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THE LAW OF DEMOCRACY

LEGAL STRUCTURE OF THE POLITICAL PROCESS

Fifth Edition

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CHAPTER TWO

Insert on page 38 after note 8:

8a. In recent years, many states have relaxed their offender disenfranchisement provisions. Between 1997 and 2018, roughly two dozen states made it easier for at least some offenders to vote, by repealing lifetime disenfranchisement laws, allowing some or all persons under community supervision (e.g., people on probation or parole) to vote, or easing the restoration process for citizens seeking to have their right to vote restored after completing their sentence. These reforms made roughly 1.4 million individuals potentially eligible to vote. See Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reforms*, The Sentencing Project (Oct. 17, 2018), available at <https://perma.cc/M9GK-2JRV>.

In 2018, Florida voters, by a wide margin (with two-thirds of voters supporting the initiative), amended the state constitution to automatically restore most individuals' right to vote "upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4. (Individuals convicted of murder or a felony sex offense were not included.) Roughly 1.4 million individuals could potentially benefit from Amendment 4.

In June 2019, the legislature enacted SB 7066, which defined "completion" of the terms of a sentence to include payment of all financial obligations ordered within the four corners of the sentencing document. These obligations might consist, in a particular case, of fines, restitution, costs, or fees. The amounts were potentially quite substantial, involving thousands of dollars. Among the costs and fees are a flat \$225 assessment in every felony case, \$200 of which is used to fund clerks' offices, and \$25 of which is deposited in the state's general fund, and a \$3 assessment in every case that goes into an account that funds domestic-violence programs and law-enforcement training.

After litigation began in federal court challenging SB 7066, the Governor sought an advisory opinion from the state supreme court. That court held, as a matter of state law, that the language of Amendment 4 itself, without regard to the subsequent legislative enactment, required the payment of all legal financial obligations (LFOs) as a condition precedent to renewed eligibility to vote. *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1072 (Fla. 2020).

In the federal litigation, various voters and civil rights and voting rights groups challenged Florida's "pay-to-vote" requirement advancing theories under the First, Eighth, Fourteenth, and Twenty-Fourth Amendments.

In the fall of 2019, the district court granted a preliminary injunction premised on the principle that requiring payment of financial obligations as a condition of restoring an offender's right to vote violates the Equal Protection Clause when the offender is unable to pay. *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1289 (N.D. Fla. 2019). The court enjoined the Florida Secretary of State and the Supervisors of Elections in the counties where the individual plaintiffs lived from preventing those seventeen individuals from registering or from voting "based only on failure to pay a financial obligation that the plaintiff asserts the

plaintiff is genuinely unable to pay.” The court did not address the plaintiffs’ procedural due process claim (which challenged the method by which aspiring voters could show their inability to pay) or their Twenty-Fourth Amendment claim, which challenged some of the LFOs as a forbidden poll tax.

In February 2020, the Eleventh Circuit affirmed the district court’s grant of a preliminary injunction. It held that “heightened scrutiny applies in this case because we are faced with a narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box.” *Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020). The Eleventh Circuit explained that disenfranchisement inflicted “a continuing form of punishment” on indigent former offenders to which non-indigent former offenders were not subjected. And it suggested that the Florida requirement might not pass even rational basis scrutiny.

The district court then certified a class and conducted a full-scale bench trial, issuing its opinion in May 2020. *Jones v. DeSantis*, 2020 WL 2618062 (N.D. Fla., May 24, 2020). The court found that “the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount.” Withholding the right to vote on that basis was irrational and because it created a wealth barrier to rights restoration without sufficient justification, it failed both rationality review and heightened scrutiny under the Equal Protection Clause.

Moreover, the district court also held that while restitution orders did not impose a “tax,” many of the fees and costs Florida mechanically assessed against all convicted felons *were* taxes because they were used to fund government operations. “The Twenty-Fourth Amendment precludes Florida from conditioning voting in federal elections on payment of these fees and costs. And because the Supreme Court has held, in effect, that what the Twenty-Fourth Amendment prescribes for federal elections, the Equal Protection Clause requires for state elections, Florida also cannot condition voting in state elections on payment of these fees and costs.”

Finally, the district court held that Florida’s system for enabling all former offenders to determine their LFOs was so plagued by intractable administrative problems that it violated procedural due process and was unconstitutionally vague. The court found that many offenders had “no way to find out” their LFOs. It pointed to testimony regarding the efforts of “a professor specializing in this field with a team of doctoral candidates from a major research university” who unsuccessfully spent weeks trying to obtain the LFOs for “153 randomly selected felons.” And a group of staff with “combined experience of over 100 years” in one county clerk’s office spent 12-15 hours “bulldog[ing]” the circumstances of one of the individual plaintiffs at the end of which “[t]hey came up with what they believed to be the amount owed. But even with all that work, they were unable to explain discrepancies in the records” they had used.

The court emphasized that based on the State’s own estimates, the projected completion date for reviewing the LFOs of only the 85,000 *currently* pending registrations for individuals with felony convictions would be completed only “early in 2026. With a flood of additional registrations expected in this presidential election year, the anticipated completion date might well be pushed into the 2030s.”

And the court found that the inability to determine LFOs accurately would deter even eligible offenders from registering or voting because the state's voter registration form warns a false affirmation of eligibility is a felony and they might reasonably fear prosecution.

The district court then declared that the "Florida pay-to-vote system" is "unconstitutional as applied to individuals who are otherwise eligible to vote but are genuinely unable to pay the required amount," that conditioning the right to vote on "amounts that are unknown and cannot be determined with diligence is unconstitutional," and that "[t]he requirement to pay fees and costs as a condition of voting is unconstitutional because they are, in substance, taxes." It enjoined the state and its officials from enforcing those requirements.

The district court also required the state to set up a process by which individuals could request an advisory opinion from the Division of Elections regarding their LFOs. If the Division of Elections fails to provide an answer within 21 days, the government was enjoined from taking any steps to impede the individual's registration or voting, including acting "to cause or assist a prosecution of the requesting person for registering to vote and voting" unless and until the person voted after "the Division of Elections provides an advisory opinion that shows the person is ineligible to vote."

The state appealed. In July 2020, the court of appeals voted to hear the case en banc (rather than initially before a three-judge panel) and in a one sentence order granted the state's motion to stay the permanent injunction pending appeal. *Jones v. Governor of Florida*, 2020 WL 4012843 (11th Cir. July 1, 2020).

The plaintiffs then asked the Supreme Court to vacate the court of appeals' stay of the district court's permanent injunction. In a per curiam order, the Court denied that motion. *Raysor v. DeSantis*, 2020 WL 4006868 (U.S. July 16, 2020).

Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented from the denial of the application to vacate the Eleventh Circuit's stay. She emphasized that "nearly a million' persons are barred from voting because of Florida's alleged wealth discrimination, inscrutable processes, and tax." Thus, it was quite likely that the question whether Florida could condition automatic re-enfranchisement on paying LFOs was "exceptionally important and likely to warrant review."

She then confronted the Court's *Purcell* jurisprudence. In *Purcell v. Gonzales*, 549 U.S. 1 (2006) (per curiam), the plaintiffs had brought suit in May 2006 to challenge Arizona's newly implemented Proposition 200, which required voters to present proof of citizenship when they registered to vote and to present identification when they voted on election day. They sought a preliminary injunction to enjoin its use in the upcoming November election. In early September, the district court denied their request for a preliminary injunction without then issuing findings of fact or conclusions of law. (Only in mid-October did the district court explain that while the plaintiffs had "shown a possibility of success on the merits of some of their arguments," the court could not say "at this stage they have shown a strong likelihood" and finding that the balance of the harms and the public interest counseled in favor of denying the injunction.) In the interim, a two-judge court of appeals motions panel issued a four-sentence order enjoining Arizona from enforcing Proposition 200 pending disposition, after full briefing, of the plaintiffs' appeal of the denial of a preliminary injunction. That briefing would not be completed until after the 2006 election.

In a per curiam opinion, the Supreme Court treated the state’s application to vacate the court of appeals injunction as a petition for certiorari, granted the petition, and vacated the court of appeals’ order. The Court emphasized that “[c]ourt 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.” Thus, the Court stated that “[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the [challenged] rules.” This proposition—that courts should not change election rules shortly before an election—came to be known as the “*Purcell* principle.” See Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427 (2016); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 456 (2015).

Quoting *Purcell v. Gonzales*, Justice Sotomayor observed that, like the Ninth Circuit in *Purcell*, the Eleventh Circuit’s “bare order” granting en banc review and staying the district court’s injunction had not “‘provide any factual findings or indeed any reasoning of its own,’ and ‘[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect.’” She emphasized that “[t]he law required the Eleventh Circuit to ‘give deference to the discretion of the District Court,’ but there is ‘no indication that it did so.’ That is the precise error this Court corrected in *Purcell*.” In light of the fact that the preliminary injunction had already been in place for nearly a year, she argued that “the Eleventh Circuit has created the very ‘confusion’ and voter chill that *Purcell* counsels courts to avoid.” And she ended by charging that “[t]his Court’s inaction continues a trend of condoning disfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. See *Republican National Committee v. Democratic National Committee*, 589 U. S. —, (2020) (per curiam). Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disfranchisement—a situation that *Purcell* sought to avoid—the Court balks.”

