricting Criteria

38. On February 24, 2021, after the U.S. Census Bureau announced that its release of P.L. 94-171 redistricting data would be delayed, the North Carolina State Board of Elections Executive Director Karen Brinson Bell presented recommendations to the House Elections Law and Campaign Finance Reform Committee to move the 2022 primary to a May 3 primary, July 12 second primary, and November 8 general election. PX1402.

39. When Senator Hise received Director Bell's recommendations, he had "no idea" how long the redistricting process would take. PX146 Hise. Dep. 155:3-18. Nonetheless, he and his co-chairs did not follow the Board's recommendations to delay the primaries and provide more time for the redistricting cycle. *Id.* at 140:18-25. Senator Hise did, however, co-

sponsor a senate bill that modified the deadline for municipalities similarly impacted by the census delay. *Id.* at 143:1-8.

40. Legislative Defendants were aware that the delay in the release of Census Data would shorten the amount of time available to pass new state Legislative and Congressional maps before relevant deadlines, including the one-year residency deadline that state Legislative candidates would have to meet and the candidate-filing deadline on December 6, 2021, for all 2022 general election candidates. PX146 Hise Dep. 149:23-150:5. Nonetheless, they chose not to convene the Senate and House Redistricting Committees earlier to plan for the process, PX146 Hise Dep. 143:8-22, and chose not to propose or set forth a schedule for the redistricting process that would have allowed the public or their Democratic colleagues to prepare for the steps that would be taken before final enactment of state Legislative and Congressional plans. PX146 Hise Dep. 153:7-13. The Chairs of the Redistricting Committees had the general authority to make such decisions and set forth a predictable schedule but chose not to. PX146 Hise Dep. 143:12-19.

41. On Thursday, August 5, 2021, at 2:00 PM, the Senate Committee on Redistricting and Elections convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee to begin discussion on the redistricting process. PX138.

42. Following this meeting, staff member Erika Churchill distributed to the joint committee members the legislative redistricting criteria ordered by the North Carolina Superior Court for Wake County in its September 3, 2019, Judgment in the matter *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (the "2019 Criteria"). PX1404. Consistent with state Constitutional requirements, including the Supremacy Clauses in Article I, Sections 3 and 5, the 2019 Criteria set forth by the court in *Common Cause* specifically required that new maps comply with the VRA and other federal

requirements concerning the racial composition of districts, and required the parties to submit briefing and expert analysis on whether VRA districts were required within 14 days of the order, including consideration of whether the minimum Black Voting Age Population ("BVAP") thresholds were met to implicate the VRA. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *417 (N.C. Super. Ct. Sept. 3, 2019).

43. On Monday, August 9, 2021, the redistricting chairs of the joint committees released the "2021 Joint Redistricting Committee Proposed Criteria." PX33.

44. The Joint Redistricting Committees received in-person public comment on the Proposed Criteria on Tuesday, August 10, 2021, beginning at 8:30 AM.

45. At that public comment period, Plaintiff Common Cause's Counsel Allison Riggs urged legislators to change the criterion providing that "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2021 Congressional, House and Senate plans," PX33, stating the following:

> It is neither appropriate nor required to draw districts race-blind. As long as redistricting has occurred, it has been a tool used to harm voters of color. Beyond compliance with the Voting Rights Act, it is entirely appropriate to advance race-equity to consider race in the drawing of districts, to ensure that voters of color are not being packed or cracked. Additionally, in *Covington v. North Carolina*, this legislative body tried the same thing with respect to race-blind redistricting. A three-judge panel, including Republican and Democratic appointees, and a unanimous Supreme Court, rejected your race-blind remedial drawing of two Senate districts and two House districts. In fact, there is apparently not a federal judge out there who agrees with this approach, and we urge you to abandon that criteria.

PX1487.

46. On Thursday, August 12, 2021, the Joint Redistricting Committees convened to debate and vote on the 2021 Joint Redistricting Committee Proposed Criteria.

47. At this meeting, Senator Newton, Chair of the Senate Redistricting Committee, made the following statement:

> The second question I want to address is the decision to exclude racial data from being used by this committee in the drawing of districts; of course we understand that North Carolina is obligated to comply with Section 2 of the Voting Rights Act when drawing districts in the 2021 Congressional, House, and Senate plans, but during the last decade the Supreme Court told us that there is not sufficient evidence of racially polarized voting in North Carolina to justify the consideration of race when drawing districts. If you have new evidence or new studies of racially polarized voting in North Carolina, we would be willing to examine that evidence, and nothing in this criteria prevents any member from bringing forward such evidence during this process.

PX77 at 10-11 (8/12/2021 Transcript).

48. In response, Senator Dan Blue stated that the Supreme Court of North Carolina held in *Stephenson v. Bartlett* that legislators were first required to determine whether districts are required to comply with the VRA. PX77 at 15 (8/12/2021 Transcript). Senator Blue queried how this would be possible without the use of racial data, stating, "I think that *Stephenson* makes it relatively clear that before you consider clustering or groupings, you have to make that VRA determination." PX77 at 15 (8/12/2021 Transcript).

49. Senator Newton replied, "The chairs have considered the various options and we will comply with the law and the methodology we used in 2019 [sic] passed muster and we're going to continue with that methodology." PX77 at 15 (8/12/2021 Transcript).

50. Senator Warren Daniel then proposed that the Joint Committees add a sentence under the criteria stating, "The Committee will draw districts that comply with the Voting Rights Act." PX77 at 15 (8/12/2021 Transcript). The amendment was adopted into the final criteria. PX77 at 18-19 (8/12/2021 Transcript).

51. After Senator Daniel proposed his amendment, Senator Blue proposed an amendment titled "Voting Rights Act." This amendment provided: "As condemned by the United States Supreme Court in *Cooper v. Harris* and *Covington v. State of North Carolina*, African-Americans shall not be packed into any grouping or district to give partisan advantage to any political party." PX77 at 53-55 (8/12/2021 Transcript); PX73 (proposed

amendment). During debate on this amendment, Senator Blue offered the following comment on the amendment:

> The amendment is sort of self-explanatory. I simply say that for the four decades since the 1980s redistricting, starting with *Gingles v. Edmisten*, and through *Shaw v. Reno*, and through the series of cases at the early part of this century, and the cases in the last redistricting cycle, North Carolina has basically been the state with the chin out before the Supreme Court to get our redistricting plans struck down. And we've spent tens of millions of dollars over that time period, from the 80s forward, to have the Supreme Court basically say no to all of those efforts that we've done. So this is an effort to make sure that we make an effort to try and save the taxpayers what now is collectively more than 50 million dollars in efforts and futility, by setting forth that related to Senator Daniel's earlier amendment, that we know what the Voting Rights Act requires, we know what the Supreme Court has said, and this is the language that they have used with respect to, in both *Cooper v. Harris* and *Covington v. North Carolina*, what you've got to do to comply with the Voting Rights Act. I just offer the amendment so that it's constantly before us, so that we don't get tempted to sort of skirt to the edge again and cost the taxpayers another 10 to 20 million dollars defending this thing back up through the Court of Appeals or the Supreme Court, or a three-judge panel and the Supreme Court. So, I move for the adoption of the amendment.

PX77 at 53-55 (8/12/2021 Transcript).

52. During debate on the amendment, Senator Clark raised concerns about how North Carolina could comply with the VRA without considering racial data: "How do we intend to comply with the Voting Rights Act if we don't use the racial data that is required to comply with it?" PX77 at 56 (8/12/2021 Transcript). In response, Defendant Daniel expressed the view that prior case law in North Carolina did not require the use of racial data:

> Just as Senator Newton explained at the beginning of the meeting, in the event that evidence is presented to the committee that there's racially polarized voting in North Carolina then that might be something the committee would need to address. At this point, the courts in 2019 and even the Democrats' own expert have said that there is not racially polarized voting in North Carolina, and so that's sort of where we think we're at.

53. PX77 at 56-57 (8/12/2021 Transcript). Senator Clark then responded: "Given that the *Stephenson* requirement is there, that we do VRA districts first, is it not incumbent upon the General Assembly itself to perform racially polarized studies in order to make that

determination that, as we are here today, that there is no racial polarization in North Carolina with regard to voting?" PX77 at 57 (8/12/2021 Transcript). Senator Daniel responded by saying, "We don't feel that that is necessary at this point at the outset of the map drawing." PX77 at 57 (8/12/2021 Transcript).

The amendment offered by Senator Blue failed. PX77 at 63 (8/12/2021 Transcript).

In that same meeting, Representative Hall said:

> We're agreeing – or at least we're proposing in this criteria not to use racial data at all in the drawing of these maps, but as Senator Daniel has said, members of the committee and members of the public are welcome to gather whatever evidence and put forth evidence that might fall under Section 2 of the Voting Rights Act, that that may require some use of racial data. And, of course, that will be up to this body, to this committee, and ultimately two bodies of the two chambers as to whether to consider that and how to do that. But at this point, none of that evidence has been put forth.

PX77 at 86:10-23 (8/12/2021 Joint Committee Transcript).

54. On August 12, 2021, the Joint Redistricting Committees adopted the final redistricting criteria ("Adopted Criteria"), which were as follows:

> **Equal Population.** The Committees will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2021 Congressional, House, and Senate plans. The number of persons in each legislative district shall be within plus or minus 5% of the ideal district population, as determined under the most recent federal decennial census. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.
>
> **Contiguity.** No point contiguity shall be permitted in any 2021 Congressional, House, and Senate plan. Congressional, House, and Senate districts shall be compromised of contiguous territory. Contiguity by water is sufficient.
>
> **Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E. 2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking. If a county is of sufficient population size to contain an entire congressional district within the county's boundaries, the Committees shall construct a district entirely within that county.

Racial Data. Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

VTDs. Voting districts ("VTDs") should be split only when necessary.

Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2021 Congressional, House and Senate plans that are compact. In doing so, the Committee may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("permitter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

Municipal Boundaries. The Committees may consider municipal boundaries when drawing districts in the 2021 Congressional, House, and Senate plans.

Election Data. Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

Member Residence. Member residence may be considered in the formation of legislative and congressional districts.

Community Consideration. So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

PX34; LDTX15.

D. Establishing the District Lines in the 2021 Enacted Plans

55. On Wednesday, September 1, 2021, the Joint Redistricting Committees announced a Joint Public Hearing Schedule, that would consist of 13 public hearings held from September 8, 2021, through September 30, 2021.[5]; PX86.

56. The 13 public hearings listed in the Joint Public Hearing Schedule were as follows:

a. 6:00 PM on Wednesday, September 8, 2021, at Caldwell Community College and Technical Institute;
b. 4:00 PM on Tuesday, September 14, 2021, at Forsyth Technical Community College;
c. 5:00 PM on Tuesday, September 14, 2021, at Elizabeth City State University;
d. 6:00 PM on Wednesday, September 15, 2021, at Durham Technical Community College;
e. 5:00 PM on Wednesday, September 15, 2021, at Nash Community College;
f. 5:00 PM on Thursday, September 16, 2021, at Alamance Community College;
g. 3:00 PM on Thursday, September 16, 2021, at Pitt Community College;
h. 5:00 PM on Tuesday, September 21, 2021, at Western Carolina University;
i. 3:00 PM on Wednesday, September 22, 2021, at Central Piedmont Community College;
j. 3:00 PM on Thursday, September 23, 2021, at Mitchell Community College, Iredell County Campus;
k. 4:00 PM on Tuesday, September 28, 2021, at UNC Pembroke;
l. 5:00 PM on Wednesday, September 29, 2021, at UNC Wilmington; and,
m. 6:00 PM on Thursday, September 30, 2021, at Fayetteville Technical Community College.

PX86.

1. Selection of County Groupings

57. On Tuesday, October 5, 2021, the Senate Committee on Redistricting and Elections and the House Committee on Redistricting each convened separately. The General

[5] 9.1.21 released Hearing schedule: https://www.ncleg.gov/documentsites/committees/House2021-182/2021/Public%20Hearing%20Schedule.pdf

Assembly's members were tasked with creating State House districts containing between 82,645 and 91,345 people; that is 86,995 plus or minus 5% from the ideal population. PX79 12:25–13:4 (Oct. 5, 2021). Members were tasked with creating Senate districts containing between 198,348 and 219,227 people; that is 208,788 people plus or minus 5% from the ideal population. PX80 6:5–10 (Oct. 5, 2021).

58. In both meetings, the Redistricting Chairs announced utilization of county groupings described in the academic paper *N.C. General Assembly County Clusterings from the 2020 Census* (the "Duke Academic Paper"), published on the Duke University website "Quantifying Gerrymandering." PX79 at 8:2-4 (10/5/2021 House Redistricting Transcript); PX80 at 1–21 (10/5/2021 Senate Redistricting Transcript); PX70 (Quantifying Gerrymandering). These groupings were then verified by non-partisan staff. PX79 8:4-7 (Oct. 5, 2021).

59. The Duke Academic Paper states that "[t]he one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act," PX70 (Quantifying Gerrymandering), a fact that was known to the Redistricting Chairs and announced publicly in both the House and Senate Redistricting Committee Meetings. PX80 at 18:6-9 (10/5/2021 Senate Redistricting Transcript); PX79 at 9:14-16 (10/5/2021 House Redistricting Transcript).

60. In the meeting of the Senate Committee on Redistricting and Elections, Defendant Hise provided the set of sixteen possible Senate cluster options, based upon the Duke Academic Paper, that constituted the set of options eligible for adoption (the "Duke Senate Clusters"). PX71 ("Duke Senate Groupings Maps 11x17").

61. In this meeting, Senator Blue asked how leadership had ensured compliance with the VRA, as required under the North Carolina Constitution, in the mandated clusters without any demographic analysis. PX80 at 20-21 (10/5/2021 Senate Redistricting

Transcript). Senator Marcus stated the committee needed to conduct a Racial Polarization Analysis ("RPV") study to ensure legal compliance. PX80 at 26 (10/5/2021 Senate Redistricting Transcript). Chair Hise confirmed the Chairs' views that no demographic data was legally required, and that there was no directive to staff to order any RPV analysis or provide racial data to members drawing maps. PX80 at 26-27 (10/5/2021 Senate Redistricting Transcript); PX80 at 24:16-24 (10/5/2021 Senate Redistricting Transcript); PX146 Hise Dep. 185:14-22. Defendant Hise also said "this committee is still open to consider any information that exists on racially polarized voting," Ex 80 at 31:24-32:2 (10/5/2021 Senate Redistricting Transcript), and that "if information does come forward regarding racially polarized voting, we will consider it." PX80 at 26:12-15 (10/5/2021 Senate Redistricting Transcript).

62. In the meeting of the House Committee on Redistricting, Defendant Hall provided the set of eight possible House cluster options, based upon the Duke Academic Paper, that constituted the set of options eligible for adoption (the "Duke House Clusters"). PX72 ("Duke House Groupings Maps 11x17").

63. In this Meeting, Representative Harrison similarly questioned how the committee would comply with the VRA, as the Duke Academic Paper stated its analysis did not reflect compliance with the VRA as required by *Stephenson*. PX79 at 36 (10/5/2021 House Redistricting Transcript). Representative Reives inquired about the obligations under the VRA and how to comply with them. PX79 at 75 (10/5/2021 House Redistricting Transcript). Chair Hall stated the committees made a decision not to use racial data, contrary to redistricting criteria used in the previous two sessions, which Chair Hall alleged to be "the best way" to ensure compliance with the VRA as well as other state and federal law. PX79 at 35 (10/5/2021 House Redistricting Transcript).

64. On Friday, October 8, 2021, Legislative Defendants received a letter from Allison J. Riggs, current counsel for Plaintiff Common Cause, concerning the county

clustering option maps introduced on Tuesday, October 5, 2021. PX1412. Representative Hall chose not to read this letter, and Sen. Hise took no action after receiving this letter. PX146 Hise Dep. 200:23-201:1, PX145 Hall Dep. 249:11-16.

65. On Monday, October 25, 2021, Legislative Defendants received a second letter from Allison J. Riggs, current counsel for Plaintiff Common Cause, concerning draft Senate map, "SST-4," and its chosen grouping "Duke Senate 02." PX1413. No action was taken in response to this letter. PX146 Hise Dep. 206:17-20, 211:2-6.

66. Overall, the redistricting chairs unilaterally decided not to undertake or commission any racially polarized voting study for the 2021 redistricting cycle. PX146 Hise Dep. 135:19-25. Plaintiffs evidence, however, fails to sufficiently show that any of the districts were required to be VRA districts and, to the extent *Stephenson* requires this determination at the outset, Plaintiffs do not assert a VRA claim.

2. The Map-Drawing Process

67. At the October 5, 2021, meetings, the House and Senate Chairs of the Redistricting Committees announced in their respective committee meetings that they would make computer stations available to legislators to draw maps, beginning the morning of October 6, 2021. PX1468 Daye Aff. ¶ 6. There would be four stations available to the House in Room 643 of the Legislative Office Building, and there would be four stations available to the Senate in Room 544 of the Legislative Office Building. *Id.* The stations would be open during business hours, and both the rooms and the screens of the station computers would be live streamed while the stations were open. *Id.*

68. Legislative Defendants sought to instill public confidence by requiring legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. PX79 at 3:1-20 (statement of Rep. Destin Hall, Chairman, H. Comm. on Redistricting) (Oct. 5, 2021, H. Redistricting Comm. Hr'g Tr.). That

software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software. *Id.* at 52:3-8.

69. According to Representative Hall, the Committee and "the House as a whole" would "only consider maps that are drawn in this committee room, on one of the four stations." PX79 at 4:15-19. "So, if a map is not drawn on one of these four stations, in this committee room, during those committee hours that the committee is open, then those maps will not be considered for a vote by this committee, and of course, will not be considered for a vote by the House." *Id.* at 4:19-24. Legislators could ensure that was the case, Representative Hall asserted, because "when you put a map into one of these computers, that becomes a matter of public record, and we can tell which were drawn on these computers. It has to be drawn in this committee room." *Id.* at 4:25-5:4. Representative Hall assured the public that this process would be fundamentally different from "what's happened in the past," where "some outside entity, a consultant, goes and they draw the map behind closed doors"; in 2021, we "will literally be drawing on the stations that you see." *Id.* at 41:23-42:13.

70. The Committees chose this method to draw the maps on their own accord—not because the law required them to. *See, e.g.,* PX79 34:17–35:4 (Oct. 5, 2021). The Committees took "the unprecedented step of being as transparent" as they possible could. PX79. 35:21–24 (Oct. 5, 2021).

71. The Committees chose not to take racial data into account in selecting county groupings because they did not take into account in 2017 and 2019, and courts approved the 2017 and 2019 plans. PX79 37:17–25 (Oct. 5, 2021). This gave them "confidence that, without using racial data, [they would] comply with the Voting Rights Act." PX79 39:3–5 (Oct. 5, 2021). Further, they took into account the fact plaintiffs' experts in previous cases "all said that there is no legally significant racially polarized voting in North Carolina." PX79 37:10-16 (Oct. 5, 2021); *see also* PX80 26:3-15 (Oct. 5, 2021).

72. Representative Hall testified that he personally drew nearly all of the House map enacted as House Bill 976, and that he did so over multiple days at an official computer terminal. PX145 at 110:4-9, 116:11-15, 120:5-24; Trial Tr. 01/05/2022. Representative Hall also testified that, between his sessions at the public terminal, he met with his then-General Counsel, Dylan Reel, and others about the map-drawing in a private room adjacent to the public map-drawing room. *Id.* at 128:2-132:17.

73. While the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data. PX79 at 66:11-66:16. Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced. PX145 at 70:22-71:1 (Hall Dep.); PX 146 at 40:2-6.

3. The 2021 Redistricting Plans are Enacted

74. A placeholder version of the state House Map was filed on Thursday, October 28, 2021, as House Bill 976 ("HB976") where it passed its first reading. A committee substitute ("HBK-14") received a favorable review and, after one amendment, passed its second and third readings on the House and its first reading in the Senate on November 2, 2021. It received a favorable report from the Senate Redistricting Committee on November 3, 2021, without alteration and passed its second and third readings on November 4, 2021.

75. HB976 was ratified into law on November 4, 2021, as S.L. 2021-175. S.L. 2021-175 is entitled "AN ACT TO REALIGN NORTH CAROLINA HOUSE OF REPRESENTATIVES DISTRICTS FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS" and re-writes N.C.G.S. § 120-2(a) to divide the State of North Carolina into one-hundred-twenty (120) districts, with each district electing one

Representative, "[f]or the purpose of nominating and electing members of the North Carolina House of Representatives in 2022 and periodically thereafter." 2021 N.C. Sess. Laws 175, § 1.

76. A proposed version of the state Senate map ("SST-13") was filed on Friday, October 29, 2021, as Senate Bill 739 ("SB739") and received its first reading in the Senate that day. It was then referred to the Senate Redistricting Committee on November 1 where the Redistricting Committee adopted a substitute along party lines ("SBK-7"). On November 2, Senator Marcus offered an amendment entitled "SBVAmend-2" to the Senate Redistricting Committee.[6] Senator Clark also offered an amendment entitled "SCGAmend-3" to the Senate Redistricting Committee.[7] Both amendments were adopted and included in the final version of SB739. The bill then passed its second and third readings in the Senate on November 3 along party lines and passed all three readings and the House Redistricting Committee without any alteration on November 3 – 4, 2021.

77. SB739 was ratified into law on November 4, 2021, as S.L. 2021-173. S.L. 2021-173 is entitled "AN ACT TO REALIGN THE DISTRICTS OF THE NORTH CAROLINA STATE SENATE FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS" and re-writes N.C.G.S. § 120-1(a) to establish the composition of the fifty (50) senatorial districts in the State of North Carolina, and apportion seats among those districts with each district electing one senator, "[f]or the purpose of nominating and electing members of the Senate in 2022 and periodically thereafter." 2021 N.C. Sess. Laws 173, § 1.

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[6] https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/11-02-2021/Adopted%20Amendments/S739-ATU-40.printing.pdf

[7] https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/11-02-2021/Adopted%20Amendments/S739-ABA-40.printing.pdf

78. A proposed Congressional map ("CST-13") was filed on October 29, 2021, as Senate Bill 740 ("SB740") and passed its first reading and received a favorable report from the Senate Redistricting Committee on November 1, 2021. It proceeded unaltered through its second and third readings in the Senate and its first reading in the House on November 2, received a favorable report from the House Redistricting Committee on November 3, and proceeded unaltered through its second and third readings in the House on November 4, 2021.

79. SB740 was ratified into law on November 4, 2021, as S.L. 2021-174. S.L. 2021-174 is entitled "AN ACT TO REALIGN THE CONGRESSIONAL DISTRICTS FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS" and re-writes N.C.G.S. § 163-201(a) to divide the State of North Carolina into fourteen (14) districts "[f]or purposes of nominating and electing members of the House of Representatives of the Congress of the United States in 2022 and periodically thereafter[.]" 2021 N.C. Sess. Laws 174, § 1.

80. The State House, State Senate and Congressional Maps all passed along party lines.

81. The State House map, HB976, passed the House on a strict party line vote, with 67 Republican Representatives in favor and 49 Democratic Representatives opposed. HB976 also passed the Senate on a strict party line vote, with 25 Republican Senators in favor and 21 Democratic Senators opposed.

82. The State Senate map, SB739, passed the Senate on a strict party line vote, with 26 Republican Senators in favor and 19 Democratic Senators opposed. SB739 also passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed.

83. The Congressional map, SB740, passed the Senate on a strict party line vote, with 27 Republican Senators in favor and 22 Democratic Senators opposed. SB740 also

passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed.

84. Plaintiffs challenge the North Carolina Congressional Districts, North Carolina Senate Districts, and North Carolina House of Representatives Districts established, respectively, by acts of our General Assembly ratified on November 4, 2021, in N.C. Sess. Laws 2021-174 (hereinafter "S.L. 2021-174" or "S.B. 740"), N.C. Sess. Laws 2021-173 (hereinafter "S.L. 2021-173" or "S.B. 739"), and N.C. Sess. Laws 2021-174 (hereinafter "S.L. 2021-175" or H.B. 976") (collectively hereinafter, the "Enacted Plans").

III. Extreme Partisan Gerrymandering Claims

A. Evidence Showing Partisan Intent, Effects, or a Lack Thereof

1. Direct Evidence

85. There is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans.

86. The Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans.

87. No elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans.

88. The 2021 Congressional Plan was passed on strict party-line votes in the House on November 4 and the Senate on November 2. No member of the Democratic party in either chamber voted for the plan.

89. The General Assembly enacted the 2021 House Plan, on strict party-line votes, on November 4. No member of the Democratic party in either chamber voted for the plan.

90. The General Assembly enacted the 2021 Senate Plan, on strict party-line votes, on November 4. No member of the Democratic party in either chamber voted for the plan.

2. Circumstantial Evidence

a. Recent History of Partisan Redistricting Litigation and Legislation

91. The General Assembly's intentional redistricting for partisan advantage has been subject to judicial review in multiple cases over the past decade.

92. First, in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the plaintiffs challenged North Carolina's congressional districting maps in federal court as unconstitutional partisan gerrymanders. The well-established record showed that Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten republicans and three democrats. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 807-808 (M.D.N.C. 2018).

93. The federal district court concluded that all but one of the districts in North Carolina's 2016 Congressional Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In examining intent, effects, and causation, the concern was that such a degree of vote dilution meant the elected representatives would feel free to ignore the concerns of the supporters of the minority party. *Id.* at 867. The district court also found partisan gerrymandering claims justiciable under the First Amendment. *Id.* at 929. Despite the undisputed findings of partisan intent in drawing the challenged districts, the Supreme Court of the United States held that partisan gerrymandering claims present political questions beyond the reach of the federal courts. 139 S. Ct. at 2506-07.

94. Then, in *Common Cause v. Lewis*, 18 CVS 14001 (N.C. Super. Ct. Sep. 03, 2019), the plaintiffs challenged North Carolina's legislative maps in state court as unconstitutional partisan gerrymanders. After a federal court had struck down certain districts as unconstitutional racial gerrymanders, *Id.* at 13-14, and in 2017, the Senate

Redistricting Committee and the House Select Committee on Redistricting met to enact new plans where leaders stated that they would again employ the same mapmaker to draw these new plans and the adopted criteria allowed for political considerations and the use of election data results, *id.* at 14-16. While Republican legislators did not publicly state that they drew the maps for partisan advantage, there was meaningful dispute that this was the case. *Id.* at 23.

95. Prior to final judicial approval of the 2019 remedial maps, the court in *Common Cause* determined that the 2017 legislative maps at issue were the result of extreme partisan gerrymandering, and ordered those maps to be remedied to the extent necessary to cure that defect—in other words, to redraw the 2017 legislative maps so that the partisan gerrymandering would not be classified as "extreme." To the extent the 2021 redistricting committees sought to retain the district lines of the 2019 maps, partisan bias, although not "extreme" by the *Common Cause* standard, is present in the Enacted Maps.

96. The three-judge panel concluded that 14 of the House district county groupings and 7 of the Senate district county groupings violated the North Carolina Constitution by operating through vote dilution such that an election would not reflect the will of the people, *Id.* at 302, by seeking to diminish the electoral power of supporters of a disfavored party, *id.* at 307, and by burdening the protected expression and association of voting, banding together in a political party, and spending on elections. *Id.* at 320. Unlike the federal court, however, the three-judge panel found that these claims were justiciable and the standards for evaluating the plaintiffs' claims were satisfactory and manageable.

97. Finally, in *Harper v. Lewis*, 19 CVS 12667 (N.C. Super. Ct. Oct. 28, 2019), the plaintiffs sought a declaration that the 2016 congressional districts, as challenged in *Rucho v. Common Cause*, violated the rights of Democratic voters in North Carolina under the North

Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Freedom of Assembly Clauses. *Id.* at 1. The three-judge panel agreed with the ruling in *Common Cause v. Lewis* that extreme partisan gerrymandering is violative of the North Carolina Constitution and presented justiciable issues. *See Harper v. Lewis generally.* Noting that "the 2016 congressional districts have already been the subject of years-long litigation in federal court arising from challenges to the districts on partisan gerrymandering grounds," the Court found that there was a detailed record of the partisan intent and effects of the 2016 congressional plan. The Court held that the Plaintiffs had shown a likelihood of success on the merits and granted the preliminary injunction, enjoining the use of the 2016 congressional districts in the 2020 election.

98. Redistricting for political gain occurred well before these most recent instances, but it has not been forbidden by the people of North Carolina through a constitutional amendment or legislative act.

99. Since the 2000 Census, there has been several proposed redistricting bills in both the House and Senate of the General Assembly. The most prominent proposed redistricting bill has been related to establishing—by constitutional amendment and statute—an independent redistricting commission.

100. In all the various iterations of proposed bills, this commission would be tasked with either the redistricting process in its entirety, removing this power from the General Assembly, or with introducing plans to the General Assembly. In all these proposed bills, the redistricting plans were to be done without consideration of political affiliation of voters, voting data from previous elections, location of incumbents' residences, or demographic data outside of that provided by the U.S. Census Bureau. None of these bills passed, or even crossed over. With few exceptions, when Democrats have controlled the House and Senate,

Republicans have introduced these bills; and when Republicans have controlled the House and Senate, Democrats have introduced these bills.

101. From 2001-2010, the Democratic Party had control of the General Assembly. A version of the independent redistricting commission was proposed and, with the exception of the 2005-2006 session where a Democrat was the primary sponsor of the bill, Republican members of the legislature were the primary sponsors of these bills. These bills were introduced at least once during each session. H.B. 318, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 283, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 285, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 1437, 2001 Leg., 144th Sess. (N.C. 2001); H.B. 1060, 2003 Leg., 145th Sess. (N.C. 2003); H.B. 1090, 2003 Leg., 145th Sess. (N.C. 2003); S.B. 650, 2003 Leg., 145th Sess. (N.C. 2003); S.B. 651, 2003 Leg., 145th Sess. (N.C. 2003); H.B. 1425, 2005 Leg., 146th Sess. (N.C. 2005); H.B. 1448, 2005 Leg., 146th Sess. (N.C. 2005); S.B. 430, 2005 Leg., 146th Sess. (N.C. 2005); H.B. 76, 2007 Leg., 147th Sess., (N.C. 2007); S.B. 1122, 2007 Leg., 147th Sess., (N.C. 2007); H.B. 252, 2009 Leg., 148th Sess., (N.C. 2009); S.B. 25, 2009 Leg., 148th Sess., (N.C. 2009); H.B. 894, 2009 Leg., 148th Sess., (N.C. 2009).

102. Similarly, from 2011-present, Republicans have had control over the General Assembly, and a version of this bill has had a Democratic primary sponsor; however, in the 2011-2012, 2013-2014, 2015-2016, 2016 Extra Session 4, and 2017-2018 sessions, at least one Republican was a primary sponsor of these bills. Since Republican control, Democrats have been the prominent sponsor of these bills in both the House and Senate. H.B. 783, 2011 Leg., 149th Sess., (N.C. 2011); S.B. 591, 2011 Leg., 149th Sess., (N.C. 2011); H.B. 824, 2011 Leg., 149th Sess., (N.C. 2011); H.B. 606, 2013 Leg., 150th Sess., (N.C. 2013); H.B. 910, 2013 Leg., 150th Sess., (N.C. 2013); S.B. 155, 2013 Leg., 150th Sess., (N.C. 2013); S.B. 722, 2013 Leg., 150th Sess., (N.C. 2013); H.B. 49, 2015 Leg., 152nd Sess., (N.C. 2015); S.B. 28, 2015 Leg., 152nd Sess., (N.C. 2015); H.B. 92, 2015 Leg., 152nd Sess., (N.C. 2015); H.B. 6, 2015 Leg.,

152nd Sess., (N.C. 2015); H.B. 200, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 209, 2017 Leg., 153rd Sess., (N.C. 2017); H.B. 674, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 702, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 800, 2017 Leg., 153rd Sess., (N.C. 2017); H.B. 69, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 574, 2019 Leg., 154th Sess., (N.C. 2019); S.B. 641, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 648, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 827, 2019 Leg., 154th Sess., (N.C. 2019); S.B. 673, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 436, 2021 Leg., 155th Sess., (N.C. 2021); H.B. 437, 2021 Leg., 155th Sess., (N.C. 2021); H.B. 542, 2021 Leg., 155th Sess., (N.C. 2021); S.B. 716, 2021 Leg., 155th Sess., (N.C. 2021).

b. Stated Redistricting Objectives of the General Assembly in the 2021 Enacted Plans

103. The General Assembly established a detailed record of the stated purposes of the configurations of the 2021 districts.

(i) The 2021 Congressional Plan

104. The legislative record shows that stated goals achieved by the 2021 Congressional Plan included the following:

a. CD1 is anchored in northeastern North Carolina to incorporate suggestions from a public hearing in Pasquotank that this region be maintained as a community of interest. The district was configured to take in the Outer Banks and most of the State's shoreline and to keep the finger counties of northeastern North Carolina together, as well as most of the counties that run along the State's border with Virginia. LDTX78 Senate Tr. 3:7–4:3 (Nov. 1, 2021).

b. CD2 was configured to contain most of rural northeastern North Carolina, to maintain whole counties (16 of 18 are whole), and to avoid splitting municipalities (none are split). One precinct is split in Pitt County and one in Wayne County for the purpose of equalizing population. LDTX78 Senate Tr. 4:4–15 (Nov. 1, 2021).

c. CD3 was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district and to improve the compactness of the prior district. Input from a public hearing in New Hanover was incorporated, including that Cape Fear River Basin be kept in one district, that New Hanover and Brunswick Counties be kept together, and that Bladen and Columbus Counties be maintained in single district. LDTX78 Senate Tr. 4:16–5:11 (Nov. 1, 2021).

d. CD4 was configured to be a four-county district south of Raleigh. These counties were chosen because they have similar geography, industry, and proximity to population base in the region in Fayetteville and Raleigh. An online comment requested that Cumberland, Harnett, and Sampson Counties be kept together in a congressional district, and this was accomplished by adding population in Johnston and one precinct in Wayne County. The district is highly compact and splits no municipalities. LDTX78 Senate Tr. 5:12–6:7 (Nov. 1, 2021).

e. CD5 was configured to be based entirely in Wake County, comprising Garner, Knightdale, Raleigh, Rolesville, Wake Forest, Wendell, and Zebulon. These municipalities are viewed as sharing common interests, given that people live and work and commute within these municipalities; no municipalities were split. Any VTDs split were done for the purposes of maintaining municipal boundaries or equalizing population. LDTX78 Senate Tr. 6:8–20 (Nov. 1, 2021).

f. CD6 was configured to include Durham and Orange Counties and a portion of Wake County that contains Apex, Cary, and Morrisville, which were all viewed as a coherent community of interest, and to match the configuration of this district that has existed in this region, in roughly the same form, for decades. No municipalities were split. LDTX78 Senate Tr. 6:21–7:11 (Nov. 1, 2021).

g. CD7 runs from the Triangle west through the Central Piedmont region encompassing four whole counties, to include Alamance, Chatham, Lee, and Randolph; parts of Davidson, Guilford, and Harnett Counties and a portion of Wake County to bring together rural areas and smaller cities and towns. VTDs were only split for the purpose of equalizing population or keeping cities together. LDTX78 Senate Tr. 7:12–25 (Nov. 1, 2021).

h. CD8 is rooted in the Sandhill region of North Carolina including eight whole counties and a portion of Mecklenburg County. The configuration was created in part based on a comment by the Moore County Democratic Chair, who suggested that Sandhills counties including Moore, Scotland, and Hoke to be kept together in a Sandhills district. LDTX78 Senate Tr. 8:3–22 (Nov. 1, 2021).

i. CD9 constitutes the General Assembly's effort to keep the City of Charlotte together in one district, given its cohesive community. This was not strictly possible, given that Charlotte is too large for one congressional district, but the adopted configuration succeeded in keeping 83% of Charlotte in one district that, in turn, is 97% composed of Charlotte. LDTX78 Senate Tr. 8:23–9:5 (Nov. 1, 2021).

j. CD10 is composed of suburban and exurban areas that stretch between the population centers of Charlotte and the Triad region, which constitute a community of interest. The district keeps all of the City of High Point in a single district, based on a comment at a public hearing in Forsyth. There is one split municipality in Greensboro. LDTX78 Senate Tr. 9:6–20 (Nov. 1, 2021).

k. CD11 is based in the northwest corner of North Carolina, containing eight whole counties and two partial counties. This was done out of a desire to maintain the incumbent in the district. Another key goal was maintaining Greensboro as much

as possible in the district, and the goal was achieved with more than 90% of Greensboro included. LDTX78 Senate Tr. 9:21–10:6 (Nov. 1, 2021).

l. CD12 was configured to join suburbs outside Charlotte to an area in and around Winston-Salem, which was achieved by incorporating four whole counties and one partial county. No municipalities were split. LDTX78 Senate Tr. 10:7–16 (Nov. 1, 2021).

m. CD13 contains municipalities and towns to the west and north of Charlotte based on an online comment suggesting that towns in North Mecklenburg, including Cornelius, Huntersville, and Davidson, be joined into a single district. LDTX78 Senate Tr. 10:17–11:5 (Nov. 1, 2021).

n. Finally, CD14 is anchored in western North Carolina to take in the mountain counties up to the westernmost tip of the State; the General Assembly implemented a comment at a Jackson County public hearing asking that McDowell and Polk Counties be removed from the district and that it be drawn into Watauga County. LDTX78 Senate Tr. 11:6–21 (Nov. 1, 2021).

105. The Committees concluded that the congressional map satisfies the adopted criteria. LDTX78 Senate Tr. 11:22–12:16 (Nov. 1, 2021). All districts were drawn to zero population deviation or to one person less than ideal. There was no point contiguity used in the map and districts are compact. LDTX78 Senate Tr. 11:22–25; 12:10-11 (Nov. 1, 2021). County, VTD, and community of interest divisions were minimized. The 2021 Congressional Plan divided 11 counties solely to equalize population. VTDs were split only when necessary to balance population or keep municipalities whole, and a total of 24 VTDs were split. And there are districts wholly within Mecklenburg and Wake Counties, the only two counties of sufficient population to contain a whole Congressional district. Only two municipalities were split in the entire State, and community consideration was considered to keep cities and towns together. LDTX78 Senate Tr. 11:22–12:16 (Nov. 1, 2021).

106. The Committee concluded that no racial or political data was used in drawing the map. Member residence was considered. LDTX78 Senate Tr. 12:6-7; 12:12-16 (Nov. 1, 2021). Senator Daniel stated that, due to the political geography of the state—with Democrats congregated in the urban areas—the only way to accomplish a roughly equal

Republican-Democratic split is with a partisan gerrymander in favor of Democrats. LDTX78 Senate Tr. 18:11–21 (Nov. 1, 2021). Indeed, the largest counties had to be split to satisfy one-person, one-vote standards. *See, e.g.*, LDTX78 Senate Tr. 24:13–17 (Nov. 1, 2021).

107. One Senator noted that when metropolitan areas are split (as many have to be because of the population size), the metropolitan areas get more representatives in Congress who are able to advocate for the municipality as a whole. LDTX78 Senate Tr. 33:21–34:12 (Nov. 1, 2021). The online portal received over 4,000 comments between when they opened at November 1, 2021. LDTX78 Senate Tr. 39:5–14 (Nov. 1, 2021).

(ii) The 2021 Senate Plan

108. The legislative record shows that stated goals achieved by the 2021 Senate Plan included the following:

a. SD1 was created out of county groupings in the northeastern corner of the State that would need to be comprised of 8 or 10 counties. The district includes 4 of the 5 "Finger Counties" together and combines them with the Northern Outer Banks, a suggestion made by persons at public hearings. About 70% of the counties and 81% of the population are in the Norfolk media market, with the others in the Greenville and Raleigh market. This district does not split VTDs or municipalities within the counties, as it comprises only whole counties. LDTX80 Senate Tr. 3:8–4:5 (Nov. 2, 2021); Trial Tr. 01/05/2022.

b. SD2 follows the Roanoke River from Warren County to Albemarle Sound in Washington County. This comprises many of the counties on the Sound, including Chowan County, Hyde County, and Pamlico County. Five of the eight included counties are in the Greenville media market, with the others split between the Raleigh and Norfolk media markets. Two-third of the population of the district is within the Greenville media market. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 4:7–24 (Nov. 2, 2021).

c. SD3 was created by the base county grouping map. It includes Beaufort, Craven, and Lenoir Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 4:25–5:4 (Nov. 2, 2021).

d. SD4 was created by the base county grouping map. It includes Green, Wayne, and Wilson Counties. This district does not split VTDs or municipalities within the

counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 5:5–9 (Nov. 2, 2021).

e. SD5 was created by the base county grouping map. It includes Edgecombe and Pitt Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 5:11–15 (Nov. 2, 2021).

f. SD6 is a single-county district containing only Onslow County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. LDTX80 Senate Tr. 5:17–20 (Nov. 2, 2021).

g. SD7 contains the majority of New Hanover County in the southeast corner of the State. Because New Hanover County's population was slightly larger than the maximum allowable population in a single district, the Committee carved out three precincts and included them in SD7. These three precincts were selected to keep all municipalities in New Hanover County whole and to keep as much population as possible in SD7. SD7 contains no split VTDs or municipalities. LDTX80 Senate Tr. 5:21–6:13 (Nov. 2, 2021).

h. SD8 contains Brunswick and Columbus Counties, in addition to three precincts of New Hanover County. It contains no split VTDs or municipalities. LDTX80 Senate Tr. 6:15–19 (Nov. 2, 2021).

i. SD9 and SD12 comprise a two district, seven county cluster created by the base county groupings in the southeastern part of the State. SD9 contains all of Bladen, Jones, Duplin, and Pender Counties, as well as the majority of Sampson County. SD12 contains a small portion of Sampson County, as well as all of Harnett and Lee Counties. The Committee endeavored to keep as much of Sampson County as possible in SD9. The Committee considered moving a single precinct from northern Sampson County into SD12, but that would have split two municipalities and placed more Sampson County residents in SD12 than the chosen route: splitting two precincts, but leaving Spivey's Corner intact in SD9 and Plainview whole in SD12. Both SD9 and SD12 contain two split VTDs, but no split municipalities. LDTX80 Senate Tr. 6:21–7:24 (Nov. 2, 2021).

j. SD10 is a single-county district containing only Johnston County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. LDTX80 Senate Tr. 8:1–4 (Nov. 2, 2021).

k. SD11 was created by the base county grouping map. It includes Franklin, Nash, and Vance Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 8:5–8 (Nov. 2, 2021).

l. SD13, SD14, SD15, SD16, SD17, and SD18 were created out of the two-county grouping of Granville and Wake Counties. The Committee attempted to keep municipalities whole, while splitting as few precincts as possible. Some VTDs had to be split, however, to comply with one-person, one-vote standards. Raleigh had

to be split between multiple districts; 98% of Raleigh is within 3 Senate districts, though. Further, Cary and Apex were unable to be contained within a single district due to their populations and geographic constraints. All other municipalities (Fuquay-Varina, Holly Springs, Garner, Knightdale, Morrisville, Rolesville, Wake Forest, Wendell, and Zebulon) were kept whole. All in all, 10 VTDS were split to keep the municipalities whole and to balance out population. LDTX80 Senate Tr. 8:10–9:13 (Nov. 2, 2021), Trial Tr. 01/05/2022.

a. SD13 contains all of Granville County, unincorporated areas in northern Wake County, as well as Rolesville, Wake Forest, Zebulon, and 2% of the population of Raleigh. LDTX80 Senate Tr. 9:14–23 (Nov. 2, 2021). Granville could be kept whole, so it had to be kept whole. However, it is not large enough to be a district by itself so it needed to be joined with a part of Wake County. Trial Tr. 01/05/2022.
b. SD14 contains all of Garner, Knightdale, Wendell, and 21% of the population of Raleigh, including portions of southeast and downtown Raleigh. LDTX80 Senate Tr. 10:8–15 (Nov. 2, 2021).
c. SD15 contains the western part of Raleigh, portions of downtown Raleigh, and portions of east Cary. 36% of the population of Raleigh resides within the district. The majority of the district's population is from Raleigh (85%), with 12% from Cary. SD15 splits two precincts with other districts to balance population. LDTX80 Senate Tr. 10:24–11:7 (Nov. 2, 2021).
d. SD16 is centered in Cary and contains western Wake County, including portions of Apex and all of Morrisville. 80% of Cary's population is in the District, as well as 45% of Apex's population. 69% of the district's population is from Cary, 15% from Morrisville, and 13% from Apex. There are two split precincts to balance population. LDTX80 Senate Tr. 11:8–16 (Nov. 2, 2021).
e. SD17 contains Holly Springs and Fuquay-Varina, as well as most of Apex and a small part of Cary. Three VTDs were split to keep Garner whole in SD 13, and another VTD was split to balance population between SD 16 and SD 17. LDTX80 Senate Tr. 11:20–25 (Nov. 2, 2021).

m. SD19 and SD21 were created out of Cumberland and Moore Counites. SD19 is contained entirely within Cumberland County and was drawn to encompass as much of Fayetteville as possible, although Fayetteville has an irregular shape and many satellite annexations; indeed, it shares some precincts with other municipalities, such as Hope Mills. Ultimately, the Committee was unable to keep all of Fayetteville together but created a district that includes 88% of Fayetteville's population and includes nearly 15% of the population of Hope Mills. The district has no split VTDs. SD21 includes all of Moore County and remainder of Cumberland County, including the remainder of Fayetteville and Hope Mills' population. LDTX80 Senate Tr. 12:11–13:11 (Nov. 2, 2021), Trial Tr. 01/05/2022.

n. SD20 and SD22 were created out of Chatham and Durham Counties. SD20 includes all of Chatham County, most of incorporated Durham County—including the portions of Chapel Hill in Durham County—and several peripheral Durham City precincts. The bulk of Durham City (70% of its population), which is too large

to comprise its own Senate District, is within SD22. No VTDs were split in either district. LDTX80 Senate Tr. 13:12–14:7 (Nov. 2, 2021).

o. SD23 was created by the base county grouping map. It includes Caswell, Orange, and Person Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 14:9–13 (Nov. 2, 2021).

p. SD24 was created by the base county grouping map. It includes Hoke, Robinson, and Scotland Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 14:15–15:8 (Nov. 2, 2021).

q. SD25, SD29, SD34, and SD35 were created out of a seven-county grouping in the center of the State, including Alamance, Randolph, Cabarrus, Anson, Montgomery, Richmond, and Union Counties. Due to population disparities, Randolph, Cabarrus, and Union Counties were split between districts; the remainder were left whole. LDTX80, Senate Tr. 14:22–15:7 (Nov. 2, 2021).

    a. SD25 contains all of Alamance County and eastern Randolph County. Faced with a choice between splitting VTDs and splitting municipalities, the Committee chose the former. One precinct was split, then, to keep all of Randleman in SD25. LDTX80, Senate Tr. 15:8–15:18 (Nov. 2, 2021).
    b. SD29 includes all of Anson, Montgomery, and Richmond Counties; the remainder of Randolph County, including Asheboro; and the eastern half of Union County. Union County was split so as to keep all precincts whole. LDTX80, Senate Tr. 15:25–16:12 (Nov. 2, 2021).
    c. SD34 contains most of Cabarrus County, minus the southern precincts which are in SD35. The Committee aimed to keep as much of the population of the county together as possible, which required splitting a precinct to avoid the District having a higher-than-allowable population. Another precinct was split so that all of Midland was kept in the same district. LDTX80, Senate Tr. 16:15-16-23; 17:14–17:19 (Nov. 2, 2021).
    d. SD35 contains the remaining portions of Cabarrus and Union Counties. LDTX80, Senate Tr. 16:13–16:15 (Nov. 2, 2021).

r. SD26, SD27, and SD28 are comprised of Guilford and Rockingham Counties. Each contains part of Greensboro, which is itself too large to comprise its own district. SD26 contains all of Rockingham County, as well as some unincorporated portions of Guilford County and some of Greensboro's bedroom communities. While it does not contain any Greensboro precincts, it includes 4% of the city's population. SD26 contains one VTD split, to keep the entire population of Kernersville in the district. SD27 includes southern parts of Greensboro, as well as High Point. SD28 contains the northern portion (about 2/3) of Greensboro and the majority (68%) of its population. LDTX80, Senate Tr. 17:20–19:4 (Nov. 2, 2021).

s. SD30 was created by the base county grouping map. It includes Davie and Davidson Counties. This district does not split VTDs or municipalities within the

counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 19:5–19:9 (Nov. 2, 2021).

t. SD31 and SD32 are comprised of Stokes and Forsyth Counties. The Committee paired Forsyth with Stokes County, rather than with Yadkin County, because this pairing led to more compact districts and minimized municipality splitting; Germantown and King span the Stokes/Forsyth county line. SD31 includes all of Stokes County as well as suburban municipalities on the outskirts of Winston-Salem, such as Bethania, Clemons, Germantown, Kernersville, King, Lewis, Rural Hall, Tobaccoville, and Walkertown. Given that Winston-Salem is too large for one district, SD31 also contains 16% of the city's population. SD32 contains the vast majority of the population of Winston-Salem (84%). Neither district contains split VTDs. LDTX80, Senate Tr. 19:11–21:4 (Nov. 2, 2021). Stokes County could be kept whole, so it was. Winston Salem is too populous to be a district by itself. Trial Tr. 01/05/2022.

u. SD33 was created by the base county grouping map. It includes Rowan and Stanly Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 21:19–21:24 (Nov. 2, 2021).

v. SD36 is made up of Alexander, Surry, and Yadkin Counties and is the remainder of the grouping stemming from the combination of Stokes and Forsyth counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 21:5–21:18 (Nov. 2, 2021).

w. SD37, SD38, SD39, SD40, SD41, and SD42 were created out of the two-county grouping of Iredell and Mecklenburg Counties. Naturally, Charlotte—the largest city in the State—is split between 5 of these Mecklenburg-based districts. Senate Tr. 21:25–22:4 (Nov. 2, 2021).

    a. SD37 includes all of Iredell County and the northmost parts of Mecklenburg County, including Davidson (which spans both counties). SD37 also contains 33% of the population of Cornelius, which is too large to fit in SD37 alone; it is the only split municipality in the district. There are no split VTDs. LDTX80, Senate Tr. 22:5–23:22 (Nov. 2, 2021); Trial Tr. 01/05/2022.
    b. SD38 includes much of northern Mecklenburg County, including the remainder of Cornelius, Huntersville and 14% of Charlotte. There are no split VTDs. LDTX80, Senate Tr. 23:3–23:14 (Nov. 2, 2021).
    c. SD39 includes portions of western Mecklenburg County, including unincorporated territory along the Gaston County line and border with South Carolina. It also includes portions of Uptown, Still Creek, and West Charlotte. Indeed 81% of the district's population is in Charlotte and the district contains 20% of the population of Charlotte. There are no split VTDs in the district. LDTX80, Senate Tr. 23:15–24:4 (Nov. 2, 2021).
    d. SD40 includes northeastern Charlotte and unincorporated portions of Mecklenburg County running along the border with Cabarrus County. 24%

of Charlotte's population resides in the district. The district contains no split VTDs. LDTX80, Senate Tr. 24:5–24:13 (Nov. 2, 2021).

e. SD41 includes south Charlotte, Matthews, and Mint Hill, as well as some unincorporated territory. 18% of Charlotte's population is in this district, comprising about 71% of the district's population. The district contains no split VTDs. LDTX80, Senate Tr. 24:14–24:25 (Nov. 2, 2021). This district encompasses Matthews and Mint Hill. Trial Tr. 01/05/2022.

f. SD42 includes portions of Uptown Charlotte, south Charlotte, and east Charlotte. No other portions of Mecklenburg County are included. 25% of Charlotte's population lives in this district no split VTDs. LDTX80, Senate Tr. 25:1–25:18 (Nov. 2, 2021).

x. SD43 and SD44 include Gaston, Cleveland, and Lincoln Counties. SD43 contains most of Gaston County, although 5 VTDs (in Cherryville, Landers Chapel, and Tryon) were placed in SD44 to even out population. SD44 includes these VTDs, as well as all of Lincoln and Cleveland Counties. LDTX80, Senate Tr. 25:19–26:6 (Nov. 2, 2021).

y. SD45, SD47, and SD50 are drawn from a grouping of 17 western North Carolina counties. Given the counties' geographic locations and populations, two of the 17 counties (Caldwell and Haywood) were required to be split. SD45 includes all of Catawba County, as well as the southeast portion of Caldwell County. SD47 contains the remainder of Caldwell County, including Lenoir. (Two VTDs were split between SD45 and SD47 to keep Lenoir whole.) SD47 also contains portions of Haywood County, including Canton, and all of Alleghany, Ashe, Avery, Madison, Mitchell, Watauga, and Yancey Counties. SD50 includes the remainder of Haywood County, and all of Cherokee, Clay, Graham, Jackson, Macon, Swain, and Transylvania Counties. SD50 contains no split precincts or municipalities. LDTX80, Senate Tr. 27:3–28:18 (Nov. 2, 2021).

z. SD46 includes all of Burke and McDowell Counties, as well as some unincorporated portions and small towns in Buncombe County. LDTX80, Senate Tr. 26:13–16 (Nov. 2, 2021). One VTD is split with SD49 to keep all of Woodfin within that district. SD49 contains the remainder of Buncombe County, including Asheville, Biltmore Forest, and Weaverville. LDTX80, Senate Tr. 26:21–26:2 (Nov. 2, 2021).

aa. There were two options for how the Buncombe grouping could be formed. They opted for the one that formed Burke County, McDowell County, and Buncombe County together because it was the more compact version. The committee determined that Burke and McDowell counties could be kept whole, so they were. SD49 was drawn to include the precincts that make up Asheville. Trial Tr. 01/05/2022.

bb. SD48 includes the whole of Henderson, Polk, and Rutherford Counties. LDTX80, Senate Tr. 26:7–26:12 (Nov. 2, 2021).

109. Ultimately, two amendments were accepted in the Senate Committee: (1) An amendment offered by Senator Clark changing the Guilford/Rockingham County grouping (SD26, SD27, and SD28). Senator Hise testified that this amendment was presented at the behest of Senator Robinson, a Democratic member from Guilford, who, under the version presented by the chairs, was double-bunked with Senator Garrett. Trial Tr. 01/05/2022. During debate, Senator Robinson attested in Committee that she understood the amendment complied with the VRA and considered it a fair draw. *Id.*; LDTX80, Senate Tr. 104:3–105:4 (Nov. 2, 2021). (2) An amendment offered by Senator Marcus changing the Durham/Chatham County grouping (SD20 and SD22). Senator Murdock, a Democratic member from Durham, attested in Committee that she understood the amendment complied with the VRA and considered it a fair draw. LDTX80, Senate Tr. 98-100 (Nov. 2, 2021).

110. The Committee concluded that the 2021 Senate Plan complies with the adopted criteria. The Committee determined that the Senate map successfully balances the criteria considered by Senators, including compliance with *Stephenson,* refusal to consider racial and political data, and minimizing the division of municipalities and VTDs. LDTX80, Senate Tr. 72:21–73:15 (Nov. 2, 2021).

(iii) The 2021 House Plan

111. The legislative record shows that stated goals achieved by the 2021 House Plan included the following:

a. The mapmakers made every effort to keep previous districts intact. LDTX76, House Tr. 9:12–15 (Nov. 1, 2021).

b. Rural areas lost immense population in the 2010s and, therefore, changes were necessary. For instance, House District 23 previously included only Edgecombe and Martin Counties. But Bertie County had to be added to meet population requirements. LDTX76, House Tr. 8:14–23 (Nov. 1, 2021).

c. The House Committee Chair endeavored to keep counties whole whenever it was possible. For instance, although Chatham, Lee, and Polk Counties could have been split, they were not. LDTX76, House Tr. 9:20–10:4 (Nov. 1, 2021).

d. The Chair also sought to minimize the splitting of VTDs. While the 2011 map had hundreds of split VTDs, the proposed map had only 6 VTD splits. LDTX76, House Tr. 10:5–11 (Nov. 1, 2021).

e. The Chair honored municipal boundaries and made every effort to keep municipalities whole. To the extent splits were necessary, the majority of them were in areas with little to no population. LDTX76, House Tr. 10:12–19 (Nov. 1, 2021).

f. Every district in the map proposed by the Chair is contiguous. LDTX76, House Tr. 10:20–21 (Nov. 1, 2021).

g. The bare minimum number of incumbents were "double-bunked" into the same districts. LDTX76, House Tr. 10:22–10:25 (Nov. 1, 2021).

112. Goals for certain House districts in certain counties were as follows:

a. Because the Wake county grouping added two house districts during this redistricting cycle, Representative Hall was unable to keep the districts similar to the previous redistricting plan. Towns like Wake Forest, Rolesville, and Fuquay-Varina were sought to be kept whole, with Raleigh in as few districts as possible. Trial Tr. 01/05/2022.

b. Because Mecklenburg County grouping added one House District and an attempt was made to keep it similar to the previous redistricting plan for the county. Mint Hill was unsplit and combined with Matthews because the two communities are similar. Trial Tr. 01/05/2022.

c. The Guilford County grouping added no seats, and a goal was to change the districts as little as possible considering past litigation of districts in the county. Only a few precincts were moved for population balancing. Trial Tr. 01/05/2022.

d. Pitt County was previously paired with Lenoir, and therefore its configuration could no longer be kept the same. An attempt was made to not split Greenville and ECU. Trial Tr. 01/05/2022.

e. In the Buncombe County grouping, Asheville had been divided up and a goal was to keep Asheville entirely within two districts. Trial Tr. 01/05/2022.

f. Districts in New Hanover County were intended to remain largely the same. Wilmington is kept almost entirely within Districts 18 and 20. Trial Tr. 01/05/2022.

g. The goal for the Cumberland County grouping was to change the districts as little as possible considering past litigation of districts in the county. A small number of precincts were changed for population purposes. Trial Tr. 01/05/2022.

h. The Forsyth County cluster districts are largely similar to the districts in the previous map with the biggest difference being that the county is now paired with Stokes county instead of Yadkin county. A goal was to not divide schools, including Wake Forest University. Winston-Salem had to be split because of its population. Trial Tr. 01/05/2022.

113. No simulated redistricting analysis was presented during the 2021 redistricting. None of the innumerable alternative redistricting plans on the record before this Court was presented to the General Assembly during the 2021 redistricting.

114. As shown above, although the redistricting process must start anew at the beginning of each decade, and no prior maps were loaded onto the map-drawing machines for legislators or other maps allowed into the room, Representative Hall sought to draw districts as close as possible to districts used in the past and with potential litigation in mind.

c. Plaintiffs' and Legislative Defendants' Experts Analysis of the Enacted Plans

(i) Harper Plaintiffs' Expert Dr. Jowei Chen

115. Plaintiffs' expert Jowei Chen, Ph.D., is an Associate Professor in the Department of Political Science at the University of Michigan, Ann Arbor. PX482 at 2 ¶2. Dr. Chen is also a Research Associate Professor at the Center for Political Studies of the Institute for Social Research at the University of Michigan and a Research Associate at the Spatial Social Science Laboratory at Stanford University. *Id.*

116. Dr. Chen has extensive experience in redistricting matters. PX482 at 2 ¶4. Dr. Chen has published academic papers on legislative districting and political geography in several political science journals, including The American Journal of Political Science and The American Political Science Review, and Election Law Journal. *Id.* at 2 ¶3. His academic areas of expertise include legislative elections, spatial statistics, geographic information systems (GIS) data, redistricting, racial politics, legislatures, and political geography. *Id.* He also has expertise in the use of computer simulations of legislative districting and in

analyzing political geography, elections, and redistricting. *Id.* Dr. Chen has presented expert testimony regarding his simulation methodology in numerous prior partisan gerrymandering lawsuits, including *Common Cause v. Lewis*.

117. Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems. Trial Tr. 01/03/2022.

118. Dr. Chen analyzed the partisan bias of the enacted congressional plan on a statewide and district-by-district basis. PX482 at 3 ¶6. Dr. Chen did not analyze the state legislative districts in the Enacted Plan. Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan cannot be explained by North Carolina's political geography or adherence to the Adopted Criteria. PX482 at 49 ¶¶77-78, 98, 100.

119. In his academic research on legislative districting, partisan and racial gerrymandering, and electoral bias, Dr. Chen has developed various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. PX482 at 4 ¶7. Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. *Id.* By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. *Id.* Specifically, by

holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations. *Id.*

120. Because Dr. Chen analyzed only the enacted congressional plan, findings based upon his statewide, regional, and district-level analysis are made in more detail below.

(ii) Harper Plaintiffs' Expert Dr. Christopher Cooper

121. Christopher A. Cooper, Ph.D., has been a tenured or tenured-track professor in the field of political science since 2002 and is currently the Robert Lee Madison Distinguished Professor of Political Science and Public Affairs at Western Carolina University. PX425 at 1 (Cooper Rep.). Dr. Cooper was previously accepted as an expert in *Common Cause v. Lewis, et al.*, 18 CVS 014001 (Sept. 3, 2019).

122. Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina. Trial Tr. 01/03/2022.

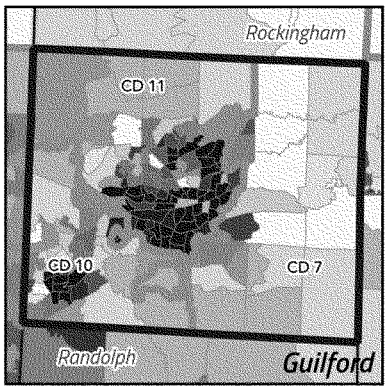
123. Dr. Cooper analyzed the 2021 Congressional Plan the partisan effects of each district's boundaries.

124. Although North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election. PX425 at 3. Trial Tr. 01/03/2022.

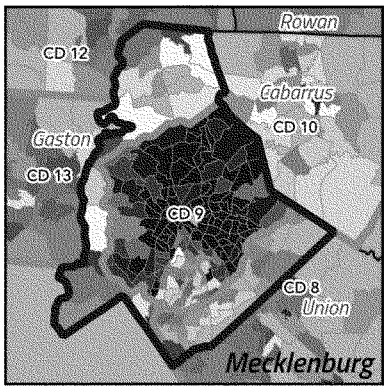
125. The 2021 Congressional Plan reduces the anticipated number of Democratic seats, disadvantaging Democratic voters, by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each. PX425 at 3.

There was no population-based reason to divide each of these three Democratic-leaning counties across three districts and in the congressional plan in effect for the 2020 election, Guilford County fell entirely within one district, while Mecklenburg and Wake counties were each divided into only two districts. PX425 at 3; Trial Tr. 01/03/2022.

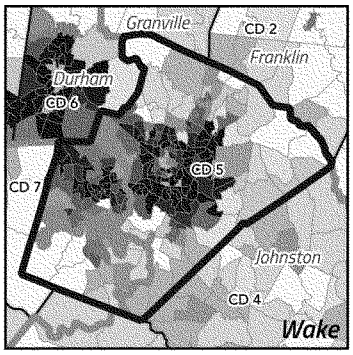
126. Dr. Cooper produced a series of maps showing the congressional district boundaries in Guilford, Mecklenburg, and Wake counties, displaying the congressional district boundaries in yellow, the county boundaries in black, and VTD boundaries in gray. Dr. Cooper also used the combined, two-party vote differential in the results of the 2020 Secretary of Labor and Attorney General elections to measure and display partisanship of the VTDs on these maps. In each map, darker red shading indicates a larger Republican vote margin in the VTD, darker blue shading indicates a larger Democratic vote margin in the VTD, and lighter colors indicate VTDs that were closer to evenly split in Democratic and Republican vote shares in the 2020 Secretary of Labor and Attorney General elections. PX425 at 15.



PX436 (Cooper Map 1)



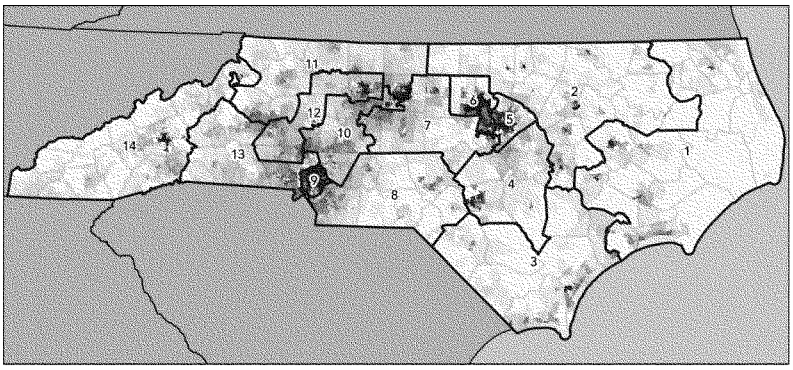
PX437 (Cooper Map 2)



PX438 (Cooper Map 3)

127. The congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for districts elsewhere in the state. PX425 at 15. Trial Tr. 01/03/2022. Thus, the Court finds that the "cracking and packing" of Democratic voters in Guilford, Mecklenburg, and Wake counties has "ripple effects throughout the map." PX425 at 15.

128. Dr. Cooper produced a map showing the state-wide congressional map with red-and-blue shading of VTDs based on the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections. PX425 at 15.



PX439 (Cooper Map 4)

129. Dr. Cooper calculated the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections for the districts in the 2021 Congressional Plan in order to estimate the partisan lean of each district. By this measure, the Court finds that the 2021 Congressional Plan will result in 10 Republican seats, 3 Democratic seats, and 1 competitive seat. PX425 at 20 & Table 1. Other measures of the partisan lean of each district in the 2021 Congressional Plan, including the Cook Political Report's Partisan Voter Index (PVI) and the percentage of the electorate that voted for Donald Trump in the 2020 election, are consistent with the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections. PX425 at 20 & Table 1.

130. The 2021 Congressional Plan places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, "virtually guaranteeing" that the Democratic incumbent will lose her seat. PX425 at 4. The 2021 Congressional Plan includes one district where no incumbent congressional representative resides. *Id.* That district, NC-4,

"overwhelmingly favors" the Republican candidate based on the district's partisan lean. PX425 at 4.

131. The 2021 House and Senate Plans similarly benefit the Republican Party. PX425 at 49. Although certain county groupings were mandated by the *Stephenson* county grouping rule, Legislative Defendants retained discretion over certain county groupings where there were alternate possibilities. *Id.* Specifically, Legislative Defendants chose from between 16 potential different county grouping maps in the Senate and 8 different potential county grouping maps in the House. *Id.* In addition, Legislative Defendants retained discretion over where to draw the district boundaries within each grouping, with the exception of single district county groupings. *Id.*

132. Legislative Defendants' exercise of this discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent.

133. Dr. Cooper also explained how partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly.

134. Findings based upon Dr. Cooper's analysis of each district in the 2021 Congressional Plan and State Senate and House Plans are made below.

(iii) Harper Plaintiffs' and Plaintiff Common Cause's Expert Dr. Jonathan Mattingly

135. Jonathan Mattingly, Ph.D., is a North Carolina native, and the James B. Duke Professor of Mathematics at Duke. PX629; PX630. Dr. Mattingly submitted a report for Harper Plaintiffs that demonstrates the extent of partisan redistricting in each of the enacted maps through longstanding statistical methods. PX629. Dr. Mattingly is an expert in applied

mathematics, probability, and statistical science. Dr. Mattingly developed his method of evaluating partisan gerrymandering in his academic research, where he leads a group at Duke University which conducts non-partisan research to understand and quantify gerrymandering. *Id.*; Trial Tr. 01/03/2022. The General Assembly, in fact, used Dr. Mattingly's publicly-released findings from his nonpartisan research to determine possible county clusters. *Id.* at 6.

136. Dr. Mattingly has testified in two previous cases. In the federal partisan gerrymandering case relating to North Carolina's congressional districts and in the 2019 *Common Cause* case, in which the court found that "Dr. Mattingly's simulated maps provide a reliable and statistically accurate baseline against which to compare the 2017 Plans," that "[b]y comparing Dr. Mattingly's simulated plans to the enacted plans, the Court can reliably assess whether the characteristics and partisan outcomes under the enacted plans could plausibly have resulted from a nonpartisan process," and that Dr. Mattingly's analysis allows the court to "reliably assess whether the enacted plans reflect extreme partisan gerrymanders." *Common Cause*, 2019 WL 4569584, at *29.

137. Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability. Trial Tr. 01/03/2022.

138. Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo ("MCMC") Algorithm to create a representative set, or "ensemble," of 100,000 maps for the state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. PX629 at 10, 72; Trial Tr. 01/03/2022. The algorithm produced maps that accorded with traditional districting criteria. *Id.* at 9, 72; Trial Tr. 01/03/2022. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits. *Id.* Dr. Mattingly

also designed the algorithm to develop maps that respected the county clustering requirement for state legislative maps under *Stephenson I*. *Id.* at 5–6. The algorithm did not incorporate as output requirements any ideas of proportional representation or notions of fairness. *Id.* at 2. The MCMC Algorithm that Dr. Mattingly employed ensured that the collection of maps was a stable, random and representative sample from the distribution of nonpartisan maps that adhere to the redistricting criteria. *Id.* at 72; Trial Tr. 01/03/2022.

139. For Congressional Districts, Dr. Mattingly ensured that the total population of any district was within 1% of the ideal district population; he has verified in his prior work that the small changes necessary to require perfect population balance, which would require splitting VTDs, do not affect the results seen in an ensemble of maps where 1% population deviation is permitted. *Id.* After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans. PX629 at 74; Trial Tr. 01/03/2022.

140. The Court finds, based upon Dr. Mattingly's analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting. PX629 at 75. The enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8. PX629 at 75. The Congressional map is "an extreme outlier" that is "highly non-responsive to the changing opinion of the electorate." *Id.* at 74-75.

141. For State House and Senate Districts, after generating the sample of maps, Dr. Mattingly used historical elections data to simulate how his nonpartisan maps would perform under a variety of political climates. *Id.* at 10; Trial Tr. 01/03/2022. He considered the following statewide election contest in the years 2016 and 2020: races for Governor,

Lieutenant Governor, Attorney General, United States Senate, Commissioner of Insurance, State Treasurer, Secretary of State, and State Auditor. *Id.*

142. The Court finds, based upon Dr. Mattingly's analysis, that the State House and Senate plans are extreme outliers that "systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps." PX629 at 2. The intentional partisan redistricting in both chambers is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it. *Id.* at 3, 10. The House map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. *Id.* The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is "astronomically small." *Id.* at 3.

143. For the State House Districts, the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections he considered. PX629 at 11. It is an outlier in its favoring of Republicans in the vast majority of the elections used in Dr. Mattingly's analysis. *Id.* The only three elections where the enacted map is not an extreme outlier are in elections that have strong Republican vote fractions (Treasurer 2020, Senate 2016, and Lieutenant Governor 2016) where the Republicans do not need to gerrymander to keep a supermajority. PX629 at 12; PX634.

144. The North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. *Id.* at 10. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. *Id.* Likewise, maps that would normally produce a Republican majority under nonpartisan maps

produce a Republican supermajority under the enacted maps. *Id.* Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. *Id.* at 11; Trial Tr. 01/03/2022. In every election scenario, Republicans won more individual seats that they statistically should under nonpartisan maps. *Id.* at 11.

145. The 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 Democratic seats or fewer, even in situations where virtually all of the plans in the nonpartisan ensemble would elect 49 Democratic seats or more. *Id.* at 11; PX633 (Mattingly Figure 5.1.1).

146. For the State Senate Districts, the results are the same: the enacted plan is an outlier or an extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. PX629 at 21. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. *Id.* But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a Democratic supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

147. Dr. Mattingly demonstrated the supermajority firewall by plotting the results of the statewide elections using the enacted Senate plan and his nonpartisan simulations in Figure 5.2.1, which is similar to Figure 5.1.1 for the House. PX629 at 22; PX643.

148. Although the effect is not as significant as in the House, the enacted plan elects fewer Democrats in each election than the majority or vast majority of plans in the non-partisan ensemble. *Id.* And in particular, the Senate plan sticks at 20 Democratic seats

across a variety of elections in which the overwhelming majority of non-partisan plans hit 21 and break the supermajority. *Id.*

149. Dr. Mattingly also performed an analysis to determine the extent of "cracking" and "packing" in the enacted maps. *Id.* at 12. In maps that are cracked and packed, it is expect to see that the concentrations of Democratic voters are outliers as compared to nonpartisan maps. *Id.* at 12.

150. For the Congressional maps, Dr. Mattingly ordered the fourteen districts in the congressional plan in his ensemble of nonpartisan plans from lowest to highest based on the Democratic vote fraction in each district, using statewide elections. PX629 at 75, Fig. 9.0.2; *see also id.* at 95-97.

151. The Court finds that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates, as shown in his charts. *Id.* at 75-76; Trial Tr. 01/03/2022. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts – *i.e.*, the districts Democrats would win no matter what – in comparison to the enacted plan. *Id.* And not a single one had the same or more Republican voters in the next seven districts – i.e., the competitive districts – in comparison to the enacted plan. *Id.* That was true across every single statewide election in 2016 and 2020. *Id.*

152. For the House, the enacted maps, as compared to the sample maps, there is an overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts. *Id.* at 16; PX637. The Court finds that the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan

maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps. *Id.*; Trial Tr. 01/03/2022.

153. In the middle districts—between the 60th most Democratic seat and the 80th most Democratic seat—the Democratic vote fraction in the enacted plan is far below the boxes representing the nonpartisan plans. PX629 at 16. These are the seats that determine the supermajority line and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The Court finds that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map's partisan outlier behavior. *Id.* Those Democrat votes are instead placed in the 90th to 105th most Democratic district, where they are wasted because those seats are already comfortably Democratic. *Id.*

154. For the Senate, the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats. *See* PX629 at 24; PX645.

155. While a redistricting plan's resiliency to electoral environments is an important indicator of partisan intent, the Court finds that even if a districting plan is the product of an intentional partisan redistricting, a political gerrymander can still be broken in a wave election under the intentionally partisan maps. Trial Tr. 01/03/2022.

156. Dr. Mattingly also conducted a secondary analysis for each chamber in which he only considered plans that preserved the same or fewer incumbents than the enacted plans. The Court finds that this did not affect his results and that "a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan." PX629 at 19, 27.

157. Finally, Dr. Mattingly observed that the enacted Senate plan appeared to split very few municipalities in comparison to what was possible under a nonpartisan ensemble, while the enacted House plan split many more municipalities. PX629 at 10. He explored why the House and Senate plans would have treated municipality splits differently by creating two entirely new ensembles for the House and Senate – in the House, he created a new ensemble that prioritized preserving municipalities (as opposed to matching the enacted plan's preservation of municipalities), and in the Senate, he created an ensemble that did not prioritize preserving municipalities. *Id.*

158. Dr. Mattingly concluded that the choice to preserve municipalities in the Senate but not in the House appeared to have been a partisan choice. He compared the partisan properties of the new ensembles to his original ensembles and found that, for the Senate plan, relaxing the requirement to preserve municipalities leads to an ensemble that is more favorable to the Democrats, meaning that the enacted plan would be an extreme outlier in more situations. *Compare* Figure 5.2.7 with Figure 5.2.1. Put differently, prioritizing municipality preservation in the Senate plan appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, he found that his new ensemble prioritizing municipalities would not have favored the Republican party in comparison. PX629 at 10. The Court finds that the mapmakers focused on municipalities in the state legislature only when doing so advantaged Republicans.

159. The partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble of plans could not be explained by political geography or natural packing. PX629 at 3. Moreover, Dr. Mattingly's analysis did not rest on any assumption about proportional representation. *Id.*

(iv) Harper Plaintiffs' Expert Dr. Wesley Pegden

160. Wesley Pegden, Ph.D., is Associate Professor in the Department of Mathematical Sciences at Carnegie Mellon University, and testified as an expert in probability. PX523 at 1 (Pegden Report). Dr. Pegden has published numerous papers on discrete mathematics and probability in high-impact, peer-reviewed journals, and has been awarded multiple prestigious grants, fellowships, and awards. *Id.*; PX524 (Pegden CV). He previously served on Pennsylvania's bipartisan Redistricting Reform Commission under appointment by the Governor. PX523 at 1.

161. Dr. Pegden's academic work on redistricting involves Markov Chains. A Markov Chain is "a sequence of random changes." PX523 at 1 (Pegden Report). In 2017, before Dr. Pegden had ever served as an expert in redistricting litigation, he published a peer-reviewed article (PX628) entitled "Assessing Significance in a Markov Chain Without Mixing" in the Proceedings of the National Academy of Sciences—a top-ranked, science-wide journal. PX523 n.1. This article provides a new way to demonstrate that a given object is an outlier compared to a set of possibilities. PX628.

162. Dr. Pegden was qualified and accepted as an expert at trial in probability. Trial Tr. 01/03/2022.

163. Dr. Pegden explained that there are three ways to show that a given object is an outlier. One of these forms of outlier analysis, developed by Dr. Pegden and his co-authors, begins with the object in question, uses a Markov chain to make a series of small, random changes to the object, and then compares the objects generated by making the small changes to the original object. PX628 at 1. Dr. Pegden's article illustrates this methodology using a redistricting plan. *Id.* at 3-5. The article demonstrates that, by using an existing plan as a starting point and then making small random changes to the district boundaries, one can prove the extent to which the existing plan is an outlier compared to all possible maps

meeting certain criteria. *Id.* Dr. Pegden's article proves mathematical theorems showing that this approach can establish a redistricting plan's outlier status in a way that is rigorously grounded in mathematics. PX523 at 4 (Pegden Report). In 2020—before this case was filed or the 2021 Plans were enacted—Dr. Pegden and three co-authors (including Dr. Mattingly) published a peer-reviewed article (PX627) titled "Separating Effect from Significance in Markov Chain Tests" in the journal *Statistics and Public Policy*.

164. In this case, Dr. Pegden used his form of outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan constraints, and then evaluated the partisan characteristics of the resulting comparison maps. PX523 at 3-11.

165. Dr. Pegden's analysis proceeded in several steps. He began with the enacted map. His computer program then randomly selected a geographic unit on the boundary line between two districts and attempted to move or "swap" the unit from the district it is in into the neighboring district. PX523 at 8-9. Dr. Pegden's method uses two different geographic units, VTDs and geounits. PX523 at 8. For the congressional plan, Dr. Pegden's primary analysis used VTDs, not geounits. *Id.* But to verify that the choice between VTDs and geounits did not affect his results, he also repeated his analyses using geounits, which allows for the splitting of VTDs. *Id.* at 8, 46. Created by a computer program, geounits are compact collections of census blocks that lie entirely within one VTD and one district, containing on average 1000 people. There are roughly four geounits per VTD. *Id.* at 8.

166. When attempting to swap a randomly selected VTD or geounit from one district to another, Dr. Pegden allowed the swap to occur only if certain constraints were satisfied. PX523 at 7 (Pegden Report). These constraints were based on the 2021 Adopted Criteria and

included: contiguity, compact districts, county preservation, municipal preservation, VTD preservation, incumbency protection, and population deviation. *Id.*

167. Dr. Pegden applied these constraints in a "conservative" way, to "avoid second-guessing the mapmakers' choices in how they implemented the districting criteria." PX523 at 7. For example, his algorithm generated a comparison map only if it included an equal or lesser number of county splits, municipal splits, and VTD splits as the enacted plan. *Id.* His comparison maps could not double-bunk any incumbents that were not double-bunked in the enacted plan. *Id.* For compactness, comparison maps needed to have a Polsby-Popper score within a 5% margin of the enacted plan. And for population deviation, comparison maps needed to have district populations within 2% of the ideal district population. *Id.*

168. Dr. Pegden ran several "robustness checks" to ensure that implementing the criteria differently would not affect the results of his analysis. PX523 at 39-47. For incumbency, he re-ran his analysis without restricting the double-bunking of incumbents. *Id.* at 41. For compactness, he re-ran his analysis allowing for 0% difference between the compactness of generated maps and the enacted map, and also allowing for a 10% difference. *Id.* at 42-43. He also used a different measure of compactness altogether to ensure that using the Polsby-Popper measure was not affecting his results. *Id.* at 44. For district population, Dr. Pegden re-ran his analysis with a 1% threshold for population deviation and a 0.5% deviation (the latter of which allowed for VTD splits). *Id.* at 10, 45-46. He also ran a version of his analysis using, as his baseline map, a version of the enacted map that split no VTDs. *Id.* at 10, 47. None of these changes affected Dr. Pegden's conclusion that the congressional map is an extreme partisan outlier and is more carefully crafted to ensure Republican advantage that nearly every possible redistricting plan. *Id.* at 41-47.

169. Because of this conservative implementation of the enacted criteria, Dr. Pegden's algorithm does not seek to generate maps better than the enacted plan in terms of their adherence to non-partisan criteria like compactness. PX523 at 7. Rather, Dr. Pegden's approach accepts the decisions the map-maker made and asks whether, "even if we accept that the mapmakers have made appropriate choices with respect to nonpartisan criteria such as compactness, population deviation, municipality preservation, incumbency protection, and so on, does their plan nevertheless stand out with respect to its *partisan* qualities?" *Id.*

170. Once Dr. Pegden's algorithm made a swap satisfying his constraints, his algorithm evaluated the partisan characteristics of the comparison map that resulted from the swap. PX523 at 5, 9-10. For his main analysis, Dr. Pegden used data from the 2020 Attorney General race to analyze the congressional plan. *Id.* at 39. Dr. Pegden also re-ran his analysis using three additional elections—the 2020 Presidential election, the 2020 Lieutenant Governor election, and the 2020 Governor election. *Id.* at 39-40. Using these different historical elections did not alter Dr. Pegden's conclusions. *Id.*

171. To evaluate the partisan characteristics of each comparison map, Dr. Pegden's algorithm calculates the number of seats Democratic candidates would win, on average, if a random uniform swing were repeatedly applied to the historical voting data being used. PX523 at 9-10. This metric captures how a given comparison map would perform over a range of electoral environments centered around the base election being used (*i.e.*, the 2020 Attorney General's election for Dr. Pegden's primary analysis). *Id.*

172. Dr. Pegden's algorithm repeats the foregoing steps billions or trillions of times. The algorithm begins with the enacted map, makes a small random change complying with certain constraints, and uses historical voting data to evaluate the partisan characteristics of the resulting map. PX523 at 5. The algorithm then repeats those steps, each time using the comparison map generated by the previous change as the starting point. *Id.* By repeating

this process many times, Dr. Pegden's algorithm generates a large number of comparison maps in sequence, each map differing from the previous map only by one small random change. *Id.* at 5, 8.

173. Each sequence of billions or trillions of small changes in Dr. Pegden's analysis is one "run." PX523 at 5. For the congressional plan, a run consisted of approximately one trillion small changes. *Id.* His algorithm performs multiple runs for each map being analyzed, with each run beginning with the enacted plan as the starting point. *Id.*

174. The comparison maps generated by Dr. Pegden's algorithm are not intended to provide a baseline for what neutral, nonpartisan maps of the North Carolina House or Senate should look like. PX523 at 7, 10. Instead, Dr. Pegden's comparison maps are intended to be *similar* to the enacted map in question with respect their relevant nonpartisan characteristics, in order to assess how carefully created the enacted plan is to maximize partisan advantage. *Id.* Thus, when Dr. Pegden reports the number of Democratic seats expected under a particular set of generated maps, that does not necessarily reflect the number of Democratic seats that would be expected under a representative set of neutral, nonpartisan districting maps. *Id.* at 10. Nor does Dr. Pegden's method "evaluate the fairness of a districting by whether it produces a 'small' or 'large number of seats for one party." *Id.* The number of Democratic seats expected "is merely a metric used to compare one map to another"—*i.e.*, to determine whether "the enacted map is [an] extreme outlier with respect to how optimized for partisanship it is compared to the set of alternative comparison districts of North Carolina satisfying the districting criteria [he] impose[s]." *Id.*

175. As explained in further detail below, Dr. Pegden found, and the Court so finds, that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated by making small random changes to the enacted

plans. *Id.* at 13. And based on these results, Dr. Pegden's theorems prove, and the Court so finds, that the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in his algorithm. *Id.*

176. The Court finds that even without using applying the mathematical theories developed in his academic papers, Dr. Pegden's first-level analysis provides evidence that the 2021 congressional plan was "drawn to optimize partisan advantage in the enacted plan." PX523 at 5. In every run, the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated making tiny random changes to the district's boundaries. PX523 at 13. "[I]f the districting had not been drawn to carefully optimize its partisan bias, we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect." *Id.* at 5. And the Court also finds that Dr. Pegden's second-level analysis provides mathematically precise calculations of how carefully crafted the plan is—that is, how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans—when compared not just to the comparison maps generated in each run of his algorithm, but to all possible maps of North Carolina that satisfy his constraints. PX523 at 6-7.

177. Dr. Pegden conducted analyses of the 2021 House and Senate maps using the same method underlying his analysis of the congressional map. PX523 at 14-15. The Court finds, as did Dr. Pegden, that the House and Senate maps are partisan outliers in their partisan bias and the degree to which they are optimized for partisan advantage. *Id.*

178. While Dr. Pegden's overall method for analyzing the House and Senate maps was the same as for the congressional map, he made certain changes to his criteria to account for differences in how state legislative maps are drawn in North Carolina. In particular, his comparison house and Senate maps used the same county clustering as used in the enacted

maps. PX523 at 7. And his House and Senate comparison maps needed to have district populations within 5% of the ideal district population—the same threshold that the General Assembly permitted in the 2021 Adopted Criteria. *Id.*; see PX34. All other criteria—contiguity, compactness, county traversals, municipality preservation, VTD preservation, and incumbency protection—were the same as for the congressional analysis. PX523 at 7. And Dr. Pegden performed similar robustness checks to ensure that changes to these criteria (for example, using a different compactness threshold) did not affect his results, which they did not. *Id.* at 48-59.

179. For some county groupings, because of Dr. Pegden's conservative application of his constraints, it was impossible for his algorithm to find a swap that satisfied all of the constraints. PX523 at 8. When this occurred, Dr. Pegden ran a modification of his algorithm allowing multiple swaps in one step. *Id.* at 8-9.

180. Although Dr. Pegden found that the House and Senate maps are extreme partisan outliers on a statewide basis, his primarily analysis was inconclusive as to four particular House county clusters—Alamance, Brunswick/New Hanover, Cabarrus/Davie/Rowan/Yadkin, and Cumberland—which are discussed in more detail below. PX523 at 33. For these clusters, Dr. Pegden also re-ran his analysis using a different partisan metric—the "wave threshold"—to determine whether they may have been drawn to achieve "other conceivable partisan goals" besides merely maximizing Republican seat count, "such as facilitating the re-election of particular representatives in particular districts." *Id.* The wave threshold metric captures, for a given map, the smallest uniform swing in election results that would be required to give the Democrats an additional seat. *Id.* Put differently, this metric captures how large of a Democratic wave election the cluster could withstand without losing any Republican seats. *Id.* For multiple of these groupings discussed further below, the Court finds that the enacted map was an extreme outlier in the degree to which

Democratic election performance would need to increase to produce an additional Democratic seat. *Id.* at 34-36.

181. The Court finds, as Dr. Pegden shows in his first-level analysis, that—in every run—the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries. PX523 at 14. The Court also finds that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps. *Id.* at 15.

182. As with the congressional plan, Dr. Pegden's second-level analysis provides mathematically precise calculations of how carefully crafted the 2021 House and Senate maps are—that is, how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans—when compared not just to the comparison maps generated in each run of his algorithm, but to all possible maps of North Carolina that satisfy his constraints. For the enacted House map, the Court finds that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying his constraints. PX523 at 14. The Court also finds that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying Dr. Pegden's constraints. *Id.* at 15.

183. These results cannot be explained by North Carolina's political geography. PX523 at 4. Dr. Pegden's algorithm compares the enacted map to other maps of North Carolina, with the very same political geography. And Dr. Pegden's theorems do not depend on any aspect of North Carolina's political geography. *Id.*

(v) NCLCV Plaintiffs' Expert Dr. Moon Duchin

184. Dr. Duchin holds a Ph.D. and an M.S. in Mathematics from the University of Chicago as well as an A.B. in Mathematics and Women's Studies from Harvard University. She is a Professor of Mathematics and a Senior Fellow in the Jonathan M. Tisch College of Civic Life at Tufts University. PX150 at 2.

185. Dr. Duchin's general research areas are geometry, topology, dynamics, and applications of mathematics and computing to the study of elections and voting. Her redistricting-related work has been published in venues such as the Election Law Journal, Political Analysis, Foundations of Data Science, the Notices of the American Mathematical Society, Statistics and Public Policy, the Virginia Policy Review, the Harvard Data Science Review, Foundations of Responsible Computing, and the Yale Law Journal Forum. *Id.*

186. Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting. Trial Tr. 01/04/2022.

187. Dr. Duchin's analysis seeks to address how a certain quantitative share of the vote should be translated to a quantitative share of the seats in a state legislature or Congressional delegation. *Id.* at 4. Dr. Duchin uses a Close-Votes-Close-Seats principle, which is where "an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split." *Id.* Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where "a party or group with more than half of the votes should be able to secure more than half of the seats." Close-Votes-Close-Seats is essentially a corollary (or byproduct) of Majority Rule; it is not practicable to design a map that always attains these properties. *Id.*

188. Dr. Duchin has previously analyzed the impacts of political geography in Massachusetts and found that even though Republicans tended to typically get over one-third

of the statewide vote, it was impossible to draw a single Congressional district with a Republican majority. *Id.* In North Carolina, however, Dr. Duchin's analysis shows, and the Court so finds, that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party. *Id.* at 4-5.

189. The Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates. Applying a standard technique in the field, Dr. Duchin overlayed each plan onto historical voting patterns from all 52 partisan elections since 2012 in order to show how the Enacted Plans would have performed in actual North Carolina elections. PX150 at 4-5.

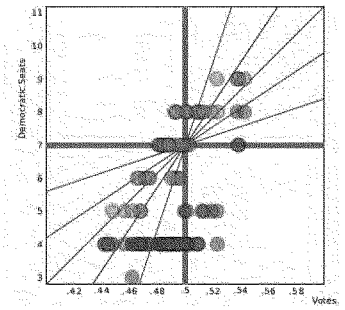
190. The results reveal a partisan skew in close elections. PX150 at 4. For instance, the 2020 vote for Chief Justice of the North Carolina Supreme Court resulted in a virtual tie, with the Republican candidate winning by 401 votes. PX150 at 6. The Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina's congressional districts, 28 (56%) of North Carolina's Senate districts, and 68 (57%) of North Carolina's House districts. PX150 at 6 (line labeled JS120). Nor is that election unusual.

191. Under this analysis, the Court finds that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state's congressional delegation, the State House, and the State Senate. PX150 at 5-6. This is true even when Democrats win statewide by clear margins. For example, under this analysis, in the 2020 gubernatorial race, although voters in that election preferred the Democratic candidate by 4.6 percentage points, the Enacted Plans translate that preference into a Republican 10-4 (71%) majority in the state's congressional delegation, a 27-23 (54%) majority in the state Senate, and a 62-58 (52%) majority in the state House—all when voters clearly prefer the other party. PX150 at 6.

192. The Enacted Plans resiliently safeguard electoral advantage for Republican candidates. PX150 at 5. This skewed result is not an inevitable feature of North Carolina's political geography.

193. The result of Dr. Duchin's "overlay" analysis for the Enacted Congressional Plan is clear: The plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins. The Enacted Congressional Plan will almost always yield 10 Republican seats and 4 Democratic seats. PX150 at 6. This includes Democratic victories as well as close elections. PX150 at 6.