Insert at page 127, before Section D:

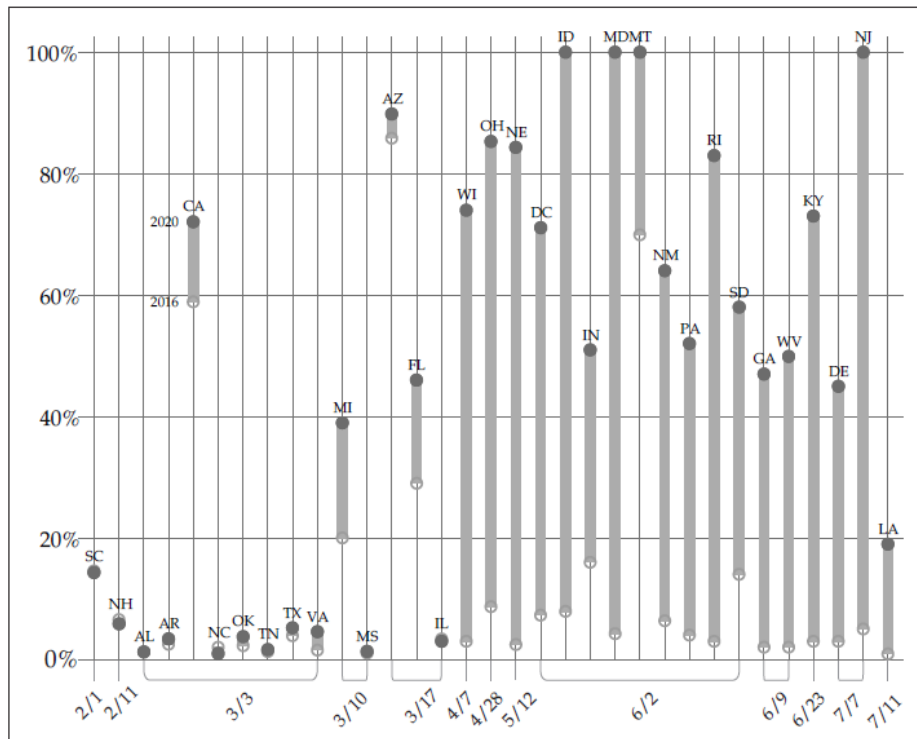
Note on the 2020 Primaries and General Election: Voting During a Pandemic

When the pandemic hit the United States with full force in March 2020, many states were in the midst of conducting primary elections, including their presidential primary. Most of those states postponed their spring primaries until June or July. But the pandemic was still ongoing in the summer, and as policymakers and election administrators prepared for the general election, they were forced to do so under the assumption that the virus would be a significant factor in shaping how voting would be conducted in November.

1. The sudden explosion in absentee voting. States responded to the pandemic by increasing absentee voting and transforming polling places to allow for safe in-person voting. Wisconsin was one of the few states that went ahead and conducted its elections as scheduled on April 7th. Its primary election, in which 97 percent of the polling places in Milwaukee were closed, became a cautionary tale for all that followed throughout the spring and summer. Even with the near collapse of in-person voting, however, turnout in the primary reached an impressive level due to absentee voting. As illustrated in the figure

below, for most states with primaries after Wisconsin, voting by mail (either through increased use of absentee voting or total conversion to vote-by-mail) became the predominant mode of voting in the primary. Absentee voting skyrocketed by more than 650 percent compared to normal times. In Pennsylvania’s June primary, about 50 percent of voters voted absentee, compared to 5 to 7 percent in previous elections. *See* Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), available at <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/>.

Percent of Ballots Cast by Mail in Presidential Primaries, 2016 and 2020



Sources: Data gathered by the Stanford-MIT Healthy Elections Project using state election department reports and media accounts. Not all states provide data. Only states that held primaries in both 2016 and 2020 are displayed.

Making the transition to absentee voting posed significant logistical challenges for jurisdictions without much experience with that mode of voting. These problems included mundane supply-chain issues, such as the need to ramp up the capacity to print a large number of absentee ballots; the stresses on the U.S Postal Service of delivering absentee ballots to voters and processing the return of those ballots to election officials throughout the country; and the need to purchase equipment for the handling of absentee ballots, in jurisdictions that did not have it, to avoid having to process this new volume of absentee ballots by hand. For a summary of these issues, see Nathaniel Persily, *It’s Not Too Late to Save the 2020 Election*, WALL ST. J. (June 12, 2020), at

<https://www.wsj.com/articles/its-not-too-late-to-save-the-2020-election-11591973979>.

Some jurisdictions were overwhelmed by the volume of requests, often coming at the last minute. In turn, some number of voters who requested absentee ballots did not receive them. Others did not return them in time to be counted. *See* Michelle Ye Hee Lee, *Scattered problems with mail-in ballots this year signal potential November challenges for Postal Service*, WASH. POST (July 15, 2020), available at https://www.washingtonpost.com/politics/scattered-problems-with-mail-in-ballots-this-year-signal-potential-november-challenges-for-postal-service/2020/07/15/0dfb8b42-c216-11ea-b178-bb7b05b94af1_story.html; David Eggert, *Court denies Mich. absentee ballots that come after election*, DETROIT NEWS (July 15, 2020), available at <https://www.detroitnews.com/story/news/local/michigan/2020/07/15/court-denies-mich-absentee-ballots-come-election/112261952/>; Evan Nicole Brown, *What It's Been Like to Vote in 2020 So Far*, N.Y. TIMES (July 14, 2020), available at <https://www.nytimes.com/2020/07/14/us/politics/voting-lines-2020-elections.html>.

Many primary voters struggled with this new mode of voting. Most states require that the exterior return envelope for an absentee ballot include the voter's signature. Some also require signatures of a witness or notary or other information, such as the last four digits of a social security number or driver's license/state ID number. These measures are required to verify the identity of the person casting the ballot. Many voters fail to include that additional information or their signatures are deemed "mismatched" to those the election office has on file, drawn from DMV or voter registration records. If the information provided on the envelope is missing or inaccurate, roughly 20 states allow a voter to "cure" the inaccuracy if sufficient time remains. *See* NAT'L VOTE AT HOME INST., VOTE AT HOME POLICY ACTIONS: COVID-19 RESPONSE (May 2020), available at <https://voteathome.org/wp-content/uploads/2020/07/NVAHI-50-State-Policy-Analysis.pdf>. They do so by attesting to their signature or otherwise interacting with an election office to resolve the discrepancy. States, and even counties within states, vary considerably in the procedures they apply for verifying signatures and the voter's identity, employing combinations of automated and human review. *See* Ali Bloomgarden et al., "Behind the Scenes of Mail Voting: Signature Verification and Witness Requirements in the 2020 Elections," in *THE VIRUS AND THE VOTE: ADMINISTERING THE 2020 ELECTION IN A PANDEMIC* 397-475 (N. Persily & C. Stewart III eds., 2021).

Although we often categorize defects in mail ballots as "errors", in truth, the discrepancies that can lead to canceled votes come from many sources. First, verification of signatures only serves its purpose if the signature on file – most often derived from a small, but coarse, electronic sign-in pad at a DMV – accurately captures the voter's signature. Younger voters, who are less likely to have learned cursive writing, and older voters with certain disabilities, often do not have consistent signatures. Second, the instructions on an absentee ballot envelope are often not intuitive. Consider the absentee ballot envelope below from the 2020 primaries in North Carolina. Especially for first time absentee voters unfamiliar with the process, they may find it strange that an anonymous ballot would require a signature on the envelope outside, let alone how important that signature is. In addition, some states require that voters insert their ballot inside another envelope (a so-called "secrecy sleeve") which is then inserted in the envelope placed in the mail. *See* Axel Hufford et al., "Secrecy Sleeves and the "Naked Ballot" in the 2020 General Election," in *THE VIRUS AND THE VOTE: ADMINISTERING THE 2020 ELECTION IN A PANDEMIC* 373-396 (N. Persily & C. Stewart III eds., 2021). Failure to do so, leads to a "naked ballot" that may not be counted. In fact, in the run-up to the 2020 general election, the Pennsylvania Supreme Court confirmed that naked ballots would be disqualified in that

state, leading to a public education campaign featuring politicians and others posing naked with only envelopes covering them.

Absentee Application and Certificate

Fraudulently or Falsely completing this form is a Class 1 felony under Chapter 163 of the N.C. General Statutes
The following people are PROHIBITED from signing the Witness Certification:
For all voters: a candidate, UNLESS the candidate is the voter's near relative;
For voters who are patients or residents of a hospital, clinic, nursing home, or adult care home: (1) an owner, manager, director, or employee of that facility; (2) an individual who holds any federal, State, or local elective office; and (3) an individual who holds office in a State, congressional district, county or precinct political party or organization, or who is a campaign manager or treasurer for any candidate or political party.