194. The below figure demonstrates the bias the Enacted Congressional Plan creates across all 52 elections that Dr. Duchin studies by comparing Democratic vote share (on the x-axis) with Democratic seat share (on the y-axis) for every election. PX150 at 7. A map that responds to voters' preferences would roughly track one of the diagonal lines crossing at the "(50, 50)" point, where a 50% vote share generates a 50% seat share. Along those lines, as either party wins more votes, it wins more seats. And if either party wins a majority of votes, it wins a majority of seats. But as the figure shows, the Enacted Congressional Plan (red dots) does not come near the diagonal lines or pass anywhere close to the (50, 50) point.



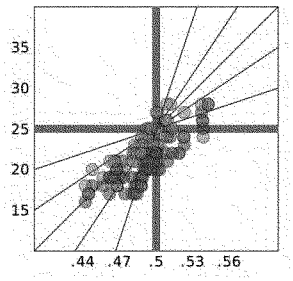
PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV Congressional Maps)

195. This shows that, under the Enacted Congressional Plan, more Democratic votes usually do not mean more Democratic seats, reflected in the flat red line near the bottom of the figure. Indeed, the bulk of the red dots are stuck on that line, where Democrats carry only 4 of 14 districts. And in each of the 12 statewide contests where the Democratic candidate won by less than seven percentage points, the winner carried only 4 or 5 of the 14 districts (these are the red dots in the lower-right quadrant, where more than half the votes generated less than half the seats for Democratic candidates). Under the Enacted Congressional Plan, a clear majority of Democratic votes does not translate into a majority of seats. The Court finds that the Enacted Congressional Plan achieves these results by the familiar means of "packing" and "cracking" Democratic voters across the state, as further described below.

196. The Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-

proof 30-seat majority. PX150 at 6. And that result holds even when Democrats win by larger margins. *Id.*

197. The below figure demonstrates the bias in the Enacted Senate Plan across all 52 recent partisan elections by comparing Democratic vote share (on the x-axis) with Democratic seat share (on the y-axis) across the 52 elections that Dr. Duchin used to analyze the plan. PX150 at 7. A map that responds to voters' preferences would roughly track one of the diagonal lines crossing at the "(50, 50)" point, where a 50% vote share generates a 50% seat share. As with the Enacted Congressional Plan, the Enacted Senate Plan (red dots) does not come near the diagonal lines or pass anywhere close to the (50, 50) point. Instead, the Enacted Plan falls well below all of the lines on the y-axis and crosses the x-axis far to the right of the midpoint, showing a plan that consistently denies Democrats majorities even when voters clearly prefer Democratic candidates.

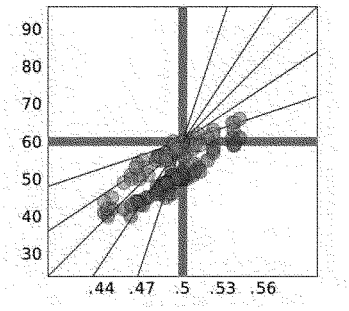


PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV Senate Maps)

198. As with the Enacted Congressional Plan, the Court finds that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts, as further described below.

199. Similarly, the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates. PX150 at 6.

200. The below figure plots Democratic vote share against Democratic seats across all 52 recent partisan elections studied by Dr. Duchin. Again, the Enacted House Plan (red dots) does not pass anywhere close to the (50, 50) point. Instead, the Enacted Plan falls well below the block trendlines on the y-axis and crosses the x-axis far to the right of the midpoint, showing a plan that consistently denies Democrats majorities or even a tie.



PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV House Maps)

201. As with the Enacted Congressional Plan and the Enacted Senate Plan, the Court finds that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters, as further described below.

(vi) Plaintiff Common Cause's Expert Dr. Daniel Magleby

202. Dr. Magleby is a professor at Binghamton University, where he holds a courtesy appointment in the Department of Economics and is the director of the Center for the Analysis of Voting and Elections. PX1483 at 3.

203. Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering. Trial Tr. 01/04/2022.

204. Dr. Magleby used a peer-reviewed algorithm that he developed to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps. PX1483 at 6. He designed this algorithm to prioritize maintaining voting districts and to draw maps that were contiguous and roughly equal in population. *Id.* Dr. Magleby then used this algorithm to develop a set of between 20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature's 2021 criteria for drawing districts. *Id.* at 6.

205. Dr. Magleby then aggregated statewide votes from statewide races between 2016 and 2020 to the voting district level in order to determine typical partisan performance in North Carolina state elections (a "seats carried" analysis). *Id.* at 8, 9. In order to match up the vote share to the newly enacted districts, Dr. Magleby determined which simulated district a precinct would fall in and assigned that precinct's vote count to the hypothetical district. *Id.* at 7. If the precinct fell in more than one simulated district, Dr. Magleby assigned to the sample district the proportion of the votes as determined by the precinct's population that fell in the simulated district. *Id.* at 7.

206. The Court finds, as Dr. Magleby found, that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina. *Id.* at 10.

207. In the neutral maps drawn using the Adopted Criteria for drawing maps, Dr. Magleby's analysis found that Democrats most commonly won 52 seats in the North Carolina House of Representatives. *Id.* at 13. In the enacted map, on the other hand, Democrats won only 48 seats. *Id.* at 13. Out of 1,000 possible maps that the algorithm drew, only one map resulted in Democrats winning as few as 48 seats. *Id.* at 13. That amounts to a 0.1% chance that Democrats would win as few as 48 seats absent partisan bias under his analysis.

208. Because an analysis of "seats carried" is not sufficient to identify all partisan redistricting, Dr. Magleby also used median-mean calculations to measure the extent of partisan advantage—specifically, to understand how dramatically Democratic voters were treated from Republican voters and how durable that gerrymander is. *Id.* at 9. To calculate the median-mean difference, Dr. Magleby first calculated the average Democratic vote share in the House districts. *Id.* at 9–10. He then found the median Democratic vote share by lining up the enacted House districts from least Democratic to most Democratic and identifying the districts that fell in the middle. *Id.* at 10. In a nonpartisan map, a low median-mean difference is expected. *Id.*

209. The Court finds, as Dr. Magleby found, that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps. The nonpartisan House maps that Dr. Magleby drew most commonly had a median-mean difference in the Democratic vote share of between 0.0225 and -0.025. *Id.* at 15. The lowest median-mean difference in the generated maps was -0.034, and the highest was -0.005. *Id.* The enacted maps have a median-mean difference in Democratic vote share of -0.04. *Id.* No randomly

generated map had such an extreme median-mean share—meaning that in his analysis, he saw no simulated map that was as extreme and durable in terms of partisan advantage. *Id.*

(vii) Legislative Defendants' Expert Dr. Michael Barber

210. Dr. Barber is an associate professor of political science at Brigham Young University and faculty fellow at the Center for the Study of Elections and Democracy in Provo, Utah. He received his PhD in political science from Princeton University in 2014 with emphases in American politics and quantitative methods and statistical analyses. Dr. Barber teaches undergraduate courses in American politics and quantitative research methods, including classes about political representation, Congressional elections, statistical methods, and research design. LDTX107 at 6. Dr. Barber's research uses advanced statistical methods for the analysis of quantitative data, oftentimes in the context of election- and voting-related topics, and his research has been published numerous times in peer-reviewed journals. LDTX107 at 7.

211. Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting. Trial Tr. 01/05/2022.

212. Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs' Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts. LDTX107 at 5.

213. Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. LDTX107 at 5. In Dr. Barber's simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries,

minimization of county traversals within clusters, and geographic compactness. LDTX107 at 22-23. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed by utilizing two-party election results from eleven statewide elections from the past ten years; these results are disaggregated to the level of the VTD and then reassembled at the district level to compute the proportion of votes. LDTX107 at 23-24.

214. Dr. Barber's method is not without limitations. Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals—which can be idiosyncratic and district-specific—differences between the range of his simulated plans and the 2021 Plans may be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals. In Dr. Barber's opinion, there is no way, then, to be sure that differences in partisan effects from simulated plans versus legislatively enacted plans result from partisan intent rather than from non-partisan goals the algorithm was not programmed to achieve. This means that the simulation method can be indicative on the question of partisan intent, but not necessarily dispositive, and under Dr. Barber's analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations.

215. Dr. Barber's definition of a partisan outlier is if the number of Democratic districts generated by the plan falls outside the middle 50% of simulation results, which he considers a conservative definition of an outlier rather than the traditional definition of falling outside the middle 95% or 90% of the comparison distribution. LDTX107 at 29. In the House of Representatives, one county grouping is a partisan outlier under this analysis, and in the Senate, two county groupings are partisan outliers under this analysis. LDTX107 at 5; *id.* at 157 (Guilford House grouping); *id.* at 227 (Granville and Wake Senate grouping); *id.* at 233 (Iredell and Mecklenburg Senate grouping).

216. Supporting Dr. Barber's finding of limited partisan outliers is the spatial distribution of voters throughout the state, which can have an impact on the partisan

outcomes of elections when a state is, by necessity, divided into a number of legislative districts. This is largely the case because Democratic-leaning voters tend to cluster in dense, urban areas while Republican-leaning voters tend to be more equally distributed across the remainder of the state. This pattern holds true in North Carolina. LDTX107 at 10-13.

217. As a result of the spatial distribution of voters throughout the state, under Dr. Barber's analysis there are many more VTDs with efficient Republican majorities than there are VTDs with efficient Democratic majorities. LDTX107 at 14. And therefore, Dr. Barber concludes the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers. LDTX107 at 15.

(viii) Legislative Defendants' Expert Dr. Andrew Taylor

218. Dr. Taylor is a tenured professor of political science at North Carolina State University and has taught at NC State since receiving his Ph.D. from the University of Connecticut in 1995. He teaches an array of courses in American politics, served as chair of the Department of Political Science from 2006 to 2010, and served as President of the North Carolina Political Science Association in 2012-13. LDTX108 at 2.

219. Dr. Taylor has written four books and published extensively in political science journals, including authoring twenty-eight peer-reviewed articles and other published work. His work utilizes a diverse array of methodologies, including different statistical techniques, and has included research on redistricting and North Carolina politics. *Id.*

220. Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina, and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions. Trial Tr. 01/04/2022.

221. Dr. Taylor analyzed the Enacted Plans deploying his knowledge of North Carolina political history and legislative politics, comparative politics, and American national and state politics and policy. LDTX108 at 2-3.

222. There is no recognized baseline of transparency for legislative redistricting, and the 2021 redistricting was a transparent and participatory process in comparison to North Carolina's past redistricting and that by legislative bodies in other states. TR 01/04/2022.

223. Complaints about unfair district lines as removed from the concepts of free elections, equal protection, and free speech and assembly are different than how those ideas have historically been understood by political scientists. LDTX108 15–25. A free election is not generally understood by political scientists to be one without burdens on the right to vote (since basic regulatory frameworks necessarily place some burden on that right), and a given districting system is not generally understood as essential to the meaning of free elections (since even free elections have limited options in all events). *Id.* at 21–22.

224. Likewise in political science, an election is generally regarded as "equal" so long as "[e]ach person has one vote to elect one legislator who has one vote in the legislature," and departures even from that ideal are tolerated (as in the case of non-citizens, who are counted towards the baseline of district population even though they are not permitted to vote). *Id.* at 23. In political science, equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual participation as a citizen. *Id.* In this respect, it makes no sense to refer to citizens as having cast "wasted" votes; it is the parties, not voters, who are properly viewed as wasting votes." *Id.* at 24.

225. Similarly, purportedly "fair" redistricting plans are not understood in the political-science field as germane to free speech, which can occur regardless of the shapes and sizes of districts. *Id.* at 24–25.

226. For many of these reasons, measuring gerrymanders can be elusive, problematic, and beyond the consensus of political scientists. *See id.* at 25–32. Measuring an alleged gerrymander as one that "produce[s] outcomes in which the share of the legislative body's seats won by a party is not proportionate with its share of the aggregate statewide vote and/or . . . produce too many districts where there is little meaningful competition" runs into the problem that "proportionality was not an objective of the designers of our electoral system." *Id.* at 27. Further, the goals of proportionality and competitiveness are often incompatible. *Id.* at 27–29.

227. Prominent political science measures of "fairness" have proven incapable of commanding consensus because they are all deficient in one or more respects. *Id.* at 29–38. Those methods tied to a measure of vote totals and seat totals are too tied into proportionality to present a meaningful notion of fairness, especially given that avoiding this problem would require gerrymandering in favor of the party complaining of unfairness. *Id.* at 34–37. Many measures of fairness are too subjective to be of use to political scientists. *See id.* at 38. All measures require judgment calls like choice of metrics and elections data for measuring partisan effect, which is a fluid concept that changes year to year. *Id.* at 37.

228. The Democratic Party's message is successful only in limited geographic areas, LDTX108 at 38–41, so any partisan "effect" the Democratic Party or its supporters complain of could be understood as the natural and probable consequences of neutral factors that cannot be considered unfair or adverse as a factual matter. There has been a significant change in North Carolina's political geography over the past thirty years. *Id.* at 39-40.

Whereas Democrats formerly did well in rural areas, especially in the eastern part of the state, and Republicans were competitive in urban and suburban areas, that is no longer true. "The transformation is not the result of redistricting." *Id.* at 40. Instead, it is a function of slow social and economic forces, changes in the state's citizenry, and party ideology. *Id.* at 40-41.

(ix) Legislative Defendants' Rebuttal Expert Sean Trende

229. Sean Trende is currently enrolled as a doctoral candidate in political science at The Ohio State University. His coursework for his Ph.D. and M.A.S. included, among other things, classes on G.I.S. systems, spatial statistics, issues in contemporary redistricting, machine learning, non-parametric hypothesis tests and probability theory. He expects to receive his Ph.D. in May of 2021. His dissertation focuses on applications of spatial statistics to political questions. LDTX106 at 1-2. Mr. Trende is a Senior Elections Analyst with RealClearPolitics, where he's been since January of 2009 after practicing law for 8 years. He is also a Visiting Scholar at the American Enterprise Institute and has authored or co-authored books analyzing demographic and political trends as well as the dynamics behind elections. He has spoken on these topics as well and has taught classes on American Politics and the Mass Media, Political Participation and Voting Behavior. *Id.* at 2. He sits on the advisory panel for the "States of Change: Demographics and Democracy" project, sponsored by the Hewlett Foundation. The project looks at trends among eligible voters and the overall population to explain the impact of changes on American politics. *Id.* at 4.

230. Mr. Trende has authored expert reports in 15 voting rights cases and currently serves as one of two special masters appointed by the Supreme Court of Virginia to redraw districts that will elect the commonwealth's representatives to the House of Delegates, state Senate, and U.S. Congress. *Id.* at 7.

231. Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps and analyzing redistricting maps. Trial Tr. 01/05/2022.

232. Mr. Trende created images by examining the Complaints filed by the plaintiffs in this action. He examined whether the districts were challenged as either partisan gerrymanders or districts that diluted minority voting power. LDTX106 at 7. He then downloaded the enacted plans from the legislative redistricting website and used R, a statistical programming tool, to color-code the districts by plaintiff group, based upon who challenged which districts. *Id.* In Exhibit 2 to his affidavit, Mr. Trende submitted 8 maps identifying the districts challenged by each Plaintiff group in these consolidated cases. *Id.* He also created color-coded maps showing each county in North Carolina, noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally. *Id.* at 8.

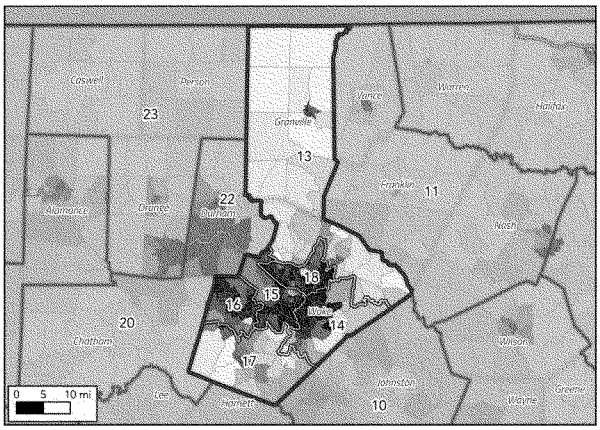
B. District-by-District Analysis

1. North Carolina Senate Districts

233. Plaintiffs' experts analyzed specific county groupings in the enacted Senate plan. Plaintiffs' experts concluded that partisan redistricting and bias in these groupings was responsible for the partisan bias that they found in their statewide analysis of the enacted Senate plan. The results of the analysis conducted by Legislative Defendants' expert Dr. Barber reinforce this conclusion.

a. Granville-Wake Senate County Grouping

234. The Granville-Wake County Grouping contains Senate District 13 ("SD13"), Senate District 14 ("SD14"), Senate District 15 ("SD15"), Senate District 16 ("SD16"), Senate District 17 ("SD17"), and Senate District 18 ("SD18"). SD13 is comprised of Granville County and portions of Wake County. SD14, SD15, SD16, SD17, and SD18 are comprised of portions of only Wake County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

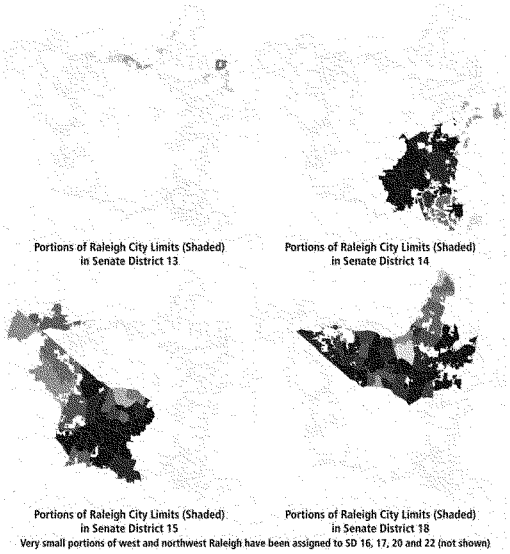


PX454 (Cooper Map 19)

235. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Rebecca Harper resides in SD17. Individual Harper Plaintiff John Anthony Balla resides in SD18. No Individual Plaintiff resides in SD13, SD14, SD15, or SD16. Organizational Plaintiff NCLCV challenges every Senate District in this county grouping. Organizational Plaintiff Common Cause challenges every Senate District in this county grouping except for SD13 and 18.

236. The district lines in this cluster pack Democratic-leaning VTDs into Senate Districts 14, 15, 16, and 18, in order to make Senate District 13, in the north, and Senate District 17, in the south, as competitive as possible for Republican candidates. Senate District 13 pairs all of "purple" Granville County with the Republican-leaning VTDs on the northern and northeastern portions of Wake County, avoiding the Democratic-leaning VTDs in North Raleigh. Some of the Democratic-leaning VTDs in North Raleigh are packed into Senate District 18, leading to a "horn-shaped section" of that district that borders Senate District 13. PX425 at 50.

237. Raleigh is divided into all of the districts in this cluster, with most of Raleigh's few Republican-leaning VTDs included in Senate District 13, in the north. PX425 at 50; PX455.



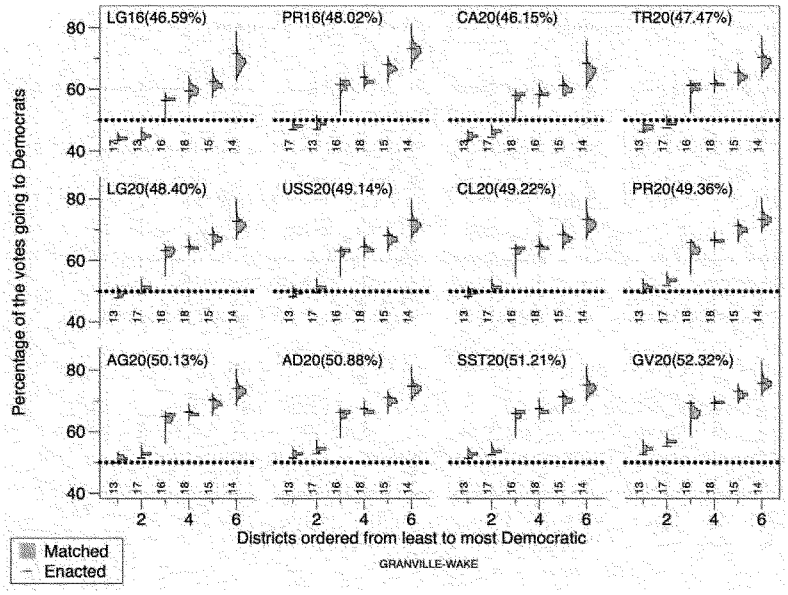
PX455 (Cooper Map 20)

238. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Granville-Wake county grouping is an intentional, pro-Republican partisan redistricting.

239. Dr. Mattingly analyzed individual county groupings by plotting the Democratic vote fraction in each district in the grouping, ordered from least to most Democratic. *See* PX629 at 29. He conducted this analysis for the enacted plan (represented by a black line in his county-grouping-level figures) and for his ensemble of nonpartisan plans (represented by the blue histograms), using 12 prior statewide elections in 2020 and 2016. PX629 at 38; PX654. If the black line representing the enacted plan is above the dotted black line at 50%, the Democrats win that district under the enacted plan. *Id.* If all or the bulk of the blue histogram representing the ensemble is above the dotted black line at 50%, the Democrats would expect to win that district under the ensemble. *Id.* Dr. Mattingly labeled the historical election whose statewide vote counts he was using at the top of each plot. Black lines that are at the bottom of the corresponding blue histogram represent districts that Democrats have been cracked out of, because the enacted plan has many fewer Democrats than would be expected in the nonpartisan plans; black lines that are at the top of the corresponding blue histogram represent districts that Democrats have been packed into. *Id.*

240. Figure 6.2.4 shows Dr. Mattingly's analysis of this grouping.

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PX663 (Mattingly Figure 6.2.4)

241. The Court finds that Democrats were cracked out of the two most Republican districts (District 17 and 13) and packed into the most Democratic districts (Districts 14, 15, 16, and 18). PX629 at 57; PX663. (Page 57 of Dr. Mattingly's report concerning Granville-Wake contains a typo that he identified at his deposition: he states that Districts 17 and 18 are cracked, when he meant (and the Figure shows) that districts 17 and 13 are packed. He correctly states that "districts 14, 15, 16, and 18" are in fact packed.) The effect is that the Republicans win two out of six districts under the enacted plan in several elections where they never would under the nonpartisan ensemble, such as the Lieutenant Governor 2020 or Senate 2020 election. PX629 at 57; PX663. Dr. Mattingly quantified the cracking of Democrats: Across every election he considered, *none* of the approximately 40,000 plans in

his ensemble had as low a fraction of Democrats in the two most Republican districts in the Granville-Wake cluster as in the enacted plan. *Id.*

242. District 13 and District 17 favor Republicans in nearly all elections in Dr. Duchin's sample as well. PX201 "SL-173" B14:BA19.

243. The Court finds, as Dr. Pegden's findings show, that the Granville-Wake Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.999989% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.999969% of all possible districting of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 30.

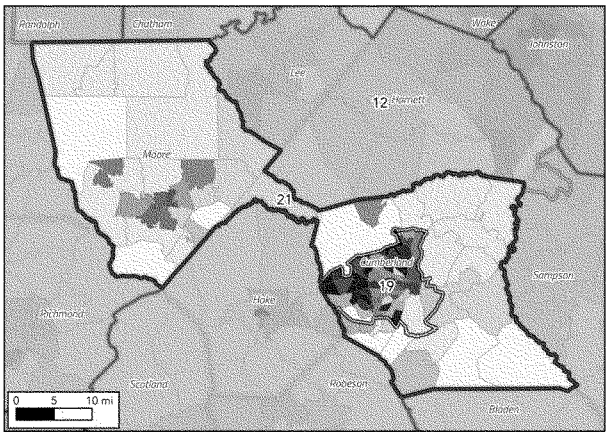
244. Drawing the districts in this manner also reduced compactness: The average Polsby-Popper score of Districts 13, 14, 15, 16, 17, and 18 is 0.31. PX150 at 15. Drawing more compact districts in Wake and Granville Counties would have generated more competitive districts in the cluster.

245. In the Granville-Wake Senate cluster, which Legislative Defendants' expert Dr. Barber refers to as "solidly Democratic" and found to be a partisan outlier, *see* LDTX107 at 221, the enacted map is a partisan outlier under 10 of the 11 elections Dr. Barber analyzed. Under seven of those 11 elections, Democrats win fewer seats under the enacted map that they would under 96-100% of his simulations. *Id.* at 228.

246. The Court finds the districts in the Granville-Wake Senate county grouping, SD13, SD14, SD15, SD16, SD17, and SD18, to be the result of intentional, pro-Republican partisan redistricting.

b. Cumberland-Moore Senate County Grouping

247. The Cumberland-Moore County Grouping contains Senate District 19 ("SD19") and Senate District 21 ("SD21"). SD19 is comprised of portions of Cumberland County. SD21 is comprised of Moore County and portions of Cumberland County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

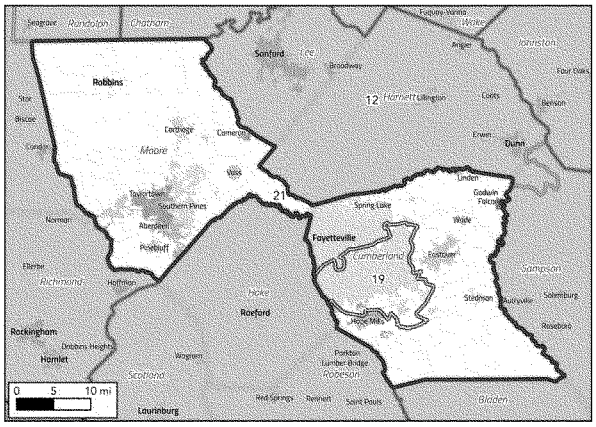


PX459 (Cooper Map 24)

248. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Sarah Taber resides in SD19. No Individual Plaintiff resides in SD21. Organizational Plaintiff Common Cause challenges both Senate Districts in this county grouping.

249. The district lines pack Democratic voters in and around Fayetteville into Senate District 19, leaving Senate District 21 as a Republican-leaning district. PX425 at 59; Trial Tr. 01/03/2022.

250. The district lines split the cities of Fayetteville and Hope Mills across both districts in the cluster, PX460, but the most Democratic-leaning VTDs in those cities are packed into Senate District 19. PX425 at 59; PX459; Trial Tr. 01/03/2022.

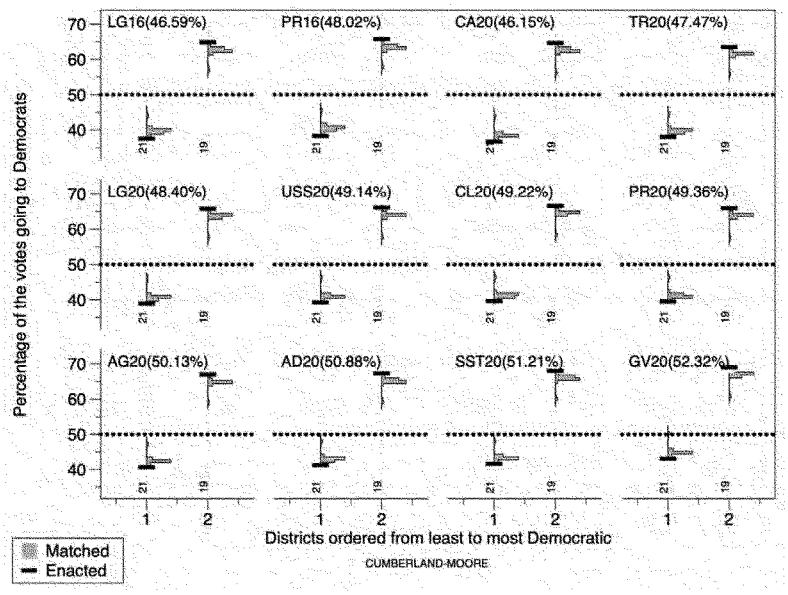


PX460 (Cooper Map 25)

251. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Cumberland-Moore county grouping is an intentional, pro-Republican partisan redistricting.

252. Figure 6.2.10 shows Dr. Mattingly's analysis of this grouping.

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PX665 (Mattingly Figure 6.2.10)

253. The Court finds that Democrats were cracked out of the most Republican district and packed into the most Democratic district to make the map maximally nonresponsive, even though this does not affect the number of seats won in the particular 12 elections that Dr. Mattingly considered. PX629 at 61; PX665.

254. The Court finds, as Dr. Pegden's findings show, that the Cumberland-Moore Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.9999949% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least

99.999984% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 28.

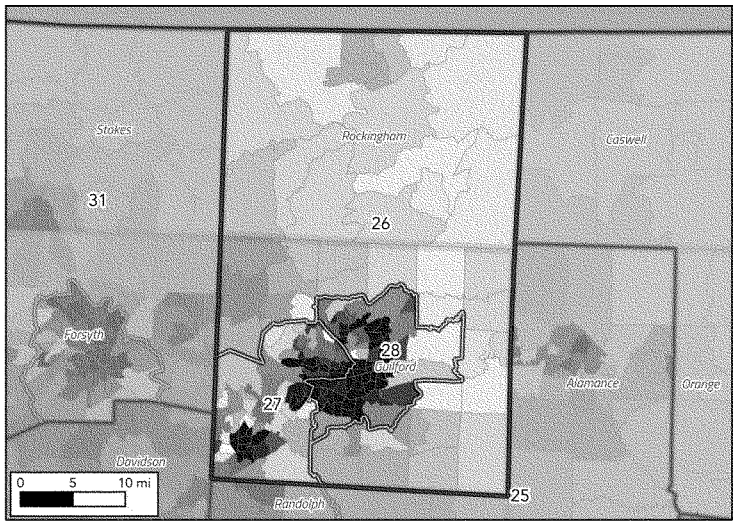
255. In the Cumberland-Moore Senate county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win one seat under the enacted map and in 77% of Dr. Barber's simulations, LDTX107 at 184, even though, under one election, Democrats would have won two seats under 93% of Dr. Barber's simulations. *Id.* at 188.

256. The Court finds the districts in the Cumberland-Moore Senate county grouping, SD19 and SD21, to be the result of intentional, pro-Republican partisan redistricting.

c. Guilford-Rockingham Senate County Grouping

257. The Guilford-Rockingham County Grouping contains Senate District 26 ("SD26"), Senate District 27 ("SD27"), and Senate District 28 ("SD28"). SD26 is comprised of Rockingham County and portions of Guilford County. SD27 and SD28 are comprised of portions of only Guilford County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

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PX456 (Cooper Map 21)

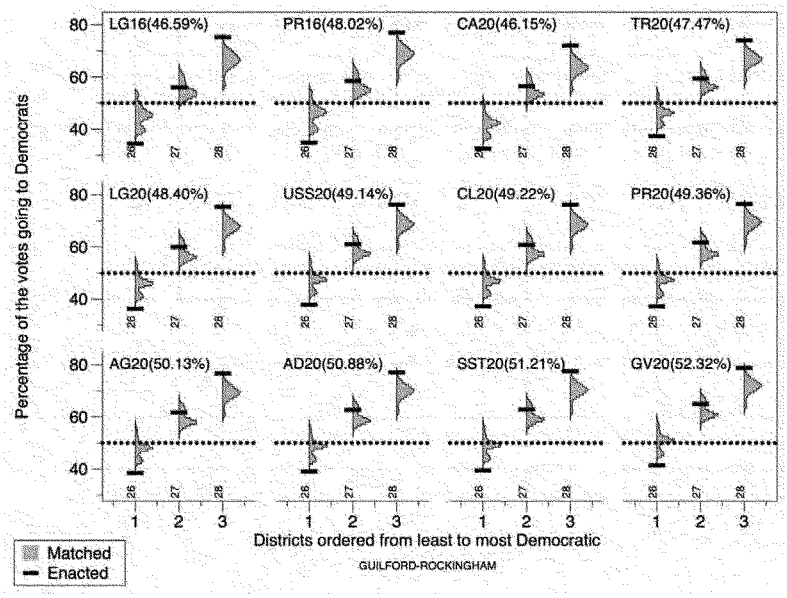
258. Harper Plaintiffs and Individual NCLCV Plaintiffs challenge this Senate county grouping. Individual NCLCV Plaintiffs Dandrielle Lewis and Talia Fernos and Individual Harper Plaintiffs David Dwight Brown, Joshua Perry Brown and Donald M. MacKinnon reside in SD27. Individual Harper Plaintiff Lily Nicole Quick resides in SD28. No Individual Plaintiff resides in SD26. Organizational Plaintiff NCLCV challenges all three Senate Districts in this county grouping. Organizational Plaintiff Common Cause challenges only SD27 and SD28.

259. Guilford County, which includes Greensboro and High Point, is among the most Democratic counties in North Carolina, while Rockingham leans toward the Republicans. The district lines pack Democratic voters into Senate Districts 27 and 28, allowing for a "safe Republican" Senate District 26 to wrap around those other districts in a

"C-shape" that connects the northern and southern boundaries of this cluster. House District 26 extends from Rockingham County into the Republican-leaning VTDs in western Guilford County on one side, and into southern Guilford County on the other, avoiding the most Democratic-leaning VTDs on the district's inner borders. PX425 at 53.

260. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Guilford-Rockingham county grouping is an intentional, pro-Republican partisan redistricting.

261. Figure 6.2.13 shows Dr. Mattingly's analysis of this grouping.



PX666 (Mattingly Figure 6.2.13)

262. The Court finds that the three districts in the Guilford-Rockingham grouping are constructed to pack an exceptional number of Democrats in the most Democratic district

(District 28) to crack Democrats out of the most Republican district (District 26). PX629 at 63. The effect is to ensure a Republican victory in the district 26, when in some elections in the nonpartisan ensemble that district would go to the Democratic Party. PX629 at 63. None of the plans in Dr. Mattingly's nonpartisan ensemble had fewer Democrats in the most Republican district than the enacted plan – in other words, zero of the plans in his nonpartisan ensemble cracked Democrats as substantially as the enacted plan. *Id.*

263. In the 2020 presidential election, 61% of Senate District 27's major-party voters voted for President Biden. In Senate District 28, that figure was 76%. PX201 "SL-173" AO28:AO29. By wasting these surplus Democratic votes, the Enacted Senate Plan ensures that Senate District 26 will reliably vote for Republican candidates: In the same race, only 37% of District 26's major-party voters cast their ballots for President Biden. PX201 "SL-173" AO27:AO29; PX422 at 53.

264. The Court finds, as Dr. Pegden's findings show, that the Guilford-Rockingham Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.999957% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.99987% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 31.

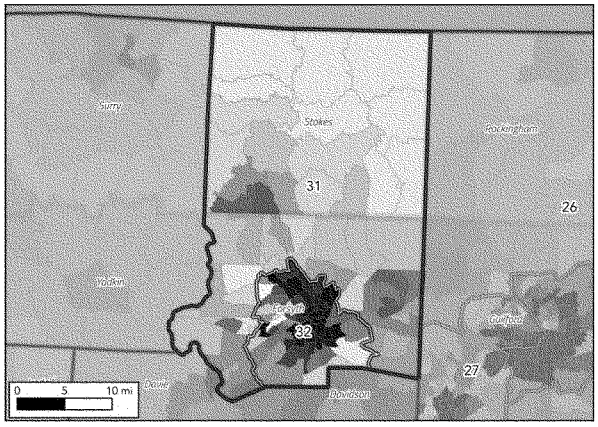
265. This grouping's formation departs from traditional redistricting principles and reduces the compactness of these districts: The average Polsby-Popper score of the three districts is 0.33. PX150 at 15.

266. In the Guilford-Rockingham Senate cluster, which Legislative Defendants' expert Dr. Barber refers to as "solidly Democratic," the enacted map is in alignment with Dr. Barber's simulations by creating two Democratic leaning districts. LDTX107 at 209, 215.

267. The Court finds the districts in the Guilford-Rockingham Senate county grouping, SD26, SD27, and SD28, to be the result of intentional, pro-Republican partisan redistricting.

d. Forsyth-Stokes Senate County Grouping

268. The Forsyth-Stokes County Grouping contains Senate District 31 ("SD31") and Senate District 32 ("SD32"). SD31 is comprised of Stokes County and portions of Forsyth County. SD32 is comprised of portions of only Forsyth County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



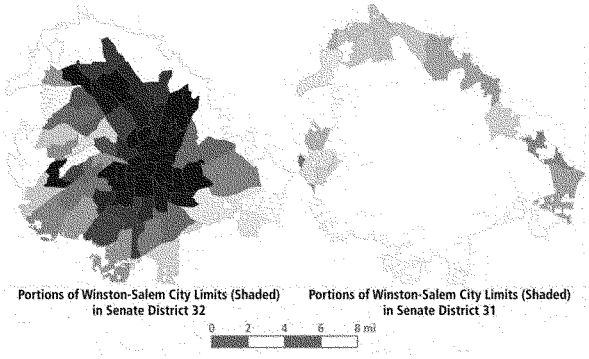
PX461 (Cooper Map 26)

269. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Chenita Barber Johnson reside in SD32. No Individual Plaintiff resides in SD31. Organizational Plaintiff NCLCV challenges both Senate Districts in this county grouping.

270. Legislative Defendants decided to pair Forsyth County with Stokes County in this cluster, rather than pairing Forsyth County with Yadkin County, to the west; since Yadkin County has a lower Republican vote advantage than Stokes County, Legislative Defendants' choice of pairing provided them with a better counter-weight to the heavily-Democratic VTDs in Winston-Salem. PX425 at 62.

271. Within the chosen cluster, Legislative Defendants packed the Democratic VTDs in Winston-Salem into Senate District 32, leaving Senate District 31 to wrap around three sides of the city and remain safely Republican. PX425 at 62-63; PX461.

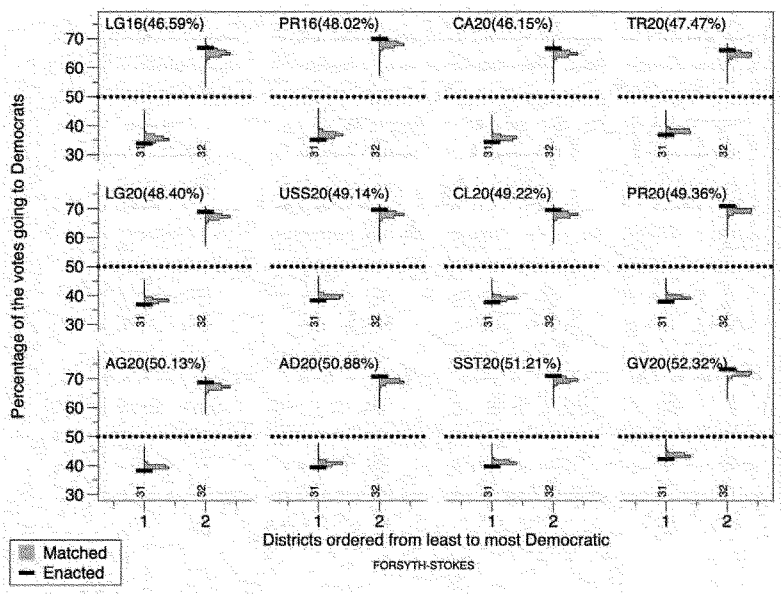
272. While Winston-Salem is split between both districts, a comparison of Dr. Cooper's red-blue map (PX461) and his map showing the municipal boundaries within this cluster (PX462) illustrates how Senate District 31 captures the more Republican VTDs on the city's edges. PX425 at 62.



PX462 (Cooper Map 27)

273. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Forsyth-Stokes county grouping is an intentional, pro-Republican partisan redistricting.

274. Figure 6.2.7 shows Dr. Mattingly's analysis of this grouping.



PX664 (Mattingly Figure 6.2.7)

275. The Court finds that, even though this does not affect the number of seats won in the particular elections that Dr. Mattingly considered, the two districts in Forsyth-Stokes maximize the number of Democrats in the most Democratic district and the number of Republicans in the most Republican district in a way that is almost never seen in the enacted map. PX629 at 59; PX664.

276. The Enacted Plan concentrates Forsyth County's Democratic voters into one district—District 32—where Democratic candidates will win elections by more than 30-point margins. PX201 "SL-173" B33;BA33. District 32's design foreordains electoral outcomes in

Senate District 31, which is safely Republican and never once elects a Democrat in any of the 52 elections Dr. Duchin studies. PX201 "SL-173" B32:BA32.

277. The Court finds, as Dr. Pegden's findings show, that the Forsyth-Stokes Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.9983% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.9947% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 29.

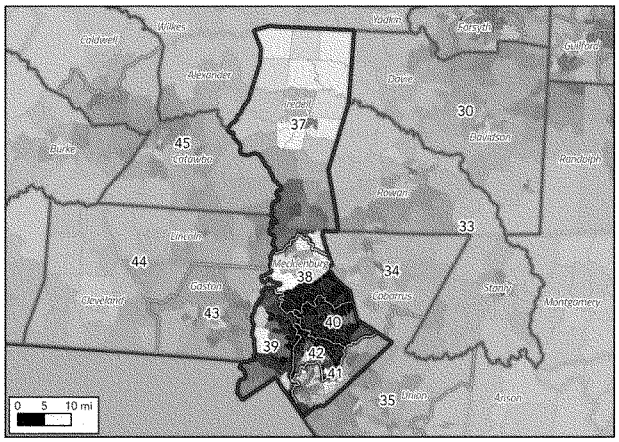
278. The Republican advantage in District 31 was the product of both a clustering decision and a drawing decision. District 32 is drawn to "pack" all of Winston-Salem's most Democratic areas into one district, but Districts 31 and 32 clearly could have been configured such that Senate District 32 is not "packed" with Democrats.

279. In the Forsyth-Stokes Senate county grouping, a "slightly Democratic" grouping, 100% of Dr. Barber's simulations, like the enacted maps, produce one Democratic leaning district. LDTX107 at 244. Under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win one seat under the enacted map, even though, under two of those elections, Democrats would have won two seats under 94% and 98% of Dr. Barber's simulations, respectively. *Id.* at 248.

280. The Court finds the districts in the Forsyth-Stokes Senate county grouping, SD31 and SD32, to be the result of intentional, pro-Republican partisan redistricting.

e. Iredell-Mecklenburg Senate County Grouping

281. The Guilford-Rockingham County Grouping contains Senate District 37 ("SD37"), Senate District 38 ("SD38"), Senate District 39 ("SD39"), Senate District 40 ("SD40"), Senate District 41 ("SD41"), and Senate District 42 ("SD42"). SD37 is comprised of Iredell County and portions of Mecklenburg County. SD38, SD39, SD40, SD41, and SD42 are comprised of portions of only Mecklenburg County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



PX457 (Cooper Map 22)

282. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Virginia Walters Brien resides in SD40. Individual Harper Plaintiff Barbara Proffitt resides in SD41. No Individual Plaintiff resides in SD37, SD38, SD39, or SD42. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge all six Senate Districts in this county grouping.

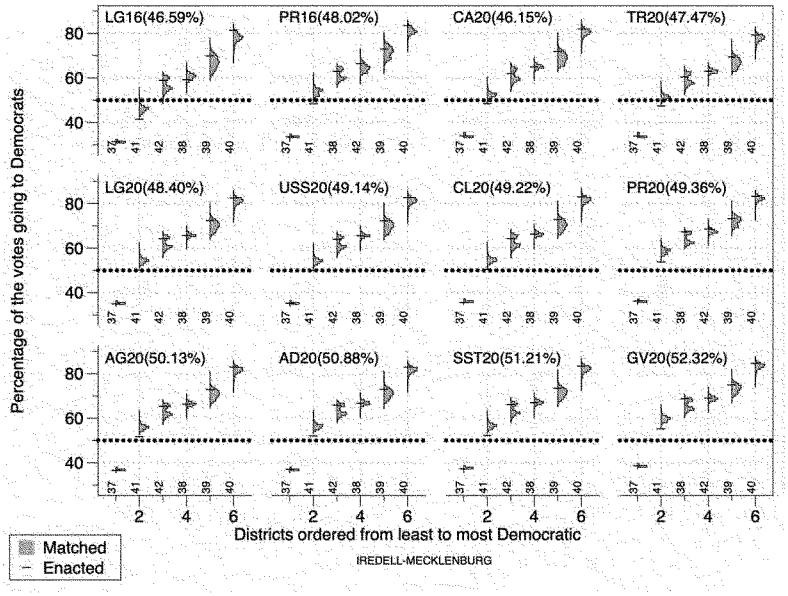
283. Mecklenburg County is the second most populous county in North Carolina and a Democratic stronghold. Every member of the current state legislative delegation from Mecklenburg County is a Democrat, as are all nine of its county commissioners. Democratic candidates also received the plurality of votes in every 2020 county-wide contest in Mecklenburg County. Yet Legislative Defendants drew district lines to create four "safe Democratic" seats, one "safe Republican" seat, and a "toss-up" seat. PX425 at 55.

284. The district lines pack Democratic voters into Senate Districts 38, 39, 40, and 42, allowing for Senate Districts 37 and 41 to be artificially favorable to Republican candidates. PX457. Senate Districts 39 and 40 do not include a single Republican-leaning VTD and almost all Republican-leaning VTDs in Mecklenburg County are included in either Senate District 37, a "safely Republican" seat, or Senate District 41, a "toss-up" seat. PX425 at 55-56.

285. Senate District 37 includes the residence of an incumbent Democrat and incumbent Republican in the same district, effectively eliminating the incumbent Democrat. The Democratic incumbent whose residence Legislative Defendants included in the safely Republican Senate District 37 lives approximately one mile from the Democratic-leaning district to the south, Senate District 38. PX425 at 55.

286. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Iredell-Mecklenburg county grouping is an intentional, pro-Republican partisan redistricting.

287. Figure 6.2.1 shows Dr. Mattingly's analysis of this grouping.



PX662 (Mattingly Figure 6.2.1)

288. The Court finds that Democrats were cracked out of the second most Republican district (District 41), and packed into SD40 and, to a lesser extent, SD39 (the two most Democratic districts). PX629 at 55; Figure 6.2.1. The effect is that the Republicans win two out of six districts under the enacted plan in many elections where the majority or vast majority of plans in the ensemble would elect only one Republican. PX629 at 55. One example is the President 2016 election. Dr. Mattingly quantified the cracking of Democrats: Across every election he considered, *none* of the approximately 80,000 plans in his ensemble had as low a fraction of Democrats in the two most Republican districts as in the enacted plan. *Id.*

289. The Enacted Senate Plan's packing of Democratic voters in Mecklenburg County, thereby converting District 41 from a swing district into a district that will usually elect Republican candidates, results in a far lower average compactness score of 0.33, PX150 at 15, as well as a significant improvement in Republican performance. Enacted District 41 elected a Democrat in only 13 of the 52 studied elections. PX201 "SL-173" B42:BA42.

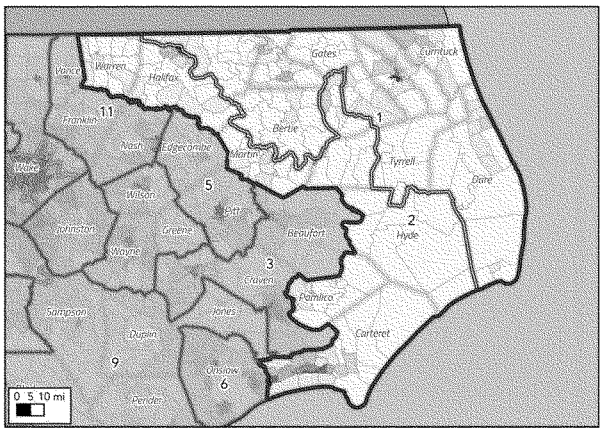
290. Dr. Pegden's findings show that the Iredell-Mecklenburg Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.998% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.9943% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 32.

291. In the Iredell-Mecklenburg Senate cluster, which Legislative Defendants' expert Dr. Barber found to be a partisan outlier, *see* LDTX107 at 229, under two of the 11 elections Dr. Barber considered, Democrats win four seats under the enacted map, even though Democrats would have won 5 seats under 93% and 95% of Dr. Barber's simulations, respectively. *Id.* at 234.

292. The Court finds the districts in the Iredell-Mecklenburg Senate county grouping, SD37, SD38, SD39, SD40, SD41, and SD42, to be the result of intentional, pro-Republican partisan redistricting.

f. Northeastern Senate County Grouping

293. The Northeastern County Grouping contains Senate District 1 ("SD1") and Senate District 2 ("SD2"). SD1 is comprised of Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, and Tyrrell County. SD2 is comprised of Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, Washington County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

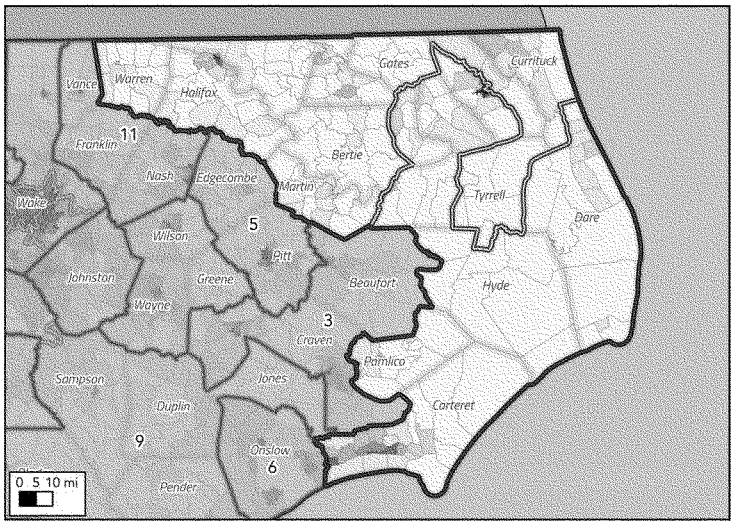


PX463 (Cooper Map 28)

294. Harper Plaintiffs and Individual NCLCV Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Laureen Flood resides in SD1. Individual NCLCV Plaintiffs Edna Scott, Roberta Scott, Yvette Roberts, Dr. Cosmos George, Jereann King Johnson, Yarbrough Williams, Jr., and Reverend Dr. Deloris L. Jerman reside in SD2. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge both Senate Districts in this county grouping.

295. Legislative Defendants had two potential county grouping options to choose from for the Northeastern counties when drawing the 2021 Senate Plan. The size of the counties in each potential cluster is such that each cluster option is large enough for one Senate district. PX425 at 65.

296. Legislative Defendants' choice of clusters paired more Republican-leaning VTDs together in an arrangement that resulted in two Republican-leaning districts. PX425 at 65. The alternative county cluster groupings, which Legislative Defendants chose against, would have included Carteret, Chowan, Dare, Hyde, Pamlico, Pasquotank, Perquimans, and Washington counties in one district and Bertie, Camden, Currituck, Gates, Halifax, Hertford, Martin, Northampton, Tyrrell, and Warren counties in a second district. PX425 at 65; PX464.



PX464 (Cooper Map 29)

297. The alternative county cluster groupings that Legislative Defendants chose against would have created one district on the northern state border that included many of the more racially diverse counties in the state and that would favor the Democrats, and another district to the south that would favor Republicans. Such an arrangement would have been more representative of the counties included in these clusters, most of which include a large number of competitive VTDs (shown in light, non-colored shading in Dr. Cooper's maps). PX425 at 65.

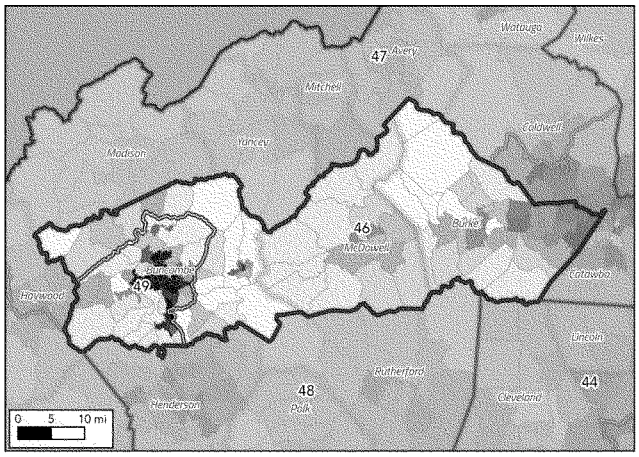
298. The Court finds, as Dr. Mattingly also showed, that their choice significantly advantaged the Republican Party. PX629 at 65. In the alternative cluster choice that the General Assembly rejected, Democrats would have won one seat under the results in every single 2016 and 2020 statewide election. In the cluster choice that the General Assembly rejected, the Republicans win both seats under the results in every single 2016 and 2020 statewide election. *Id.*

299. The enacted district configuration has 24 county traversals. District 2's Polsby-Popper compactness score is just 0.11, and the average score of both districts is 0.16. PX150 at 15.

300. The Court finds the districts in the Northeastern Senate county grouping, SD1 and SD2, to be the result of intentional, pro-Republican partisan redistricting.

g. Buncombe-Burke-McDowell Senate County Grouping

301. The Buncombe-Burke-McDowell County Grouping contains Senate District 46 ("SD46") and Senate District 49 ("SD49"). SD46 is comprised of Burke County, McDowell County, and portions of Buncombe County. SD49 is comprised of portions of only Buncombe County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



PX458 (Cooper Map 23)

302. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Mark S. Peters resides in SD46. Individual Harper Plaintiff Ann Butzner resides in SD49. Organizational Plaintiff NCLCV challenges both Senate Districts in this county grouping.

303. Legislative Defendants had discretion as to the counties included in this cluster and the adjacent cluster to the south. Rather than pair Buncombe County with Henderson County, which has become a "bedroom community" of Asheville, Legislative Defendants grouped Buncombe County with Burke and McDowell counties, to the east. Burke and McDowell counties include a greater number of heavily-Republican VTDs than does Henderson County, allowing for Legislative Defendants to neutralize the Democratic stronghold in and around Asheville to a greater extent than under the alternate potential grouping.

304. Within this county grouping, the mapmakers maximized Republican advantage by drawing one lopsidedly Democratic district (District 49), leaving the remaining district (District 46) reliably Republican. Notably, District 46 ***never*** elects a Democrat in any of the 52 elections in Dr. Duchin's study. PX201 "SL-173" B47:BA47.

305. The Court finds that Legislative Defendants' chosen county grouping allowed them to draw a map that packed Democratic voters in Senate District 49, leaving Senate District 46 to favor the Republican Party. PX425 at 57-58.

306. Grouping Henderson County with Polk and Rutherford counties in the bordering cluster to the south also allowed for Legislative Defendants to create a single-district cluster there that heavily favors the Republican candidate. PX425 at 57.

307. Dr. Barber's analysis reflects that in 100% of his simulations, as with the enacted map, there is one Democratic district in this "very slightly Democratic" grouping, LDTX107 at 235, and 100% of his simulations produce 1 Democratic leaning district like the enacted maps under all 11 elections used in his analysis. *Id.* at 239.

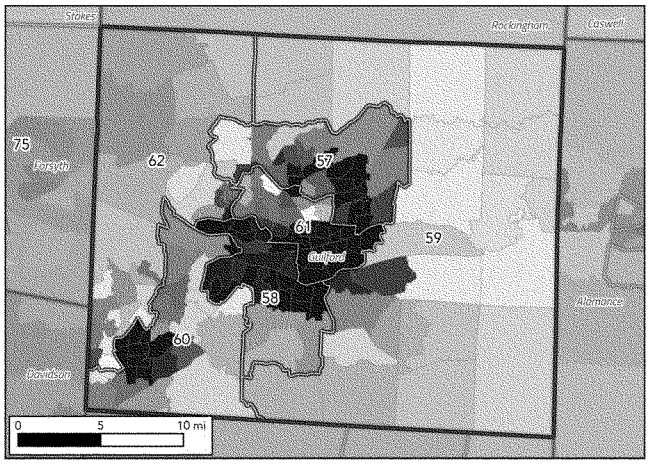
308. The Court finds the districts in the Buncombe-Burke-McDowell Senate county grouping, SD46 and SD49, to be the result of intentional, pro-Republican partisan redistricting.

2. North Carolina House of Representatives Districts

309. Plaintiffs' experts analyzed specific county groupings in the enacted House plan. Plaintiffs' experts concluded that partisan redistricting and bias in these groupings were responsible for the partisan bias that they found in their statewide analysis of the enacted House plan. The results of the analysis conducted by Legislative Defendants' expert Dr. Barber largely reinforce this conclusion.

a. Guilford House County Grouping

310. The Guilford House County Grouping contains House District 57 ("HD57"), House District 58 ("HD58"), House District 59 ("HD59"), House District 60 ("HD60"), House District 61 ("HD61"), and House District 62 ("HD62"). All six House Districts are comprised of portions of only Guilford County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



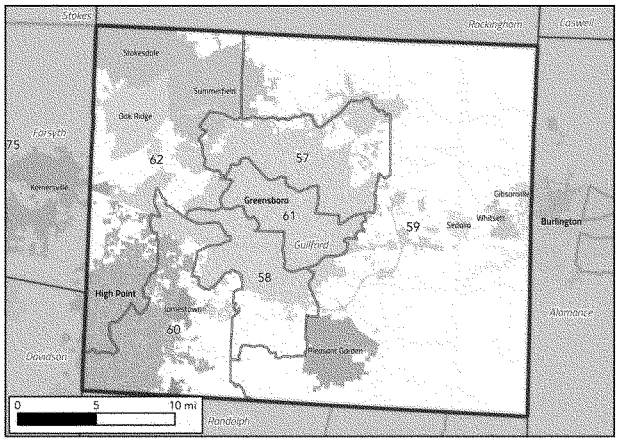
PX470 (Cooper Map 35)

311. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff David Dwight Brown resides in HD58. Individual Harper Plaintiff Lily Nicole Quick resides in HD59. Individual Harper Plaintiff Joshua Perry Brown resides in HD60. Individual Harper Plaintiff Donald M. MacKinnon resides in HD62. Individual NCLCV Plaintiff Talia Fernos resides in HD61. No Individual Plaintiff resides in HD57. Organizational Plaintiff Common Cause challenges every House District in this county

grouping. Organizational Plaintiff NCLCV challenges only HD59 and HD62 in this county grouping.

312. Legislative Defendants packed Democratic-leaning VTDs into House Districts 57, 58, 60, and 61, allowing House Districts 59 and 62 to be artificially favorable to Republican candidates. PX425 at 76; TR 01/03/2022.

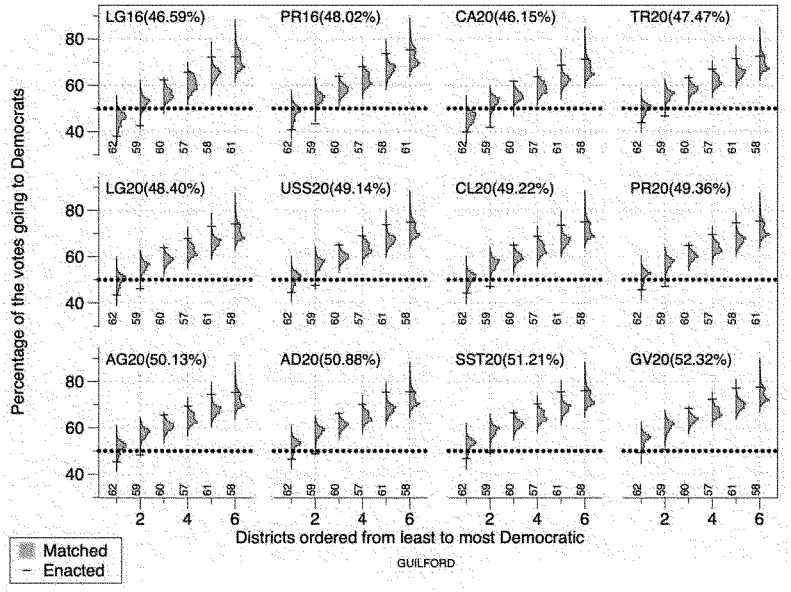
313. A comparison of Dr. Cooper's red-blue map (PX470) and his map showing the municipal boundaries within this cluster (PX471) illustrates how the district boundaries split Greensboro and High Point in a way that ensures the most Democratic-leaning VTDs in those municipalities are kept out of House Districts 59 and 62. PX425 at 76.



PX471 (Cooper Map 36)

314. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Guilford county grouping is an intentional, pro-Republican partisan redistricting.

315. Figure 6.1.10 shows Dr. Mattingly's analysis of this grouping.



PX653 (Mattingly Figure 6.1.10)

316. The Court finds that Democrats were again cracked out of the two least Democratic (*i.e.*, most-Republican) districts in this grouping (Districts 59 and 62) and packed into heavily Democratic districts (Districts 57, 58, 60, and 61). PX629 at 36; PX653. The effect is that the Republicans regularly win two out of six seats in this cluster even in situations where the Democrats would win all six in the majority or vast majority of plans in the nonpartisan ensemble. This is seen in the Senate 2020, President 2020, and Attorney General 2020 races, among others. PX653. Dr. Mattingly quantified the cracking and packing of Democrats in the Guilford cluster: over all of the elections considered and all of the around 80,000 plans in the ensemble, none of the plans have a higher Democratic fraction in the four most Democratic districts or a lower Democratic fraction in the two most

Republican districts, in comparison to the enacted plan. PX629 at 36. In other words, this grouping shows more cracking and packing of Democrats than every single plan in the nonpartisan ensemble. *Id.*

317. Due to the packing in two districts—Districts 59 and 62—that favor Republican candidates, District 62 never elected a Democrat in Dr. Duchin's 52-election sample, and District 59 did so only once. PX201 "SL-175" B60:BA60, B53:BA63.

318. The Court finds, as Dr. Pegden's findings show, that the Guilford House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.99997% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.99991% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 19.

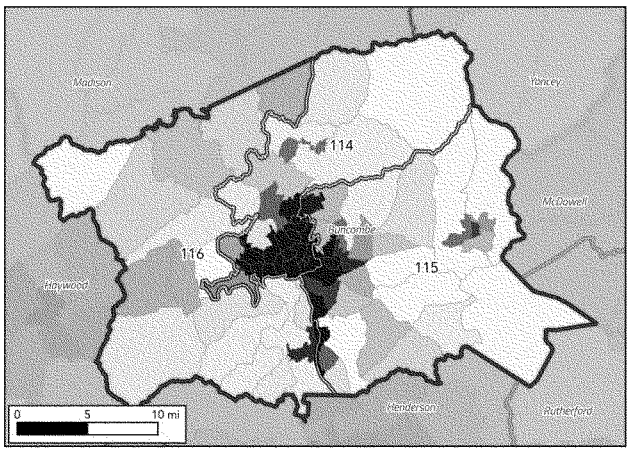
319. The Enacted Plan for this grouping has an average Polsby-Popper score of 0.30. PX150 at 16.

320. In the Guilford House county grouping—which Legislative Defendants' expert Dr. Barber himself labeled a "partisan outlier," *see* LDTX107 at 5 ("the Guilford County grouping in the House of Representative . . . is a partisan outlier")—the enacted map is a partisan outlier under each of the 11 elections he considered. Under nine of those 11 elections, the enacted map produces fewer Democratic districts than 93-100% of his simulations. *Id.* at 158. Under four of those nine elections, the enacted map produces four Democratic districts when 100% of his simulations produce a greater number, and under three more of the nine elections, the enacted map produces four or five Democratic districts when 99% of his simulations produce a greater number. *Id.*

321. The Court finds the districts in the Guilford House county grouping, HD57, HD58, HD59, HD60, HD61, and HD62, to be the result of intentional, pro-Republican partisan redistricting.

b. Buncombe House County Grouping

322. The Buncombe House County Grouping contains House District 114 ("HD114"), House District 115 ("HD115"), and House District 116 ("HD116"). All three House Districts are comprised of portions of only Buncombe County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



PX472 (Cooper Map 37)

323. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Mark S. Peters and Ann Butzner reside in HD115. No Individual Plaintiff resides in HD114 or HD 116. Organizational Plaintiffs NCLCV and Common Cause challenge the House Districts in this county grouping.

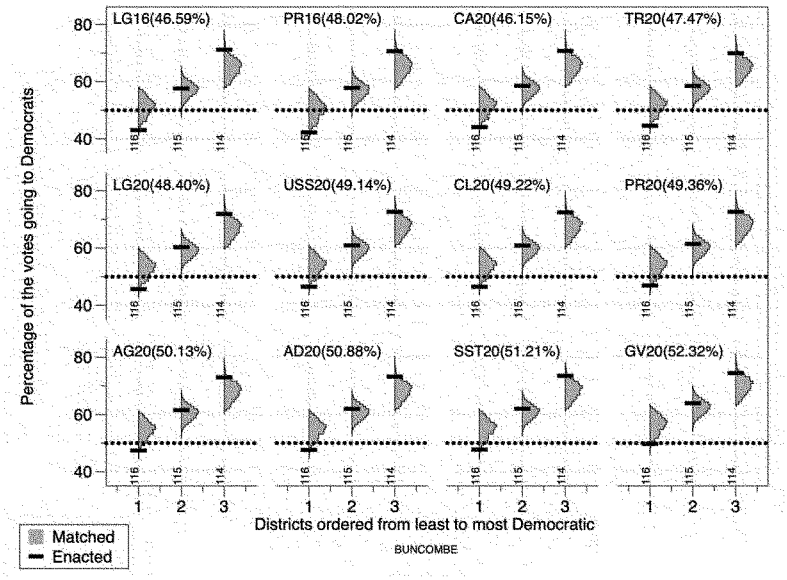
324. Buncombe County is an overwhelmingly Democratic county and has been trending more Democratic each year. PX425 at 79. All three House Districts in Buncombe are currently represented by members of the Democratic Party. *Id.*

325. Legislative Defendants shifted the district lines where they meet in Asheville to pack as many Democratic voters as possible into House District 114, thereby creating a Republican-leaning district in House District 116. Prior to the enactment of these lines in the 2021 House Plan, the district in the western part of Buncombe County that is now House District 116 was considered a safely Democratic district. PX425 at 79.

326. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Buncombe county grouping is the result of intentional, pro-Republican partisan redistricting.

327. Figure 6.1.13 shows Dr. Mattingly's analysis of the Buncombe House county grouping:

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PX654 (Mattingly Figure 6.1.13)

328. The Court finds that Democrats were packed into the most Democratic leaning district in this grouping (114) and cracked out of the most Republican district (116). PX629 at 38; PX654. In the enacted plan, there is a huge jump in Democratic vote share between the least Democratic district and the middle Democratic district. *Id.* This jump means that elections in the grouping will be nonresponsive to the votes cast and, as the figure above shows, cost Democrats a seat in multiple electoral environments, because the black line for District 116 often falls below the 50% line in elections where the majority or overwhelming majority of the blue histogram rises above it (for example, the Governor 2020, President 2020, and Senate 2020 race, among other examples). *See* PX629 at 38; PX654.

329. Dr. Mattingly mathematically quantified the cracking and packing across all the 2020 and 2016 statewide elections he considered. Specifically, Dr. Mattingly calculated the average Democratic vote share in the two least Democratic districts and the average Democratic vote share in the three most Democratic districts, for both the enacted plans and his ensemble plans. PX629 at 16. He found that, across every election, at most 1.2% of the plans in the nonpartisan ensemble had the same or fewer Democrats in the least Democratic district as the enacted plan (District 116). PX629 at 38. The Court finds that this signifies cracking of Democrats to enable Republicans to win a district they would not win under the nonpartisan ensemble.

330. The Court finds, as Dr. Pegden's findings show, that the Buncombe House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.979% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.938% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 16.

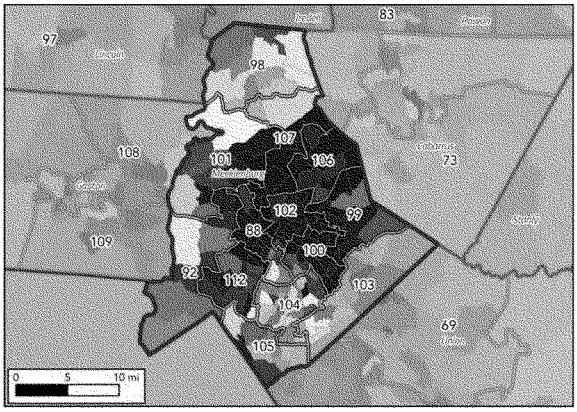
331. HD116 is the least compact district in the entire Enacted House Plan and is designed such that it never elects a Democrat in the entire set of 52 elections compiled by Dr. Duchin. PX150 at 16; PX201 "SL-175" B118:BA118.

332. In the Buncombe House county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win two seats under the enacted map, even though, under 10 of those 11 elections, Democrats would have won three districts in the majority of Dr. Barber's simulations, including in 98% of the simulations under the 2020 Governor election. LDTX107 at 98.

333. The Court finds the districts in the Buncombe House county grouping, HD114, HD115, and HD116, to be the result of intentional, pro-Republican partisan redistricting.

c. Mecklenburg House County Grouping

334. The Mecklenburg House County Grouping contains House District 88 ("HD88"), House District 92 ("HD92"), House District 98 ("HD98"), House District 99 ("HD99"), House District 100 ("HD100"), House District 101 ("HD101"), House District 102 ("HD102"), House District 103 ("HD103"), House District 104 ("HD104"), House District 105 ("HD105"), House District 106 ("HD106"), House District 107 ("HD107"), and House District 112 ("HD112"). All thirteen House Districts are comprised of portions of only Mecklenburg County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



PX465 (Cooper Map 30)

335. Harper Plaintiffs challenge this House county grouping. Individual NCLCV Plaintiff Timothy Chartier resides in HD98. Individual Harper Plaintiff Mary Elizabeth Voss resides in HD101. Individual Harper Plaintiff Virginia Walters Brien resides in HD102.

Individual Harper Plaintiff Barbara Proffitt resides in HD103. No Individual Plaintiff resides in HD88, HD92, HD99, HD100, HD104, HD105, HD106, HD107, or HD112. Organizational Plaintiff NCLCV challenges HD98 and HD103 in this county grouping. Organizational Plaintiff Common Cause challenges the House Districts in this county grouping.

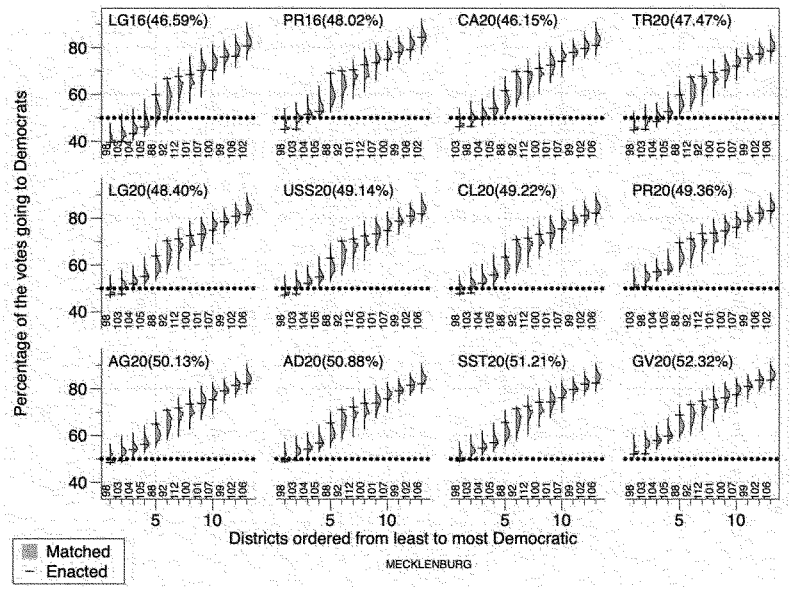
336. Mecklenburg County is the home of Charlotte as well as six other municipalities. Mecklenburg County is dominated by Democratic voters and is becoming even more so as the county continues to grow in population. PX425 at 68.

337. The district boundaries in this grouping place no Republican-leaning VTDs in House Districts 92, 99, 100, 101, 102, 106, 107, and 112, leaving every Republican-leaning VTD in House Districts 88, 103, 104, and 105. House District 98, in the north, and House District 103, in the south, are carved out of the pockets of Republican-leaning VTDs in the north and southeast portions of Mecklenburg County so as to be particularly favorable to Republican candidates. PX425 at 68.

338. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Mecklenburg county grouping is the result of intentional, pro-Republican partisan redistricting.

339. Figure 6.1.1 shows Dr. Mattingly's analysis of this grouping.

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PX650 (Mattingly Figure 6.1.1)

340. The Court finds that Democrats were again cracked out of the two least Democratic (i.e., most-Republican) districts in this grouping (Districts 98 and 103), and packed into heavily Democratic districts (Districts 100, 112, 92, and 88). PX629 at 29; PX650. The effect is to make those districts competitive, or to turn them into Republican seats, when in the majority of the nonpartisan plans those two seats safely elect Democrats. PX629 at 29. An example is the Attorney General 2020 election. Dr. Mattingly quantified the cracking and packing of Democrats in the Mecklenburg cluster: across every election he considered, the percentage of maps in the ensemble which have more Democrats packed into the most Democratic districts than the enacted plan is always less than 0.11%. PX629 at 29.

341. Although the County is one of the most Democratic in North Carolina, the Enacted House Map carves out at least two districts that Republicans will ordinarily win. PX201 "SL-175" B99:BA99, B104:BA105.

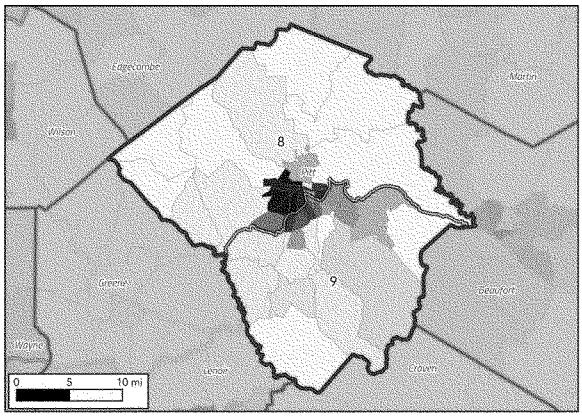
342. The Court finds, as Dr. Pegden's findings show, that the Mecklenburg House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 98.3% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 95.0% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 20.

343. In the Mecklenburg House county grouping, under 4 of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Republicans outperform the majority of Dr. Barber's simulations, but Democrats never outperform a majority of the simulations. Under the 2020 Attorney General election, Democrats win 11 seats under the enacted map, even though Democrats would have won 12 seats under 91% of Dr. Barber's simulations. LDTX107 at 168.

344. The Court finds the districts in the Mecklenburg House county grouping, HD88, HD92, HD98, HD99, HD100, HD101, HD102, HD103, HD104, HD105, HD106, HD107, HD112, to be the result of intentional, pro-Republican partisan redistricting.

d. Pitt House County Grouping

345. The Pitt House County Grouping contains House District 8 ("HD8") and House District 9 ("HD9"). HD8 and HD9 are comprised of portions of only Pitt County. Harper Plaintiffs and NCLCV Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

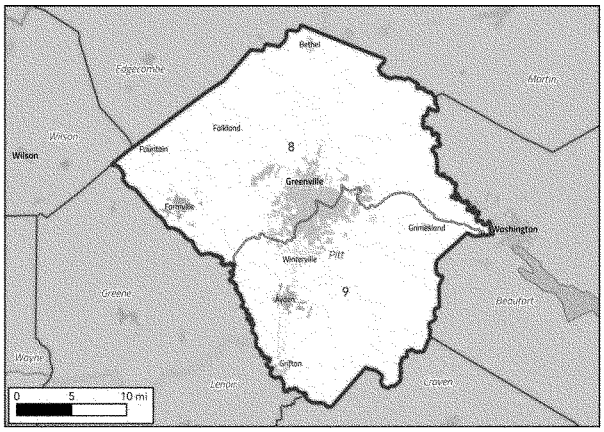


PX473 (Cooper Map 38)

346. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Amy Clare Oseroff resides in HD8, and Individual Harper Plaintiff Donald Rumph resides in HD9. Organizational Plaintiff NCLCV challenges only HD9 in this county grouping.

347. The two House districts in Pitt County are both currently represented by Democrats and Pitt County gave 55% of its vote share to President Joe Biden in the 2020 election, making it the 19th most Democratic county in the state according to that metric. PX425 at 81. But by splitting Greenville "at a particularly consequential location," the Legislative Defendants packed the most heavily Democratic VTDs together in House District 8, allowing for House District 9 to lean towards the Republican candidate. *Id.*

348. The split of Greenville, *see* PX474, cannot be explained with reference to communities of interest or natural geography. Some students at East Carolina University will take classes in House District 9, while living in residence halls that are located in House District 8. PX425 at 81.

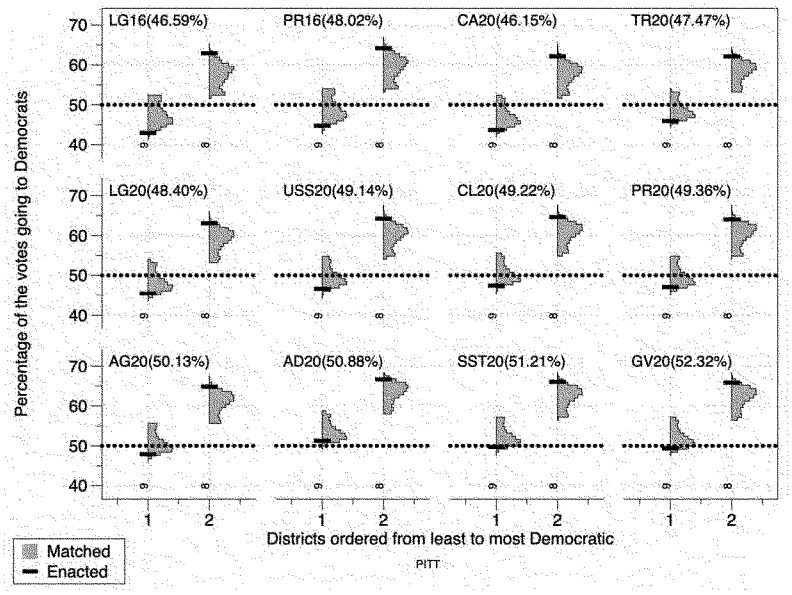


PX474 (Cooper Map 39)

349. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Pitt county grouping is an intentional, pro-Republican partisan redistricting.

350. Figure 6.1.16 shows Dr. Mattingly's analysis of this grouping.

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PX655 (Mattingly Figure 6.1.16)

351. The Court finds that Democrats were packed into the most Democratic district in Pitt County (District 8) and cracked out of the most Republican district (District 9). PX629 at 40; PX655. The effect is that the Republicans regularly win one of the two seats in situations where in the nonpartisan ensemble plans would not, including in the Attorney General 2020, Governor 2020, and Secretary of State 2020 elections. Dr. Mattingly quantified the cracking and packing of Democrats in Pitt County: over all of the elections considered, the percentage of plans in the non-partisan ensemble that have more Democrats in District 8 than the enacted plan fluctuates between 1.1% and 5.3%. PX629 at 40.

352. The Court finds, as Dr. Pegden's findings show, that the Pitt House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level

analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 96.3% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 89.1% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 21.

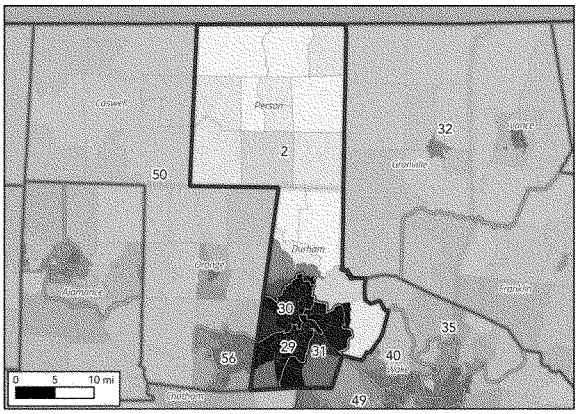
353. In Dr. Barber's analysis, in 91% of his simulations there is one Democratic leaning district and in the remaining 9% of the simulations there are two Democratic leaning districts. Although the current seats in this county grouping are both held by Democrats, the Enacted Map aligns with the outcome of his simulations and now creates only one Democratic district. LDTX107 at 39, 43.

354. The Court finds the districts in the Pitt House county grouping, HD8 and HD9, to be the result of intentional, pro-Republican partisan redistricting.

e. Durham-Person House County Grouping

355. The Durham-Person House County Grouping contains House District 2 ("HD2"), House District 29 ("HD29"), House District 30 ("HD30"), and House District 31 ("HD31"). HD2 is comprised of Person County and portions of Durham County. HD29, HD30, and HD31 are comprised of portions of only Durham County. Harper Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

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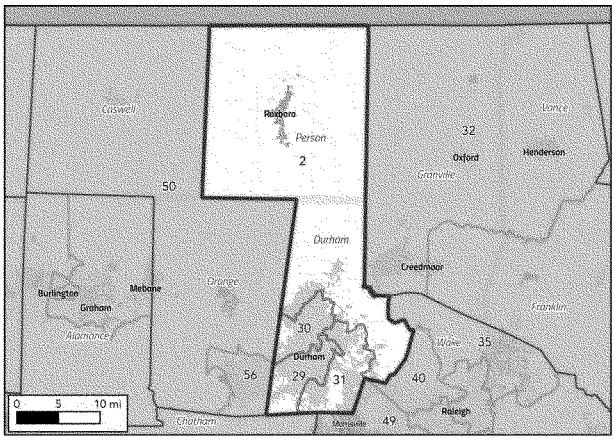


PX475 (Cooper Map 40)

356. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Sondra Stein resides in HD2. No Individual Plaintiff resides in HD29, HD30, or HD31. No Organizational Plaintiff challenges the House Districts in this county grouping.

357. Durham County is the most Democratic county in North Carolina, having given 81.6% of its two-party vote share to President Biden in the 2020 election and having "voted overwhelmingly Democratic candidates in every 2020 county-wide election." PX425 at 84. But the enacted district lines create an artificially competitive district in this cluster, HD2, by joining the more competitive VTDs in eastern and northern Durham County with Person County, to the north. *Id.*

358. Although the City of Durham is split across all four House districts in this county grouping, a comparison of Dr. Cooper's red-blue map (PX475), and his map showing the municipal boundaries within this cluster (PX476), indicates that Legislative Defendants packed the most Democratic portions of the City of Durham into House Districts 29, 30, and 31.

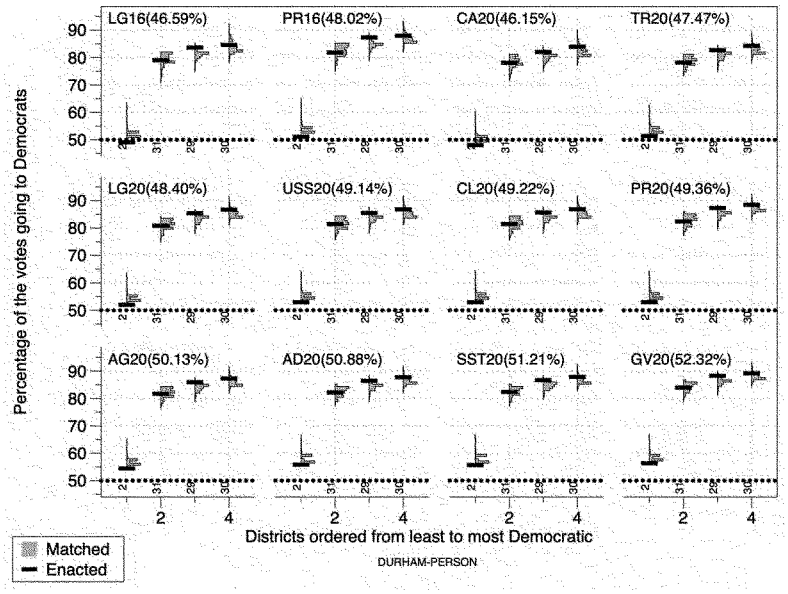


PX476 (Cooper Map 41)

359. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Durham-Person county grouping is an intentional, pro-Republican partisan redistricting.

360. Figure 6.1.22 shows Dr. Mattingly's analysis of this grouping.

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PX657 (Mattingly Figure 6.1.22)

361. The Court finds that Democrats were again cracked out of the most Republican district in the Durham-Person grouping. PX629 at 44; PX657. The nonpartisan ensemble shows that there are typically three highly Democratic districts and one more moderately Democratic district. *Id.* But in the enacted plan, the Democrats are cracked out of the moderately Democratic district, such that in Republican wave elections, the Republicans gain that seat even though they rarely would under the nonpartisan ensemble. In particular, in the Lieutenant Governor 2016 and Commissioner of Agriculture 2020 elections, where the Democrats only get around 46% of the statewide vote fraction, this cracking would be enough to deny a seat to the Democrats even though they would win the seat in a nonpartisan map. Not a single map in the non-partisan ensemble across any of the elections Dr. Mattingly

considered showed a smaller fraction of Democrats in the most Republican district than the enacted plan. PX629 at 44. In other words, this cluster shows more cracking of Democrats than every single plan in the nonpartisan ensemble. *Id.*

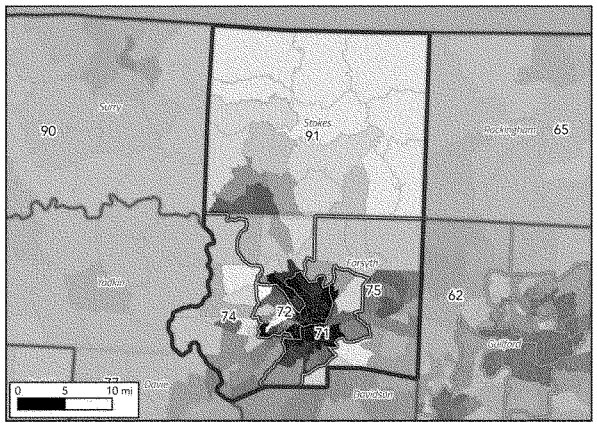
362. The Court finds, as Dr. Pegden's findings show, that the Durham-Person House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.932% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.79% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 25.

363. In the Durham-Person House county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win four seats under 100% of Dr. Barber's simulations, but under two of those elections (2016 Senate and 2016 Lt. Governor), Democrats win only three seats under the enacted map—an outcome never once encountered in the 37,800 simulations for this cluster generated by Dr. Barber's algorithm. LDTX107 at 131.

364. The Court finds the districts in the Durham-Person House county grouping, HD2, HD29, HD30, and HD31, to be the result of intentional, pro-Republican partisan redistricting.

f. Forsyth-Stokes House County Grouping

365. The Forsyth-Stokes House County Grouping contains House District 71 ("HD71"), House District 72 ("HD72"), House District 74 ("HD74"), House District 75 ("HD75"), and House District 91 ("HD91"). HD71, HD72, HD74, and HD75 are comprised of portions of only Forsyth County. HD91 is comprised of Stokes County and portions of Forsyth County. Harper Plaintiffs and Plaintiff Common Cause challenge these House Districts as the product of unlawful partisan gerrymanders.

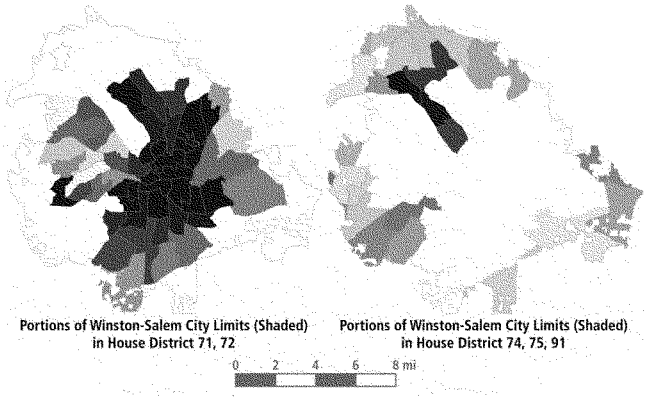


PX468 (Cooper Map 33)

366. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Chenita Barber Johnson resides in HD72. No Individual Plaintiff resides in HD71, HD74, HD75, or HD91. Organizational Plaintiff Common Cause challenges the House Districts in this county grouping.

367. Legislative Defendants created Republican-leaning districts in House Districts 74, 75, and 91 by packing the Democratic voters in and around Winston-Salem into House Districts 71 and 72. PX425 at 73.

368. While the district boundaries in this grouping split Winston-Salem across all five districts, the district boundaries pack most Democratic voters in Winston-Salem into House Districts 71 and 72. *Id.*

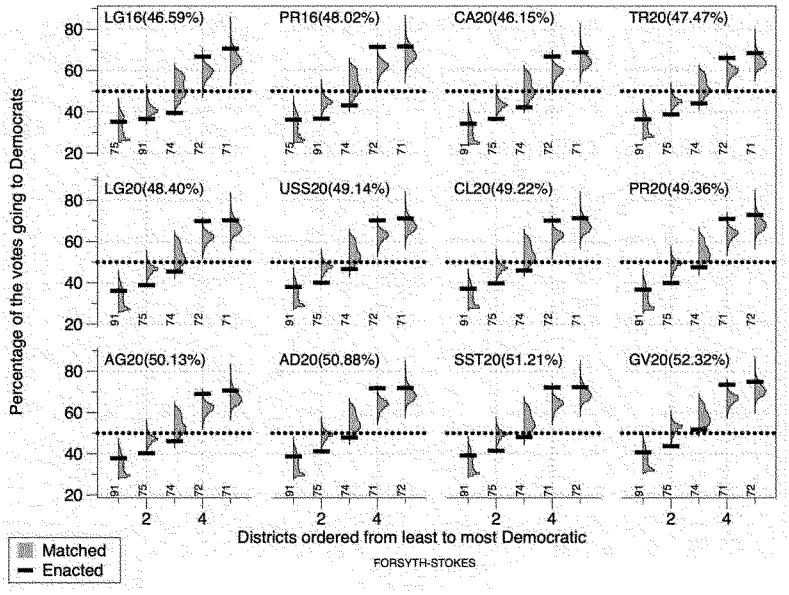


PX469 (Cooper Map 34)

369. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Forsyth-Stokes county grouping is an intentional, pro-Republican partisan redistricting.

370. Figure 6.1.7 shows Dr. Mattingly's analysis of this grouping.

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PX652 (Mattingly Figure 6.1.7)

371. The Court finds that Democrats were again cracked out of the three least Democratic (*i.e.*, most-Republican) districts in this grouping and packed into heavily Democratic districts (Districts 72 and 71). PX629 at 34; PX652. The effect is that the Republicans regularly win three out of five seats in this cluster even in situations where the Democrats would win three in the vast majority of plans in the nonpartisan ensemble. This is seen in the Senate 2020, President 2020, President 2016, and Attorney General 2020 races, among others. PX629 at 34. Dr. Mattingly quantified the cracking and packing of Democrats in the Forsyth-Stokes cluster: across every election he considered, less than 0.02% of the plans in the ensemble have a lower Democratic fraction in the three most Republican districts than the enacted plan, signaling extreme cracking. *Id.*

372. To preserve District 74's Republican lean, District 91—which is heavily Republican and at no risk of electing a Democrat—cuts into Winston Salem to pick up those Democratic precincts that cannot be incorporated into Districts 71 and 72. The result is a district line that cuts to the core of Winston-Salem and preserves Republican advantage in District 74. PX201 "SL-175" B75:BA75, B80:BA80. This configuration comes at a cost of compactness; the Enacted House Plan in Forsyth and Stokes Counties has an average Polsby-Popper score of 0.33. PX150 at 16.