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|---|--|--|------------|----------------------------|----------------------------|---------------------------------|---------------------------------|--------------------------------------|--------------------------------------|------------|------------|--|----------------------|----------------------------|--|----------------|----------------|--|---------------|---------------|--|---------------|---------------------|--|
| <p>Voter's Certification (Required) I attest that I am currently registered to vote in this county and I will have resided at the address on this application for 30 days immediately prior to this election. I am a United States citizen and I am at least 18 years old, or will be by the date of the general election. I understand that it is a felony to vote more than one time in an election. I have not been convicted of a felony, or if I have been convicted of a felony, I have completed my sentence, including any probation or parole. I further certify that I marked the enclosed ballot for it was marked for me according to my instructions in the presence of:</p> <p><input type="checkbox"/> two (2) witnesses who are at least 18 years of age and who are not disqualified by law to witness the casting of my absentee ballot (the witnesses must complete Option 1 of the Witness Certification) OR</p> <p><input checked="" type="checkbox"/> a notary public (the notary must complete Option 2 of the Witness Certification)</p> <p>Signature of Voter (Required) _____ Date _____</p> <p>Name (Correction if applicable) _____</p> <p>Voter Assistant Certification (if applicable)</p> <p><input type="checkbox"/> I certify that: • the Voter requested my assistance • I assisted by marking the ballot and/or the Absentee Application and Certificate according to the Voter's instruction only • I assisted only while in the Voter's presence • I am the Voter's near relative or verifiable legal guardian, or I am providing assistance because a near relative or legal guardian is unavailable to assist the voter and I am not disqualified from assisting the Voter under G.S. 163-226.3(a)(4) or G.S. 163-237(c).</p> <p><input type="checkbox"/> I certify that: • Due to a disability the Voter requested my assistance placing the sealed absentee return envelope in the closest U.S. Mail depository or mailbox • I mailed the ballot as directed by the Voter • I am not disqualified from assisting the Voter under G.S. 163-226.3(a)(4) or G.S. 163-237(c).</p> <p>Name of Assistant _____ Address of Assistant _____ Assistant's Signature _____ Date _____</p> | <p>Witness Certification</p> <p>Option 1: Two (2) Witnesses (Required Unless a Notary Public is the Witness)</p> <p>I certify that: • I am at least 18 years old • I am not disqualified from witnessing the ballot as described in the WARNING on the flap of this envelope • The Voter marked the enclosed ballot in my presence, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this Absentee Application and Certificate, or caused it to be signed • I respected the secrecy of the ballot and the Voter's privacy, unless I assisted the Voter at his/her request (complete Voter Assistant Certification section).</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; text-align: center;">Witness #1</td> <td style="width: 50%; text-align: center;">Witness #2</td> </tr> <tr> <td>Signature (Required) _____</td> <td>Signature (Required) _____</td> </tr> <tr> <td>Street Address (Required) _____</td> <td>Street Address (Required) _____</td> </tr> <tr> <td>City, State and Zip (Required) _____</td> <td>City, State and Zip (Required) _____</td> </tr> <tr> <td>Date _____</td> <td>Date _____</td> </tr> </table> <p>Option 2: Notary Public as Witness (Required Unless Two Witnesses Provided)</p> <p>I certify that: on the _____ day of _____, 20____, the Voter _____ personally appeared before me, was positively identified and in my presence, the Voter marked the enclosed ballot, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this Absentee Application and Certificate, or caused it to be signed • I am at least 18 years old • I am not disqualified for witnessing the ballot as described in the WARNING on the flap of this envelope • I respected the secrecy of the ballot and the privacy of the Voter, unless I assisted the Voter at his/her request (complete Voter Assistant Certification section).</p> <p><small>NOTE: A notary stamp or other proof of notary status and affidavit is not required to be attached to this application and certificate. (31 B. § 168-39)</small></p> <p>STATE OF _____ COUNTY OF _____ Notary Public _____ Commission Expiration Date _____</p> | Witness #1 | Witness #2 | Signature (Required) _____ | Signature (Required) _____ | Street Address (Required) _____ | Street Address (Required) _____ | City, State and Zip (Required) _____ | City, State and Zip (Required) _____ | Date _____ | Date _____ | <p style="text-align: center;">Affix NON-BARCODE Label HERE</p> <hr/> <p style="text-align: center;">Affix BARCODE Label HERE</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td>Date Marked Received</td> <td>Voter Certification Signed</td> <td><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td>Witness Marked</td> <td>Witness Signed</td> <td><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td>Notary Marked</td> <td>Notary Signed</td> <td><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td>Ballot Signed</td> <td>Ballot Applied Data</td> <td></td> </tr> </table> <p>Second Primary Request or Runoff Request In the event that a Second Primary (or Runoff Election) is called, I request that an absentee application and ballot be issued to me and mailed to me:</p> <p>Signature of voter if applicable _____ Date _____</p> <p style="text-align: right;">Address where application and ballots should be mailed _____</p> | Date Marked Received | Voter Certification Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | Witness Marked | Witness Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | Notary Marked | Notary Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | Ballot Signed | Ballot Applied Data | |
| Witness #1 | Witness #2 | | | | | | | | | | | | | | | | | | | | | | | |
| Signature (Required) _____ | Signature (Required) _____ | | | | | | | | | | | | | | | | | | | | | | | |
| Street Address (Required) _____ | Street Address (Required) _____ | | | | | | | | | | | | | | | | | | | | | | | |
| City, State and Zip (Required) _____ | City, State and Zip (Required) _____ | | | | | | | | | | | | | | | | | | | | | | | |
| Date _____ | Date _____ | | | | | | | | | | | | | | | | | | | | | | | |
| Date Marked Received | Voter Certification Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | | | | | | | | | | | | | | | | | | | | | | |
| Witness Marked | Witness Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | | | | | | | | | | | | | | | | | | | | | | |
| Notary Marked | Notary Signed | <input type="checkbox"/> Yes <input type="checkbox"/> No | | | | | | | | | | | | | | | | | | | | | | |
| Ballot Signed | Ballot Applied Data | | | | | | | | | | | | | | | | | | | | | | | |

Given the potential for defects in the absentee voting process, it may come as little surprise that, in each election, many absentee ballots are not counted. Most uncounted absentee ballots are rejected because they are received after the deadline. Rates of uncounted ballots ranged widely between jurisdictions, from 3% to 30% (in an extraordinary example from the New York City primary) and varied significantly even between counties in the same state. A rate of 3% is less significant when only 5% of the overall vote is cast absentee than when 50% is by absentee ballot. Moreover, rates of uncounted ballots are not evenly distributed. One study of the rates of uncounted ballots in Florida's 2020 primary found the youngest voters were three times as likely to have their absentee vote go uncounted, and African Americans and Latinos were twice as likely to have their votes go uncounted as whites. DIANA CAO, FLORIDA ELECTION ANALYSIS (2020), available at <https://healthyelections.org/sites/default/files/2020-06/Florida%20Election%20Memo.pdf> (noting that most of these discrepancies are due to late ballots).

Third, many voters prefer to vote in person, despite the virus. Some do not trust the postal service to deliver their ballot and others simply enjoy the civic spirit associated with voting in a polling place. A recent survey found that even with the virus, 30% of people in California still prefer to vote in-person. See *Republicans and Democrats in California prefer to get their ballot in the mail*, CALMATTERS (July 2, 2020), available at <https://calmatters.org/commentary/my-turn/2020/07/republicans-and-democrats-in-california-prefer-a-mail-ballot-but-safe-accessible-options-are-important/>.

Finally, a massive flood of absentee ballots means that many ballots will not be received and counted until after Election Day. Most states permit these ballots to be postmarked as late as on Election Day, and some states treat them as valid if received as

late as 14 days after Election Day. In New York in 2020, a winner in some congressional primaries was not declared until two weeks after Election Day, and in one congressional primary, a winner was still not declared more than a month after the election.

2. *Political Controversies Over “Vote by Mail.”* “Voting by mail” also became politically controversial in the primary election period, with President Trump, in particular, arguing that voting by mail would increase the risk of election fraud. While there are a few, more significant examples of absentee ballot fraud than in-person voter impersonation fraud, the number of examples is small. Some of the political conflict over “vote by mail” was the product of widespread terminological confusion between “no-excuse absentee voting” and what might be called true “vote-by-mail,” such as used in Washington, Oregon, Colorado, Utah, and Hawaii. The functional difference is that the former requires the voter to request an absentee ballot while in the latter the state mails out absentee ballots to all eligible voters.

It is easy to find supporters and critics who sound as if they are defending or criticizing one of these options when they are actually addressing the other option. As an example of someone defending no-excuse absentee voting who *sounds* as if they are supporting true VBM. Michigan’s Secretary of State, Jocelyn Benson (a former election law scholar), wrote an op-ed entitled “Vote By Mail Worked in Michigan.” Jocelyn Benson, *Vote-by-mail worked in Michigan. Here’s what we need to succeed in the fall*, BROOKINGS (June 19, 2020), available at <https://www.brookings.edu/blog/fixgov/2020/06/19/vote-by-mail-worked-in-michigan-heres-what-we-need-to-succeed-in-the-fall/>. That title makes it sound as if she is defending true VBM, but she is not; Michigan does not use true VBM (writers of op-eds typically have no say over the title a publication puts on a piece). Benson’s piece was only defending and explaining no-excuse absentee voting.

Similarly, some critics of true VBM might sound as if they are attacking no-excuse absentee voting, or be taken to be doing that, when they are not. Professor Michael Morley, for example, has written strongly against true VBM, but supports no-excuse absentee voting. See Michael Morley, *Election Modifications to Avoid During the COVID-19 Pandemic*, LAWFARE BLOG (April 17, 2020), available at <https://www.lawfareblog.com/election-modifications-avoid-during-covid-19-pandemic>.

In addition, no-excuse absentee voting is not as controversial as some of these public debates might suggest. About 28 states now have no-excuse absentee voting (another 5 states use true VBM). Nor is no-excuse absentee voting as much of a partisan issue as some of the public debates might suggest. The list of these no-excuse absentee ballot states includes many that would be considered “red states,” including such states as KS/ID/WY/SD/ND/NC/NV/NE/MT/GA/AK (a few of these states currently have divided government).

To be sure, some states do strongly oppose no-excuse absentee voting; Texas is a current, prominent example, as discussed further below. But at least some of the political conflict over “Vote By Mail” was a product of commentators believing that defenders of no-excuse absentee were defending true VBM and critics of true VBM being thought of as hostile to no-excuse absentee voting. Indeed, President Trump and Vice President Pence suggested at points that they supported no-excuse absentee voting and were criticizing only true VBM.

3. *The Role of State Courts and the Lower Federal Courts.* Policymakers in a

number of states adapted their voting systems and rules to the circumstances of the pandemic. In some states, this involved the passage of new legislation while in others, Governors or Secretaries of states used their powers under public-health emergency statutes to restructure the voting process. Alabama law, for example, permits absentee voting only for certain specific reasons. But in light of the pandemic, Alabama's Secretary of State issued an order permitting no-excuse absentee voting.