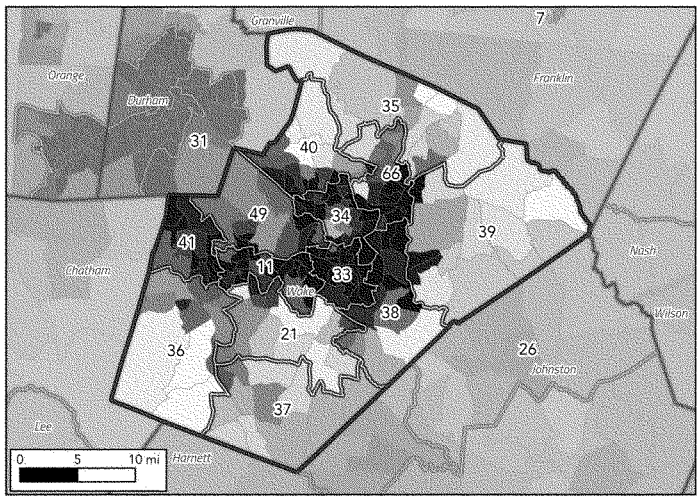
373. The Court finds, as Dr. Pegden's findings show, that the Forsyth-Stokes House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.912% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.73% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 18.

374. In the Forsyth-Stokes House cluster, the enacted map is a partisan outlier under three of the elections that Legislative Defendants' expert Dr. Barber considered. Under the 2020 President election, Democrats win only two seats, even though they would have won three seats under 50% of Dr. Barber's simulations and four seats under 35% of the simulations—a two-seat shift. Under eight of the 11 elections, the enacted map produces fewer Democratic seats than a majority of Dr. Barber's simulations—a metric Dr. Barber himself has relied upon. LDTX107 at 142.

375. The Court finds the districts in the Forsyth-Stokes House county grouping, HD71, HD72, HD74, HD75, and HD91, to be the result of intentional, pro-Republican partisan redistricting.

g. Wake House County Grouping

376. The Wake House County Grouping contains House District 11 ("HD11"), House District 21 ("HD21"), House District 33 ("HD33"), House District 34 ("HD34"), House District 35 ("HD35"), House District 36 ("HD36"), House District 37 ("HD37"), House District 38 ("HD38"), House District 39 ("HD39"), House District 40 ("HD40"), House District 41 ("HD41"), House District 49 ("HD49"), and House District 66 ("HD66"). All thirteen House Districts are comprised of portions of only Wake County. Plaintiffs challenge these House Districts, with the exception of HD66, as the product of unlawful partisan gerrymanders.



PX466 (Cooper Map 31)

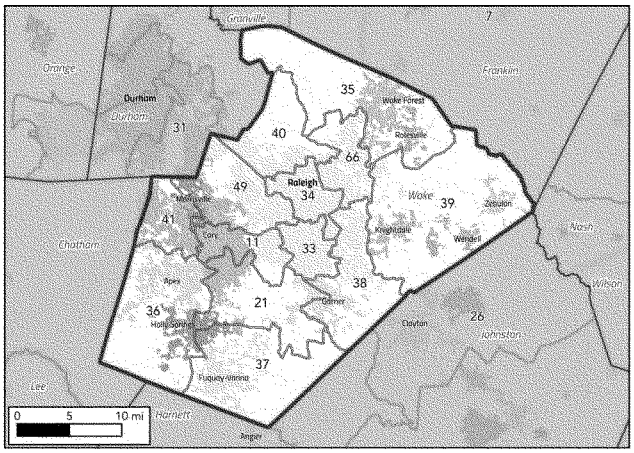
377. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Rebecca Harper resides in HD21. Individual Harper Plaintiff John Anthony Balla resides in HD40. No Individual Plaintiff resides in HD11, HD33, HD34, HD35, HD36, HD37, HD38, HD39, HD41, or HD49. Organizational Plaintiff NCLCV challenges HD35, HD37, and

HD38 in this county grouping. Organizational Plaintiff Common Cause challenges HD35 in this county grouping.

378. Wake County includes Raleigh and 11 other municipalities. The county is strongly Democratic, LDTX107 at 169, and there are no Republicans on the county commission, PX425 at 70. The district boundaries in this grouping pack Democrats into as few districts as possible, leaving House Districts 11, 33, 36, 38, 41, and 49 without any Republican-leaning VTDs, House Districts 34 and 66 with only one Republican-leaning VTD, and House District 40 with only two Republican-leaning VTDs. Packing the majority of Democratic voters within these districts allows House Districts 35, to the north, and 37, to the southeast, to favor Republican candidates. *Id.*

379. House District 66 includes a "spike" that juts north to include a Democratic-leaning VTD on its boundary, effectively keeping the Democratic voters in that VTD "fenced off" from the House District 35, where they would otherwise make the election more favorable for a Democratic candidate. *Id.*

380. To the extent that Legislative Defendants argue that preserving municipal boundaries was a governing criterion, the district lines in this cluster split a number of cities, including Raleigh (split across 10 of the 12 districts), Cary, Garner, Fuquay-Varina, Apex, Holly Springs, and Morrisville. PX37.

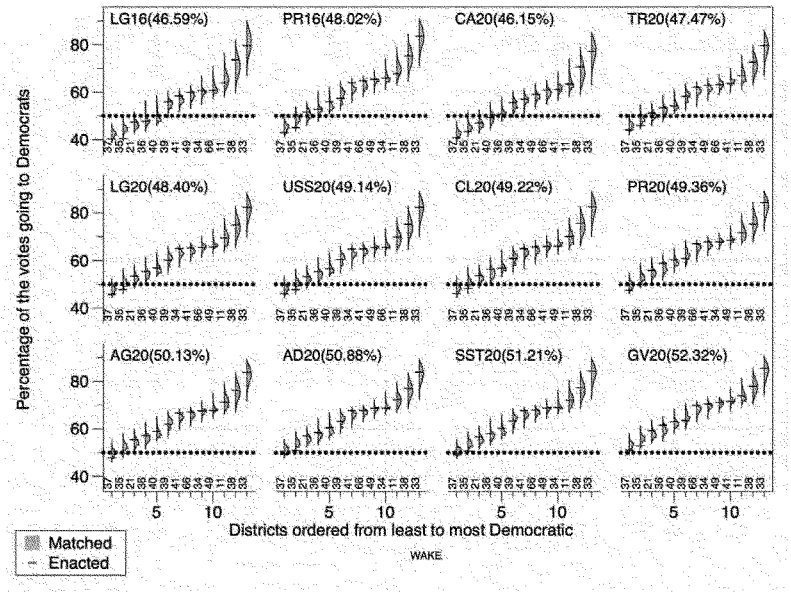


PX467 (Cooper Map 32)

381. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Wake county grouping is the result of intentional, pro-Republican partisan redistricting.

382. Figure 6.1.4 shows Dr. Mattingly's analysis of this grouping.

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PX651 (Mattingly Figure 6.1.4)

383. The Court finds that Democrats were cracked out of the two least Democratic (*i.e.*, most-Republican) districts in this grouping (Districts 37 and 35) and packed into heavily Democratic districts. PX629 at 32; PX651. The effect is to swing the two most Republican districts into play in elections where they would not be under the ensemble. For example, in the Attorney General 2020 election, Republicans win two districts under the enacted plan and Democrats win 11 even though Democrats would always win 12 under the ensemble and often win all 13. Dr. Mattingly quantified the cracking of Democrats out of those two most Republican districts: across every election he considered, the number of maps in the ensemble which have a lower Democratic vote fraction in the two most Republican districts than they do in the enacted plan is less than 0.42%, except for the Commissioner of Agriculture 2020

election, where it is 1.2%. That is, the enacted plan is in the most extreme 0.42% percent of plans in terms of cracking of Democrats. PX629 at 32.

384. The Court finds, as Dr. Pegden's findings show, that the Wake House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.27% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 97.8% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 22.

385. In the Wake House county grouping, the enacted map is a partisan outlier under four of the elections that Legislative Defendants' expert Dr. Barber considered. Under three of those elections, the enacted map produces fewer Democratic districts than 90-98% of Dr. Barber's simulations, and under the fourth election, the enacted map produces fewer Democratic districts than 85% of Dr. Barber's simulations. LDTX107 at 173.

386. The Court finds the challenged districts in the Wake House county grouping, HD11, HD21, HD33, HD34, HD35, HD36, HD37, HD38, HD39, HD40, HD41, and HD49, to be the result of intentional, pro-Republican partisan redistricting.

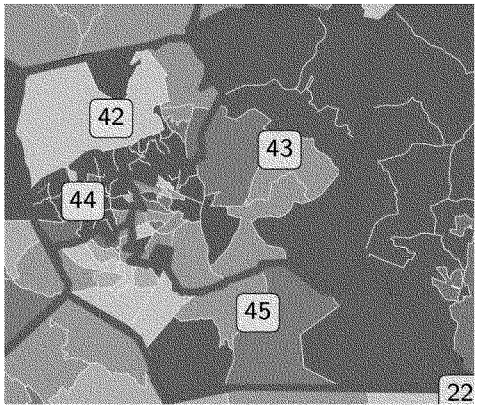
h. Cumberland House County Grouping

387. The Cumberland House County Grouping contains House District 42 ("HD42"), House District 43 ("HD43"), House District 44 ("HD44"), and House District 45 ("HD45"). Each of these four House Districts are comprised of portions of only Cumberland County. The Organizational Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

388. No Individual NCLCV Plaintiff resides in any House District within this county grouping. Organizational Plaintiff Common Cause challenges every House District in

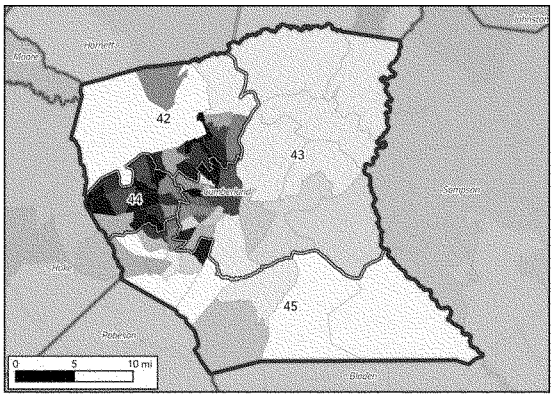
this county grouping. Organizational Plaintiff NCLCV challenges only HD43 and HD45 in this county grouping.

389. The Enacted Plan sacrifices compactness in order to maximize Republican advantage in this grouping. It does so by packing Democrats into two Districts 42 and 44. PX201 "SL-175" AO43, AO45. The result of this packing is that Districts 43 and 45 favor Republicans. 50.5% of District 43's major-party voters voted for President Trump in the 2020 election; the same figure in District 45 was 50.8%. PX201 "SL175" AO44, AO46. This result came at the cost of lowering the average compactness score of the four districts to 0.34. PX150 at 16.



PX181 (Figure 31: Enacted House Districts 42, 43, 44 & 45)

390. Harper Plaintiffs do not challenge the districts in this county grouping; however, Harper Plaintiffs' experts, as part of their overall analysis in these consolidated cases, analyzed this county grouping as shown below.



PX478 (Cooper Map 43)

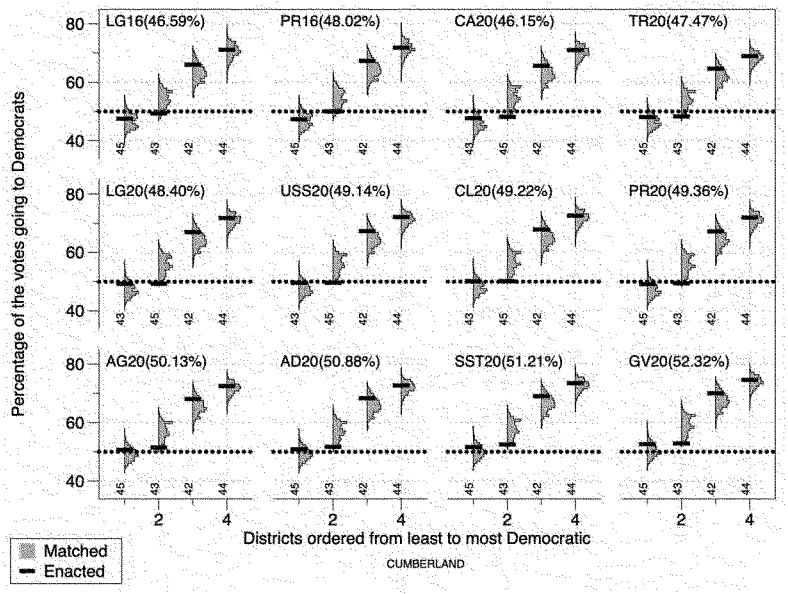
391. Cumberland County is a "heavily Democratic county" that provided 58% of its two-party vote share to Joe Biden in 2020 and that has not provided a plurality of votes to a Republican Presidential candidate since 2004. PX425 at 89.

392. Despite Cumberland County's strong Democratic tilt, Legislative Defendants drew district lines that created two competitive districts, House District 43 in the east and House District 45 in the south, by packing the most heavily Democratic VTDs in Fayetteville into House Districts 42 and 44. *Id.*; TR 01/03/2022.

393. Fayetteville is split among all four districts in this county House District 43 includes almost all of the few Republican-leaning VTDs within Fayetteville, while House District 45 includes Republican-leaning and more competitive VTDs in the south of the city. PX425 at 89-90; TR 01/03/2022. These district lines allowed House District 43 to be more favorable than it otherwise would be for the first-term incumbent Republican candidate in that district. PX425 at 89.

394. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Cumberland county grouping is an intentional, pro-Republican partisan redistricting.

395. Figure 6.1.28 shows Dr. Mattingly's analysis of this grouping.



PX659 (Mattingly Figure 6.1.28)

396. The Court finds that Cumberland County is a partisan outlier. Democrats have been cracked out of the second most Republican district (District 43), which normally is comfortably Democratic, but under the enacted plan frequently produces a Republican seat. For each of the elections considered, the number of plans in the ensemble with smaller fraction of Democrats in the second most Republican district is typically around 1% with, for a few elections, the percentage reaching as high as 7% or as low as 0.4%. PX629 at 48; PX659.

397. The Court finds, as Dr. Pegden's findings show, that the Cumberland House county grouping is the result of intentional, pro-Republican partisan redistricting. Dr. Pegden's first-level analysis determined that the enacted plan's version of the Cumberland county grouping is more favorable to Republicans than 83.5% of maps that his algorithm encountered by making small changes to the district boundaries. PX523 at 27. This result was not an unusual enough result to enable a statistically significant second-level analysis. *Id.* But Dr. Pegden's "wave threshold" analysis found the Cumberland county grouping to be a partisan outlier. *Id.* at 36. As explained, the wave threshold metric captures, for a given map, the smallest uniform swing in election results that would be required to give the Democrats an additional seat. Using this alternative analysis allowed Dr. Pegden to assess whether this grouping may have been drawn to achieve "other conceivable partisan goals" besides merely maximizing Republican seat count, "such as facilitating the re-election of particular representatives in particular districts." *Id.* at 33. Dr. Pegden concluded, and the Court finds, that the enacted plan's version of this county grouping had a wave threshold more favorable to Republicans than 99.59% of maps that his algorithm encountered by making small changes to the district boundaries. *Id.* at 36.

398. In the Cumberland House county grouping, under six of the individual elections Legislative Defendants' expert Dr. Barber considered, Democrats win two seats under the enacted map. While Dr. Barber notes that in these cases the enacted plans create one, or occasionally two, competitive districts that could be heavily contested, in each case Democrats would have won more than two seats in 100% of Dr. Barber's simulations. LDTX107 at 116.

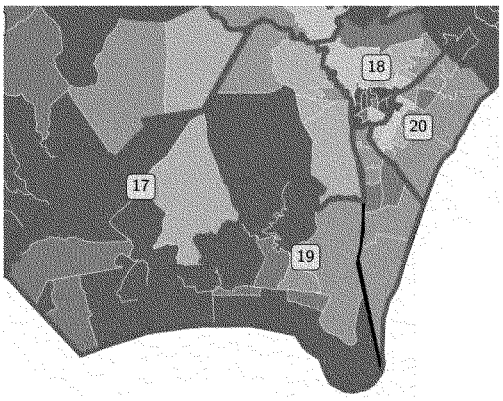
399. The Court finds the districts in the Cumberland House county grouping, HD42, HD43, HD44, and HD45, to be the result of intentional, pro-Republican partisan redistricting.

i. Brunswick-New Hanover House County Grouping

400. The Brunswick-New Hanover House County Grouping contains House District 17 ("HD17"), House District 18 ("HD18"), House District 19 ("HD19"), and House District 20 ("HD20"). HD17 is comprised of portions of only Brunswick County. HD19 is comprised of portions of Brunswick and New Hanover Counties. HD18 and HD20 are comprised of portions of only New Hanover County. NCLCV Plaintiffs challenge this county grouping as the product of an unlawful partisan gerrymander.

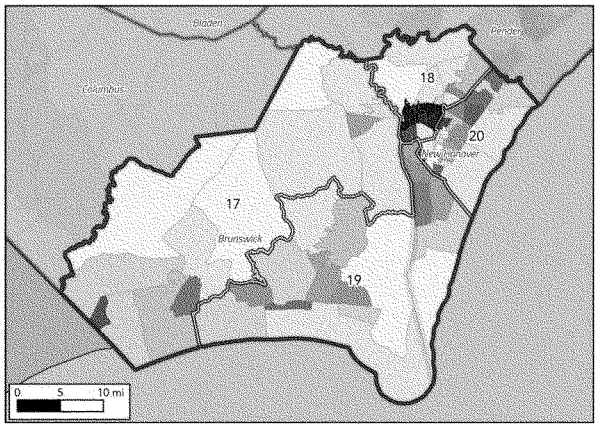
401. NCLCV Plaintiffs challenge this House county grouping. No Individual NCLCV Plaintiff resides in these House Districts. Organizational Plaintiff NCLCV challenges all House districts in this county grouping.

402. The Enacted House Plan creates three Republican districts in this cluster: House Districts 17, 19, and 20. PX425 at 96; PX201 "SL175" B18:BA21.



PX181 (Figure 26: Enacted House Districts 17, 18, 19 & 20)

403. Harper Plaintiffs do not challenge the districts in this county grouping; however, Harper Plaintiffs' experts, as part of their overall analysis in these consolidated cases, analyzed this county grouping as shown below.

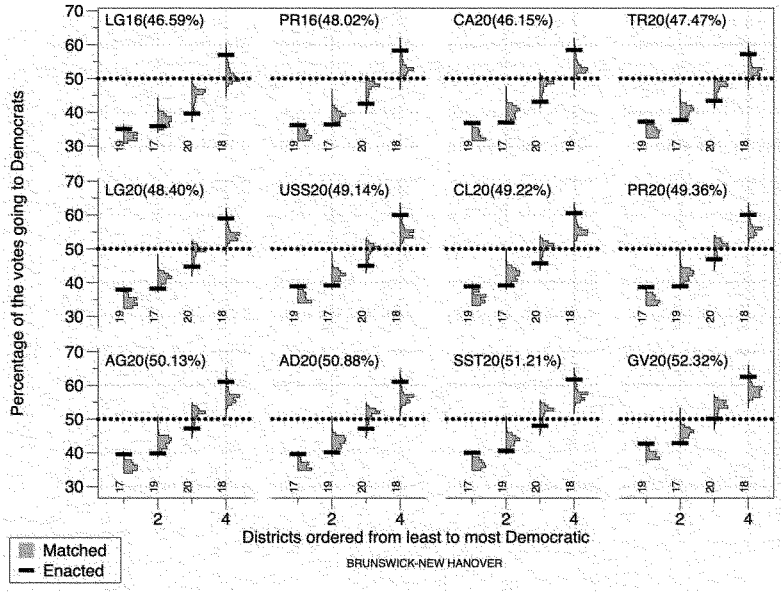


PX481 (Cooper Map 46)

404. This grouping is located in the southeastern corner of the state and includes the heavily Democratic City of Wilmington. The district lines pack Democratic voters in and around Wilmington into House District 18, allowing the other three districts, particularly House District 20, to lean more heavily towards the Republican candidate. PX425 at 95. House District 19 includes a Democratic-leaning VTD south of Wilmington, which has the effect of keeping those Democratic voters out of House District 20, keeping that district safer for the Republican candidate. PX425 at 95.

405. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Brunswick-New Hanover county grouping is an intentional, pro-Republican partisan redistricting.

406. Figure 6.1.34 shows Dr. Mattingly's analysis of this grouping.



PX661 (Mattingly Figure 6.1.34)

407. The Court finds that Democrats were again packed and cracked in the Brunswick-New Hanover cluster. PX629 at 52; PX661. In particular, they are packed into the most Democratic district (District 18) and cracked out of the middle-most Republican districts. PX661. This enables Republicans to safely win three out of four districts, even in situations where Democrats would almost always win two seats under the nonpartisan ensemble. PX629 at 42. Examples of this are in the Attorney General 2020, State Auditor 2020, and Secretary of State 2020 elections. Over each of the elections considered, the fraction of plans in the nonpartisan ensemble where there are fewer Democratic votes in the second and third most Republican districts than in the enacted plan is always less than 0.5%

and often much smaller. PX629 at 52. In other words, the enacted plan cracks more Democrats in those districts than all but 0.5% of plans in the nonpartisan ensemble.

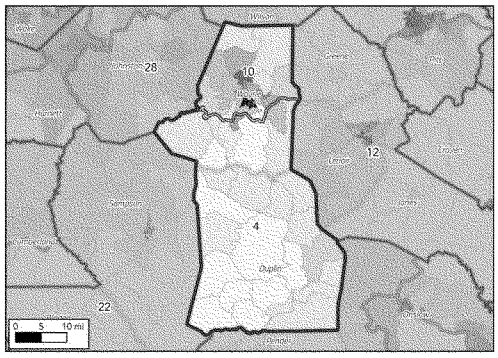
408. The Court finds, as Dr. Pegden's findings show, that the Brunswick-New Hanover House county grouping is the result of intentional, pro-Republican partisan redistricting. Dr. Pegden's first-level analysis determined that the enacted plan's version of the Brunswick-New Hanover county grouping is more favorable to Republicans than 89.4% of maps that his algorithm encountered by making small changes to the district boundaries. PX523 at 24. This result was not an unusual enough result to enable a statistically significant second-level analysis. *Id.* But Dr. Pegden's "wave threshold" analysis found this county grouping to be a partisan outlier. *Id.* at 34. Dr. Pegden concluded, and the Court finds, that the enacted plan's version of the Brunswick-New Hanover county grouping had a wave threshold more favorable to Republicans than 99.72% of maps that his algorithm encountered by making small changes to the district boundaries. *Id.* In particular, for the enacted map, Democratic performance could increase by 10.1 percentage points in every district, yet Democrats still would capture only two of the four seats. *Id.*

409. In 100% of Legislative Defendants' expert Dr. Barber's simulations, there is one Democratic leaning district in this Republican leaning county cluster. Under Dr. Barber's analysis, the enacted plans are in alignment with his simulations in creating one Democratic district. LDTX107 at 132, 136.

410. The Court finds the districts in the Brunswick-New Hanover House county grouping, HD17, HD18, HD19, and HD20, to be the result of intentional, pro-Republican partisan redistricting.

j. Duplin-Wayne House County Grouping

411. The Duplin-Wayne House County Grouping contains House District 4 ("HD4") and House District 10 ("HD10"). HD4 is comprised of Duplin County and portions of Wayne County. HD10 is comprised of portions of only Wayne County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

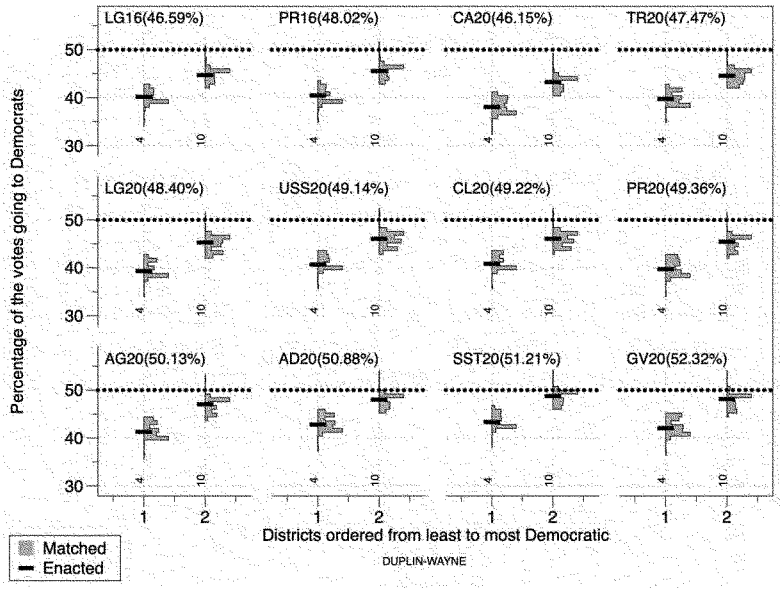


PX477 (Cooper Map 42)

412. Harper Plaintiffs and NCLCV Plaintiffs challenge this House county grouping. Individual Harper Plaintiffs Bobby Jones and Kristiann Herring reside in HD10. No Individual Plaintiff resides in HD4. Organizational Plaintiff NCLCV challenges both House districts in this county grouping.

413. The district boundary that runs through Wayne County ensures that this cluster will contain two safely-Republican districts. PX425 at 87.

414. Figure 6.1.19 shows Dr. Mattingly's analysis of this grouping.



PX656 (Mattingly Figure 6.1.19)

415. Dr. Mattingly's analysis did not find that Duplin-Wayne was an outlier, because the black bars representing the enacted plan fall within the middle of the blue histograms representing the nonpartisan ensemble. PX629 at 42.

416. Dr. Pegden was unable to generate any comparison districtings of this House county grouping due do his conservative methodology. PX523 at 17; *see id.* at 11. The fact that his algorithm cannot generate comparison maps does not say one way or the other whether the enacted map of this grouping is the result of intentional, pro-Republican partisan redistricting. *Id.* at 11.

417. Under Legislative Defendants' expert Dr. Barber's analysis, this county grouping is moderately Republican and, after discarding simulations for containing more

county traversals or being less compact, zero simulated maps remained for Dr. Barber to analyze. After retaining 2,704 of his simulated maps that have the highest compactness score, the enacted maps match his simulated maps in producing no Democratic leaning districts in this county grouping for all 11 elections. LDTX107 at 58, 63.

418. The Court finds the districts in the Duplin-Wayne House county grouping, HD4 and HD10, to not be the result of intentional, pro-Republican partisan redistricting.

k. Onslow-Pender House County Grouping

419. The Onslow-Pender House County Grouping contains House District 14 ("HD14"), House District 15 ("HD15"), and House District 16 ("HD16"). HD14 and HD15 are each comprised of portions of only Onslow County. HD16 is comprised of Pender County and portions of Onslow County. NCLCV Plaintiffs challenge this county grouping as the product of an unlawful partisan gerrymander.

420. No Individual Plaintiff resides in these House Districts. Organizational Plaintiff NCLCV challenges HD14 and HD15 in this county grouping.

421. Although one of the districts in this cluster—District 15—could have centered around Jacksonville, Legislative Defendants instead split the Jacksonville area's Democrats between two districts—House Districts 14 and 15—in order to create three heavily Republican districts that prevent Onslow County's Democratic voters from having any meaningful say in elections. PX201 "SL-175" B15:BA16. This, again, came at the cost of compactness: the average compactness score for Districts 14, 15, and 16 is 0.30. PX150 at 16.

422. The Court finds the districts in the Onslow-Pender House county grouping, HD4 and HD10, to not be the result of intentional, pro-Republican partisan redistricting.

3. North Carolina Congressional Districts

423. The analysis and conclusions of Plaintiffs' experts establishes that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation. Plaintiffs' experts employed computer simulations to generate alternative Congressional plans to serve as a baseline for comparison to the enacted Congressional plan. Even though these experts employed different methodologies, each expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage. Plaintiffs' expert Dr. Christopher Cooper explained how this intentional, pro-Republican partisan redistricting was carried out in each of the 14 congressional districts and has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly. The Court agrees with the findings of each of these experts and finds that the 2021 Congressional Plan is an intentional, and effective, pro-Republican partisan redistricting.

424. Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting.

a. Harper Plaintiffs' Expert Dr. Chen's Analysis of the Congressional Plans

(i) Analysis of the Congressional Plan's Adherence to the Adopted Criteria

425. In his simulation set, Dr. Chen programmed his algorithm to follow the traditional districting principles mandated by the General Assembly's Adopted Criteria. PX482 at 5 ¶8; PX34. This is the same method Dr. Chen employed in *Common Cause v. Lewis*, 2019 WL 4569584, and *Harper v. Lewis*, No. 19 CVS 012667 (N.C. Super. 2019). PX482 at 5 ¶8.

426. Specifically, Dr. Chen programmed the computer algorithm to create 1,000 independent simulated plans adhering to the following seven districting criteria mandated by the 2021 Adopted Criteria: (1) population equality (2) contiguity, (3) minimizing county splits and (4) minimizing VTD splits and prioritizing the other traditional redistricting principles set forth in the Adopted Criteria of (5) compactness, (6) avoiding incumbent pairings, and (7) avoiding splitting municipalities. PX482 at 6-9 ¶11; PX34.

427. The Court finds that Dr. Chen's computer algorithm properly adhered to the Adopted Criteria, as well as traditional redistricting principles. The Court further finds that Dr. Chen's interpretation and application of the Adopted Criteria is fully consistent with General Assembly's requirements and guidance. The Court further finds that Dr. Chen's application of these criteria is consistent with generally accepted redistricting principles and practice.

428. First, Dr. Chen compared the number of counties that the simulated and enacted congressional plans split. The enacted congressional plan splits 14 counties. PX482 at 11-12 ¶17; PX484. Dr. Chen concluded this was one more split than necessary. *Id.* at 12-13 ¶17-18. From this, Dr. Chen concluded that the enacted congressional plan does not comply with the Adopted Criteria's rule against unnecessary division of counties. *Id.* at 13 ¶18. Dr. Chen also found that counties were only split multiple times in 1.8% of his simulations, and that within that small percentage Mecklenburg, Wake, and Guilford were not all split multiple times. *Id.* at 19; PX485.

429. The Court finds that the enacted congressional plan fails to follow and subordinates the Adopted Criteria's requirement that counties be split only for reasons of population equality or for the protection of incumbents. The Court finds that the enacted congressional plan splits more counties than is necessary. The Court also finds that the

enacted congressional plan unnecessarily splits three heavily Democratic counties—Mecklenburg, Wake, and Guilford Counties—into three districts each.

430. Dr. Chen also compared the number of VTDs split in the enacted congressional plan to his 1,000 simulations. Dr. Chen found that, in comparison to his simulations, the enacted congressional plan contains 25 VTD splits, almost double the number of VTDs that are necessary to split to maintain population equality. PX482 at 15 ¶21-22. From this, Dr. Chen concluded that the enacted congressional plan violates the Adopted Criteria's requirement that VTDs "should be split only when necessary." *Id.* at 15 ¶23; PX486.

431. The Court finds that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement of avoiding the unnecessary splitting of VTDs. The Court finds that the enacted congressional plan splits more VTDs than is necessary.

432. Dr. Chen found that the enacted congressional plan is also less compact than almost all of his 1,000 simulations. Dr. Chen employed the measures of compactness set forth in the Adopted Criteria, known as Reock and Polsby-Popper scores. PX482 at 17 ¶24. PX34. For both measures, a higher score indicates that a plan's districts are more compact. PX482 at 17-18 ¶¶26-27.

433. Dr. Chen found that, as measured by Polsby-Popper scores, the enacted congressional plan is far less compact than all 1,000 simulated congressional plans. PX482 at 17 ¶26. He further found, as measured by Reock scores, the enacted congressional plan is far less compact than almost all 1,000 simulated congressional plans. *Id.* at 18 ¶27. From this, Dr. Chen concluded that the enacted congressional plan is significantly less compact than would have been expected from a districting process adhering to the Adopted Criteria. *Id.* at 17-18 ¶¶26-27; PX487.

434. The Court finds that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The Court finds that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

(ii) Analysis of Whether the Congressional Plan is a Statistical Partisan Outlier

435. To compare the partisanship of his simulated plans to the enacted congressional plan, Dr. Chen used census block-level election results from recent statewide elections in North Carolina. PX482 at 21 ¶¶31-32. For his analysis, Dr. Chen used the following ten elections: 2016 US President, 2016 US Senator, 2016 Governor, 2016 Lieutenant Governor, 2016 Attorney General, 2020 US President, 2020 US Senator, 2020 Governor, 2020 Lieutenant Governor, and 2020 Attorney General. *Id.* at 21 ¶31. Dr. Chen aggregated the results of these elections into a single composite, referred to as the "Statewide Election Composite." *Id.* at 22 ¶33.

436. Dr. Chen analyzed these elections because they are the same state and federal offices whose election results were used by the General Assembly during its 2017 legislative redistricting process, and the 2017 redistricting process was the most recent one in which the leadership of the General Assembly's redistricting committees publicly announced how the General Assembly would evaluate the partisanship of its own districting plans. PX482 at 21 ¶31. Additionally, past voting history in federal and statewide elections is a strong predictor of future voting. *Id.* at 20 ¶28.

437. By overlaying these past election results onto the enacted congressional plan, Dr. Chen calculated the Republican share of the votes cast from within each district in the enacted congressional plan and in each simulated plan. PX482 at 20 ¶28. Based on these

calculations, Dr. Chen directly compared the partisanship of the enacted congressional plan and the simulated plans. *Id.* Dr. Chen used these comparisons to determine whether the partisanship of individual enacted districts and the partisan distribution of seats in the enacted congressional plan could reasonably have arisen from a districting process adhering to the Adopted Criteria and its explicit prohibition on partisan considerations. *Id.*

438. The Court finds that the use of statewide elections by Plaintiffs' experts to measure the partisanship of simulated and enacted districts to be a reliable methodology.

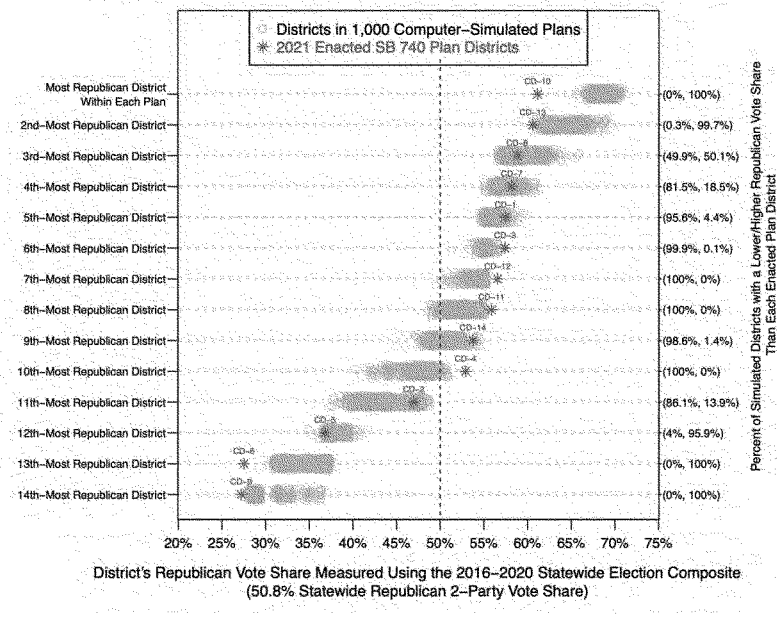
439. To measure the partisanship of his simulated districts and the enacted districts, Dr. Chen obtained precinct-level results for the elections in the ten elections in the Statewide Election Composite and aggregated the census block-level results to the district level. PX482 at 21 ¶32. In other words, using the census blocks that would comprise a particular district in a given simulation and the actual election results from those census blocks, Dr. Chen calculated the percentage total two-party votes in that simulated district for Republican candidates in the 2016-2020 statewide election contests. *Id.* at 21-22 ¶32-33.

440. Figure 4 in Dr. Chen's report compares the partisan distribution of districts in the enacted congressional plan to the partisan distribution of districts in the 1,000 computer-simulated plans:

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Figure 4:

Comparisons of Enacted SB 740 Plan Districts to 1,000 Computer-Simulated Plans' Districts



PX488 (Chen Figure 4)

PX482 at 22 ¶33; *id.* at 23 ¶35.

441. In Figure 4, the enacted congressional plan's districts are ordered from the most to the least-Republican district, as measured by Republican vote share using the Statewide Election Composite. PX482 at 23 ¶35; PX488. The red stars mark enacted districts and are labeled with district numbers, while the gray dots represent the corresponding 1,000 simulated districts. In other words, each row compares one district from the enacted congressional plan to 1,000 computer-simulated districts based on Republican vote share. *Id.* at 23-24 ¶35. The two percentages in parentheses in the right margin of this

Figure report the percentage of these 1,000 simulated districts that are less Republican than, and more Republican than, the enacted congressional plan's district. *Id.* at 26 ¶36.

442. The Court finds, as the bottom row of Figure 4 illustrates, the most-Democratic district in the enacted congressional plan (CD-9) is more heavily Democratic than 100% of the most-Democratic districts in each of the 1,000 computer-simulated plans. PX482 at 26 ¶37; PX488. Every single one of the computer-simulated counterpart districts would have been more politically moderate than CD-9 in terms of partisanship: CD-9 exhibits a Republican vote share of 27.2%, while all 1,000 of the most-Democratic districts in the computer-simulated plans would have exhibited a higher Republican vote share and would therefore have been more politically moderate. *Id.* at 26 ¶36. Based on this, Dr. Chen concluded, and the Court so finds, that CD-9 packs together Democratic voters to a greater extent than the most-Democratic district in 100% of the computer-simulated plans. *Id.* Dr. Chen therefore concluded that CD-9 is an extreme partisan outlier when compared to its 1,000 computer-simulated counterparts, using a standard threshold test of 95% for statistical significance. *Id.* Dr. Chen uses the standard threshold test of 95% for statistical significance throughout his analysis.

443. The Court finds that the same pattern observed for CD-9, exists for CD-6. PX482 at 26-27 ¶38; PX488. Again, CD-6 is more heavily Democratic than 100% of the corresponding second-most-Democratic districts in each of the 1,000 computer-simulated plans. *Id.* Again, every single one of its computer-simulated counterpart districts would have been more politically moderate than CD-6 in terms of partisanship: CD-6 exhibits a Republican vote share of 27.5%, while 100% of the second-most-Democratic districts in the computer-simulated plans would have exhibited a higher Republican vote share and would therefore have been more politically moderate. Chen *Id.* The Court finds, like CD-9, CD-6 packs together Democratic voters to a greater extent than the second-most-Democratic

district in 100% of the computer-simulated plans. *Id.* at 27 ¶38. From these results, Dr. Chen identified CD-6 as an extreme partisan outlier when compared to its 1,000 computer-simulated counterparts, using a standard threshold test of 95% for statistical significance. *Id.*

444. The Court finds that CD-5, the next most Democratic district in the enacted congressional plan, similarly contains more Democratic voters than over 95% of its counterpart simulated plans. PX488.

445. The Court finds that the same partisan skew exists for the two most-Republican districts in the enacted congressional plan. As the top row of Figure 4 illustrates, and the Court so finds, the most-Republican district in the enacted congressional plan (CD-10) is less heavily Republican and more heavily Democratic than 100% of the most-Republican districts in each of the 1,000 computer-simulated plans. PX482 at 27 ¶39; PX488.

446. The Court finds that a similar pattern appears in the second-to-top row of Figure 4, which illustrates that the second most-Republican district in the enacted congressional plan (CD-13) is less heavily Republican and more heavily Democratic than 99.7% of the second-most-Republican districts in each of the 1,000 computer-simulated plans. *Id.*

447. The Court finds that the two most Republican districts (CD-10 and CD-13) and the three most Democratic districts (CD-9, CD-6, and CD-5), which include more Democratic voters than virtually all of their counterpart districts in the 1,000 computer-simulated plans, draw Democratic voters out of the more moderate districts in the enacted congressional plan. PX482 at 27 ¶40. Having fewer Democratic voters in these more moderate districts enhances Republican candidate performance in these districts. *Id.*

448. The Court finds that the middle six rows in Figure 4 confirm this effect. These rows compare the partisanship of districts in the fifth, sixth, seventh, eighth, ninth, and

tenth-most Republican districts (CD-1, 3, 4, 11, 12, and 14) within the enacted congressional plan and the 1,000 computer-simulated plans. For all six districts, the enacted congressional plan district is a partisan outlier; the enacted congressional plan's district is more heavily Republican than over 95% of its counterpart districts in the 1,000 computer-simulated plans, with three being more heavily Republican than 100% of their counterpart districts. PX482 at 28 ¶41; PX488

449. These six enacted congressional plan districts, CD-1, 3, 4, 11, 12, and 14, are more heavily Republican than nearly all of their counterpart computer-simulated plan districts because the five most partisan-extreme districts in the enacted congressional plan, CD-5, 6, 9, 10, and 13, are more heavily Democratic than nearly all of their counterpart districts in the computer-simulated plans. *Id.*

450. Based on these findings, Dr. Chen identified the enacted congressional plan's six most moderate districts, CD-1, 3, 4, 11, 12, and 14 as partisan statistical outliers. PX482 at 28-29 ¶¶42-43. Each of these six districts has a Republican vote share that is higher than over 95% of the computer-simulated districts. *Id.* He also concluded that the four most extreme districts in the enacted congressional plan in terms of partisanship, CD-6, 9, 10, and 13, are partisan statistical outliers. *Id.* Each of these four districts has a Republican vote share that is lower than at least 99.7% of the computer-simulated districts. *Id.* CD-5 likewise is a partisan statistical outlier, containing more Democratic voters than 95.9% of the computer-simulated districts. PX482 at Figure 4. Dr. Chen thus concluded that overall, eleven individual districts in the enacted congressional plan are extreme statistical outliers, exhibiting partisan characteristics that are rarely or never observed in the computer-simulated plan districts. *Id.* at 23 ¶34; *id.* at 29 ¶44.

451. The Court finds that the enacted congressional plan contains 11 districts, CD-1, 3, 4, 5, 6, 9, 10, 11, 12, 13, and 14, that are partisan outliers, which cannot be explained by

adherence to the Adopted Criteria. The Court finds that these enacted congressional districts have partisan compositions that would not have arisen under a map-drawing process that adhered to the Adopted Criteria. The Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

452. The enacted congressional plan's ten most-Republican districts exhibit a significantly narrower range of partisanship than is exhibited by the ten most-Republican districts in each of the computer-simulated plans. PX482 at 30 ¶46. Specifically, the enacted congressional plan's ten most-Republican districts all have Republican vote shares within the narrow range of 52.9% to 61.2%. *Id.* at 29 ¶45. Dr. Chen refers to these districts as "Mid-Range Republican Districts," meaning they favor Republican candidates within this narrow range. *Id.*

453. The creation of ten Mid-Range Republican Districts is an outcome that never occurs in the computer-simulated plans and is therefore an extreme statistical outlier. PX482 at 30 ¶46. Instead, virtually all of the simulated plans contain from two to six Mid-Range Republican Districts, with the most common outcome among the simulations being four such districts. *Id.* Based on this, Dr. Chen concluded that the enacted congressional plan is an extreme partisan outlier in terms of maximizing the number of Mid-Range Republican Districts, and that the enacted congressional plan did so to an extreme degree far beyond any of the 1,000 simulated plans created using a partisan-blind computer algorithm that follows the Adopted Criteria. *Id.*; *see* PX489.

454. The enacted congressional plan's maximization of Mid-Range Republican Districts necessarily results in fewer competitive districts. PX482 at 30 ¶47. The enacted congressional plan contains zero districts in which the Republican vote share is within 5% of the Democratic vote share. *Id.* Dr. Chen labels districts within this range as "Competitive Districts." The enacted congressional plan contains no Competitive Districts as measured

using the Statewide Election Composite. *Id.* at 30 ¶48. Only about 5% of the 1,000 simulated plans fail to have a single Competitive District, and the vast majority of the computer-simulated plans contain two or more such districts. *Id.*; *see* PX490.

455. Dr. Chen's analysis of Mid-Range Republican and Competitive Districts is evidence of the intent and effects of Legislative Defendants' pro-Republican partisan redistricting. Dr. Chen's analysis of Mid-Range Republican and Competitive Districts is evidence that the enacted congressional plan was designed specifically to ensure that Republicans can efficiently and consistently win at least ten congressional seats and that Democrats are packed into the remaining districts. The frequency of Mid-Range Republican and Competitive Districts in the enacted congressional plan would not have occurred under a map-drawing process that adhered to the Adopted Criteria, and the Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

456. Dr. Chen also analyzed the number of total Republican-favoring districts in the enacted congressional plan, which are defined as a district having greater than 50% Republican vote share as measured using the Statewide Election Composite. PX482 at 32 ¶50; Figure 7. While the enacted congressional plan has 10 Republican districts, only 3% of the computer-simulated plans create 10 Republican-favoring districts, and no computer-simulated plan ever creates more than 10 Republican districts. *Id.*

457. Based on these results, in terms of the total number of Republican-favoring districts created by the plan, the enacted congressional plan is a statistical outlier when compared to the 1,000 computer-simulated plans. *Id.* at 32 ¶51. The enacted congressional plan creates the maximum number of Republican districts that ever occurs in any computer-simulated plan, and more Republican districts than 97% of the computer-simulated plans,

which were drawn using a non-partisan districting process adhering to the Adopted Criteria. *Id.*; *see* PX491.

458. Dr. Chen also measured the number of Republican districts that would exist under his simulated plans and the enacted congressional plan under a variety of electoral environments. PX482 at 34 ¶54; *id.* at 86-95; PX513-522 (Figures B1-B10). The ten individual elections in the Statewide Election Composite showed a range of different electoral outcomes, ranging from a Republican vote share of 47.7% to 53.3%. *Id.* at 86-95, PX513-522. Across this range of electoral environments, the enacted congressional plan always creates a 10-4 distribution of seats in favor of Republican candidates. *Id.* at 34 ¶54. Based on this, the enacted congressional plan's 10-4 distribution is durable across a range of electoral conditions. *Id.*

459. Dr. Chen's analysis of the enacted congressional plan under various electoral outcomes is evidence that the enacted congressional plan was designed specifically to ensure that Democrats cannot win more than four congressional seats under any reasonably foreseeable electoral environment. The number of Republican-leaning districts in the enacted congressional plan would be lower under a map-drawing process that adhered to the Adopted Criteria. The Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

460. Dr. Chen also examined the enacted congressional plan as compared to the simulated plans under a variety of methods redistricting scholars commonly use to compare the relative partisan bias of different districting plans.

461. First, Dr. Chen examined the enacted congressional plan's mean-median difference and compared it to the simulated plans. PX482 at 36 ¶59. A plan's mean-median difference is calculated as the mean district-level Republican vote share, minus the median district-level Republican vote share. *Id.* at 35 ¶57.

462. The mean-median difference analysis confirms that the enacted congressional plan creates an extreme partisan outcome that cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria. PX482 at 37 ¶60; PX492.

463. Second, Dr. Chen analyzed another commonly used measure of a districting plan's partisan bias called the efficiency gap. PX482 at 39 ¶62. The efficiency gap provides a measure of the degree to which more Democratic or Republican votes are wasted across an entire districting plan. *Id.* at 40 ¶63. The efficiency gap is calculated using the total sum of surplus votes in districts a party won and lost votes in districts where that party lost. *Id.* at 39-40 ¶62. Dr. Chen found that the enacted congressional plan exhibits an efficiency gap of 19.5%, indicating that the plan results in far more wasted Democratic votes than wasted Republican votes. PX482 at 40-41 ¶66; PX493.

464. The efficiency gap analysis confirms that the enacted congressional plan creates an extreme partisan outcome that cannot be explained by North Carolina's political geography or the Adopted Criteria. *Id.*

465. Third, Dr. Chen analyzed another commonly used measure of a districting plan's partisan bias called the lopsided margins test. PX482 at 43 ¶67. The basic premise of the lopsided margins measure is that a partisan-motivated map-drawer may attempt to pack the opposing party's voters into a small number of extreme districts that are won by a lopsided margin. *Id.* Dr. Chen compared the enacted congressional plan's lopsided margins measure with the computer simulated plans and found that the simulated plans all have a smaller lopsided margins measure than the enacted congressional plan. PX482 at 44 ¶70; PX494.

466. The enacted congressional plan is an extreme outlier compared to the simulated plans on the lopsided margins measure, and the enacted congressional plan's

packing of Democrats into Democratic-favoring districts was not simply the result of North Carolina's political geography, combined with adherence to the Adopted Criteria. *Id.* at ¶71.

467. Fourth, Dr. Chen analyzed another common measure of partisan bias in a districting plan based on the concept of partisan symmetry. PX482 at 46 ¶72. This analysis, which Dr. Chen calls "partisan symmetry based on uniform swing," examines what share of seats a party would win under the enacted congressional plan in a hypothetical tied election. *Id.*

468. Based on the results of this analysis, the enacted congressional plan creates a durable Republican majority for North Carolina's congressional delegation, such that even when Democrats win 50% of the statewide vote, Republicans will still be favored in 10 out of 14 (71.4%) of the congressional districts, while Democrats will only be favored in 4 out of the 14 (28.6%) districts. *Id.* at 47 ¶76; PX495.

469. Based on Dr. Chen's overall statewide conclusions based on his computer simulations, the Court adopts these conclusions and finds that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage.

(iii) Analysis of Whether the Congressional Plan is a Statistical Partisan Outlier at the Regional Level

470. In addition to the above statewide analyses, Dr. Chen also examined the extent to which partisan bias affected the map-drawing process within specific cities and regions of the state. PX482 at 50 ¶79. Dr. Chen found, and the Court so finds, that the enacted congressional plan's districts in each region examined exhibit political bias when compared to the computer-simulated districts in the same regions. *Id.*

471. Dr. Chen first examined the Piedmont Triad area. The enacted congressional plan splits Guilford County into three different districts: CD-7, 10, and 11. PX482 at 50 ¶80.

These three fragments of Guilford County voted solidly Democratic in recent statewide elections but were each combined with more Republican areas in surrounding counties across the Piedmont Triad area. *Id.* This splitting results in CD-7, 10, and 11 being safely Republican, each with a Republican vote share between 55.9% and 61.2%. *Id.*

472. The enacted congressional plan cracked Democratic voters in the region to a greater extent than virtually all of the computer-simulated plans. PX482 at 50 ¶81 - 54 ¶81. The enacted congressional plan achieved this result by creating districts that are significantly less compact than virtually all of the Guilford County districts in the computer-simulated plans. *Id.*; *see* PX496. The vast majority (75.6%) of simulated plans did not split Guilford County a single time, and if the County was split, it was usually split only once. PX497.

473. The Court finds that the three-way splitting of Guilford County and resulting creation of three safe Republican districts in the Piedmont Triad area could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

474. Dr. Chen next conducted similar analyses of the districts in the Research Triangle. PX482 at 56 ¶ 88; PX498. In this area of the state, the enacted congressional plan's Raleigh-based district (CD-5) and Durham-based district (CD-6) are more heavily packed with Democrats than almost 100% of the simulated districts containing Raleigh and Durham. *Id.* CD-5 and CD-6 are also less geographically compact than nearly 100% of the computer-simulated districts containing Raleigh and Durham. PX482 at 56 ¶ 89; PX499.

475. Because the enacted congressional plan packs Democratic voters into CD-5 and CD-6, the surrounding districts are more safely Republican than they would have been in the absence of such packing. PX482 at 56 ¶ 90; PX499. CD-7 is a partisan outlier that was enabled by the packing of Democratic voters in CD-5 (Raleigh) and CD-6 (Durham). *Id.*

476. The Court finds that the enacted congressional plan packs Democrats in its Raleigh-based and Durham-based districts by subordinating geographic compactness in the drawing of CD-5 and CD-6, and this could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

477. Finally, Dr. Chen examined Mecklenburg County. PX482 at 60 ¶91; PX500. The enacted congressional plan's CD-9 is more heavily Democratic than 100% of the simulated plans' districts containing the most of Charlotte. *Id.* As a result, the surrounding suburban districts in the enacted congressional plan, including CD-13 in Northern Mecklenburg County and CD-8 in Eastern Mecklenburg County, are more safely Republican than their geographic counterparts in all of the computer-simulated plans. PX482 at 60 ¶92-93.

478. Based on this data, the enacted congressional plan packed Democrats in Mecklenburg County to an extent greater than what naturally occurs as a result of the area's political geography. PX482 at 60 ¶94.

479. The Court finds that the enacted congressional plans created a Charlotte district that is more heavily Democratic than what could be expected from a partisan-blind map-drawing process, and this could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

480. The Court finds that the packing and cracking of Democrats in the Piedmont Triad Area, the Research Triangle Area, and Mecklenburg County could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria. The enacted congressional map was therefore designed in order to accomplish the legislature's predominant partisan goals.

(iv) Effect of Political Geography

481. Political geography can create a natural advantage for Republicans in Republican vote share in suburban and rural districts, where for example, Democratic voters are clustered in urban areas because of the common districting principle of drawing geographically compact districts. *Id.* at 63 ¶95. But Dr. Chen programmed a computer algorithm that drew simulated plans using North Carolina's unique political geography. *Id 63, ¶96.* As Dr. Chen, explained "the entire premise of conducting districting simulations is to fully account for North Carolina's unique political geography, its political subdivision boundaries, and its districting criteria, as mandated by the Adopted Criteria." *Id.* Thus, the simulation analysis allowed Dr. Chen to identify how much of the electoral bias in the enacted congressional plan is caused by North Carolina's political geography and how much is caused by the map-drawer's intentional efforts to favor one political party over the other. *Id.* at 63-64 ¶97.

482. The Court finds that the enacted congressional plan's partisan bias goes beyond any "natural" level of electoral bias caused by North Carolina's political geography or the political composition of the state's voters, *Id.* at 64 ¶98, and this additional level of partisan bias in the enacted congressional plan can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party, *Id.* at 64 ¶100.

483. Additional, district-specific findings in addition to those made above are as follows:

b. Individual Congressional Districts

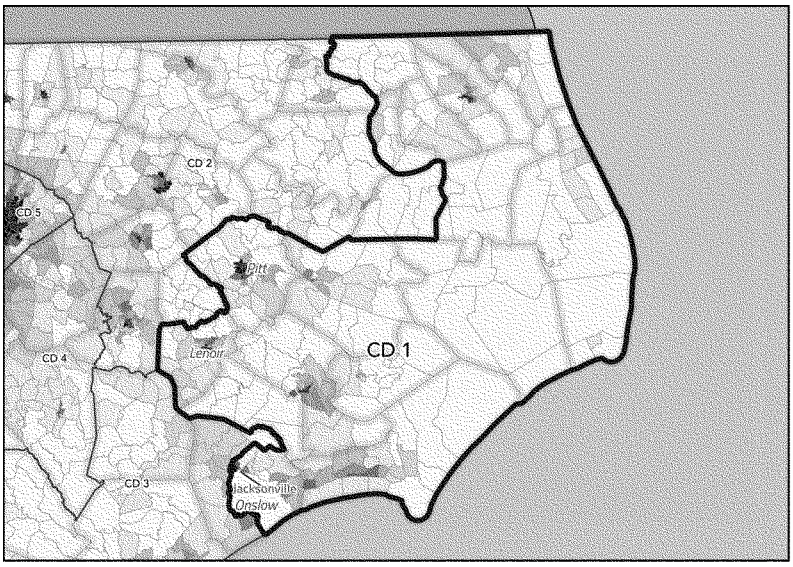
(i) Congressional District No. 1 ("CD1")

484. CD1 is comprised of Beaufort County, Camden County, Carteret County, Chowan County, Craven County, Currituck County, Dare County, Gates County, Hyde County, Jones County, Lenoir County, Pamlico County, Pasquotank County, Perquimans County, Tyrrell County, portions of Onslow County, and portions of Pitt County. Harper Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

485. Individual Harper Plaintiffs Amy Clare Oseroff and Donald Rumph reside in and challenge CD1.

486. CD1 is in the northeastern corner of the state and includes part of the former CD1 and CD3. PX425 at 21. As Dr. Cooper's reported and his map illustrates, Legislative Defendants included the Democratic-leaning areas of Pitt County within CD1, allowing for a greater Republican advantage in bordering CD2, to the west. *Id.*

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PX440 (Cooper Map 5)

487. CD1 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD1, as well as other measures. PX425 at 21.

488. The Court finds this congressional district, CD1, to be the result of intentional, pro-Republican partisan redistricting.

(ii) Congressional District No. 2 ("CD2")

489. CD2 is comprised of Bertie County, Caswell County, Edgecombe County, Franklin County, Granville County, Greene County, Halifax County, Hertford County, Martin County, Nash County, Northampton County, Person County, Vance County, Warren County, Washington County, Wilson County, portions of Pitt County, and portions of Wayne

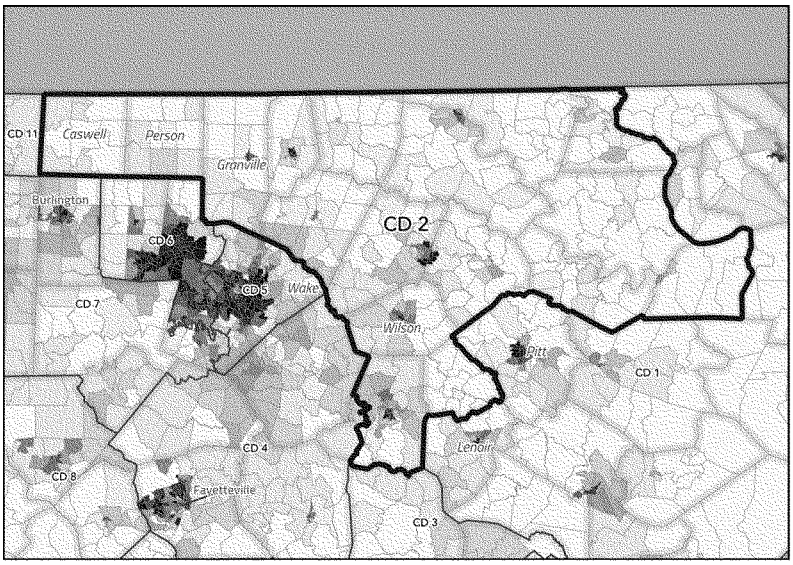
County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

490. Individual Harper Plaintiffs Laureen Flood, Bobby Jones, and Kristiann Herring reside in and challenge CD2. Organizational Plaintiff Common Cause challenges CD2 as well.

491. CD2 stretches from Albemarle Sound, in the east, to the Raleigh-Durham-Chapel Hill metropolitan area and includes Caswell County, northeast of Greensboro, to the west. Washington County and Caswell County have never been paired together in a congressional map in North Carolina's history, no matter which political party was in charge. PX425 at 23; Trial Tr. 01/03/2022.

492. CD2 includes the "core" of former CD1, as well as portions of the former CD4 and CD13. While the former CD1 previously included Pitt County, home to East Carolina University in Greenville, CD2 does not include Pitt County. PX425 at 21-23.

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PX441 (Cooper Map 6)

493. CD2 is now a "competitive" district based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD2, as well as other measures. PX425 at 23. CD2 is "the lone competitive district in the state of North Carolina under the Enacted Maps." Trial Tr. 01/03/2022.

494. Most of the area that comprises CD2 is represented by Democrat G.K. Butterfield in a Democratic-leaning district. Representative Butterfield, who is the longest serving member of North Carolina's congressional delegation, announced that he will not seek re-election after the 2021 Congressional Plan was enacted. PX425 at 23.

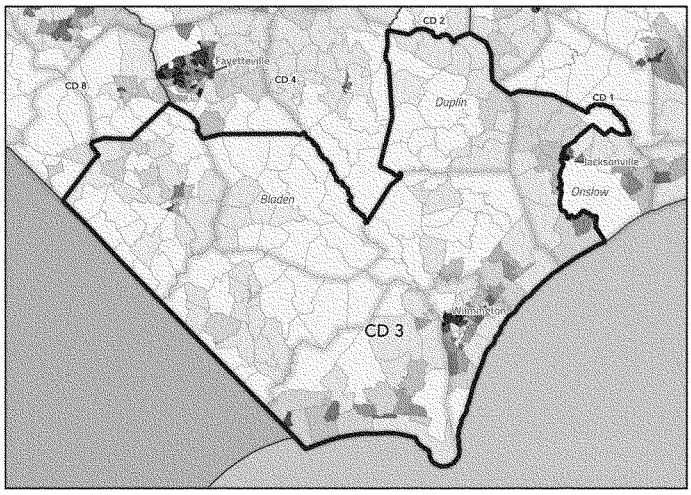
495. The Court finds this congressional district, CD2, to be the result of intentional, pro-Republican partisan redistricting.

(iii) Congressional District No. 3 ("CD3")

496. CD3 is comprised of Bladen County, Brunswick County, Columbus County, Duplin County, New Hanover County, Pender County, portions of Onslow County, and portions of Robeson County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

497. Individual Harper Plaintiff Eileen Stephens resides in and challenges CD3. Organizational Plaintiff NCLCV challenges CD3 as well.

498. CD3 combines portions of the Sandhills, on its western boundary, with the coastal enclave in and around Wilmington and a piece of Onslow County, in the east. CD3 includes portions of three former districts: CD3, CD7, and CD9. PX425 at 25.



PX442 (Cooper Map 7)

499. CD3 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD3, as well as other measures. PX425 at 25.

500. The Court finds this congressional district, CD3, to be the result of intentional, pro-Republican partisan redistricting.

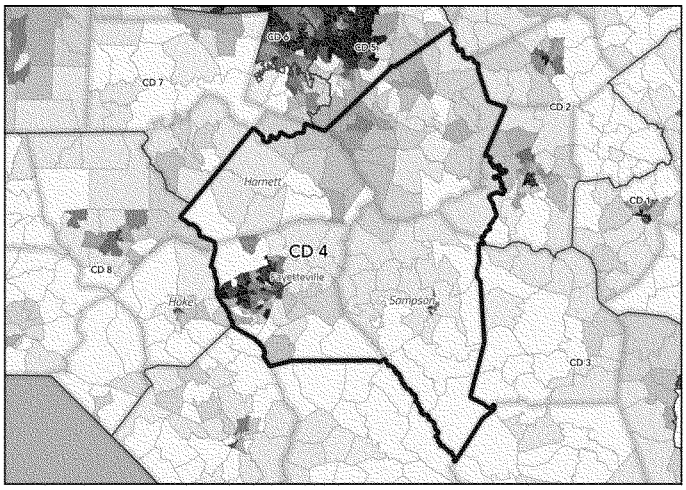
(iv) Congressional District No. 4 ("CD4")

501. CD4 is comprised of Cumberland County, Johnston County, Sampson County, portions of Harnett County, and portions of Wayne County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

502. Individual NCLCV Plaintiff Reverend Reginald Wells and Individual Harper Plaintiffs Gettys Cohen, Jr. and Sarah Taber reside in and challenge CD4. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD4 as well.

503. CD4 contains portions of the Sandhills, including Cumberland and Johnston counties along with parts of Harnett and Wayne counties. CD4's boundaries thereby combine the Democratic-leaning areas in Fayetteville with Republican-leaning areas that were in the former CD7 and CD8. PX425 at 27.

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PX443 (Cooper Map 8)

504. CD4 does not contain the residence of an incumbent congressional representative. CD4 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD4, as well as other measures. PX425 at 27.

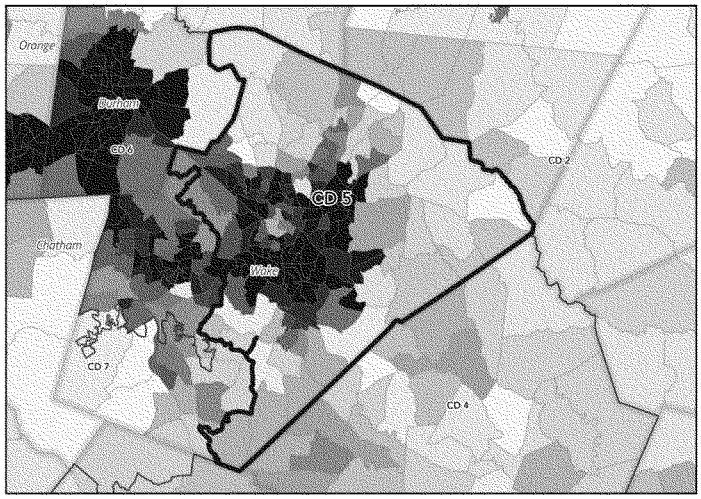
505. The Court finds this congressional district, CD4, to be the result of intentional, pro-Republican partisan redistricting.

(v) Congressional District No. 5 ("CD5")

506. CD5 is comprised of portions of only Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

507. Individual Harper Plaintiff John Anthony Balla resides in and challenge CD5. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD5 as well.

508. CD5 sits entirely within Wake County and is one of the three districts that includes a part of that county. Trial Tr. 01/03/2022. It is made up of portions of former CD2 and CD4 and packs the Democratic voters in these heavily-Democratic areas into one district, increasing the probability that Republican candidates will win in the adjacent districts. PX425 at 29.



PX444 (Cooper Map 9)

509. CD5 is likely to elect a Democratic candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD5, as well as other measures. PX425 at 29.

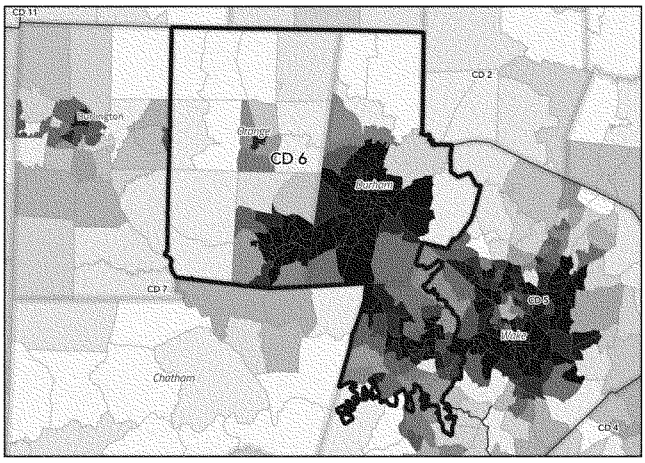
510. The Court finds this congressional district, CD5, to be the result of intentional, pro-Republican partisan redistricting.

(vi) Congressional District No. 6 ("CD6")

511. CD6 is comprised of Durham County, Orange County, and portions of Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

512. Individual NCLCV Plaintiffs Henry M. Michaux, Jr. and Katherine Newhall and Individual Harper Plaintiffs Rebecca Harper and Sondra Stein reside in and challenge CD6. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD6 as well.

513. CD6 is another district including parts of Wake County and combines portions of the former CD4 and CD2.



PX445 (Cooper Map 10)

514. CD6 is a really good example of packing Democratic voters across multiple counties and adds a greater proportion of Democratic voters into a single district than any district from the former congressional plan, increasing the probability that Republicans can

win in the adjacent districts. There are only four marginally Republican-leaning VTDs in CD6. PX425 at 31; Trial Tr. 01/03/2022.

515. CD6 is likely to elect a Democratic candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD6, as well as other measures. PX425 at 31.

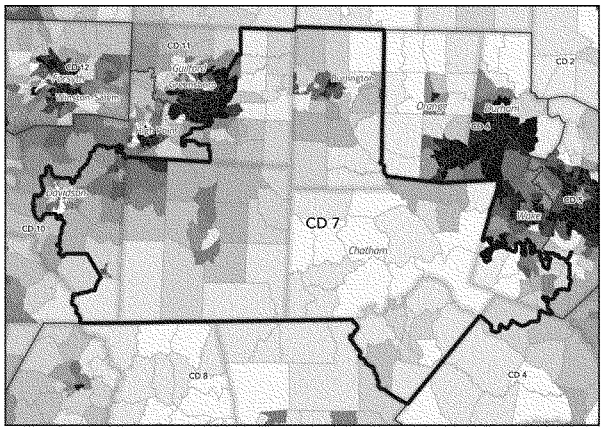
516. The Court finds this congressional district, CD6, to be the result of intentional, pro-Republican partisan redistricting.

(vii) Congressional District No. 7 ("CD7")

517. CD7 is comprised of Alamance County, Chatham County, portions of Davidson County, portions of Guilford County, portions of Harnett County, Lee County, Randolph County, and portions of Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

518. Individual Harper Plaintiffs Lily Nicole Quick and Ron Osborne reside in and challenge CD7. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD7 as well.

519. CD7, one of three districts to include parts of Guilford county. is made up of portions of former CD2, CD4, CD6, and CD13. The boundaries of CD7 split Guilford and Wake counties but do not include the most Democratic-leaning VTDs in those counties within the district. PX425 at 33.



PX446 (Cooper Map 11)

520. CD7 leans heavily towards the Republican Party and is going to be a Republican district as a result of how this district is drawn alongside CD6. Trial Tr. 01/03/2022. CD7 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD7, as well as other measures. PX425 at 33.

521. Because District 7 is drawn to include several heavily Republican counties while carefully avoiding concentrations of Democratic voters, the result is a district that will reliably elect Republicans to office; in Dr. Duchin's analysis of 52 elections, District 7 never once elects a Democrat. PX201 "SL-174" A8:BA8.

522. As a result of packing in Congressional District 6, and cracking in Guilford County, District 7 is less compact. District 7 has a Polsby-Popper compactness score of only 0.20 (on a scale of 0 to 1, where 1 is the most compact). PX150 at 14. It was not necessary to trisect Wake County in this manner.

523. The Court finds this congressional district, CD7, to be the result of intentional, pro-Republican partisan redistricting.

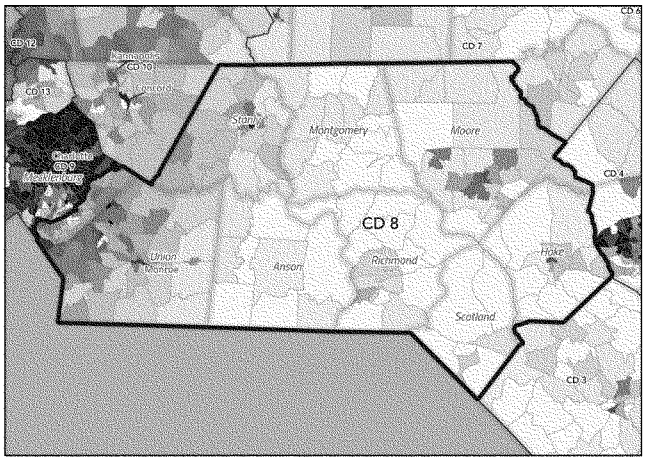
(viii) Congressional District No. 8 ("CD8")

524. CD8 is comprised of Anson County, Hoke County, portions of Mecklenburg County, Montgomery County, Moore County, Richmond County, portions of Robeson County, Scotland County, Stanly County, and Union County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

525. Individual Harper Plaintiff Barbara Proffitt resides in and challenges CD8. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD8 as well.

526. CD8 includes portions of the Sandhills, stretching from the eastern side of Mecklenburg County, in the west, to include Hoke and Scotland counties, in the east. It is one of three districts to contain portions of Mecklenburg County and is made up of portions of former CD8, CD9, and CD12. CD8's western boundary splits Mecklenburg County in such a way that the most Democratic-leaning VTDs within that county fall outside of CD8. PX425 at 35.

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PX447 (Cooper Map 12)

527. CD8 is likely to elect a Republican candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD8, as well as other measures. PX425 at 35.

528. The Court finds this congressional district, CD8, to be the result of intentional, pro-Republican partisan redistricting.

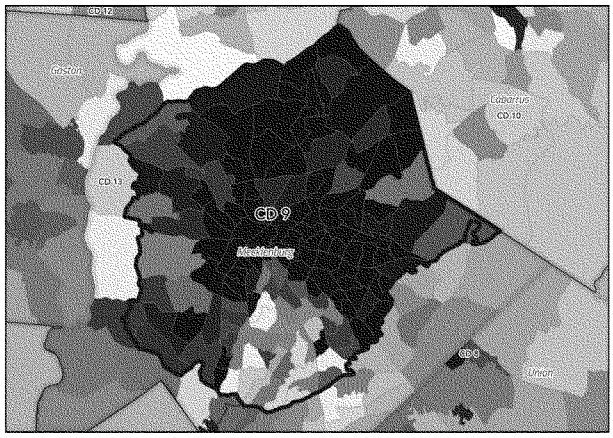
(ix) Congressional District No. 9 ("CD9")

529. CD9 is comprised of portions of only Mecklenburg County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

530. Individual Harper Plaintiff Virginia Walters Brien resides in and challenges CD9. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD9 as well.

531. CD9, one of three districts to contain portions of Mecklenburg County, sits wholly within Mecklenburg County and includes portions of the former CD9 and CD12. CD9

packs the most-Democratic VTDs in Mecklenburg County within one district, while most Republican-leaning and competitive VTDs are placed outside its boundaries, in CD13 to the west and CD8 to the east, allowing those districts to be more favorable to Republican candidates. PX425 at 37.



PX448 (Cooper Map 13)

532. CD9 is likely to elect a Democratic candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD9, as well as other measures. PX425 at 37. Mecklenburg County need not have been fractured three times, and District 9 need not have been "packed."

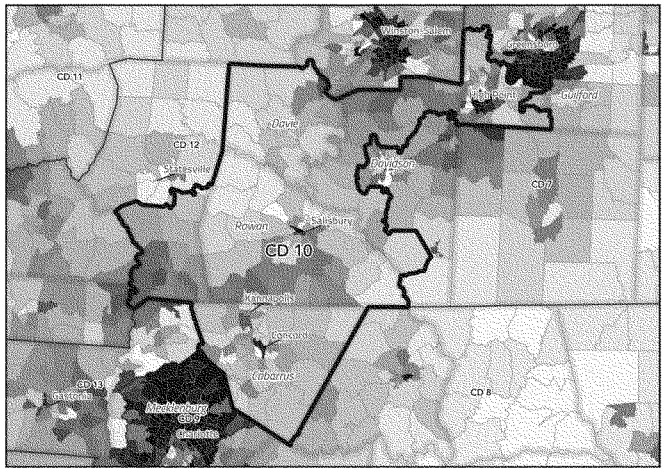
533. The Court finds this congressional district, CD9, to be the result of intentional, pro-Republican partisan redistricting.

(x) Congressional District No. 10 ("CD10")

534. CD10 is comprised of Cabarrus County, portions of Davidson County, Davie County, portions of Guilford County, portions of Iredell County, and Rowan County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

535. Individual Harper Plaintiffs Shawn Rush, Joshua Perry Brown, and Donald M. MacKinnon reside in and challenge CD10. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD10 as well.

536. CD10, one of three districts to contain portions of Guilford County, combines portions of former CD6, CD9, CD10, and CD13. PX425 at 39. CD10 includes heavily-Democratic VTDs in High Point, within Guilford County, as well as Democratic-leaning VTDs in Salisbury, Kannapolis, and Concord, in Rowan and Cabarrus counties. *Id.* at 40. But CD10 separates the Democratic voters in those areas from other pockets of Democratic voters just across CD10's boundaries in Guilford, Forsyth, and Mecklenburg counties. *Id.*



PX449 (Cooper Map 14)

537. While North Carolina's Piedmont Triad (High Point, Winston-Salem, and Greensboro) was previously kept together in one district (former CD6), the Piedmont Triad—and the Democratic voters there—are split across three districts, CD10, CD11, and CD12. PX425 at 39.

538. Because District 10 cuts west to avoid Democratic populations in central Davidson County and then turns 90 degrees to the south, bringing within its bounds Republican voters as distant as the suburbs of Charlotte, District 10 has a Polsby-Popper score of just 0.20. PX150 at 14.

539. The former CD6 is represented by Democrat Kathy Manning, who is now "double-bunked" with Republican Virginia Foxx in CD11, a Republican leaning district. PX425 at 4.

540. CD10 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD10, as well as other measures. PX425 at 39.

541. Because of the way in which the Enacted Plan divides the county's Democratic voters, Districts 7, 10, and 11 do not elect a Democrat in a single one of the 52 elections Dr. Duchin studied. PX201 "SL-174" A8:BA9, A11:BA11. Just as with Mecklenburg and Wake Counties, there was no need to trisect Guilford County into CD7, CD10, and CD11 in this manner.

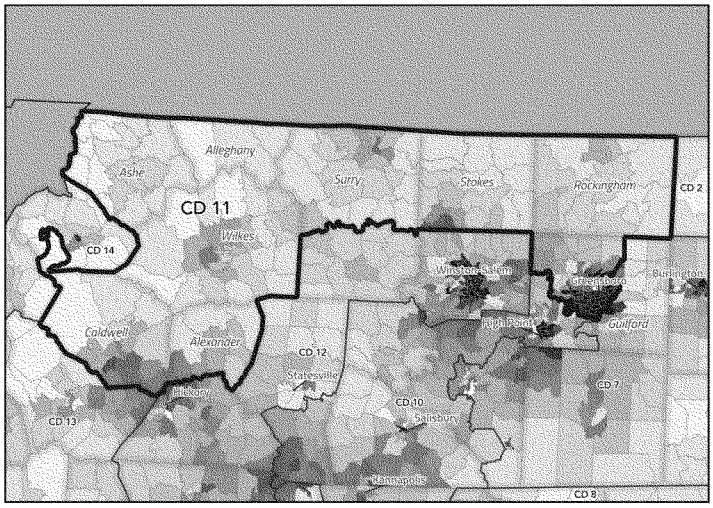
542. The Court finds this congressional district, CD10, to be the result of intentional, pro-Republican partisan redistricting.

(xi) Congressional District No. 11 ("CD11")

543. CD11 is comprised of Alexander County, Alleghany County, Ashe County, Caldwell County, portions of Guilford County, Rockingham County, Stokes County, Surry County, portions of Watauga County, and Wilkes County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

544. Individual NCLCV Plaintiffs Dandrielle Lewis and Talia Fernos and Individual Harper Plaintiff David Dwight Brown reside in and challenge CD11. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD11 as well.

545. CD11, one of three districts to contain portions of Guilford County, is made up of portions of the former CD5, CD6, and CD10. PX425 at 41.



PX450 (Cooper Map 15)

546. Caldwell County, in the west, and Rockingham, in the east, have never shared a congressional representative in the history of North Carolina. Some of the locations in CD11—particularly the "high country" areas in Watauga and Ashe counties and Greensboro, in the Piedmont—sit in different media markets, with different area codes. PX425 at 41; Trial Tr. 01/03/2022.

547. CD11 includes the Democratic-leaning VTDs in Greensboro in the same district as heavily-Republican VTDs to the north and the west in an "overwhelmingly Republican district," thereby ensuring that Greensboro voters will not be represented by a Democrat. PX425 at 41.

548. District 11's boundaries, by bending to avoid Forsyth County and stretching far west through Republican-majority counties all the way to the Tennessee border, result in a Polsby-Popper score of just 0.21. PX150 at 14.

549. The portion of CD11 that includes the residence of Republican incumbent Virginia Fox is a tiny sliver of Watauga County that is connected to Caldwell County by a narrow passage of land that is roughly three miles wide and requires a traverse of the Daniel Boone Scout Trail. PX425 at 41-42. This inclusion leads to a double bunking with a Republican and incumbent Democrat in another current district together in a new district that leans heavily towards the Republican Party. Trial Tr. 01/03/2022.

550. CD11 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD11, as well as other measures. PX425 at 41.

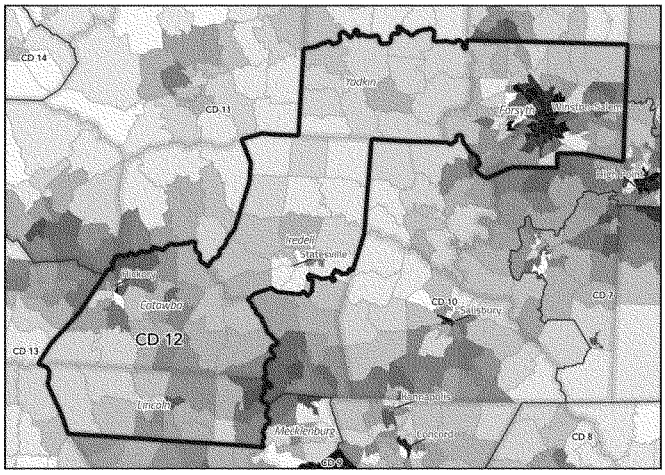
551. The Court finds this congressional district, CD11, to be the result of intentional, pro-Republican partisan redistricting.

(xii) Congressional District No. 12 ("CD12")

552. CD12 is comprised of Catawba County, Forsyth County, portions of Iredell County, Lincoln County, and Yadkin County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

553. Individual Harper Plaintiff Chenita Barber Johnson resides in and challenges CD12. Organizational Plaintiff NCLCV challenges CD12 as well.

554. CD12 stretches from Lincoln County, in the southwest, through Catawba, Iredell, Yadkin, and Forsyth counties, in the northeast. PX425 at 43. CD12's boundaries separate the Democratic-leaning VTDs in Winston-Salem and the Democratic-leaning VTDs in High Point (in CD10), combining Winston-Salem with Republican-leaning VTDs further south. PX425 at 44. Republican incumbent Patrick McHenry currently resides in the southeast corner of CD12, on the other end of the district from Winston-Salem. PX425 at 43.



PX451 (Cooper Map 16)

555. CD12 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD12, as well as other measures. PX425 at 43.

556. The Court finds this congressional district, CD12, to be the result of intentional, pro-Republican partisan redistricting.

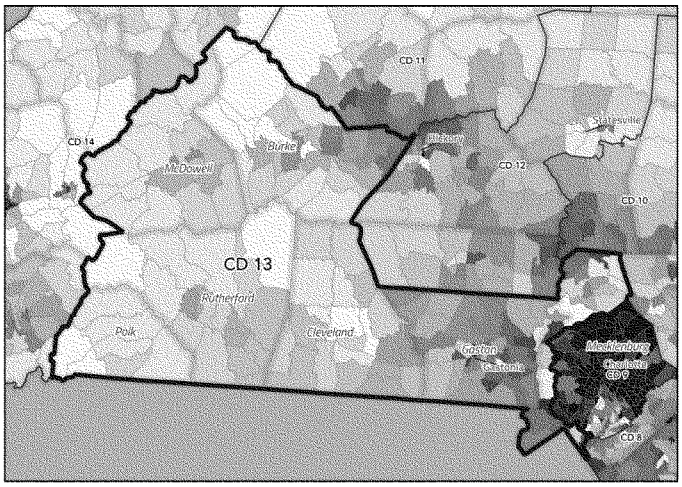
(xiii) Congressional District No. 13 ("CD13")

557. CD13 is comprised of Burke County, Cleveland County, Gaston County, McDowell County, portions of Mecklenburg County, Polk County, and Rutherford County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

558. Individual NCLCV Plaintiff Timothy Chartier and Individual Harper Plaintiff Mary Elizabeth Voss reside in and challenge CD13. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD13 as well.

559. CD13, one of three districts to include portions of Mecklenburg County, is made up of portions of former CD5, CD10, CD11, and CD12. *Id.* Until the 2021 Congressional Plan, Polk County and Mecklenburg County have never been included in the same congressional district. PX425 at 45.

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PX452 (Cooper Map 17)

560. CD13 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD13, as well as other measures. PX425 at 45.

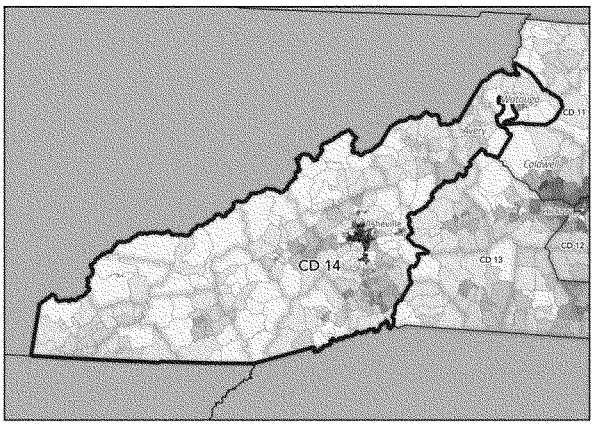
561. The Court finds this congressional district, CD13, to be the result of intentional, pro-Republican partisan redistricting.

(xiv) Congressional District No. 14 ("CD14")

562. CD14 is comprised of Avery County, Buncombe County, Cherokee County, Clay County, Graham County, Haywood County, Henderson County, Jackson County, Macon County, Madison County, Mitchell County, Swain County, Transylvania County, portions of Watauga County, and Yancey County. Harper Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

563. Individual Harper Plaintiffs Richard R. Crews, Mark S. Peters, Kathleen Barnes, and Ann Butzner reside in and challenge CD14. Organizational Plaintiff NCLCV challenges CD14 as well.

564. CD14 sits in the southwestern corner of the state and includes most of the former CD11, as well as part of Watauga County, to the northeast. PX425 at 47. The former CD11 also included "Republican strongholds" of Polk and McDowell counties, as well as part of Rutherford County, which are now placed in CD13. *Id.* Watauga County has not been in the same congressional district with the southwestern end of the state since 1871, before Graham and Swain counties were in existence. *Id.*



PX453 (Cooper Map 18)

565. CD14 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD14, as well as other measures. PX425 at 47.

566. The Court finds this congressional district, CD14, to be the result of intentional, pro-Republican partisan redistricting.

C. Elections are Decided by any Number of Factors

567. All of Plaintiff's statistical experts, except Dr. Pegden, used as a baseline or point of comparison nonpartisan maps to determine whether the Enacted Maps are partisan "outliers." Even Plaintiffs would have to concede that under *Stephenson,* the General Assembly is at least, to some degree, allowed to draw districts for partisan advantage. The experts' analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible.

568. Many of the opinions of the experts at trial were informed by either the vote share of a party on a single or aggregated statewide race or races. These statewide races include presidential and gubernatorial races as well as Attorney General, Judicial and Council of State races. These statewide races have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina. The function and responsibilities of our legislature and our members of congress differ from these statewide and national offices. Also, these races do not take into account the individual needs and issues that are important to each of the 170 legislative districts and 14 congressional districts at issue. They also treat the candidates as inanimate objects in that they do not consider the personality or qualifications of each candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate. Moreover, these opinions assume that voters will vote along party lines. Testimony of the experts that by considering many statewide races across a significant period of time somehow washes these considerations out is not persuasive. In effect, they believe the computer can take the human element out of the human. That is a process we doubt they can do and hope will never happen.

569. Notwithstanding these doubts, we conclude based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting.

IV. Intentional Racial Discrimination and Racial Vote Dilution Claims

A. Intentional Racial Discrimination

1. Direct Evidence

570. There is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans.

571. The Adopted Criteria expressly proscribed the use of data identifying the race of individuals or voters in the construction or consideration of districts in the Enacted Plans while also requiring each redistricting committee to draw districts that comply with the Voting Rights Act.

572. There also is no evidence that the Enacted Plans were evaluated based on racial considerations after the respective congressional, Senate, and House plans were selected and prior to enactment. Defendants Expert Dr. Lewis stated that he was only asked to do the RPV study after he was retained on November 12, 2021. Trial Tr. 01/05/2022.

2. Circumstantial Evidence

a. Recent Race-Based Redistricting Litigation

573. The General Assembly's intentional racial gerrymandering has been subject to judicial review in multiple cases over the past decade.

574. First, in *Dickson v. Rucho*, 367 N.C. 542 (2014), the plaintiffs challenged North Carolina's redistricting plans for the North Carolina Senate, House of Representatives, and Congressional delegation as unconstitutional racial gerrymanders. 367 N.C. at 548.

575. The three-judge panel that heard the challenges concluded that 26 of the challenged districts were predominately motivated by race, and thus were subject to strict

scrutiny and determined that these districts were intended by the General Assembly to be "VRA districts" that necessarily required the drafters to classify residents by race. *Id.* at 551. The Supreme Court of North Carolina determined that the consideration of race to the degree necessary to comply with Section 2 of the VRA does not rise to the level of a "predominate motive," though this was not fatal to the order, *Id.* at 522, because of the three-judge panel's determination that compliance with Section 2 and Section 5 of the VRA are compelling state interests. *Id.* at 562-563.

576. The Supreme Court of the United States reviewed this decision, vacated the judgment, and remanded the case for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See Dickson v. Rucho*, 368 N.C. 481, 484 (2015). The Supreme Court of North Carolina, again, affirmed the ruling of the three-judge panel, determining that the trial court did the appropriate district-by-district analysis without giving improper weight to population equalization. 368 N.C. at 485.

577. Second, in *Covington v. North Carolina*, 316 F.R.D. 176 (M.D.N.C. 2016), the plaintiffs challenged North Carolina state legislative redistricting plans as unconstitutional racial gerrymanders. The court determined that race was the predominate factor motivating the drawing of all the challenged districts, based on the redistricting committee's criteria of creating "VRA districts" that reach a 50%-plus-one BVAP threshold first, *Id.* at 130-31, and that the defendants had not shown that their use of race was reasonably necessary to remedy a violation of Section 2 of the VRA because they had not demonstrated that any of the districts challenged were based on evidence that the majority votes sufficiently as a bloc, pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). 316 F.RD. at 124. The court ordered new maps be drawn. *Id.*

b. Plaintiff Common Cause's Expert James Leloudis, II

578. Dr. James Leloudis, a professor of history at the University of North Carolina at Chapel Hill, submitted an expert report and was accepted as an expert during trial for Plaintiff Common Cause in the areas of North Carolina history, politics, race relations, and government policy. Trial Tr. 01/04/2022.

579. Dr. Leloudis received his B.A. and Ph.D. from the University of North Carolina at Chapel Hill, and M.A. from Northwestern University. PX1486 (Leloudis Report) p. 4.

580. Dr. Leloudis' primary expertise is in the history of the United States, with specialization in the history of race, politics, labor, and reform in the 19th and 20th century American South. *Id.* Dr. Leloudis conducted qualitative research on the history of race, voting rights, voter suppression, and redistricting in North Carolina, from the end of the Civil War to the present. He examined the historical context for recent attempts to limit minority citizens' voting rights and ability to elect candidates of their choice. PX1486 (Leloudis Report) p. 5.

581. North Carolina has had a long and cyclical history of suppressing minority political participation. Over the last century and a half, there have been numerous instances where white conservatives have employed a variety of measures to limit the rights of racial and ethnic minorities. PX1486 (Leloudis Report) p. 77.

582. Dr. Leloudis found that although Republicans may claim that the redistricting process was conducted race-blind, accepting this contention "asks us to believe that history has ended and that in a society deeply scarred by slavery and Jim Crow, race no longer matters; and that politicians vying for public office in the racially polarized America of the 21st century lack an intimate knowledge of where people live and how they vote." PX1486 (Leloudis Report) p. 77.

B. Racial Vote Dilution

583. As noted above, the process in creating the Enacted Plans deviated from past procedure in not following *Stephenson* by drawing VRA districts first.

1. The Parties' Experts

a. NCLCV Plaintiffs' Expert Dr. Duchin

584. Dr. Moon Duchin, as noted above, submitted an expert report on behalf of NCLCV Plaintiffs. PX150. During trial, Dr. Duchin was accepted as an expert witness.