Some federal and state courts did order changes to matters such as signature requirements for candidates and ballot initiatives; deadlines for voter registration; deadlines for absentee ballots; and witness requirements for absentee ballots. These decisions are based on application of the *Anderson-Burdick* doctrine. Though state courts are not obligated to apply that doctrine as a matter of state constitutional law, many state courts read their state constitutions to incorporate these same standards. One of the noteworthy features of these cases is that courts concluded that laws completely constitutional under normal circumstances become unconstitutional under the conditions of the pandemic. Due to the virus, courts concluded, states must not enforce otherwise valid provisions and must affirmatively adopt other measures. As one example, a Virginia district court concluded that “[i]n ordinary times,” Virginia’s requirement that an absentee ballot be signed by a witness may not be a significant burden on the right to vote.” “But these are not ordinary times. In our current era of social distancing . . . the burden is substantial for a substantial and discrete class of Virginia’s electorate.” *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020).

One intriguing aspect to these early cases is the sudden emergence of *Anderson-Burdick* as the dominant font of authority for federal courts to order state-election code changes to enable effective political participation in the conditions of Covid-19. For most of the years since the *Anderson-Burdick* doctrine emerged, it had proven to be weak tea, particularly in the Supreme Court. Indeed, the doctrine was considered a retrenchment on the more robust right-to-vote doctrine that had first emerged in the 1960s, under which the Court subjected restrictions on the franchise to strict scrutiny. *Burdick* explicitly stated that “a more flexible standard” than strict scrutiny should apply going forward. Since the *Anderson-Burdick* test was formulated, the Supreme Court has never used it to strike down a regulation of, or restriction on, access to the ballot box – the most prominent example being the Court’s decision invoking *Anderson-Burdick* to uphold a voter-identification law in *Crawford v. Marion County Election Bd.* But under the conditions of the pandemic, *Anderson-Burdick* has thus far become a much more robust doctrine in application.

A second intriguing aspect of these cases is that the federal courts can be seen as exercising the kind of emergency powers normally thought to be the province of only executives and legislatures. Courts became first-movers and front-line actors in adopting new policies that the emergency circumstances were thought to require. In addition, the conception of constitutional rights shifted in the emergency. As against the ordinary state of affairs, in which American constitutional rights are viewed as negative rights, during the pandemic, these rights become the kind of positive constitutional rights thought to exist only in other constitutional systems. See Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356:

In the domain of elections, federal courts are themselves becoming affirmative institutions of the state taking the initiative to create new policies that the pandemic crisis is thought to warrant. The courts are not

engaging in an *ex post* checking function against new emergency measures the government has taken; instead, the courts are responding to the *failure* of governments to adopt new policies tailored to the extreme new circumstances of the pandemic. Courts in this arena are not negatively checking and vetoing government action, they are *affirmatively* requiring government to adopt certain policies. Courts are not issuing injunctions blocking coercive new emergency measures governments have adopted; instead, courts are mandating that governments *exercise* extraordinary powers that would not be required in normal times. In a fragmented way thus far, across district courts scattered around the country, the federal courts are moving bit by bit toward building a new election code for pandemic-time elections. While we are not accustomed to viewing the Constitution as granting federal courts emergency powers, that is an apt overarching framework for synthesizing the various election-related decisions rapidly emerging -- with several new decisions weekly -- from the federal courts.

The insertion of federal court authority did not fare well on appeal. In Texas, which permits absentee voting only for those who are disabled, away, or over 65, a federal district court had held that the Constitution required Texas to make absentee voting available to all eligible voters. But in staying the district court's injunction, a motions panel of the Fifth Circuit stated that the "Virus's emergence has not suddenly obligated Texas to do what the Constitution has never been permitted to command, which is to give everyone the right to vote by mail." *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *14 (5th Cir. June 4, 2020). Judge Ho's concurring opinion elaborated this view: the Constitution can be implicated in response to state action, but "expanding access to mail-in voting to redress personal hardship . . . is a policy matter for the Legislature." The case will be argued to the Fifth Circuit later this year.

The Sixth Circuit took a similar position, but in a more nuanced form. That court held that a district court had properly applied *Anderson-Burdick* in enjoining Michigan from applying its usual deadlines and signature requirements to state and federal candidates seeking access to the primary ballot, given the circumstances of Covid-19. But exercising the kind of emergency powers discussed above, the district court had gone on to order the state to (1) reduce the number of signatures required by 50%; (2) extend the deadline for filing the signatures; and (3) permit the collection of signatures through the use of electronic mail. The Sixth Circuit held that the district court did not have the power to order Michigan to take these affirmative steps; it was up to the state, in the first instance, to decide how to re-design its election process in light of the holding that its current rules had become unconstitutional, due to the virus. In the words of the Sixth Circuit, the district court had impermissibly crossed the line into engaging in "a plenary re-writing of the State's ballot-access provisions." *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *2 (6th Cir. May 5, 2020). Despite the virus, "federal courts have no authority to dictate to the States precisely how they should conduct their elections." In a later, unanimous decision, the Sixth Circuit elaborated by saying that "[f]ederal courts can enter positive injunctions that require parties to comply with existing law. But they cannot 'usurp a State's legislative authority by re-writing its statutes' to create new law." *Thompson v. DeWine*, No. 20-3526, 2020 WL 2702483, at *6 (6th Cir. May 26, 2020).

The 2020 Election in the Supreme Court

During the 2020 election cycle, the Supreme Court issued written opinions on two

cases, both which arose from Wisconsin (one for the primaries, the other for the general election). In addition, the Court ruled on requests for procedural relief in cases from three other states during the primaries. We start with these cases involving questions of procedural relief:

a. In Texas, a federal district court in a preliminary injunction context held that plaintiffs were likely to succeed on their claim that Texas' policy of permitting only those over the age of 65 to cast an absentee ballot without further justification unconstitutionally discriminated against younger voters, in the context of the pandemic, in violation of the 26th Amendment (few cases address the 26th Amendment at all). The Fifth Circuit stayed that decision. Plaintiffs then asked the Supreme Court to vacate that stay and for expedited consideration of their cert. petition before the Fifth Circuit had resolved the appeal pending before it. The Supreme Court declined to do so. The cert. petition remains pending, and the Fifth Circuit has scheduled argument on the state's appeal from the district court's preliminary injunction.

In Alabama, the state was holding runoff elections for its primaries on July 14, 2020. Because of the virus, the Secretary of State (SOS) issued an emergency regulation permitting all voters to vote absentee. But the SOS did not modify other requirements related to absentee voting, including requirements that the voter submit with the ballot a copy of a photo ID and an affidavit signed either by a notary public or two witnesses (the Governor issued an order permitting notarization to be done by videoconference rather than in person). Invoking *Anderson-Burdick*, plaintiffs challenged these requirements and also argued that they should have a right to engage in in-person curbside voting, which the SOS was allegedly preventing counties from using.

The district court accepted these claims and granted a preliminary injunction. Specifically, the court's order enjoined (1) state officials from enforcing the witness requirement against any qualified voter who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the CDC has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19; (2) the election officials from enforcing the photo ID requirement for any qualified voter age 65 or older or with a disability who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty of perjury that he or she is 65 or older or has a disability; and (3) the Secretary from prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law.

The Eleventh Circuit denied Alabama's emergency motion to stay the preliminary injunction. The Supreme Court, in a 5-4 order, then stayed the district court's order pending resolution of the issues on the merits in the Eleventh Circuit. In the runoff primaries, 5.2% of the total vote was cast absentee, a record for Alabama.

The Court also took action in a felon-disenfranchisement case out of Florida not connected to the unique circumstances of the virus. After the district court issued an injunction, holding that the Florida law at issue was unconstitutional, the en banc Eleventh Circuit issued a stay pending appeal of that injunction. The Supreme Court then declined to vacate that stay.

b. The Court's first written decision during the primaries emerged from a stay application involving an intense political struggle in Wisconsin between the Governor, a

Democrat, and the Republican-controlled state legislature. Wisconsin was scheduled to hold elections in April 2020, during the first peak of the pandemic, for both the presidential primary and an important general election for the state supreme court. After acknowledging he did not have the unilateral power to postpone the election, the Governor sought to get the legislature to do so. When the legislature refused, the Governor then went ahead and did so unilaterally. The state supreme court concluded that the Governor had been right that he lacked the power unilaterally to postpone the election and ordered the election to go forward.

Plaintiffs then turned to the federal courts, invoking *Anderson-Burdick* to request several changes to the rules governing the election. The district court acknowledged it had no power to postpone the election. But the court ordered two changes for the April election: (1) that the state treat as valid all absentee ballots received on or before April 13th, six days after Election Day; (2) that absentee ballot postmarked *after* Election Day also be treated as valid votes as long as they too were received by April 13th.

The state then took the case to the Supreme Court. The state did not challenge the first part of the district's court's order. The District Court issued its preliminary injunction on Thursday, April 2; on Friday, the Seventh Circuit declined to vacate that stay; on Monday, the day before the election, the Supreme Court in a 5-4 per curiam decision (without plenary briefing or oral argument) then overturned the second part of the district's court and held that the court could not order state officials to treat absentee ballots as valid votes if those ballots were postmarked after Election Day:

REPUBLICAN NATL. COMM. et al. v. DEMOCRATIC NATL. COMM., et al.
140 S. Ct. 1205 (2020)

PER CURIAM:

The application for stay presented to Justice Kavanaugh and by him referred to the Court is granted. The District Court's order granting a preliminary injunction is stayed to the extent it requires the State to count absentee ballots postmarked after April 7, 2020.