585. Dr. Duchin used well-recognized ecological inference statistical tools to assess racial voting trends in North Carolina and to determine if racial vote polarization persists today. *Id.* at 11. She designated 8 elections (4 generals and 4 primaries)—by prioritizing more recent elections that had a Black candidate on the ballot, that was polarized, and close enough to produce variation at the district level—to determine the opportunity to elect Blacks' candidates of choice. *Id.* at 11.

586. Dr. Duchin found that there is a consistent pattern of polarization in statewide general elections. More specifically, the Enacted Congressional districts had two effective districts for Black voters while the NCLCV map had four effective districts. The Enacted Senate map had eight effective districts while the NCLCV map had 12 effective districts. The Enacted House districts were effective for Black voters in 24 districts, while the NCLCV map had 36 effective districts. *Id.* at 12.

587. During trial, however, Dr. Duchin was asked about conducting a *Gingles* analysis, to which Dr. Duchin stated she did do *Gingles* two and three, by doing an RPV analysis, but didn't do *Gingles* one. Trial Tr. 01/04/2022. When asked whether a district-by-district analysis was conducted, Dr. Duchin stated that the EI is run on the statewide basis, but it makes inferences about every precinct's preferences. Trial Tr. 01/04/2022.

b. Plaintiff Common Cause's Expert Jonathan Mattingly

588. In his addendum report, Dr. Mattingly examined the correlation between the fraction of the black voting age population and the partisan makeup of (i) the North Eastern cluster choices in the North Carolina State Senate, and (ii) the districts within the Duplin-Wayne county cluster in the North Carolina State House. PX1485 (Mattingly Addendum) at 1.

589. The enacted plan splits the Black voters roughly in half between the two districts, whereas the other potential clustering would have concentrated Black voters into one of the two districts. PX1485 (Mattingly Addendum) at 2. Additionally, the enacted plan leads to two stable Republican districts when measured across a range of historic voting patterns. *Id.* In contract, the alternate clustering would have allowed the district with the larger BVAP (42.33% BVAP) to reliably elect a Democratic candidate. *Id.* Thus, the chosen cluster is the choice that favors the Republican Party and significantly fractures Black voters in that area. *Id.*

590. In examining the Duplin-Wayne cluster, Dr. Mattingly used the 2020 Governor race and plotted the relationship between the BVAP and the vote fraction in the ensemble maps he created and the exacted plan. PX1485 (Mattingly Addendum) at 2. Using this analysis, it is possible to draw districts with significantly higher BVAPs and raising the BVAP would likely raise the Democratic vote fraction. *Id.* Trial Tr. 01/04/2022.

c. Defendants' Expert Jeffrey Lewis

591. Dr. Jeffery B. Lewis, a Professor of Political Science at UCLA, received a B.A. in Political Science and Economics from Wesleyan University. He received a Ph.D. in Political Science from the Massachusetts Institute of Technology. LDTX109 at 1-2 (Lewis Rep.).

592. Dr. Lewis specializes in quantitative political methodology with a focus on making inferences about preferences and behavior from the analysis of voting patterns in the

mass public and in legislatures. *Id.* at 2. He submitted an expert report and was accepted as an expert witness on behalf of Legislative Defendants in the areas of political methodology and racial bloc voting analysis. Trial Tr. 01/05/2022.

593. Dr. Lewis presented summaries of the results of North Carolina general and Democratic primary election contests held in 2014, 2016, 2018, and 2020. He considered how each contest would have turned out if only the votes of those residing in each current and in each enacted State House, State Senate, and Congressional district had been counted. This allowed for the consideration of the voting strength of Black voters in each existing and proposed legislative district. *Id.* at 2.

594. For each of the reconstituted elections in each district, Dr. Lewis used weighted ecological regression (ER) to estimate the degree of Black voter cohesion and non-Black voter crossover. He omitted contest-district combinations where the number of voting precincts available for the analysis or Black share of voters was too small. *Id.* at 3. He evaluated 420 individual contests including over 190 that included a Black candidate. *Id.* at 5-6. He then used and relaxed, without endorsing, Dr. Duchin's definition of effective Black districts (greater than 75% Black preferred win rate in races with minority candidates combined with greater than 25% BVAP). *Id.* at 6.

595. Using Dr. Duchin's definition of effective Black districts against Dr. Lewis's data set and comparing it with more relaxed requirements of this definition, the Court finds that in no district, enacted or in 2020, does it appear that a majority of BVAP is needed for that district to regularly generate majority support for minority-preferred candidates in the reconstituted elections. *Id.* at 7.

2. A District-by-District Analysis of Racial Vote Dilution Is Not Necessary

596. Plaintiffs failed to set forth racial polarization data supporting a district-by-district analysis and relied solely on an argument as to the process as a whole.

597. Race was not the predominant, overriding factor in drawing the districts in the Enacted Plans.

598. The General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations.

V. Whole-County Provision Claim

599. The Senate Districts in which counties were divided in their formation are as follows: 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 25, 26, 27, 28, 29, 31, 32, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, and 50. S.L. 2021-173.

600. Across all fifty Senate Districts, eighty-five (85) counties were kept whole and fifteen (15) counties were divided in the formation of a Senate District. S.L. 2021-173.

601. In the Senate District County Groupings, there are a total of 97 county boundary traversals (*i.e.*, the number of times a district crosses between adjacent counties within a grouping). PX150 at 17.

602. The House Districts in which counties were divided in their formation comprise 107 total House Districts, with the following House Districts being the only districts comprised solely of whole counties: 5, 12, 22, 23, 27, 48, 65, 67, 86, 97, 118, 119, and 120. S.L. 2021-175.

603. Across all 120 House Districts, sixty-three (63) counties were kept whole and thirty-seven (37) counties were divided in the formation of a House District. S.L. 2021-175.

604. In the House District County Groupings, there are a total of 69 county boundary traversals. PX150 at 17.

605. The number of persons in each state legislative district must be within plus or minus 5% of the ideal district population and, as determined under the most recent federal decennial census, this is a population of 86,995 in the House and 208,788 in the Senate. PX150 at 12; LDTX107 at 22.

606. NCLCV Plaintiffs present the sole challenge under the Whole County Provisions of the North Carolina Constitution, N.C. Const. art. II, §§ 3(3) and 5(3), and challenge Senate Districts 1, 2, 43, 44, 47, 50, 46, 49, and 48, and House Districts 1 and 79 as impermissibly traversing county lines in violation of the respective Whole County Provisions.

607. The North Carolina Constitution requires that State House and Senate districts comply with a series of requirements adopted to implement the Constitution's Whole County Provisions, including establishing districts within county groupings.

608. In several regions, multiple county groupings were possible under our Supreme Court's interpretation of the Whole County Provisions. In such instances, groupings were chosen from the range of legally possible groupings, as identified in the Duke Academic Paper.

609. NCLCV Plaintiffs do not bring a VRA claim, and there is on the record before the Court no evidence that majority-minority districts under Section 2 of the VRA are required anywhere in North Carolina, such that a deviation from these chosen county groupings is necessary to comply with the VRA.

610. The face of S.L. 2021-173 shows, and NCLCV Plaintiffs do not offer evidence to the contrary, that SD1, SD2, and SD 48 do not traverse county lines and are, therefore, each comprised of only whole counties.

611. Within each remaining county grouping containing a district challenged under the Whole County Provisions, the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria.

VI. Individual and Organizational Plaintiffs' Standing

A. Individual NCLCV Plaintiffs

612. Individual NCLCV Plaintiffs reside in North Carolina Congressional Districts 2, 4, 6, 11, and 13. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these Congressional Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

613. Individual NCLCV Plaintiffs reside in North Carolina Senate Districts 2, 12, 20, 27, and 37. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these Senate Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking. Furthermore, some are located in counties that have been divided in the formation of the Senate Districts and which further contribute to the resulting partisan packing and cracking.

614. Individual NCLCV Plaintiffs reside in North Carolina House of Representatives Districts 6, 27, 29, 58 and 98. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these House Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking. Furthermore, some are located in counties that have been divided in the formation of the House Districts and which further contribute to the resulting partisan packing and cracking.

B. Individual Harper Plaintiffs

615. Individual Harper Plaintiffs reside in all North Carolina Congressional Districts. PX400-424. As shown by the Individual Harper Plaintiffs residing in these Congressional Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking:

616. Individual Harper Plaintiffs reside in North Carolina Senate Districts 1, 18, 19, 27, 32, 40, 41, 46, and 49. PX400, 405, 407, 408, 410, 412, 413, 414, 415, 416, and 418. As shown by the Individual Harper Plaintiffs residing in these Senate Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

617. Individual Harper Plaintiffs reside in North Carolina House Districts 2, 8, 9, 10, 21, 40, 58, 59, 60, 62, 72, 101, 102, 103, and 115. PX400, 402, 405, 407, 408, 410, 411, 412, 414, 416, 418, 419, 420, 421, 422, 423, and 424. As shown by the Individual Harper Plaintiffs residing in these House Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

C. North Carolina League of Conservation Voters

618. Organizational Plaintiff NCLCV is a "nonpartisan nonprofit advocacy organization whose mission is to protect the health and quality of life for all North Carolinians, by fighting to build a better world with clean air, clean water, clean energy, and a safe climate, all protected by a just an equitable democracy." NCLCV Compl. ¶ 11; PX203 ¶ 3. NCLCV attempts to complete this mission by helping to "elect legislators and statewide

candidates who share it's values," and working "to hold elected official accountable for their votes and actions." *Id.*

619. Plaintiff NCLCV has members who reside in every challenged North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives district. PX203 ¶ 5.

620. Plaintiff NCLCV's interests it seeks to protect in this litigation are its ability to effectively advocate for candidates who will protect the environment, its ability to build a pro-environment majority, and its ability to hold legislators accountable, which is frustrated by the predetermining of elections they allege will occur under the Enacted Plans. NCLCV Compl. ¶ 12; PX203 ¶ 6.

621. The partisan composition of the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives Districts significantly affect NCLCV's ability to fulfill its mission and purpose because pro-environment candidates will often be unable to win individual elections and will certainly not be able to win individual elections. Additionally, when incumbent legislators know their seats and their majorities are safe regardless of their votes on legislation, NCLCV cannot fulfil its mission of "[i]nstill[ing] fear into NC's elected leaders of the consequences of taking anti-environment actions." PX203 ¶ 6. Additionally, when potential pro-environment candidates do not believe they can win, they are less likely to run for office. *Id.* at ¶ 7. Lastly, it will diminish the effectiveness of NCLCV's limited funds and resources and so will require the expenditure of more resources while at the same time making fundraising more difficult. *Id.* at 8-9.

622. Plaintiff NCLCV's interests it seeks to protect in this litigation on behalf of its members are the ability of its members' efforts to address environmental harms. NCLCV Compl. ¶ 13; PX203 ¶ 12.

623. Neither the claims asserted, nor the relief requested, by Plaintiff NCLCV requires the participation of individual members in the lawsuit.

D. Common Cause

624. Organizational Plaintiff-Intervenor Common Cause is "a non-profit nonpartisan democracy organization with over 1.5 million members and local organizations in 30 states, including North Carolina." Common Cause Compl. ¶ 17; PX1480 ¶ 2. Common Cause is "dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people." *Id;* PX1480 ¶ 5. The organization attempts to meet this goal by assisting voters in navigating the elections process, providing resources for voters to determine their districts and their polling locations, and mobilizing voters to engage in political advocacy. Common Cause also advocates for redistricting reform. *Id.;* PX1480 ¶¶ 5-6.

625. Plaintiff-Intervenor Common Cause has members who reside in every challenged North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives district. PX1480 ¶ 9.

626. Plaintiff-Intervenor Common Cause's interests it seeks to protect in this litigation are its ability to engage with voters because Common Cause alleges the Enacted Plans will diminish the voices of these voters, its ability to direct its resources effectively, and it will be forced to divert these resources toward "combatting the ill effects of unlawful redistricting," and its ability to increase voter engagement and holding government officials accountable, which is allegedly frustrated by "preordained election results." Common Cause Compl. ¶ 17; PX1480 ¶ 7. Common Cause also seeks to protect its interest in advocating for redistricting reform measures. Common Cause Compl. ¶ 17.

627. The partisan composition of the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives Districts significantly affect Common

Cause's ability to fulfill its mission and purpose because it frustrates Common Cause's organizational mission of increasing democratic engagement and voter participation by insulating elected officials from the democratic process and, in turn, voters are much less likely to contact their representatives, vote in elections, or engage in the democratic process. PX1480 ¶ 7.

628. Plaintiff-Intervenor Common Cause's interests it seeks to protect in this litigation on behalf of its members are the members', registered as Democrats, right to have representation in the State Legislature in compliance with the North Carolina Constitution, right to be free from unequal treatment, and right to free association.

629. Neither the claims asserted, nor the relief requested, by Plaintiff Common Cause requires the participation of individual members in the lawsuit.

E. Standing to Assert Intentional Racial Discrimination and Racial Vote Dilution Claims

630. Individual NCLCV Plaintiffs have shown that they are Black registered voters. PX206, 207, 208, 209, and 211. Organizational Plaintiffs NCLCV and Common Cause have shown that some of its members are Black registered voters. PX203 ¶ 14, PX205; PX1480 ¶ 10.

631. However, none of these plaintiffs have shown that the redistricting plan that affects their Congressional, State Senate, or State House district was the product of intentional racial discrimination.

632. Additionally, the NCLCV plaintiffs have not shown that the Congressional, State Senate, and State House redistricting plans provide one racial group with less opportunity than other members of the electorate to nominate and elect members of their choice.

CONCLUSIONS OF LAW

I. Standing

A. General Principles

1. The North Carolina Constitution provides: "All courts shall be open; every person, for an injury done him in this lands, goods, person, or reputations shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18. This provision should be read to guarantee standing where a legal right arising under the North Carolina Constitution has been infringed. *Comm. to Elect Forest v. Employees PAC*, 2021-NCSC-6, ¶ 81, 376 N.C. 558 ("*Elect Forest*").

2. "[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our State's standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (quotation marks omitted); *accord Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles. . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.").

3. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). "[T]he 'concrete adverseness' rationale undergirding our standing doctrine is grounded on prudential principles of self-restraint in exercise of [the courts'] power of judicial review for constitutionality[.]" *Elect Forest*, 2021-NCSC-6, ¶ 65 (internal citations omitted).

4. An action, such as the case at bar, arising under the Declaratory Judgment Act does require that the plaintiff make a showing of direct injury. *Id.* at ¶ 61. This is because "only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Id.* at ¶ 64 (quoting *Stanley*, 284 N.C. at 28). "The 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.'" *Id.* at ¶ 82 (quoting *State ex rel. Summerell v. Carolina-Virginia Racing Ass'n*, 239 N.C. 591, 594, 80 S.E.2d 638, 640 (1954)); *see also Piedmont Canteen Services, Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (holding only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge the constitutionality of a statute).

5. "An association may have standing to in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211 (1975)).

6. A plaintiff association may also assert that it has standing to sue on behalf of its members. *See River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990); *Shearon Farms Townhome Owners Ass'n v. Shearon Farms Dev., LLC*, 847 S.E.2d 229, 235 (N.C. Ct. App. 2020). Under North Carolina law, an organization has standing to bring suit on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs.*, 326 N.C. at 129-30, 3388 S.E.2d at 555. An associational plaintiff need not show that *all* of its members would have standing to sue in their own right when seeking declaratory or injunctive relief; rather, it is sufficient

if any "one" member would have individual standing. *Id.; see also State Employees Ass'n of N.C., Inc. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003) (reversing lower court decision that had required every member of association or organization to have standing).

B. Plaintiffs' Standing

7. As recognized by the Supreme Court of the United States, the right to vote is individual and unique to each person. Any "interest in the composition of 'the legislature as a whole'" is "not an individual legal interest. *See Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018). As such, in federal court, a voter is only injured by specific concerns with that voter's districts and has standing to challenge the districts in which the voter lives. *Id.* The "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm. *Id.* at 1932. Additionally, a district's partisan composition cannot constitute a cognizable injury if a similar composition would result "under any plausible circumstance." *Id.* at 1924.

8. The Supreme Court of the United States has previously held that individual voters have standing under the federal Constitution to challenge only their own districts on gerrymandering grounds, *Gill*, 138 S. Ct. at 1930-31; however, in light of the different, prudential standing principles in our State, *see Comm. to Elect Forest*, 376 N.C. at 563, and because the unique manner in North Carolina in which one state legislative district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that same grouping, a challenge to the entire county grouping by an individual plaintiff constitutes the necessary "personal stake in the outcome of the controversy" for a plaintiff to have standing to challenge all districts within a county grouping. *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879; *see Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that a "reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole" and that an "allegation that a litigant's district was improperly gerrymandered necessarily involves a

critique of the plan beyond the borders of his district"), *abrogated on other grounds by League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

9. Individual private citizens and voters of a county have standing to sue to seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5. *See Pender County v. Bartlett*, 361 N.C. 491, 497 (2007); *see also Pender County v. Bartlett*, 04-CVS-0696, slip op. at 139-171 (N.C. Sup. Ct. Dec. 2, 2005).

10. The individual Plaintiffs in these consolidated cases challenging a district as the product of impermissible extreme partisan gerrymandering reside either in the district challenged or, in the case of the state legislative districts, the county grouping containing a challenged district.

11. For those reasons, the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing.

12. The organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution.

13. Similarly, the organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

14. However, as discussed below, Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution. As such, Plaintiffs lack standing.

15. "Courts never anticipate a question of constitutional law before the necessity of deciding it arises." *Chemical Co. v. Turner*, 190 N.C. 471, 130 S.E.2d 154 (1925). "They will not listen to an objection made to the constitutionality of an ordinance by a party whose rights it does not affect and who therefore as no interest in defeating it." *State v. Trantham*, 230

N.C. 641, 644, 33 S.E.2d 198 (1949). In the equal protection context, "[i]t is not sufficient to show discrimination. It must appear that the alleged discriminatory provisions operate to hurt the [plaintiff] or adversely affect his rights or put him to a disadvantage." *Id.* "He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against." *Id. See also Munger v. State*, 2002 N.C. App. 404, 410-11 (2010) (using the same standard in the context of taxpayer standing).

16. NCLCV Plaintiffs and Plaintiff Common Cause assert claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because this Court finds there to be no factual basis underlying these asserted claims, there is a lack of the requisite "direct injury"—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, these Plaintiffs do not have standing for these claims.

17. Similarly, Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment from this Court directing the legislative process to be undertaken in redistricting.

II. Partisan Gerrymandering Claims

18. These consolidated cases raise important constitutional issues in which we are asked to strike down, as unconstitutional, redistricting maps enacted by the General Assembly based in part upon what is termed "extreme partisan gerrymandering."

19. The function of the judiciary is to faithfully interpret the law through judicial review and determine whether it is compliant with the constitution. *State ex. Rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) citing N.C. Const. art. IV, § 1; *Bayard v. Singleton*, 1 N.C. 5, 6-7, 3 N.C. 42, 1 Martin 48 (1787). While *Bayard* and *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed 60 (1803), establish the right of the court to say what the law is, "sometimes, however, 'the law is that the judicial department has no

business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" *Rucho v. Common Cause*, ___ U.S. ___, 139 S. Ct. 2484, 2494 (2019) (*citing Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004)).

20. The political power in this State has always been invested in and derived from its citizens. N.C. Const. of 1776, Decl. of Rights § 2; N.C. Const. of 1868 art. I, § 2; N.C. Const. of 1971, art. I, § 3. Likewise, the sole and exclusive right to regulate the government of this State has always been vested in its citizens. N.C. Const. of 1776, Decl. of Rights § 2; N.C. Const. of 1868, art. I, § 3; N.C. Const. of 1971, art. I, § 3.

21. "The will of the people as expressed in the Constitution is the supreme law of the land." *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (*citing Warrenton v. Warren County*, 215 N.C. 342, 2 S.E.2d 463 (1939)). "The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne County Citizens Ass'n for Better Tax Control v. Wayne County Nd of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991)(citing *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)). "[T]he power of the people, through their elected representatives in the General Assembly, is constrained by the specific limitations imposed by duly adopted constitutional provisions." *Stephenson v. Bartlett*, 355 NC 354, 390, 562 S.E.2d 377, 402 (2002) (Orr, J. dissenting).

22. It is not the function of the judiciary to express the will of the people or to right perceived wrongs allowed by laws that public sentiment deems unwise or ill-advised. *Blankenship v. Bartlett*, 363 N.C. 518, 523. 681 S.E.2d 759, 763 (2009) (*citing Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("Judges are 'often called upon to disregard, or even to defy,

popular sentiment,' creating a 'fundamental tension between the ideal character of the judicial office and the real world of electoral politics'")); *People ex rel Von Bokkelen v. Canady,* 73 N.C. 198, 221 (1875) ("Whether [an act of the General Assembly] is wise or unwise, the Court can give no opinion. Our province is to expound the Constitution and laws as they are made, and not to make them").

23. Declaring as unconstitutional, an act of the branch of government that represents the people is a task that is not to be taken lightly. There is a strong presumption that enactments of the General Assembly are constitutional. *Town of Spruce Pine v. Avery County,* 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997). Despite the presumption of the constitutionality of an enactment of the legislature, "[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *City of Asheville v. State,* 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016) (quoting *Glenn v. Bd. of Educ.,* 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston,* 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). "An act of the General Assembly will be declared unconstitutional only when 'it [is] plainly and clearly the case,' . . . and its unconstitutionality must be demonstrated beyond a reasonable doubt." *Town of Boone v. State,* 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016).

24. Plaintiffs request that this Court strike down the Enacted Maps is based upon the following clauses of the North Carolina Constitution: (1) Free Elections Clause; (2) Equal Protections Clause; (3) Freedom of Speech Clause; and (4) Freedom of Assembly Clause.

25. In *Stephenson*, a case cited and relied upon by the Plaintiffs, the North Carolina Supreme Court explained the framework of the analysis this Court must use in interpreting and giving meaning to the terms of our state Constitution:

> "Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.'" *Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (*quoting Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). . . . .
>
> As part of our constitutional interpretation, it is fundamental "to give effect to the intent of the framers of the organic law and of the people adopting it." *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. More importance is to be placed upon the intent and purpose of a provision than upon the actual language used. *Id.* "In arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words . . . ." *Id.* This Court will consider the "history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation" when interpreting the State Constitution in light of federal requirements. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980); see also *Perry*, 237 N.C. at 444, 75 S.E.2d at 514.

Stephenson at 370-371, 562 S.E.2d at 389.

26. As our Supreme Court stated in *State v. Emery*, 224 N.C. 581, 584, 31 S.E. 858, 861 (1944):

> It is a cardinal principle, in the interpretation of constitutions, that they should receive a consistent and uniform construction, **so as not to be given one meaning at one time and another meaning at another time, even though circumstances may have so changed as to render a different construction desirable. The will of the people as expressed in the organic law is subject to change only in the manner prescribed by them.**

Id. (emphasis added).

27. In order to determine the intent of the drafters, "[i]nquiry should be directed to the old law, the mischief and the remedy." *Perry*, 237 N.C. at 444, 75 S.E.2d at 514 (1953).

The "court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided." *Id.* The circumstances and conditions which existed at the time of the enactment of the constitutional provision must be given prime consideration in the construction of the language. *Id.* at 447, 75 S.E.2d at 516.

28. As Justice Orr stated in his partial dissent in *Stephenson*,

> If the provisions of [an Article of the State Constitution] are obsolete or ill-adapted to existing conditions, this Court is without power to devise a remedy. However liberally we may be inclined to interpret the fundamental law, we should offend every canon of construction and transgress the limitations of our jurisdiction to review decisions upon matters of law or legal inference if we undertook to extend the function of the Court to a judicial amendment of the Constitution.

Stephenson, 355 at 410-411, 562 S.E.2d at 414 (Orr, J. dissenting) *citing Elliott v. State Bd. of Equalization*, 203 N.C. 749, 756, 166 S.E. 918, 922 (1932).

29. The principles stated above are bedrock principles of constitutional construction that have existed in the jurisprudence of this state for at least 150 years. The Court is not excused or relieved from this analytical framework because we disagree with the result it brings or even find personally repugnant.

30. Trial judges admonish jurors on an almost daily basis that it is "absolutely necessary that you understand and apply the law as [we] give it to you, not as you think the laws is, or as you might like it to be." (N.C. Pattern Jury Instruction Civil 101.5; Criminal 101.5). It is our duty to apply the law as to the construction of the Constitution as set forth above. It is not our prerogative to deviate from this long-established analytical framework.

31. To date, no appellate court in North Carolina has examined the specific question of whether "extreme partisan gerrymandering" is violative of our State Constitution.

Plaintiffs, in support of their position that extreme partisan gerrymandering is unconstitutional, rely on two cases decided by a three-judge panel established pursuant to N.C. Gen. Stat. § 1-267.1(a): *Common Cause v. Lewis,* Wake County File No. 18CVS 14001 and its Judgment dated September 3, 2019; and (b) *Harper v. Hall,* Wake County, File No. 19 CVS 12667 ("*Harper I*") and the Order on Injunctive Relief entered in that matter on October 28, 2019. In *Common Cause,* a prior three judge-panel, empaneled in 2010 pursuant to N.C. Gen. Stat. § 1-267.1(a), declared the legislative maps enacted in 2017 unconstitutional as a result of "extreme partisan" gerrymandering. That same panel, in *Harper I,* found congressional maps enacted by the N.C Legislature in 2016 unconstitutional as a result of "extreme partisan gerrymandering."

32. While instructive and persuasive, the court's legal analysis and conclusions in *Common Cause* and *Harper I* are not binding on this Court.

33. In reaching a decision, it is necessary for the Court to examine the history of the geographic areas from which legislators have been elected and the legislative body that was responsible for creating those districts and any limitations placed upon the same. In addition, it is necessary to review the history of the four constitutional provisions Plaintiffs claim are violated by the enactment of the maps at issue.

A. Historical Background

1. Structure of Government, Apportionment and Election of Members to Legislative Bodies Under the Lord Proprietors 1663-1729

34. North Carolinians have been electing individuals to representative bodies for approximately 350 years. The original 1663 Charter of Carolina from Charles II to the eight Lord Proprietors of Carolina and the 1665 Charter of Carolina gave the Lord Proprietors power to enact laws and constitutions with the "advice, assent and approbation of the freemen of the said province . . . or of their delegates." Charter granted by Charles, II, King

of England to the Lords Propreitors of Carolina, March 24, 1663, The Colonial Records of North Carolina, Ed. William Sanders, Vol. 1 Raleigh, N.C. P.M. Hale, Printer to the State, 1886, 20-23 at 23, Documenting the South 2007, 2007 University Library, The University of North Carolina, http://docsouth.edu/csr/. (Colonial Records from docsouth are hereinafter referred to as C.R.)

35. In 1665 the Concessions and Agreements of the Lord Proprietors of the Province of Carolina were published. C.R. 1:75-93. The Concessions and Agreements provided for the election of freemen representatives to a General Assembly. The freemen were to be elected from certain political subdivisions within each county, with the election occurring annually on January 1. C.R. 1:81.

36. On March 1, 1669, the Lord Proprietors published the Fundamental Constitutions of Carolina (C.R. 1:187-206) which divided the province of Carolina into counties each of which consisted of four precincts. (C.R.1:80, Item Three) There were four precincts in each county. A parliament, consisting in part of freeholders elected from each precinct, was created and was required to meet every two years. (C.R. 1:99, Item 71). Elections for freeholder representatives were to be held on September 1 every two years. (C.R.1:200, Item 75).

2. Structure of Government, Apportionment and Election of Members to The General Assembly During Colonial Rule 1729-1996

37. In 1729 the Lord Proprietors sold their interest in the province of Carolina to the Crown and North Carolina became an official English Colony. See Charles Lee Raper, NORTH CAROLINA, A STUDY IN ENGLISH COLONIAL GOVERNMENT, P 1-2 (1904). See also, C.R. 3:32-47

38. The Royal Governor, who was appointed by the Crown by way of a commission (*see,* C.R. 3:68) and given authority or directives from the Crown by way of instructions (*see,*

C.R.3:93), was "the supreme ruler in [North Carolina] and responsible to the crown for all of his acts, and not to the people whose affairs he was to administer." Charles S. Cooke, THE GOVERNOR, COUNSEL AND ASSEMBLY IN ROYAL NORTH CARLINA, Vol. 12, No. 1 The James Sprunt Historical Publications, (J.G. DeRoulhac Hamilton, Henry McGilbert Wagstaff, Eds.) p. 13, 23 (1912). *See also*, Raper at 27.

39. Pursuant to the letters and instructions to each governor, North Carolina was to be governed by a bicameral General Assembly. The General Assembly consisted of the upper house, which included the Royal Governor's Council, and the lower house, also called the House of Burgesses. Raper at 85-71; *See also*, C.R. 3:90.

40. The Council was comprised of a set number of individuals recommended by the Royal Governor and appointed by the Crown and were largely under the control of the Royal Governor. Cooke at 16-17. The Council was essentially an executive body that advised the Royal Governor. In the absence or death of the governor, the president of the Council became the acting governor. Finally, the Council, as the upper house of the legislature, had the ability to hold up legislation by giving its consent to the same. Raper at 75, Cooke at 19-20. "[T]he governor and council were practically a unit in their point of view and in their attempt to maintain the rights and interest of the Crown." Cooke at 40, *see also*, Raper at 71.

41. The authority for the existence of a lower house was set forth in commissions given to each Royal Governor. *See* C.R. 3:66 Raper *at 85*. The lower house "stood not merely for the representative principle in government but also for distinctly local interests." Cooke at 23. The House of Burgesses consisted of freeman elected from each county and certain towns.

42. Beginning in 1774 there were five extralegal provincial congresses that met in North Carolina culminating in the Fifth Provincial Congress that drafted North Carolina's First Constitution in 1776 (1776 Constitution). During the First Provincial Congress the

concept of voting by counties and towns was established as the best method of deciding any differences that would arise during the deliberations of the Provincial Congresses. The membership of the Provincial Congresses mirrored closely the membership of the House of Burgesses.

3. Structure of Government, Apportionment and Election of Members to the General Assembly of the State of North Carolina 1776-Present

43. The 1776 Constitution[8] drafted and approved by the Fifth Provincial Congress provided, in part, as follows:

> Wherefore, in our present state, in order to prevent anarchy and confusion, it becomes necessary that government should be established in this State; therefore we, the Representatives of the freemen of North-Carolina, chosen and assembled in Congress, for the express purpose of framing a Constitution, under the authority of the people, most conducive to their happiness and prosperity, do declare, that a government for this State shall be established, in manner and form following, to wit:
>
> I. That the legislative authority shall be vested in two distinct branches both dependent on the people, to wit, a *Senate* and *House of Commons*.
>
> II. That the Senate shall be composed of Representatives annually chosen by ballot, one for each county in the State.
>
> III. That the House of Commons shall be composed of Representatives annually chosen by ballot, two for each counts [sic] and one for each of the towns of Edentown, Newbern, Wilmington, Salisbury, Hillsborough and Halifax.
>
> IV. That the Senate and House of Commons, assembled for the purpose of legislation, shall be denominated, *The General Assembly*.

44. In 1789, and as part of the constitutional convention in North Carolina that was called for the purpose of ratifying the new U.S. Constitution, the 1776 Constitution was amended to allow Fayetteville to elect a representative to the House of Commons. John L.

[8] The 1776 Constitution was not presented to the people for ratification.

Sanders, *Amendments to the Constitutions of North Carolina, 1776-1996*, 1 (1997) (hereinafter referred to as "*Sanders, Amendments to the Constitution of N.C.*").

45. While not expressly provided for in the 1776 Constitution, the power to create counties and draw their boundaries was necessarily vested in the people of this State, through their elected representatives. *See, Wayne County Citizens Ass'n for Better Tax Control,* 328 N.C. at 29, 399 S.E.2d at 319 (citation omitted).

4. 1835 Amendments to the N.C. Constitution of 1776

46. In 1835 a Constitutional Convention met in Raleigh for the purpose of, again, amending the 1776 Constitution. The convention was a result of "dissatisfaction with the legislative representation system, which gave no recognition to population." John L. Sanders, *Our Constitutions: An Historical Perspective*, p. ___, (200_) (hereinafter "*Sanders, Our Constitutions*")(the document available to the Court was not dated and did not include page numbers).

47. As a result of the 1835 Constitutional Convention, the 1776 Constitution was amended, in part, to provide one senator per district to be laid out by the General Assembly based upon public taxes paid by each county into the Treasury of the State. The amendment also prohibited a county from being divided in the creation of a Senate district. 1776 Constitution, amend. of 1835, art. I, § 1.[9] The provision that a county not be divided in the formation of a district has become known as the "Whole County Provision."

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[9] Due to the public interest in this case and the facts that the prior Constitutions of North Carolina and amendments thereto may not be readily or easily accessible to the public, the Court has elected to provide the relevant text of the same in footnotes.

Article 1 of the N.C. Const. of 1776 amend. of 1835 provide in relevant part:

> § 1. The Senate of this State shall consist of fifty Representatives, biennially chosen by ballot, and to be elected by districts; which districts shall be laid off by the General

48. The 1835 amendments also provided for 120 seats in the House of Commons, each county being guaranteed one seat with the remaining seats being distributed among the counties according to their population. 1776 Constitution, amend. of 1835, art. I, § 2. The apportionment on population favored the more populous counties. Sanders, *Our Constitutions*, 1.

Assembly, at its first session after the year one thousand eight hundred and forty-one; and afterwards, at its first session after the year one thousand eight hundred and fifty-one; and then every twenty years thereafter, in proportion to the public taxes paid into the Treasury of the State, by the citizens thereof; and the average of the public taxes paid by each county into the Treasury of the State, for the five years preceding the laying off of the districts, shall be considered as its proportion of the public taxes, and constitute the basis of apportionment: *Provided*, That no county shall be divided in the formation of a Senatorial district. And when there are one or more counties having an excess of taxation above the ratio to form a Senatorial district, adjoining a county or counties deficient in such ratio, the excess or excesses aforesaid shall be added to the taxation of the county or counties deficient, and if, with such addition, the county or counties receiving it, shall have the requisite ratio, such county and counties each, shall constitute a Senatorial district.

§ 2. The House of Commons shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by counties according to their federal population, that is, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons, and each county shall have at least one member in the House of Commons, although it may not contain the requisite ratio of population.

§ 3. This apportionment shall be made by the General Assembly, at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off; and the said apportionment shall be made according to an enumeration to be ordered by the General Assembly, or according to the census which may be taken by order of Congress, next preceding the period of making such apportionment.

§ 4. In making the apportionment in the House of Commons, the ratio of representation shall be ascertained by dividing the amount of Federal population in the State, after deducting that comprehended within those counties which do not severally contain the one hundred and twentieth part of the entire Federal population aforesaid, by the number of Representatives less than the number assigned to the said counties. To each county containing the said ratio, and not twice the said ratio, there shall be assigned one Representative; to each county containing twice, but not three times the said ratio, there shall be assigned two Representatives, and so on progressively, and then the remaining Representatives shall be assigned severally to the counties having the largest fractions.

49. The 1835 Amendments also provided, for the first time, for the popular election of the Governor. 1776 Constitution, amend. 1835, art. 2, §1.

5. The North Carolina Constitution of 1868

50. In 1868, a constitutional convention was called at the initiative of the Federal Government in order to provide for a constitution that would allow North Carolina to rejoin the Union after the Civil War. While Article I largely became what had previously been known as the Declaration of Rights, Article II now set forth those provisions related to the Legislature.

51. Under the 1868 Constitution, the number of and apportionment of members of the newly renamed House of Representative remained relatively the same as set forth in the 1776 Constitution, amend. of 1835, art. I, § 2. However, apportionment of the Senate was now based upon population. The Whole County Provision remained and for the first time Senate districts drawn by the General Assembly were required to be contiguous, and once drawn could not be redrawn until the next statewide "enumeration" or census. 1868 Constitution, art. II, § 5. As the census was required every 10 years, the provision against redrawing districts until the next census has become known as the Mid-Decade Provision.[10]

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[10] Article II of the 1868 Constitution provides in relevant part:

Sec. 1. The Legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: a Senate and House of Representatives.

Sec. 2. The Senate and House of Representatives shall meet annually on the third Monday in November and when assembled shall be denominated the General Assembly. Neither House shall proceed upon public business, unless a majority of all the members are actually present.

SEC. 3. The Senate shall be composed of fifty Senators biennially chosen by ballot.

. . .

Sec. 5. An enumeration of the inhabitants of the State shall be taken under the direction of the General Assembly in the year one thousand eight hundred and seventy-five, and at the end of every ten years thereafter; and the said Senate districts, shall be so altered by the General Assembly, at the first session after the return of every

6. Amendments to the North Carolina Constitution of 1868

52. In 1962, the voters of this State ratified a proposed Constitutional Amendment amending the apportionment of members of the House of Representatives by giving the Speaker of the House the authority of apportionment. 1868 Constitution, amend. of 1962, art. II, § 5.[11] The apportionment of the members of the Senate remained unchanged.

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enumeration taken as aforesaid, or by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more Senators.

Sec. 6. The House of Representatives shall be composed of one hundred and twenty Representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation. This apportionment shall be made by the General Assembly at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off.

Sec. 7. In making the apportionment in the House of Representatives, the ratio of representation should be ascertained by dividing the amount of the population of the State, exclusive of that comprehended within those counties which do not severally contain the one hundred and twentieth part of the population of the State, by the number of Representatives, less the number assigned to such counties; and in ascertaining the number of the population of the State, aliens and Indians not taxed, shall not be included. To each county containing the said ratio and not twice the said ratio, there shall be assigned one representative; to each county containing twice but not three times the said ratio, there shall be assigned two representatives, and so on progressively, and then the remaining representatives shall be assigned severally to the counties having the largest fractions.

[11] The amendment of 1962 to art. II, § 5, reads in part:

The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation. This apportionment shall be made by the Speaker of the House of Representatives at the first regular Session of the General Assembly convening after the return of every enumeration by order of Congress. The formula set out in Section 6 of this Article shall be applied by the Speaker and the new apportionment entered on the Journal of the House of Representatives on or before the 60th calendar day of the Session. When so entered, the new apportionment shall have the same force and effect as an Act of the

53. In 1968, the voters of this State ratified a proposed Constitutional Amendment which amended the apportionment of members in both the Senate and House. 1868 Constitution, amend. of 1968, art. II, §§ 4-5[12]: In the Senate the provisions remained almost the same with certain exclusions from the population omitted. 1868 Constitution, amend. of 1968, art. II, §§ 4-5. The 1968 Amendment had the greatest impact on the apportionment of seats in the House of Representatives. While keeping the membership of the House at 120

General Assembly, and shall become effective at the next election for members of the General Assembly.

[12] The amendment of 1968 to art. II, § 5, reads in part:

Sec. 4. Senate Districts; Apportionment of Senators. The Senators shall be elected from districts. The General Assembly shall, at the first regular Session convening after the return of every decennial enumeration taken by order of Congress, revise the Senate Districts and the apportionment of Senators among those districts, subject to the following requirements:
(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants which each Senator represents being determined for this purpose by dividing the population of the district he represents by the number of Senators apportioned to that district;
(2) Each Senate District shall at all times consist of contiguous territory;
(3) No county shall be divided in the formation of a Senate District;
(4) When established, the Senate Districts and the apportionment of Senators shall remain unaltered until the return of another decennial enumeration taken by order of Congress

Sec. 5. Number of Representatives. The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot.

Sec. 6. Representative Districts; Apportionment of Representatives. The Representatives shall be elected from districts. The General Assembly shall, at the first regular Session convening after the return of every decennial enumeration taken by order of Congress, revise the Representative Districts and the apportionment of Representatives among those districts, subject to the following requirements:
(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants which each Representative represents being determined for this purpose by dividing the population of the district he represents by the number of Representatives apportioned to that district;
(2) Each Representative District shall at all times consist of contiguous territory;
(3) No county shall be divided in the formation of a Representative District;
(4) When established, the Representative Districts and the apportionment of Representatives shall remain unaltered until the return of another decennial enumeration taken by order of Congress.

members, representatives were no longer apportioned by county, but instead by districts to be drawn by the General Assembly with apportionment based upon equal population. In addition, districts had to be contiguous, were subject to the While County Provision and Mid-Decade Provision. N.C. Const. of 1868, amend. of 1968, art. II, §§ 4-5.

7. The North Carolina Constitution of 1971

54. In March, 1968, the North Carolina State Constitution Study Commission ("Study Commission") was "created by the North Carolina State Bar and North Carolina Bar Association, acting concurrently on the recommendation of His Excellency Governor Dan K. Moore . . . to give consideration to the question of whether there is need for either rewriting or amending the Constitution . . . ." Report of the North Carolina State Constitution Commission, p. iii (December 16, 1968) (hereinafter referred to as "Report of Study Comm'n"). The Study Commission made recommendations to change certain language in the 1868 Constitution. Changes to the 1868 Constitution were made in two ways: to the body of the constitution itself in the form of a "proposed constitution; and proposed amendments to the "proposed constitution" once it had been ratified. The changes to be effected in the "proposed constitution" were typically grammatical or stylistic changes. Those substantive changes contained in the "proposed constitution" were not calculated "to bring about any fundamental change in the power of state and local government or the distribution of that power." Report of Study Comm'n at 10. Any substantive change reflected in the "proposed constitution itself [was] not of significant magnitude" to justify their treatment in separate proposed amendments. *Id.* Those proposed changes that were significant in magnitude or in which citizens of the State would strongly differ were recommended to be voted on through separate proposed amendments. *Id. at 9-10.*

55. In 1971, a new constitution was ratified by the voters of this state. The 1971 Constitution did not modify Article II of the 1868 Constitution as it pertains to apportionment in any substantive manner.

56. Table 1 below reflects a summary of the progression of how districts for state legislative seats were to be created and the requirements, if any, for those districts from 1776 to the present.

TABLE 1	
Senate	
Year	**Method for creating districts**
1776	One senator per county
1835	50 districts with one senator per district to be laid out by General Assembly, apportionment based on the amount of public taxes paid into the Treasury; includes a whole-county provision
1868	50 districts with one senator per district to be laid out by General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision (with only exception being if a county's population was large enough, then the county was entitled to two senators)
1968	50 districts with one senator per district to be laid out by the General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision
1971	Only slight grammatical changes to 1968 amendment
House of Representatives (initially referred to as House of Commons)	
Year	**Method for creating districts**
1776	Two representatives per county with six towns receiving an additional representative
1835	120 representatives elected by the counties and each county must have at least one representative, apportionment based on population
1868	120 representatives elected by the counties and each county must have at least one representative, apportionment based on population
1962	Apportionment now made by the Speaker of the House of Representatives
1968	120 representatives now elected in districts with one representative per district to be laid out by General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision
1971	Only slight grammatical changes to 1968 amendment

8. The Governor's Power to Veto Acts of the General Assembly

57. As noted above, neither the 1776 Constitution, the 1868 Constitution, nor the 1971 Constitution as originally enacted, gave the Governor veto power over acts of the legislature.

58. In 1968, the Study Commission recommended nine separate amendments to the proposed constitution that provided such substantial changes that they believed the voters should have a chance to act upon them individually. Report Of Study Comm'n at 11-12. One proposed amendment would have granted the Governor the right to veto legislation passed by the General Assembly. *Id.* at 10, 102. In its commentary to the proposed amendment giving the Governor veto power, the Study Comm'n stated, "[i]t is intended to add to the legislative process one participant who is responsible to a state wide constituency, and who is in a position to consider the impact of a bill on the state as a whole and in the light of considerations perhaps not known to the majority of the General Assembly." *Id.* at 104 While the General Assembly, at that time, proposed 5 amendments to the Constitution, it did not submit the proposed amendment giving the Governor the power to veto acts passed by the General Assembly.

59. Finally, in 1995, the General Assembly placed a proposed amendment to the 1971 Constitution on the ballot in the 1996 general election to provide the Governor the power to veto ordinary statewide legislation enacted by the General Assembly. N.C. Sess. Laws. 1995, Chapter 5. The act placing the proposed amendment on the ballot was passed by a House of Representatives controlled by the Republican Party and a Senate controlled by the Democratic Party. This amendment was ratified on November 5, 1996, by a vote of 1,652,294 to 544,335. John L. Sanders, *Amendments to the Constitution of N.C.*, 24 (1997). Notably excepted from the Governor's veto power, as proposed by the General Assembly and approved by the people of this State, was the authority of the Governor to veto legislative or

congressional redistricting maps enacted by the General Assembly. 1971 Constitution, amend. of 1995, art. II, § 22(5)(b)-(d).

60. Over the last twenty years numerous bills have been submitted to the approximately 11 different General Assemblies in North Carolina which would require bipartisan or nonpartisan redistricting. Each party has had the ability to pass redistricting reform, yet each party has failed to take advantage of these opportunities.

9. Power to Draw Congressional Districts.

61. While Congress has the ability to regulate districting with respect to congressional maps, it has largely left the redistricting of congressional districts to the state legislatures or other bodies. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (citations omitted). Despite having this ability and the repeated public outcry concerning partisan gerrymandering, Congress has not taken any action to address the problem. The lack of will to address the problem is not limited to a single political party as the Republicans had an opportunity to address the issue between 2017 and 2018 when they controlled both houses of Congress as well as the Presidency. Likewise, with the results of the 2020 census and redistricting of congressional districts looming, Democrats have had an opportunity in 2021 to address the issue as it has control over both chambers of Congress as well as the Presidency. Congress' inaction has left the Equal Protection Clauses in both our State and Federal Constitution as they relate to racial gerrymandering, the Voting Rights Act of 1965, and the one person one vote requirement set forth in *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) as the only constraints placed on our General Assembly in the drawing of congressional districts.

B. The Constitutional Provisions Plaintiffs Claim Have Been Violated

1. Free Elections Clause

62. The 1776 Constitution provided that "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Decl. of Rights §, IV. This has become known as the Free Elections Clause. With the ratification of the 1868 Constitution, the Free Elections Clause was restated as "[a]ll elections ought to be free." 1868 Const. art. I, § 10. Finally, the Free Elections Clause was again amended as part of the 1971 Constitution and now states "[a]ll Elections shall be free." "[O]ught was changed to shall throughout the Declaration of Rights to make clear the rights are commands." Report of Study Comm'n at 74-75). The change to the Free Elections Clause was not meant as a substantive change that was intended to "bring about a fundamental change" to the power of the General Assembly. *Id.*

2. Equal Protection Clause

63. The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution and provided "[n]o person shall be denied equal protection of the laws, nor shall any person be subjected to discrimination because of race, color, religion or national origin." 1971 Const. art. I, § 19. The addition of the Equal Protection Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.

3. Free Speech Clause

64. Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution and now reads "freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." 1971 Const. art. I, § 14. The addition of the Free Speech Clause, while a substantive change, was not meant to

"bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.

4. Freedom of Assembly Clause

65. The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that "the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances." 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause "that." 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution which now reads "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated." 1971 Const. art. I, § 12. The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10.

C. Redistricting is an Inherently Political Process

66. Under our State Constitution, redistricting of Senate and House Districts is left to the General Assembly. As stated above, the drawing of congressional maps has been left to the discretion of state legislative bodies. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (citations omitted). In that redistricting is left to legislative bodies, bodies which are inherently political in nature, the United State Supreme Court has indicated that a State may engage in "constitutional political gerrymandering." *Rucho*, ___ U.S. ___, 139 S. Ct. at 2947. Likewise, the North Carolina Supreme Court has stated:

> [t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Stephenson I, 355 N.C.at 371-372, 562 S.E.2d at 390.

67. Indeed, redistricting "inevitably has and is intended to have substantial consequences" as it is part of the American political process. *Rucho*, ____ U.S. at ___, 139 S. Ct. at 2497. While the United States Supreme Court has attempted to address partisan gerrymandering on a number of occasions, in *Rucho* it determined that claims for partisan gerrymandering were not justiciable because they:

> present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the [Federal] Constitution, and no legal standards to limit and direct their decisions.

Id. at __, 139 S. Ct. at 2506-07.

68. While determining that political gerrymandering claims were beyond the reach of the federal courts, the U.S. Supreme Court noted that "[t]he States . . . are actively addressing the issue on a number of fronts," and "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

69. In *Rucho*, the U.S. Supreme Court pointed to examples of how the States are specifically addressing the issue and how statutes and constitutions can provide standards and guidance for the state courts to apply. In Florida, the Fair Districts Amendment to the Florida Constitution was adopted in 2010 and specifically provides that in creating congressional or legislative districts "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . ." Fla. Const. Art. III, §§ 20-21. In Michigan, the state constitution was amended in 2018 to provide for an independent citizens redistricting commission. Mich. Const. Art. IV, §6. Missouri has added

language to its constitution that requires that "[d]istricts be drawn in a manner that achieves both partisan fairness, and secondarily, competitiveness. . . ." Mo. Const. Art. III, § 3(b)(5). Other states identified by the Supreme Court, Iowa and Delaware, have elected to address the issue through their state statutes. All of the states identified and the manner in which they are addressing the problem have one thing in common: the problem was addressed by the people, their legislatures, or both—not the judiciary.

D. The Enacted Maps Are Not Unconstitutional as a Result of Partisan Gerrymandering.

1. The Enacted Maps Do Not Violate the Free Elections Clause

70. While the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause. In *Clark v. Meyland*, 261 N.C. 140, 136 S.E.2d 168 (1964), the plaintiff, a registered Democrat sought to change his party affiliation to that of a Republican in order to vote in the next Republican primary. *Id.* at 141, 136 S.E.2d at 169. At the time, the then existing N.C.G.S. § 106-50, required a person changing their party affiliation to take an oath in which they agreed to support the nominees to their new party in all elections until such time as they change their party again. *Id.* The Court found that the provision of the oath requiring the plaintiff to vote for the candidate of his new party operated as a "deterrant [sic] to his exercising a free choice among available candidates at the election ---even by casting a write-in ballot." *Id.* at 142-143, 136 S.E.2d at 170. The Court found this to be violative of the Free Elections Clause. *Id.* at 143, 134 S.E.2d 170.

71. In *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937) the Supreme Court found that an allegation of fraud in an election was contrary to the Free Elections Clause and thus could serve as a basis to try title to an office through the *quo warranto* procedure. *Id.* at 701-02; 191 S.E. at 746.

72. In *Obie v. North Carolina State Board of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991), the United States District Court for the Eastern District of North Carolina found that a requirement that an unaffiliated voter obtain the signature of 10% of the registered voters in the district in which they were running for office impeded the ability to gain access to the ballot and thus, among other things, violated the Free Elections Clause. *Id.* at 121.

73. None of the aforementioned cases deal with redistricting for partisan advantage. However, as noted above, "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution." *Stephenson*, 355 N.C.at 371-72, 562 S.E.2d at 390. (citations omitted).

74. The Court must now seek to construe the Free Elections Clause as well as the redistricting provisions of the North Carolina Constitution within the analytical framework dictated by our Supreme Court, as set forth above and in light of the language of *Stephenson*.

75. The Free Elections Clause was first set forth as part of the North Carolina Declaration of Rights which was specifically incorporated as part of the 1776 Constitution. N.C. Const. of 1776, § XLIV. The Free Elections clause plainly and simply provided "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Decl. of Rights, § IV. "The word 'free' originally derives by way of Section 3 of the Virginia Declaration of Rights[13], and from the English Bill of Rights (1689)[14]." John V. Orth, The North Carolina State Constitution: A Reference Guide, 56 (1993). "The meaning is plain: free from interference or intimidation." *Id.*

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[13] [E]lections of members to serve as representatives of the People, in assembly, ought to be free . . . ." Va. Decl. of Rights, §3.

[14] [E]lections of members of Parliament ought to be free."

76. In addition to the clear meaning of the words found in our Free Elections Clause, we are directed to also consider the circumstances and conditions which existed at the time of the enactment of the same. *Perry*, at 447, 75 S.E.2d at 516.

77. As Plaintiffs correctly point out, the words as originally used in the English Bill of Rights (1869) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England,* 148 (1972). However, that is where the Plaintiffs' analysis ends. Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.

78. At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed.[15] After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.

79. The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own

[15] In 1669, and prior to his ascension to the throne, King James, II converted to Catholicism.

interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to the elected members of parliament from interference by the Crown.

80. By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.

81. Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. Raper at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.

82. No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly.

This remained in effect until 1754 when the legislation was repealed by the Crown. Raper 90-91.

83. Disputes also arose as to whether the Governor could require counties and towns to obtain charters of incorporation prior to being able to elect representative to the legislature. As this was specifically allowed in his instructions from the Crown, the colonists did not continually press this particular issue. Raper at 69.

84. At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the authority, but the House believed they had a role in the process in the creation of counties. Raper at 89-90.

85. The House of Burgesses fought the Royal Governor over the right to establish a quorum for the legislature to act - the governor desiring a smaller number, feeling they would be easier to influence. Raper at 216-217.

86. The House of Burgesses and Governor also had disputes regarding land, quit-rents and the form of payment thereof, (Cooke at 35, Raper at 191-193), the nomination of public treasurers, (Raper at 205), the appointment of agents to England, (Raper at 26), and disposition of public revenue, Raper at 197-199; Cooke at 37.

87. The most serious disputes between the Royal Governor and the House of Burgesses arose over fiscal matters, the courts and appointment of judges. Raper at 208-209; Cooke at 38.

88. At the time of the adoption of the 1776 Constitution, North Carolina was:

> much more democratic than many of her sister states, such as Virginia and Maryland. There was an absence of any landed aristocracy as found in Virginia and the absence of any large ports had hindered the development on an influential commercial class. Lastly, the Church of England with its aristocratic tendencies, was weaker in North Carolina that in her sister colonies directly north and south.

Ketcham at 216.

89. Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. Unlike Parliament, who after the passage of the Declaration of English Rights continued to have to deal with the Crown as part of the constitutional monarchy, North Carolinians and their General Assembly were no longer subservient to parliament, the Crown, or its representatives: the Royal Governor and his Council.

90. The circumstances under which the English Free Election Clause was written were far different than those which caused the same language to be used in the 1776 Constitution.

91. It was the experience of the people of the State of North Carolina that was the most important source for the creation of the 1776 Constitution. Ketcham at 230. By far, the greatest change in the structure of North Carolina's government, other than elimination of the parliament and the Crown, was the vast reduction in the powers of the Governor and the substantial increase in the powers of the General Assembly. These changes were made to make "the governor that figurehead in law which in fact the colonial legislature had long sought to make him." *Id.* Turning the Governor into a figurehead was a result of the experience of the colonists with "the overbearing colonial governors who presided over North Carolina." John V. Orth, *North Carolina Constitutional History*, 70 North Carolina Law Review, 1759, 1764 (Sept. 1, 1992).

92. Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. First, apportionment was by county and town. As past disputes between the Royal Governor and the House of Burgesses dealt

primarily with what role the lower house had in creation of counties, that dispute was eliminated with the severance of ties with the Monarch and the Royal Governor. The General Assembly, and only the General Assembly, had the right to create counties.

93. In addition to having authority to create counties and towns, the legislature had the exclusive power to: (1) elect the Governor (N.C. Const. of 1776, § XV); (2) appoint the Attorney General; (3) appoint Judges of the Supreme Court of Law and Equity and Judges of Admiralty (*id.* at § XIII); (4) appoint the general and field officers of the militia (*id.* at § XIV); (5) elect the council of State (*id.* at. XVI); (6) appoint a treasurer or treasurers of the State (*id.* at §. XXII); (7) appoint the Secretary of State (*id.* at § XXXIII); and (8) recommend the appointment of Justice of the Peace to the Governor who shall commission them accordingly. (*id.* at § XXXIII). Moreover, unlike the Royal Governor, the Governor of the State of North Carolina was not given the power to veto acts of the legislature. The lack of veto and the sweeping powers granted to the legislature caused the governor's "executive authority to be hemmed in on every side." John v. Orth, *Constitutional History of North Carolina,* 70 North Carolina Law Review, 1759, 1764 (Sept 1, 1992). Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

94. The drafters of the 1776 Constitution discussed how to place a check on legislative excess. See, C.R. 10:498-99, Letter from Samuel Johnston to James Iredell dated April 20, 1776. Their solution was simple and direct: have elections often.

95. The check on any excesses of the legislature was embodied in Section XX of the Declaration of Rights of the 1776 Constitution which states "[t]hat for redress of grievances and for amending and strengthening the laws, elections ought to be often held." Further solidifying the check on legislative excesses was the requirement that Senators and Representatives be elected annually. N.C. Const. of 1776, arts. II & III. "Annual elections

ensured accountability" to the people of North Carolina. *The North Carolina State Constitution*, John V. Orth, Paul Martin Newby, 2nd Ed., p. 6 (2013).

96. While the legislature did not specifically draw districts from 1776 to 1835, they did create counties. In 1776 there were approximately 35 counties in North Carolina and by 1835 that number exceeded 60. There were no constitutional checks on the legislature's ability to create counties, the basis of representation during that time, nor is there any evidence of the need for any constraints on that authority. As the General Assembly was given the authority to lay out Senate districts in 1835, objective constraints were placed on the General Assembly starting with a Whole County Provision. N.C. Const. of 1776, amended 1835, art. I, §1. Over time, additional objective constitutional constraints have been placed on the General Assembly so as today there are four objective constraints delineated in the North Carolina Constitution: (1) apportionment of the district by population such that the representative or senators in each district shall represent, as nearly as may be, an equal number of inhabitants; (2) A contiguity requirement; (3) a Whole County Provision; and (4) a Mid-Decade Provision.[16] At no point has restriction of redistricting for partisan advantage ever been made part of any North Carolina Constitution.

97. Further evidence that the North Carolina Free Elections Clause was not intended to operate as a restriction on the authority of the General Assembly to redistrict is how the framers of the English Bill of Rights and Virginia Declaration of Rights understood how the provisions applied at the time they were enacted and immediately thereafter.

98. Before, during and after the Glorious Revolution, and the signing of the English Bill of Rights, there existed in England what were known as Rotten Boroughs. These

[16] These are in addition to constraints/requirements imposed by the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act of 1965.

were Boroughs where there were very few residents but that elected the same number of members of parliament as heavily populated districts.

99. Thomas Paine in *The Rights of Man* explained:

> The County of York, which contains nearly a million of souls, sends two county members; and so does the county of Rutland, which contains not an hundredth part of that number. The old town of Sarum, which contains not three houses, sends two members; and the town of Manchester, which contains upwards of sixty thousand souls, is not admitted to send any.

Thomas Paine, *The Rights of Man*, Part, the First, Being an Answer to Mr. Burke's Attack on the French Revolution.

100. Old Sarum was once the site of a cathedral and a fort, but when the cathedral moved, the population dwindled. Despite this, it continued to send two members to parliament. This allowed whoever controlled the land to elect the members. Old Sarum was just one of many Rotten Boroughs and it and others existed as such before, at the time of and after the signing of the English Bill of Rights.

101. Rotten Boroughs allowed fathers to pass on a constituency to their sons ensuring their son or a person of their choosing would have the power of a member of Parliament. https://www.historylearningsite.co.uk/british-electoral-history-since-1832/rotten-boroughs/ (last visited 01/07/2022)

102. Despite the Free Elections Clause in the English Bill of Rights, the Rotten Boroughs were allowed to continue to exist until the Reform Act of 1832.[17] At the time of the passage of the reform Act of 1832 more than 140 parliamentary seats out of a total of 658 or 21%of members of parliament came from Rotten Boroughs. Of those Rotten Boroughs, 50 had fewer than 50 voters.[18]

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[17] Parliament.uk/about/living-heritage/evolutionofparliament/reformacts/overview/reformactof 1832/

[18] http://www.britannica.com/topic/rotten-borough (last visited January 7, 2022).

103. Given the existence of these Rotten Boroughs at the time of the signing of the English Bill of Rights, and their continued unopposed use of the same until 1832, it is doubtful that such boroughs maintained by or for members of parliament were subject to the English Free Elections Clause.

104. North Carolina's Free Election Clause is modeled and taken from a similar clause in the Virginia Declaration of Rights written by George Mason and approved by the Fourth Virginia Convention in 1775. Members of the convention who approved the Virginia Declaration of Rights included Patrick Henry and James Madison.

105. In *Rucho*, the United States Supreme Court noted that

> During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792-794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

Rucho, ___ U.S. at ___, 139. S. Ct. at 2494.

106. What is telling is that Patrick Henry, who was responsible in part for the Free Elections Clause in the Virginia Declaration of Rights, was attempting to partisan gerrymander districts to the detriment of James Madison, who was also responsible in part for the Free Elections Clause in the Virginia Declaration of Rights. If the Virginia Free Elections Clause applied to partisan gerrymandering, two of the men responsible for the clause did not seem to think it applied. It did not stop Patrick Henry from his actions, nor did Madison or his supporters assert the Free Election Clause to stop Patrick Henry. If the two men who were responsible or approving the clause did not think it applied to partisan gerrymandering, this Court is certainly hesitant to do so. In fact, it was not until 2020 that Virginia addressed the issue of partisan gerrymandering, not by judicial fiat, but buy a

constitutional amendment providing for a bipartisan districting commission. Va. Const. of 1971, amend. 2020, art. II, § 6-A. The Virginia General Assembly also passed legislation setting standards and criteria for redistricting. One of these standards specifically prohibits maps "when considered on a statewide basis from unduly favoring or disfavoring a political party." Va. Code § 24.2-304.4 (8).

107. Given the history and factors described above, this Court concludes that the Free Elections Clause does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage.

2. The Incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 Was Not Intended to Bring About a Fundamental Change to the Power of the General Assembly

108. In determining whether the Equal Protection Clause and Free Speech Clause were intended to apply to the political question of partisan gerrymandering, it is necessary to examine the intent of the framers and citizens who adopted it. *Sneed*, 299 N.C. at 613, 264 S.E.2d at 110. This necessarily entails an examination of "history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration" *Perry*, 237 N.C. at 444, 75 S.E.2d at 514.

109. The Equal Protection Clause was incorporated into our State constitution in 1971 as part of the Law of the Land Clause. N.C. Const. of 1971, art. I, § 19. The Free Speech Clause was incorporated into our State constitution in 1971 as part of Free Press Clause. N.C. Const. of 1971, art. I, § 14. Prior to the adoption of the "proposed constitution" in 1971, no version of an Equal Protection Clause or Free Speech Clause was found in any of our State's prior Constitutions. *See* N.C. Const. of 1776, as amended; N.C. Const. of 1868 as amended. At the time the Equal Protection Clause and Free Speech Clause were added to the State Constitution, the North Carolina legislature had been dominated by the Democratic

Party since the end of Reconstruction, a period of over 90 years representing 45 legislative elections.

110. In 1967, and just three years prior to the addition of the Equal Protection Clause and Free Speech Clause to the State Constitution, the Legislature placed on the ballot for ratification a constitutional amendment setting forth the objective constraints placed on the legislature in the drawing of legislative districts. 1967 Sess. Laws ch. 640. This amendment was ratified on November 8, 1968, by a vote of 582,633 to 373,395. John L. Sanders, Amendments to the Constitution of North Carolina 1776-1996, 15 (1997). N.C. Const. of 1868, amend. 1968, art. II, §§ 4 & 6. The objective constraints listed in the amended Article II of the 1868 Constitution are the only objective constraints that the framers of the North Carolina Constitution and amendments thereto saw fit to place on the legislature in drawing legislative maps. *Id.* The constraints are overall consistent with the progression of constraints placed upon the legislature in the two prior constitutions. *See* Table 1.

111. Plaintiffs would have this Court infer that it was the intent of the framers of the 1971 Constitution, by including the Equal Protection Clause and Free Speech Clause in the State Constitution, to limit the legislature's ability to redistrict for partisan advantage to some degree. As previously stated, the addition of the Equal Protection Clause and Free Speech Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10. If the framers did intend to limit the partisan advantage that could be obtained through redistricting, "it is reasonable to presume it would have been declared in direct terms and not be left as a matter of inference." *Sneed*, 299 N.C. at 616, 264 S.E.2d at 112. We will not "assume that, whatever the intent of the framers, the citizens intended by their adoption at the polls of the 1970 constitutional changes" that the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting. *See Id; Perry v. Stancil*, 237 N.C.

442, 447, 75 S.E.2d 512, 516 (1953) ("In the absence of an express provision to that effect, we should be slow in adopting the conclusion that it was the intention of the framers of the Constitution to enact so radical a change in the law; because if such was the intention, it is reasonable to presume it would have been declared in direct terms and not left to a matter of inference.")

112. Perhaps most probative of the intent of the framers and citizens of 1971 was the refusal of the legislature, as the representative of the people, to accept the recommendation of the Study Commission to give the Governor, as a person elected on a Statewide basis by the majority of the voters of this State, the power of the veto as a check on the excesses of the Legislature.

a. The Enacted Maps Do Not Violate the Equal Protection Clause

113. Plaintiffs also ask this Court to strike down the enacted maps as unconstitutional as a violation of our State Constitution's Equal Protection Clause.

114. As an initial matter, this Court notes that the United States declined to strike the partisan gerrymandered maps in *Rucho* as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. ___ U.S. at ___, 139 S.Ct. at 2504. It is true that in some instances greater protection has been afforded to citizens of North Carolina under our State Constitution than under the Federal Constitution. However, those occasions are rare. *Stephenson*, 355 N.C. at 397-98, 398 S.E.2d at 406-07 (Orr, J. concurring in part, dissenting in part).

115. It is also true that our Courts have found on several occasions that certain circumstances involving elections or the right to vote may give rise to equal protection claims under our state Constitution. In *Common Cause*, the court relied upon *Stephenson*, *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2007), and *Northampton County*

Drainage District No. One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990), to justify application of the equal protection clause to strike down the 2017 redistricting plan as unconstitutional based upon extreme partisan gerrymandering.

116. In *Stephenson*, the North Carolina Supreme Court held that "[t]he classification of voters into both single-member and multi-member districts within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms . . . ." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393-94. The Court went on to reason that members in multi-member districts had greater representation, in terms of members, than those voters in a single member district. *Id.*

117. In *Blankenship,* the Court held that the Equal Protection Clause was implicated and that the legislature's actions were examined with heightened scrutiny when judicial districts created by the General Assembly represented a great disparity of residents to judge when one such district had five times the voting power of another district. *Blankenship*, 363 N.C. at 527-28, 681 S.E.2d at 766.

118. In *Northampton County Drainage No. One,* commissioners of the drainage district could assess members for maintenance or improvements in the district. 326 N.C. at 745-46, 392 S.E.2d at 355. The commissioners were appointed by the Northampton County Clerk of Court. *Id.* Because the drainage district encompassed land in Hertford County, the landowners within the Hertford County district were unable to vote for the Clerk of Court of Northampton County. *Id.* This gave Northampton County members voting rights that member in Hertford County lacked. *Id.* The North Carolina Supreme Court found that this deprived the Hertford County residents of Equal Protection under the law. 326 N.C. at 747, 392 S.E.2d at 356.

119. *Blankenship* and *Stephenson* are cases dealing with the ratio between the voters in a district and the elected representatives in that district. *Northampton* deals with the right to vote on equal terms with other members of the voting district.

120. In analyzing Plaintiffs' Equal Protection Claims as it relates to redistricting for partisan advantage, Plaintiffs are not denied the right to vote, nor are they in a district where they have less voting power than those in other districts. Plaintiffs are not part of a suspect class. Plaintiffs cite no appellate case where a person's membership in a political party is a suspect classification. The opposite seems to be true. *See Libertarian Party of North Carolina v. State,* 365 N.C. 41, 51, 707 S.E.2d 199, 206 (2011). To find as such would subject any person affected by a political decision of the state to heightened scrutiny.

121. It is true that there is a fundamental right to vote. However, if "no individual minority voter has a right to be included in a majority-minority district," *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 504, 126 S. Ct. 2594, 2659 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Shaw* v. *Hunt,* 517 U.S. 899, 917, and n. 9, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) *(Shaw II); id.,* at 947, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (Stevens, J., dissenting)), then an individual voter would not be entitled to be included in a district that is more likely to elect a candidate from their own party.

122. Moreover, there is no requirement that each party must be influential in proportion to its number of supporters. *Rucho,* 139 S.Ct. at 951.

123. Redistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person's right to cast a vote. Any impingement is limited and distant and as such is subject to a rational basis review. "Under the rationality standard of review, '[s]tate legislatures are presumed to have

acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'" *See Beech Mountain v. County of Watauga*, 324 N.C. 409, 414, 378 S.E.2d 780, 783 (1989) (citations omitted). The Court finds that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause.

b. The Enacted Plans Do Not Violate the Free Speech Clause.

124. As stated above, the incorporation of the Free Speech Clause into the 1971 Constitution was not intended to bring about a fundamental change to the power of the General Assembly.

125. Our appellate courts have interpreted the rights to free speech in alignment with cases interpreting the First Amendment to the United States Constitution. *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019); *Feltman v. City of Wilson*, 283 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014). The United States Supreme Court addressed the issue of whether partisan gerrymandering impinged upon free speech and other rights protected by the First Amendment to the United States Constitution. Their analysis was direct and to the point: "To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. The same is true with the enacted plans. Plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district.

126. Plaintiffs' claims based upon the Free Speech Clause fail.

c. The Enacted Plans Do Not Violate the Right of Assembly Clause.

127. The 1971 Constitution, art. I, § 14 provides: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to

apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated." With the exception of the provision relating to the "right to instruct," the language of the Freedom of Assembly Clause closely resembles the language in the First Amendment to the United States Constitution which guarantees, in part, the right of the people "to assemble and petition the government for a redress of grievances."

128. In *Libertarian Party,* our Supreme Court

> [J]oin[ed] a growing number of federal courts applying the Supreme Court's associational rights analysis to equal protection challenges in the context of ballot access restrictions on political parties and candidates. [They did] so because the interests of equal protection bear a strong relationship to the associational rights protected by our state constitution's free speech and assembly provisions.

(citations omitted) *Libertarian Party,* 365 NC. at 48, 707 S.E.2d at 204. See *Feltman,* 238 N.C. App. at 253, 767 S.E.2d at 620 (recognizing that "[t]he right to freedom of assembly is similar to the right of freedom of association embodied within the federal constitution" and analyzing a claim based upon freedom of assembly in light of federal case law).

129. Given our appellate courts' adoption of the United States Supreme Court's associational rights analysis and other federal precedent, we find no reason not to adopt the United States Supreme Court's analysis and findings on the effect of redistricting plans to the right of assembly and petition as set forth in *Rucho,* 139 S.Ct. at 2504. Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district.

130. There is absolutely no evidence that the Plaintiffs' right to instruction was violated during the redistricting process or that the Enacted Maps somehow inhibit the right to instruct.

131. Plaintiffs' claims based upon the Right of Assembly Clause fail.

132. As the North Carolina Supreme Court has stated:

> [t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Stephenson I, 355 N.C.at 371-372, 562 S.E.2d at 390.

133. The objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech or Freedom of Assembly Clauses found in Article I of the 1971 Constitution.

134. Therefore, the Court concludes that our Constitution does address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs' claims on the basis of "extreme partisan advantage" fail.

E. Plaintiffs' Claims Are Nonjusticiable

135. In North Carolina, our Supreme Court has had an opportunity on a number of occasions to address whether the creation of boundaries is a question that presents a justiciable controversy. In those instances, the Supreme Court has found that they were political questions and thus non-justiciable. *See e.g., Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909) (rejecting partisan-gerrymandering challenge to a special-tax district); *Norfolk & S.R. Co. v. Washington County*, 154 N.C. 333, 335-36, 70 S.E. 634, 635 (1911) (holding the General Assembly's authority to "declare and establish what it deemed the true boundary between . . . counties . . . is a political question, and the power to so declare is vested in the General Assembly."); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) ("[T]he power to create or establish municipal corporations . . . is a political function which rests solely in the legislative branch of the

government."); *State ex. Rel. Tillett v. Mustain*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) ("The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function."); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) ("Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate.").

136. In *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), in adopting the United States Supreme Court's definition on what constitutes a nonjusticiable claim, the North Carolina Supreme Court held that "any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error." *Id.* at 639, 599 S.E.2d at 391. The North Carolina Supreme Court stated:

> the United States Supreme Court has defined issues as nonjusticiable when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue.

Id. (citing *Baker v. Carr*, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682, 82 S. Ct. 691 (1962)).

137. The constitutional provisions relevant to the issue before the Court establish that redistricting is in the exclusive province of the legislature. N.C. Const. of 1971, amend 1996, art. II §§ 3, 5, and 20. Moreover, redistricting of congressional districts is largely left to the legislatures of the individual states. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414, 126 S. Ct. 2594, 2607 (2006).

138. As to whether satisfactory and manageable criteria or standards exist for judicial determination of the issue, the United States Supreme Court's analysis in *Rucho* is instructive. *See Rucho* 139 S. Ct. at 2498-2506.

139. As the role apportionment plays is critical and a traditional part of American politics, "[a]ny standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'" *Id.* at 2498.

140. This Court has not been asked to eliminate all partisan gerrymandering, only "extreme" partisan gerrymandering. In short, we are asked to decide how much partisanship is "extreme." In attempting to do so, we necessarily require "especially clear standards" because "[w]ith uncertain limits [we] – even when proceeding with the best intentions – would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (citing *Vieth, v. Jubelirer,* 541 U.S. 267, 307 (2004)).

141. "Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. . . . But such a claim is based on a 'norm that does not exist' in our electoral system—'statewide elections for representatives along party lines.'" *Id.* at 2499. (citations omitted.)

142. In order to avoid repeating the entirety of *Rucho*, it is safe to say that all of the arguments as to justiciability in the present case were made before the United States Supreme Court in *Rucho* and after an exhaustive analysis, the United States Supreme Court determined that:

> Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U. S., at ___, 135 S. Ct. 2652, 192 L. Ed. 2d 704, 716, does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U. S., at 278, 279, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Id. at 2506-07

143. In essence we are asked to apportion political power as a matter of fairness. This is no different than what our Supreme Court was asked to determine in *Dickson v. Rucho,* 367 N.C. 542, 766 S.E.2d 238 (2014). In that case, the North Carolina Supreme Court stated:

> Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley,* 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

Id. at 575, 766 S.E.2d at 260, vacated and remained on other grounds *Dickson v. Rucho,* ___ *U.S.* ___ 135 S. Ct. 1843 (2015).

144. Utilizing the test for determining whether a claim is nonjusticiable as adopted in *Hoke County Bd. Of Education,* and following the extensive analysis of the nonjusticiability of partisan gerrymandering claims in *Rucho,* this Court determines that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach.

145. We agree with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. *Rucho,* 139 S.Ct, at 2504. Furthermore, it has the potential to violate "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,* 567 U.S. 787, 824, 135 S. Ct. 2652, 2658 (2015). Also, it can represent "an abuse of power that, at its core, evinces a

fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *LULAC v. Perry*, 548 U.S. 399, 456, 126 S.Ct. 2594, 2631 (2006) (Stevens, J. concurring in part and dissenting in part) (quotation and citation omitted)).

146. In addition, excessive partisan gerrymandering can subject the State to unwanted attention, ridicule and derision. As this Court mentioned at the hearing on Plaintiffs' Motions for Preliminary Injunction, the Supreme Court in *Stephenson* pointed out:

> Since *Cavanagh*, many North Carolina legislative districts have been increasingly gerrymandered to a degree inviting widespread contempt and ridicule. *See, e.g.*, "Red-Light District: It's time to draw the line on gerrymandering," John Fund's Political Diary, WSJ.com Opinion Journal from the Wall Street Journal Editorial Page, at http://www.opinionjournal.com/diary/?id=105001756 (Mar. 13, 2002) ("elections in many semi-free Third World nations routinely offer more choices than many North Carolina residents will have" under the 2001 legislative redistricting plans); *How to Rig an Election*, The Economist, Apr. 27, 2002, at 29, 30 ("In a normal democracy, voters choose their representatives. In America, it is rapidly becoming the other way around" and asserting that "North Carolina [has been] long notorious for outrageous reapportionment.")

Stephenson, 355 N.C. at 375, 562 S.E.2d at 392.

147. Over 19 years have elapse since *Stephenson* was decided. The political party drawing North Carolina's legislative maps has changed, yet the ridicule has continued. *See,* "Gerrymandering Puts Partisanship in Overdrive; Can California Slow It" Gerald F. Seib, WSJ.com from the Wall Street Journal Politics Page at https://www.wsj.com/articles/gerrymandering-puts-partisanship-in-overdrive-can-california-reverse-it-11638198550 (November 29, 2021).

148. This Court neither condones the enacted maps nor their anticipated potential results. Despite our disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule, this Court must remind itself that these maps are the result of a democratic process.

149. The drafters of the 1776 Constitution were elected from eligible males to the Fifth Provincial Congress who were responsible for drafting and approving the 1776 Constitution. Beginning with the 1835 Amendments to the 1776 Constitution, every proposed change since then relating to the drawing of legislative districts was proposed by elected representatives of the people of this State and ratified by the eligible voters. This democratic process left redistricting solely in the province of the legislature subject to only four objective restraints and accountability through frequent elections.

150. The decision of the voters of this State to approve an amendment to the Constitution giving the Governor the right to veto acts of the General Assembly, which excepted the right to veto redistricting maps, by an almost 3-1 margin, put out of reach any control over redistricting by a person elected by the majority of the citizens of this State.

151. The Enacted Maps comply with the objective constraints contained in the North Carolina Constitution of 1971, art. II, §§ 3 & 5., and were thereafter approved by a majority of the elected members of the General Assembly, all of whom were elected pursuant to maps that had previously been determined constitutional by the courts of North Carolina.

152. The people of this State enacted this political process and specifically declined to place any checks on their representatives, other than the objective constraints set forth in the North Carolina Constitution of 1971, art. II, §§ 3 & 5. Some of these people, perhaps even a majority, now ask this Court to undo what they have allowed to be done through the democratic processes of this State. To do so would require us to act outside the bounds of our constitutional authority.

153. Redistricting is a political process that has serious political consequences. It is one of the purest political questions which the legislature alone is allowed to answer. Were we as a Court to insert ourselves in the manner requested, we would be usurping the political power and prerogatives of an equal branch of government. Once we embark on that slippery

slope, there would be no corner of legislative or executive power that we could not reach. Indeed, under Plaintiffs' rationale, we could require the Governor to ensure that the partisan makeup of his political appointees matched or closely resembled the percentage of votes that his political opponent received.

154. We are aware of the effects of partisan gerrymandering. This Court is not without power remedy some of those effects. If partisan gerrymandering dilutes the vote of minorities, remedies under Section 2 of the Voting Rights Act are available. However, either for strategic reasons or a lack of evidence, Plaintiffs have repeatedly informed the Court that they are not pursing a Voting Rights Act claim, but rather, are only pursuing a State Constitutional claim for racial gerrymandering. This is true despite the fact that it potentially would be easier to prove a violation of the Voting Rights Act, as one only need prove effect and need not prove intent.

155. Plaintiffs' theory of extreme partisan gerrymandering necessarily entails a calculation of the number of seats a party is expected to win in any given election. Seats that are deemed outliers based upon certain calculations are the result of "extreme partisan gerrymandering."

156. In a scenario where a party is expected to win 65 seats and the legislatively approved extreme partisan gerrymandered maps would result in a win of 75 seats, those seats in excess of 65 would be outliers and under plaintiffs' theories, are the product of extreme partisan gerrymandering. The Court would be required to order the mapmakers to redraw the maps so that they are consistent with the number of seats a party would expect to win. Given that the party could reach the 65 seat projection through the use of allowable partisan gerrymandering, some of the voters in the 65 permitted districts would suffer the same effects from partisan gerrymandering that the voters in the 10 excessively gerrymandered districts would have suffered had the maps not been withdrawn. To accept

the Plaintiffs' arguments that the maps are unconstitutional on the theories advanced would necessarily mean that no partisan gerrymandering is allowed as no voter should suffer from the effects of the same. This is contrary to the established precedent of the United States Supreme Court and the North Carolina Supreme Court. *Rucho*, 139 S. Ct. at 2504; *Stephenson*, 355 N.C.at 371-372, 562 S.E.2d at 390.

III. Intentional Racial Discrimination and Racial Vote Dilution Claims

A. Intentional Discrimination and Voter Dilution in Violation of the Equal Protection Clause

157. NCLCV Plaintiffs and Plaintiff Common Cause have asserted a claim that the Enacted Plans unnecessarily dilute the voting strength of Black North Carolinians and intentionally discriminate against Black North Carolinians in violation of the Equal Protection Clause of the North Carolina Constitution. The Court concludes that based upon the record before the Court, Plaintiffs have failed to prove the merit of their claim.

158. Under North Carolina's Equal Protection Clause, North Carolina's citizens—including its minority voters—have "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'" *White v. Pate*, 308 N.C. 759, 768, 304 S.E.2d 199, 205 (1983). In particular, North Carolina's minority voters have a right to "substantially equal voting power" and "substantially equal legislative representation." *Stephenson I*, 355 N.C. at 379.

159. The North Carolina Constitution's guarantees of "substantially equal voting power" and "substantially equal legislative representation" are violated when a redistricting plan deprives minority voters of "a fair number of districts in which their votes can be effective," measured based on "the minority's rough proportion of the relevant population." *Bartlett v. Strickland*, 556 U.S. 1, 28-29 (2009) (Souter, J., dissenting)

160. An act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was "a motivating factor." *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (quoting *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016)); *see also Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (quoting *White*, 308 N.C. at 766, 304 S.E.2d at 204) (strict scrutiny is triggered under North Carolina's Equal Protection Clause when it creates a "classification" that "operates to the peculiar disadvantage of a suspect class")). And whether discriminatory purpose was a motivating factor can be "inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Holmes*, 270 N.C. App. at 17. To determine whether this is true, the court may weigh the law's historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law's disproportionate impact. *Id.* at 17.

161. The Supreme Court has observed that "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Dickson v. Rucho*, 368 N.C. 481, 506, 781 S.E.2d 404, 423 (2015), *cert. granted, judgment vacated on other grounds*. The Court considers three factors:

> First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional.
>
> Second, the Supreme Court has recognized the importance of the states' own traditional districting principles, holding that states can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race.
>
> Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities.

Id. (internal citations omitted).

162. North Carolina's Equal Protection Clause is treated the same as the Equal Protection Clause of the United States Constitution. "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19.

163. "[A] finding that race was the predominant motive in drawing a district does not automatically render that district unconstitutional. Nor does it signify that the legislature acted in bad faith or with discriminatory intent in its redistricting." *Covington v. N.C.*, 316 F.R.D. 117, 129 (2016). Further, a legislatures knowledge of racial demographics is most certain, "but that sort of race consciousness does not lead inevitably to impermissible race discrimination." *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)).

164. If a plaintiff shows "that race predominated over traditional race-neutral redistricting principles, [then the court is to] apply strict scrutiny," and the government defendants then "have the burden of show[ing] not only that [their] redistricting plan was in pursuit of a compelling state interest, but also that [their] redistricting legislation is narrowly tailored to achieve [that] compelling interest." *Id.* (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (internal quotations omitted).

165. A "discriminatory purpose may often be inferred from the totality of the relevant facts," even when no discriminatory purpose is "express or appear[s] on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241-42, 96 Ct. 2040, 2048 (1976).

166. The relevant framework for analyzing whether an official action was motivated by discriminatory purpose is set forth in *Village of Arlington Heights v. Metro. House. Dev. Corp.*, 429 U.S. 252 (1977). Courts must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266; *State v. Jackson*,

322 N.C. 251, 261, 318 S.E.2d 838, 843-44 (1988) (Frye, J., concurring). The Supreme Court of the United States in *Arlington Heights* laid out a non-exhaustive list of factors for courts to consider. *Holmes v. Moore,* 270 N.C. App. 7, 18 (2020). Those factors include: (1) the law's historical background, (2) the specific sequence of events leading to the law's enactment, including any departures from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266-68.

167. NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn.

168. First, Plaintiffs have failed to show a predominant racial motive through direct evidence. The Adopted Criteria proscribed the use of racial considerations in the drawing of the Enacted Plan, nor did the General Assembly consider race by, for instance, conducting a racially polarized voting study on the selected plans prior to their enactment.

169. Plaintiffs have also failed to show a predominant racial motive through circumstantial evidence. Though the testimony elicited from Plaintiff's expert, Dr. Leloudis, provided a contextual backdrop for the way redistricting maps have been drawn, litigated, and accordingly struck down in the past, it is incumbent upon this Court to afford the legislature a presumption of good faith. *N.C. State Conference of the NAACP v. Raymond,* 981 F.3d 295, 303 (4th Cir. 2020). "A legislature's past acts do not condemn acts of a later legislature, which we must presume acts in good faith." *Id.* at 298 (citing *Abbot v. Perez,* 138 S. Ct. 2305, 2324 (2018)). Plaintiffs have failed to link past, impermissible race-based redistricting to the current legislature and have failed to provide sufficient circumstantial evidence in accordance with the requirements of the *Arlington Heights* analysis.

170. Second, Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*. Plaintiffs provide insufficient evidence that the instances in which traditional districting principles were not adhered to was because of *racial* considerations. Instead, as discussed above, the General Assembly consistently acted with an intent to redistrict for partisan advantage, and nothing in the record shows that to be a pretext for underlying racial considerations.

171. Third, giving deference to the redistricting process as conducted by the General Assembly, Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group. Plaintiffs have shown, and the Court agrees, that a substantial number of Black voters are affiliated with the Democratic Party. What Plaintiffs have not shown, however, is how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before this Court showing that race *and* partisan gain were *coincident* goals predominating over all other factors in the redistricting.

172. Plaintiffs, for the same reasons, have failed to satisfy their burden of showing that the General Assembly was motivated by discriminatory purpose with regard to violating the Equal Protection Clause. Plaintiffs have presented no direct evidence as to discriminatory purpose, and the circumstantial evidence presented is insufficient to sustain their burden pursuant to *Arlington Heights*.

B. Voter Dilution in Violation of the Free Elections Clause

173. NCLCV Plaintiffs' claim that the Enacted Plan unnecessarily dilutes the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis.

174. Under North Carolina's Free Elections Clause, "the object of all elections is to ascertain, fairly and truthfully the will of the people." *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E.351, 356 (1915).

175. As explained above, the Free Elections Clause has been interpreted narrowly, and Courts have upheld violations of the Free Elections Clause infrequently. "The meaning [of the word free] is plain: free from interference or intimidation." John V. Orth, The North Carolina State Constitution: A Reference Guide, 56 (1993). The Free Elections Clause is inapplicable to NCLCV Plaintiffs' voter dilution claim.

176. Further, Plaintiffs failed to assert a claim under the Voting Rights Act of 1965 ("VRA"), and their application of the *Gingles* analysis, even if used in support of a VRA claim, is insufficient—Plaintiffs failed to conduct a complete *Gingles* analysis. While Dr. Duchin conducted an analysis and made findings concerning the "effective" districts for Black voters, admittedly, she did not conduct step 1 of the *Gingles* analysis.

IV. Whole-County Provision Claims

177. NCLCV Plaintiffs claim that certain state legislative districts violate the Whole County Provision of the North Carolina Constitution. While the boundaries for these districts, noted in the findings of fact, cross county lines, the Court concludes that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such

a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383,84, 562 S.E.2d 377, 397 (2002).

178. The Court further concludes that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting.

V. Declaratory Judgment Claim Regarding the Redistricting Process Laid Out in *Stephenson I* and *Dickson*.

179. Intervenor-Plaintiff Common Cause, in its First Claim for Relief requests that this Court declare that

> Plaintiff and its members and the voters it serves are entitled to, and Legislative Defendants have a duty to undertake, a redistricting process that adheres to the requirements of Article II, Sections 3 and 5 of the North Carolina Constitution as set forth in *Stephenson v. Bartlett*, including a requirement to undertake the analysis of racial data necessary to ascertain what districts are required by the VRA.

Common Cause Complaint, ¶ 157.

180. Plaintiff Common Cause further seeks injunctive relief requiring

> the North Carolina General Assembly to adhere to the requirements of Article II, Sections 3 and 5, as set forth in *Stephenson v. Bartlett*, and specifically to perform a meaningful attempt to determine whether there are any districts compelled by the VRA, which, at a minimum, requires the consideration of racial data to understand changing demographics and performing a racially polarized voting analysis where the racial demographics indicate potential VRA problems before designating county clusters required in Senate and House legislative maps.

Common Cause Complaint, ¶ 159.

181. At the outset, the Court notes that in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), the Supreme Court of North Carolina was asked to address whether the legislative plans enacted in 2001 violated the Whole County Provision (WCP) of the State Constitution. *Id.* 355 N.C. at 360, 520 S.E.2d at 383. The Supreme Court stated "the

expanded question before this Court, in light of the VRA, is whether the WCP is now entirely unenforceable . . . or, alternatively, whether the WCP remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law." *Id.* at 369, 562 S.E.2d at 388.

182. The Court then embarked on an analysis to harmonize the WCP and VRA. The *Stephenson* Court, in reconciling the VRA and WCP, required the formation of single-member legislative districts to ensure compliance with the VRA according to the following criteria:

> [L]egislative districts required by the VRA shall be formed prior to creation of non-VRA districts. ... To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.
>
> In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.
>
> In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.
>
> When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single- member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.
>
> In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one- person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within

> plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one- person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

Id. at 355 N.C. at 381-84, 520 S.E.2d at 396-97.

183. The requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WCP and VRA. There is nothing in *Stephenson* that requires any particular analysis prior to making a decision as to whether VRA districts are necessary. In this case, having just been involved in multiple redistricting lawsuits, the Legislative Defendants determined, based on their prior experience, that no VRA districts were required. FOF 41-50, 52, 72. The Legislative Defendants were open to considering any VRA analysis submitted. While counsel for Common Cause "raised concerns," no VRA analysis was provided to Legislative Defendants that contradicted the Legislative Defendant's perception of the need, or lack thereof, for VRA districts. Whether the decision to rely on prior experience rather than an expert analysis was prudent or wise, that is not for the Court to decide and would impermissibly intrude on the internal decision-making processes of the Legislature. The fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required.

184. What Plaintiff Common Cause asks of this Court is to impose a judicially-mandated preclearance requirement. Such a requirement does not exist in *Stephenson.*

185. If the Legislative Defendants are incorrect that no VRA Districts are required, Plaintiff Common Cause has an adequate remedy at law and that is to bring a claim under Section 2 of the VRA. Plaintiff Common Cause has made it abundantly clear that it has not made such a claim and have presented no evidence to support such as claim.

186. For the reasons stated above, the Court concludes, as a matter of law, that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief pursuant to its First Claim for Relief.

DECREE

Having considered all of the evidence, the memoranda and arguments of counsel, and the record proper, and based upon the foregoing Findings of Fact and Conclusions of Law, the Court ORDERS the following:

I. Plaintiffs' requests for Declaratory Judgment are DENIED.

II. Plaintiffs' requests for Permanent Injunctive Relief are DENIED.

III. This Judgment fully and finally resolves all claims of all Plaintiffs raised in the consolidated cases and Judgment is hereby entered in favor of Legislative Defendants, and Plaintiffs Claims are hereby dismissed with prejudice.

IV. The candidate filing period for the 2022 primary and municipal elections is hereby set and shall resume at 8:00 A.M. on Thursday, February 24, 2022 and shall continue through and end at 12:00 noon on Friday, March 4, 2022.
SO ORDERED, this the 11th day of January, 2022.

A. Graham Shirley, Superior Court Judge

Nathaniel J. Poovey, Superior Court Judge

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 11th day of January 2022.

/s/ Kellie Z. Myers
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