Wisconsin has decided to proceed with the elections scheduled for Tuesday, April 7. The wisdom of that decision is not the question before the Court. The question before the Court is a narrow, technical question about the absentee ballot process. In this Court, all agree that the deadline for the municipal clerks to receive absentee ballots has been extended from Tuesday, April 7, to Monday, April 13. That extension, which is not challenged in this Court, has afforded Wisconsin voters several extra days in which to mail their absentee ballots. The sole question before the Court is whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13. Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots mailed and postmarked after election day, April 7, to be counted. That is a critical point in the case. Nonetheless, five days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. 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. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited, but is that the plaintiffs themselves did not see the need

to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (*per curiam*) [other citations omitted].

The unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day is perhaps best demonstrated by the fact that the District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day. In doing so, the District Court in essence enjoined non-parties to this lawsuit. It is highly questionable, moreover, that this attempt to suppress disclosure of the election results for six days after election day would work. And if any information were released during that time, that would gravely affect the integrity of the election process. The District Court's order suppressing disclosure of election results showcases the unusual nature of the District Court's order allowing absentee ballots mailed and postmarked after election day to be counted. And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.

The dissent is quite wrong on several points. First, the dissent entirely disregards the critical point that the plaintiffs themselves did not ask for this additional relief in their preliminary injunction motions. Second, the dissent contends that this Court should not intervene at this late date. The Court would prefer not to do so, but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error. Third, the dissent refers to voters who have not yet received their absentee ballots. But even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots (which was this past Friday in this case) will usually receive their ballots on the day before or day of the election, which in this case would be today or tomorrow. The plaintiffs put forward no probative evidence in the District Court that these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots. In that regard, it bears mention that absentee voting has been underway for many weeks, and 1.2 million Wisconsin voters have requested and have been sent their absentee ballots, which is about five times the number of absentee ballots requested in the 2016 spring election. Fourth, the dissent's rhetoric is entirely misplaced and completely overlooks the fact that the deadline for receiving ballots was already extended to accommodate Wisconsin voters, from April 7 to April 13. Again, that extension has the effect of extending the date for a voter to mail the ballot from, in effect, Saturday, April 4, to Tuesday, April 7. That extension was designed to ensure that the voters of Wisconsin can cast their ballots and have their votes count. That is the relief that the plaintiffs actually requested in their preliminary injunction motions. The District Court on its own ordered yet an additional extension, which would allow voters to mail their ballots after election day, which is extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election.

Therefore, subject to any further alterations that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m.

The Court’s decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.

The stay is granted pending final disposition of the appeal by the United States Court of Appeals for the Seventh Circuit and the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE GINSBURG, with whom JUSTICES BREYER, SOTOMAYOR, AND KAGAN join, dissenting.

* * *

II

A

The Court’s order requires absentee voters to postmark their ballots by election day, April 7—*i.e.*, tomorrow—even if they did not receive their ballots by that date. That is a novel requirement. Recall that absentee ballots were originally due back to election officials on April 7, which the District Court extended to April 13. Neither of those deadlines carried a postmark-by requirement.

While I do not doubt the good faith of my colleagues, the Court’s order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received. Yet tens of thousands of voters who timely requested ballots are unlikely to receive them by April 7, the Court’s postmark deadline. Rising concern about the COVID–19 pandemic has caused a late surge in absentee ballot requests. The Court’s suggestion that the current situation is not “substantially different” from “an ordinary election” boggles the mind. Some 150,000 requests for absentee ballots have been processed since Thursday, state records indicate. The surge in absentee ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots. As of Sunday morning, 12,000 ballots reportedly had not yet been mailed out. It takes days for a mailed ballot to reach its recipient—the postal service recommends budgeting a week—even without accounting for pandemic-induced mail delays. It is therefore likely that ballots mailed in recent days will not reach voters by tomorrow; for ballots not yet mailed, late arrival is all but certain. Under the District Court’s order, an absentee voter who receives a ballot after tomorrow could still have voted, as long as she delivered it to election officials by April 13. Now, under this Court’s order, tens of thousands of absentee voters, unlikely to receive their ballots in time to cast them, will be left quite literally without a vote.

This Court’s intervention is thus ill advised, especially so at this late hour. See *Purcell v. Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Election officials have spent the past few days establishing procedures and informing voters in accordance with the District Court’s deadline. For this Court to upend the process—a day before the April 7 postmark deadline—is sure to confound election officials and voters.

B

What concerns could justify consequences so grave? The Court’s order first suggests a problem of forfeiture, noting that the plaintiffs’ written preliminary-injunction motions did not ask that ballots postmarked after April 7 be counted. But unheeded by the Court, although initially silent, the plaintiffs specifically requested that remedy at the preliminary-injunction hearing in view of the ever-increasing demand for absentee ballots.

Second, the Court’s order cites *Purcell*, apparently skeptical of the District Court’s intervention shortly before an election. Never mind that the District Court was reacting to a grave, rapidly developing public health crisis. If proximity to the election counseled hesitation when the District Court acted several days ago, this Court’s intervention today—even closer to the election—is all the more inappropriate.

Third, the Court notes that the District Court’s order allowed absentee voters to cast ballots after election day. If a voter already in line by the poll’s closing time can still vote, why should Wisconsin’s absentee voters, already in line to receive ballots, be denied the franchise? According to the stay applicants, election-distorting gamesmanship might occur if ballots could be cast after initial results are published. But obviating that harm, the District Court enjoined the publication of election results before April 13, the deadline for returning absentee ballots, and the Wisconsin Elections Commission directed election officials not to publish results before that date.

The concerns advanced by the Court and the applicants pale in comparison to the risk that tens of thousands of voters will be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern.

* * *

The majority of this Court declares that this case presents a “narrow, technical question.” That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. Under the District Court’s order, they would be able to do so. Even if they receive their absentee ballot in the days immediately following election day, they could return it. With the majority’s stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others’ safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin’s citizens, the integrity of the State’s election process, and in this most extraordinary time, the health of the Nation.

NOTES AND QUESTIONS

1. There were a number of problems administering the primary election, including a dramatic reduction of the number of polling sites in Milwaukee and Green Bay due to the lack of poll workers able to staff those sites. Even with these problems, the enormous volume of absentee votes led turnout to be surprisingly high; at 34 percent, turnout was higher than the 31 percent average for all of Wisconsin’s presidential primaries since 1984. *See* Richard Pildes and Charles Stewart III, “The Wisconsin primary had Extraordinarily High Voter Turnout,” *Wash. Post* (April 15, 2020).

2. The effect of the *RNC v. DNC* precedent is unclear. The case was limited to a discrete issue: whether a federal court can order absentee ballots cast after Election Day to be treated as valid votes. Many states permit absentee ballots to be *received* by election

officials after Election Day; but neither those states, nor any others, permit absentee ballots postmarked after Election Day to be treated as valid votes. Apart from that specific, uncommon issue, from a broader vantage point the Court's decision might mean that, whatever power federal courts have to modify more discretionary policies concerning elections, they do not have the power to change the formal qualities that give an election finality; just as federal courts do not have the power to change the date of the election, they do not have the power to change the date by which votes must be cast. What other aspects of elections, if any, might fall into that category remains to be seen.

c. The Supreme Court returned to these issues in its one major written opinion preceding the general election. Just as it had done during the chaotic spring primary, the district court in Wisconsin ordered that the State was required to permit absentee ballots to be *received* up to six days after Election Day, despite the Wisconsin election code's requirement that they arrive no later than Election Day. This time, the Seventh Circuit stayed that order, after which the plaintiffs asked the Supreme Court to vacate that stay.

On October 26, eight days before Election Day, the Court declined to do so in a 5-3 per curiam order. Various Justices issued individual opinions. The two most substantial came from Justices Kavanaugh and Kagan:

DEMOCRATIC NAT'L COMM. V. WIS. STATE LEGIS.
141 S. Ct. 28 (2020)

JUSTICE KAVANAUGH, concurring in denial of application to vacate stay.

Approximately 30 States, including Wisconsin, require that absentee ballots be received by election day in order to be counted. Like most States, Wisconsin has retained that deadline for the November 2020 election, notwithstanding the COVID-19 pandemic.
...

I

For three alternative and independent reasons, I conclude that the District Court's injunction was unwarranted.

First, the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents. This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle.

The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.

Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand

the court’s injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent. . . .¹

Second, even apart from the late timing, the District Court misapprehended the limited role of the federal courts in COVID-19 cases. This Court has consistently stated that the Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID-19 pandemic.

The COVID-19 pandemic has caused the deaths of more than 200,000 Americans, and it remains a serious threat, including in Wisconsin. The virus poses a particular risk to the elderly and to those with certain pre-existing conditions. But federal judges do not possess special expertise or competence about how best to balance the costs and benefits of potential policy responses to the pandemic, including with respect to elections. . . .

To be sure, in light of the pandemic, some state legislatures have exercised their Article I, §4, authority over elections and have changed their election rules for the November 2020 election. Of particular relevance here, a few States such as Mississippi no longer require that absentee ballots be received before election day. . . . The variation in state responses reflects our constitutional system of federalism. Different state legislatures may make different choices. Assessing the complicated tradeoffs involved in changing or retaining election deadlines, or other election rules, in light of public health conditions in a particular State is primarily the responsibility of state legislatures and falls outside the competence of federal courts. . . .

Third, the District Court did not sufficiently appreciate the significance of election deadlines. This Court has long recognized that a State’s reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues under the traditional *Anderson-Burdick* balancing test.

To state the obvious, a State cannot conduct an election without deadlines. It follows that the right to vote is not substantially burdened by a requirement that voters “act in a timely fashion if they wish to express their views in the voting booth.” *Burdick*, 504 U. S., at 438. For the same reason, the right to vote is not substantially burdened by a

¹ A *federal court’s* alteration of state election laws such as Wisconsin’s differs in some respects from a *state court’s* (or state agency’s) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States “in such Manner as the *Legislature* thereof may direct.” §1, cl. 2 (emphasis added). The text of Article II means that “the clearly expressed intent of the legislature must prevail” and that a state court may not depart from the state election code enacted by the legislature. *Bush v. Gore*, 531 U. S. 98, 120, (2000) (Rehnquist, C. J., concurring); see *Bush v. Palm Beach County Canvassing Bd.*, 531 U. S. 70, 76-78, (2000) (*per curiam*); *McPherson v. Blacker*, 146 U. S. 1, 25, (1892). In a Presidential election, in other words, a state court’s “significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Bush v. Gore*, 531 U. S., at 113 (Rehnquist, C. J., concurring). . . .

requirement that voters act in a timely fashion if they wish to cast an *absentee ballot*. Either way, voters need to vote on time.... Voters who, for example, show up to vote at midnight after the polls close on election night do not have a right to demand that the State nonetheless count their votes. Voters who submit their absentee ballots after the State's deadline similarly do not have a right to demand that the State count their votes.

For important reasons, most States, including Wisconsin, require absentee ballots to be *received* by election day, not just *mailed* by election day. Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election. And those States also want to be able to definitively announce the results of the election on election night, or as soon as possible thereafter. Moreover, particularly in a Presidential election, counting all the votes quickly can help the State promptly resolve any disputes, address any need for recounts, and begin the process of canvassing and certifying the election results in an expeditious manner. The States are aware of the risks described by Professor Pildes: “[L]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode.” Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. Chi. L. Rev. Online (June 26, 2020) (online source archived at www.supremecourt.gov). The “longer after Election Day any significant changes in vote totals take place, the greater the risk that the losing side will cry that the election has been stolen.” *Ibid.*

II.

The dissent claims that the State's election-day deadline for receipt of absentee ballots will “disenfranchise” some Wisconsin voters. But that is not what a reasonable election deadline does. This Court has long explained that a State's election deadline does not disenfranchise voters who are capable of meeting the deadline but fail to do so. In other words, reasonable election deadlines do not “disenfranchise” anyone under any legitimate understanding of that term. And the dissent cannot plausibly argue that the absentee ballot deadline imposed—and still in place as of today—in most of the States is not a reasonable one. Those voters who disregard the deadlines or who fail to take the state-prescribed steps for meeting the deadlines may have to vote in person. But no one is disenfranchised by Wisconsin's reasonable and commonplace deadline for receiving absentee ballots. Indeed, more than *one million* Wisconsin voters have already requested, received, *and returned* their absentee ballots.

To help voters meet the deadlines, Wisconsin makes it easy to vote absentee and has taken several extraordinary steps this year to inform voters that they should request and return absentee ballots well before election day.

For starters, as the Seventh Circuit aptly noted, Wisconsin has “lots of rules” that “make voting easier than do the rules of many other states.” Wisconsin law allows voters to vote absentee without an excuse, no questions asked. Registered voters may request an absentee ballot by mail, e-mail, online, or fax.

Since August, moreover, the Wisconsin Elections Commission has been regularly reminding voters of the need to act early so as to avoid backlogs and potential mail delays. In August and September, for example, Wisconsin's chief elections official explicitly urged voters not to wait to request a ballot: “It takes time for Wisconsin clerks to process your request. Then it may take up to seven days for you to receive your ballot in the mail. It can

then take another seven days for your ballot to be returned by mail.”

Perhaps most importantly, in early September, Wisconsin decided to leave little to chance and mailed every registered voter in the State who had not already requested an absentee ballot (2.6 million of Wisconsin’s registered voters) an absentee ballot application, as well as information about how to vote absentee.

Returning an absentee ballot in Wisconsin is also easy. . . . Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk’s office. The Wisconsin Elections Commission has made federal grant money available to local municipalities to purchase additional absentee ballot drop boxes to accommodate expanded absentee voting.

Alternatively, absentee voters may vote “in-person absentee” beginning two weeks before election day. . . . Some municipalities have created drive-up absentee voting sites to allow voters to vote “in-person absentee” without leaving their cars.

Finally, on election day, a voter may drop off an absentee ballot at a polling place until 8:00 p.m. . . .

The dissent insists, however, that “tens of thousands” and perhaps even 100,000 votes will not be counted if we do not reinstate the District Court’s extension of the deadline. The District Court arrived at the same prediction, but it was a prediction, not a finding of fact. Indeed, the District Court did not include this prediction in the facts section of its opinion. For its part, the dissent makes the same prediction by looking at the number of absentee ballots that arrived after the primary election day in April. But in the April primary, the received-by deadline had been extended to allow receipt of absentee ballots after election day. The dissent’s statistic tells us nothing about how many voters might miss the deadline when voters know that the ballots must be received by election day. To take an analogy: How many people would file their taxes after April 15 if the filing deadline were changed to April 21? Lots. That fact tells us nothing about how many people would file their taxes after April 15 if the deadline remained at April 15.

The dissent also seizes on the fact that Wisconsin law allows voters to request absentee ballots until October 29, five days before election day. But the dissent does not grapple with the good reason why the State allows such late requests. The State allows those late requests for ballots because it wants to accommodate late requesters who still want to obtain an absentee ballot so that they can drop it off in person and avoid lines at the polls on election day. . . . In short, Wisconsin provides an option to request absentee ballots until October 29 for voters who decide relatively late in the game that they would prefer to avoid lines at the polls on election day. . . .

In short, I agree with the dissent that COVID-19 is a serious problem. But you need deadlines to hold elections—there is just no wishing away or getting around that fundamental point. And Wisconsin’s deadline is the same as that in 30 other States and is a reasonable deadline given all the circumstances. . . .

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

[...] State election officials report that 1.7 million people—about 50 percent of Wisconsin’s voters—have already asked for mail ballots. And more are expected to do so, because state law gives voters until October 29, five days before Election Day, to make that request.

To ensure that these mail ballots are counted, the district court ordered in September the same relief afforded in April: a six-day extension of the receipt deadline for mail ballots postmarked by Election Day. The court supported that order with specific facts and figures about how COVID would affect the electoral process in Wisconsin. The court found that the surge in requests for mail ballots would overwhelm state officials in the weeks leading up to the October 29 ballot-application deadline. And it discovered unusual delays in the United States Postal Service’s delivery of mail in the State. The combination of those factors meant, as a high-ranking elections official testified, that a typical ballot would take a full two weeks “to make its way through the mail from a clerk’s office to a voter and back again”—even when the voter instantly turns the ballot around. Based on the April election experience, the court determined that many voters would not even *receive* mail ballots by Election Day, making it impossible to vote in that way. And as many as 100,000 citizens would not have their votes counted—even though timely requested and postmarked—without the six-day extension. ... In the court’s view, the discarding of so many properly cast ballots would severely burden the constitutional right to vote. The fit remedy was to create a six-day grace period, to allow those ballots a little extra time to arrive in the face of unprecedented administrative and delivery delays.

But a court of appeals halted the district court’s order, and today this Court leaves that stay in place. I respectfully dissent because the Court’s decision will disenfranchise large numbers of responsible voters in the midst of hazardous pandemic conditions.

I.

[... I]f there is one area where deference to legislators should not shade into acquiescence, it is election law. For in that field politicians’ incentives often conflict with voters’ interests—that is, whenever suppressing votes benefits the lawmakers who make the rules.

II

Justice Kavanaugh’s concurring opinion goes further than the court of appeals. Rather than relying on *Purcell* and deference alone, he also concludes that Wisconsin’s election rules, as applied during the COVID pandemic, do not violate the right to vote. That follows, in his view, because voting by mail is “easy” in Wisconsin and because in-person voting is “reasonably safe.”

The first problem with that reasoning is that the district court found to the contrary. As this Court constantly states, a district court has the greatest familiarity with the facts in a case, because it oversees the development and presentation of evidence.

Recall that the district court’s findings include the following. The COVID pandemic has been getting worse and worse in Wisconsin. And as the State has “broken numerous new case records,” in-person voting—according to credible expert testimony—creates a “significant [health] risk,” especially for older and sicker citizens. For that reason, Wisconsinites have turned to the mails. According to the state elections commission, close to 2 million people are likely to request mail ballots (That is about double the number of already-returned ballots that the concurrence chooses to emphasize). State election offices have not received the resources they need to deal with that influx of applications, and severe administrative backlogs have therefore developed. Postal Service delays, detailed by both state and federal officials, compound the risk that voters will be unable to return timely requested mail ballots by Election Day. And if a voter discovers on Election Day that her mail ballot has not yet arrived, Wisconsin law prevents her from voting in person—even assuming she would undertake the risk. All these facts would mean, as the chair of the

Wisconsin Elections Commission testified, that many thousands of timely requested and postmarked votes—potentially into the six-figure range—would not be counted without a short extension of the ballot-receipt deadline.

The concurrence fails to give those findings the respect they are due. Of course, the concurrence *says* it is not committing that elementary error; according to Justice Kavanaugh, he disputes only the district court’s “speculative predictions,” not its statement of “historical facts.” But the concurrence alternately rejects, ignores, or accepts only *pro forma* the district court’s account of the facts (just the facts). In responding to this dissent, the concurring opinion acknowledges that in-person voting in Wisconsin “can pose a health risk.” Yet in condemning the injunction, it continues to insist—how else could it reach the decision it does?—that going to the polls is “reasonably safe” for Wisconsin’s citizens, contrary to the expert testimony the district court relied on. Similarly, the concurrence nods glancingly to increased ballot applications, but it fails to recount (as the district court did in detail) how that influx has created heavy backlogs and prevented ballots from issuing in timely fashion. And it does not discuss the evidence of unusual, even unprecedented, delays in postal delivery service in Wisconsin. In short, the concurrence refuses to engage with the core of the analysis supporting the district court’s injunction: that a veritable tsunami (in the form of a pandemic) has hit Wisconsin’s election machinery, and disrupted all its usual mail ballot operations. And as to the supposedly “speculative prediction” that without the ballot-receipt extension as many as 100,000 timely cast mail votes would go uncounted? That estimate itself derived from the factual findings just listed, along with the credible testimony of the elections commission’s chair—all matters indisputably entitled to deference from an appellate tribunal. Those findings, and not the concurrence’s substitute facts purporting to show that voting in Wisconsin is safe and easy, should properly ground today’s decision.

A related flaw in the concurring opinion is how much it reasons from normal, pre-pandemic conditions. A “reasonable election deadline,” the concurrence says, “does not disenfranchise voters.” I have no argument with that statement, even though some voters may overlook the deadline. But what is “reasonable” in one set of circumstances may become unreasonable in another. And when that switch occurs, a constitutional problem arises. So it matters not that Wisconsin could apply its ballot-receipt deadline when ballots moved rapidly through the mails and people could safely vote in person. At *this* time, neither condition holds—again, according to the district court’s eminently believable findings. Today, mail ballots often travel at a snail’s pace, and the elderly and ill put themselves in peril if they go to the polls. So citizens—thousands and thousands of them—who have followed all the State’s rules still cannot cast a successful vote. And because that is true, the ballot-receipt deadline that once survived constitutional review no longer does.

That deadline, contrary to Justice Kavanaugh’s view, now disenfranchises Wisconsin citizens—however much he objects to applying that term here. Far from using the word “rhetoric[ally],” I mean it precisely. During COVID, the State’s ballot-receipt deadline and the Court’s decision upholding it disenfranchise citizens by depriving them of their constitutionally guaranteed right to vote. Because the Court refuses to reinstate the district court’s injunction, Wisconsin will throw out thousands of timely requested and timely cast mail ballots. . . . As the COVID pandemic rages, the Court has failed to adequately protect the Nation’s voters.

* * *

For all these reasons, I would vacate the court of appeals’ stay. The facts, as found

by the district court, are clear: Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day. Without the district court's order, they must opt between "brav[ing] the polls," with all the risk that entails, and "los[ing] their right to vote." The voters of Wisconsin deserve a better choice.

NOTES AND QUESTIONS

1. The issue over absentee ballot deadlines for the general election was one of the most heavily litigated and politically charged issues. Six months after the election, it became possible to look back and determine how many late-arriving ballots these deadline issues affected:

Perhaps surprisingly, the number of ballots that came in too late to be valid was extremely small, regardless of what deadline states used, or how much that deadline shifted back and forth in the months before the election.

Take Wisconsin and Minnesota, two important states that were the site of two major court controversies over these issues. In both, voters might be predicted to be the most confused about the deadline for returning absentee ballots, because those deadlines kept changing....

Writing for the three dissenters, Justice Elena Kagan invoked the district court's prediction that as many as 100,000 voters would lose their right to vote, through no fault of their own, as a result of the majority's ruling that the normal state-law deadline had to be followed. Commentators called this a "disastrous ruling" that "would likely disenfranchise tens of thousands" of voters in this key state.

The post-election audit now provides perspective on this controversy that sharply divided the court. Ultimately, only 1,045 absentee ballots were rejected in Wisconsin for failing to meet the Election Night deadline. That amounts to 0.05% ballots out of 1,969,274 valid absentee votes cast, or 0.03% of the total vote in Wisconsin.

The fight over ballot deadlines in Minnesota was even more convoluted. If voters were going to be confused anywhere about these deadlines, with lots of ballots coming in too late as a result, it might have been expected to be here.

State law required valid ballots to be returned by Election Night, but as a result of litigation challenging that deadline, the secretary of state had agreed in early August that ballots would be valid if they were received up to seven days later.

But a mere five days before the election, a federal court pulled the rug out from under Minnesota voters. On Oct. 29, it held that Minnesota's secretary of state had violated the federal Constitution and had no power to extend the deadline. The original Election Night deadline thus snapped

back into effect at the very last minute.

Yet it turns out that only 802 ballots, out of 1,929,945 absentees cast (0.04%), were rejected for coming in too late. . . .

The small number of absentee ballots that came in after the legal deadlines occurred despite a massive surge in absentee voting in nearly all states. What explains that?

Voters were highly engaged, as the turnout rate showed. They were particularly attuned to the risk of delays in the mail from seeing this problem occur in the primaries. Throughout the weeks before the election, voters were consistently returning absentee ballots at higher rates than in previous elections.

The communications efforts of the Biden campaign and the state Democratic parties, whose voters cast most of these absentee votes, got the message across about these state deadlines. Election officials did a good job of communicating these deadlines to voters. In some states, drop boxes that permitted absentee ballots to be returned without using the mail might have helped minimize the number of late arriving ballots, though we don't have any empirical analysis on that.

In a highly mobilized electorate, it turns out that the specific ballot-return deadlines, and whether they shifted even late in the day, did not lead to large numbers of ballots coming in too late.

Richard H. Pildes, *There's a Surprising Ending to all the 2020 Election Conflicts over Absentee Ballot Deadlines*, *The Conversation* (April 7, 2021).

2. *The Independent State Legislature Doctrine.* Footnote 1 in Justice Kavanaugh's opinion references the so-called "independent state legislature doctrine." Whether such a principle exists in the Constitution will be a major source of contestation in federal elections in the coming years, particularly for presidential elections.

No majority opinion of the Court in the modern era has yet recognized the existence of such a doctrine. But several Justices on the Court in the 2020 election cases made clear their view that the Constitution should be read to establish such a doctrine. The issue arises both under the Elections Clause, which empowers state "legislatures" to regulate federal elections, and the Electors Clause in the 12th Amendment, which empowers state "legislatures" to choose the manner of selecting presidential electors.

In the *DNC v. Wisconsin State Legislature* case, Justice Gorsuch, joined by Justice Kavanaugh, endorsed the independent state legislature doctrine:

So, it's indisputable that Wisconsin has made considerable efforts to accommodate early voting and respond to COVID. The district court's only possible complaint is that the State hasn't done *enough*. But how

much is enough? If Wisconsin's statutory absentee voting deadline can be discarded on the strength of the State's status as a COVID "hotspot," what about the identical deadlines in 30 other States? How much of a "hotspot" must a State (or maybe some sliver of it) be before judges get to improvise? Then there's the question what these new ad hoc deadlines should be. The judge in this case tacked 6 days onto the State's election deadline, but what about 3 or 7 or 10, and what's to stop different judges choosing (as they surely would) different deadlines in different jurisdictions? A widely shared state policy seeking to make election day real would give way to a Babel of decrees. And what's to stop courts from tinkering with in-person voting rules too? This judge declined to go that far, but the plaintiffs thought he should have, and it's not hard to imagine other judges accepting invitations to unfurl the precinct maps and decide whether States should add polling places, revise their hours, rearrange the voting booths within them, or maybe even supplement existing social distancing, hand washing, and ventilation protocols.

The Constitution dictates a different approach to these how-much-is-enough questions. The 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. Art. I, §4, cl. 1. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them. *Ibid.* ("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 . . ."). Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions.

Understandably so. Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot. Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful. Legislatures enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge. In reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose.

Of course, democratic processes can prove frustrating. Because they cannot easily act without a broad social consensus, legislatures are often slow to respond and tepid when they do. The clamor for judges to sweep in and address emergent problems, and the temptation for individual judges to fill the void of perceived inaction, can be great. But what sometimes seems like a fault in the constitutional design was a feature to the framers, a means of ensuring that any changes to the status quo will not be made hastily, without careful deliberation, extensive consultation, and social consensus.

The 2020 Election and Its Aftermath.

The two months following Election Day in 2020 were unprecedented in a number of respects. The winner of the Presidential race was not known – or at least not “declared” by the mainstream media – until four days after the election. Additional time was needed in some states to verify and count a large number of absentee ballots. Under Pennsylvania law, for example, processing and counting of ballots could not begin until polls had closed on Election Day. Given that Democrats had voted disproportionately by mail in this election, in several states where Donald Trump was leading in the Election Day vote, he eventually lost once all the ballots were counted. A “red mirage” was replaced by a “blue shift”—a familiar phenomenon in recent elections as late-arriving and counted absentee ballots favored Democrats.

Donald Trump never conceded, however. Instead, he and his surrogates maintained in lawsuits and out of court statements that fraud, mistakes, and illegal actions tainted the outcome in several states. The Trump campaign and its allies brought 76 lawsuits alleging irregularities and attempting to affect the vote count or certification process. They alleged manipulation of voting machines, election officials filling out ballots, the counting of illegal votes cast by felons, children, out-of-state residents, and dead people, failure to allow observers in polling places and counting rooms, defective signature verification technology, failure to count legal votes cast using sharpie markers, and unequal treatment of voters or ballots due to certain counties allowing the curing of ballot defects. The lawyers supporting Trump lost all but two of these cases, which decided minor procedural issues and had no effect on the outcome or vote totals.

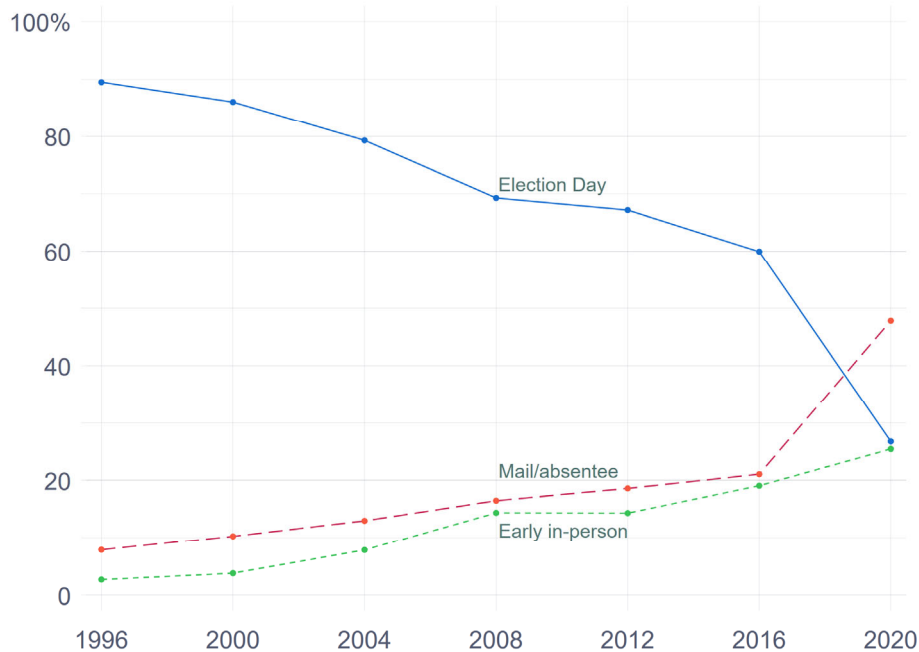
Unlike *Bush v. Gore* and the 2020 election controversy, no single issue or state emerged as the focal point for these claims of irregularities. The sheer variety of claims of fraud and election law violations undermined the legitimacy of any given argument, and judges elected or appointed from both parties rejected these arguments with near uniformity. See Jacob Kovacs-Goodman, “Post-Election Litigation Analysis and Summaries,” in *The Virus and the Vote: Administering the 2020 Election in a Pandemic* 677-84 (Persily & Stewart eds., 2021), www.healthyelections.org. In fact, several of the lawyers for the Trump campaign, including former New York Mayor Rudolph Giuliani, are now undergoing investigations or suspensions of their licenses to practice law, given false statements they made alleging widespread election fraud.

By all authoritative accounts, the 2020 election was successfully administered. See generally *The Virus and the Vote: Administering the 2020 Election in a Pandemic* (Persily & Stewart eds., 2021), www.healthyelections.org. It produced record turnout, with over 160 million voters casting ballots, which is all the more remarkable given the stresses that the pandemic placed on both voters and election officials. The chaos of the primary elections proved a valuable learning experience for the general election.

The shift to vote by mail was the most significant administrative change for the 2020 general election. Whereas 21 percent of voters cast ballots by mail in the 2016 election, 46 percent cast mail ballots in the 2020 election. Election Day in-person voting dropped by half between the elections – from 60 percent in 2016 to 28 percent in 2020. Many worried that this increase in mail-balling would lead to a large number of rejected ballots, because of lateness, signature mismatches, or other technical problems. But the surge in rejections never materialized. Both because of increased public education around

mail-in ballots and jurisdictions giving voters a greater opportunity to cure mistakes, voters generally sent in their absentee ballots early and most states saw a reduction in the share of absentee ballots rejected. See Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. Dem. 159 (2021). Election Day voting was also administered successfully with voters reporting few differences from their experience in 2016. Perhaps as a result of social distancing requirements, wait times were longer on average, though: Roughly fifteen percent of voters waited in line for more than a half hour, up from 8.5 percent in 2016. *Id.*

Trends in Early, Absentee, and Election Day Voting (1996-2020)



Despite the success in administering the 2020 election, the certification of the vote by state election officials from both parties, and the uniform rejection by courts of any lawsuits that might affect the election's outcome, the Trump campaign persisted in pressing its claims of election irregularities. Some of these claims were based on the so-called "independent state legislature" doctrine; the argument was that state courts or state election officials had deviated too far from the state election code and that this unconstitutionally interfered with the legislature's sole ability, under Art. II, to determine the "manner" of how their state selected presidential electors (Art. I, Sec. 4 also gives state legislatures the power to determine the "manner" of holding elections for members of the House and Senate, though Congress can take over this role).

These efforts reached a breaking point with the insurrection at the Capitol on January 6, 2021, the day, specified by statute, when Congress met to open the certificates of election from the Electoral College and ratify the victor. All told, objections were raised by at least one House member to the electoral votes from Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. However, only the objections to Arizona and Pennsylvania received support from at least one senator, as required by the Electoral Count

Act for the slate to be debated separately by both houses. As Congress debated the objection to the Arizona electoral slate, a violent mob breached the Capitol and members of Congress were forced to evacuate the chambers. Once the violence was quelled, Congress returned and voted to reject the objection to Arizona's slate by a vote of 6 to 93 in the Senate and 121 to 303 in the House. The slate of electors from Pennsylvania was also challenged but rejected, by a vote of 7 to 92 in the Senate and 138 to 282 in the House. By 3:44 AM on January 7th, the joint session of Congress was dissolved and Joseph Biden had won the presidency by an Electoral College vote of 306 to 232. President Biden was inaugurated on January 20, 2021, although President Trump did not attend the inauguration and continues to claim the election was stolen.

The United States Supreme Court did not get involved in any significant way in the litigation concerning the result of the 2020 election. On February 22, 2021, the Court denied certiorari in the last significant case that remained on its docket from the 2020 election. The case involved a challenge to the decision of the Pennsylvania Supreme Court extending the statutory deadline for receipt of mail-in ballots. The Trump Campaign and its supporters had argued that the Pennsylvania Supreme Court had violated the Independent State Legislature Doctrine by going beyond the deadline in the election statute passed by the legislature. Justice Thomas and Justice Alito (joined by Justice Gorsuch) dissented from the denial of certiorari.

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JUSTICE THOMAS dissenting from the denial of certiorari.

[W]e are fortunate that the Pennsylvania Supreme Court's decision to change the receipt deadline for mail-in ballots does not appear to have changed the outcome in any federal election. This Court ordered the county boards to segregate ballots received later than the deadline set by the legislature. . . . And none of the parties contend that those ballots made an outcome-determinative difference in any relevant federal election. But we may not be so lucky in the future. . . .

That is not a prescription for confidence. Changing the rules in the middle of the game is bad enough. Such rule changes by officials who may lack authority to do so is even worse. When those changes alter election results, they can severely damage the electoral system on which our self-governance so heavily depends. If state officials have the authority they have claimed, we need to make it clear. If not, we need to put an end to this practice now before the consequences become catastrophic. . . .

For at least three reasons, the Judiciary is ill equipped to address problems—including those caused by improper rule changes—through postelection litigation.

First, postelection litigation is truncated by firm timelines. That is especially true for Presidential elections, which are governed by the Electoral Count Act, passed in 1887. . . . Five to six weeks for judicial testing is difficult enough for straightforward cases. For factually complex cases, compressing discovery, testimony, and appeals into this timeline is virtually impossible.

Second, this timeframe imposes especially daunting constraints when combined

with the expanded use of mail-in ballots. . .

This expansion [in mail balloting] impedes postelection judicial review because litigation about mail-in ballots is substantially more complicated. For one thing, as election administrators have long agreed, the risk of fraud is “vastly more prevalent” for mail-in ballots. Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N. Y. Times, Oct. 6, 2012. The reason is simple: “[A]bsentee voting replaces the oversight that exists at polling places with something akin to an honor system.” *Ibid.* . . .

[B]ecause fraud is more prevalent with mail-in ballots, increased use of those ballots raises the likelihood that courts will be asked to adjudicate questions that go to the heart of election confidence. . . . Tallying these ballots tends to be more labor intensive, involves a high degree of subjective judgment (e.g., verifying signatures), and typically leads to a far higher rate of ballot challenges and rejections. Litigation over these ballots can require substantial discovery and labor-intensive fact review. . . . Judicial review in this situation is difficult enough even when the rules are clear and the number of challenged ballots small. Adding a dispute about who can set or change the rules greatly exacerbates the problem.

Third, and perhaps most significant, postelection litigation sometimes forces courts to make policy decisions that they have no business making. For example, when an official has improperly changed the rules, but voters have already relied on that change, courts must choose between potentially disenfranchising a subset of voters and enforcing the election provisions—such as receipt deadlines—that the legislature believes are necessary for election integrity. . . . Settling rules well in advance of an election rather than relying on postelection litigation ensures that courts are not put in that untenable position.

In short, the postelection system of judicial review is at most suitable for garden-variety disputes. It generally cannot restore the state of affairs before an election. And it is often incapable of testing allegations of systemic maladministration, voter suppression, or fraud that go to the heart of public confidence in election results. That is obviously problematic for allegations backed by substantial evidence. But the same is true where allegations are incorrect. After all, “[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.” An incorrect allegation, left to fester without a robust mechanism to test and disprove it, “drives honest citizens out of the democratic process and breeds distrust of our government.” *Purcell*.

III

Because the judicial system is not well suited to address these kinds of questions in the short time period available immediately after an election, we ought to use available cases outside that truncated context to address these admittedly important questions. Here, we have the opportunity to do so almost two years before the next federal election cycle. Our refusal to do so by hearing these cases is befuddling. There is a clear split on an issue of such great importance that both sides previously asked us to grant certiorari. And there is no dispute that the claim is sufficiently meritorious to warrant review. By voting to grant emergency relief in October, four Justices made clear that they think petitioners are likely to prevail. Despite pressing for review in October, respondents now ask us not to grant certiorari because they think the cases are moot. That argument fails.

* * *

One wonders what this Court waits for. We failed to settle this dispute before the

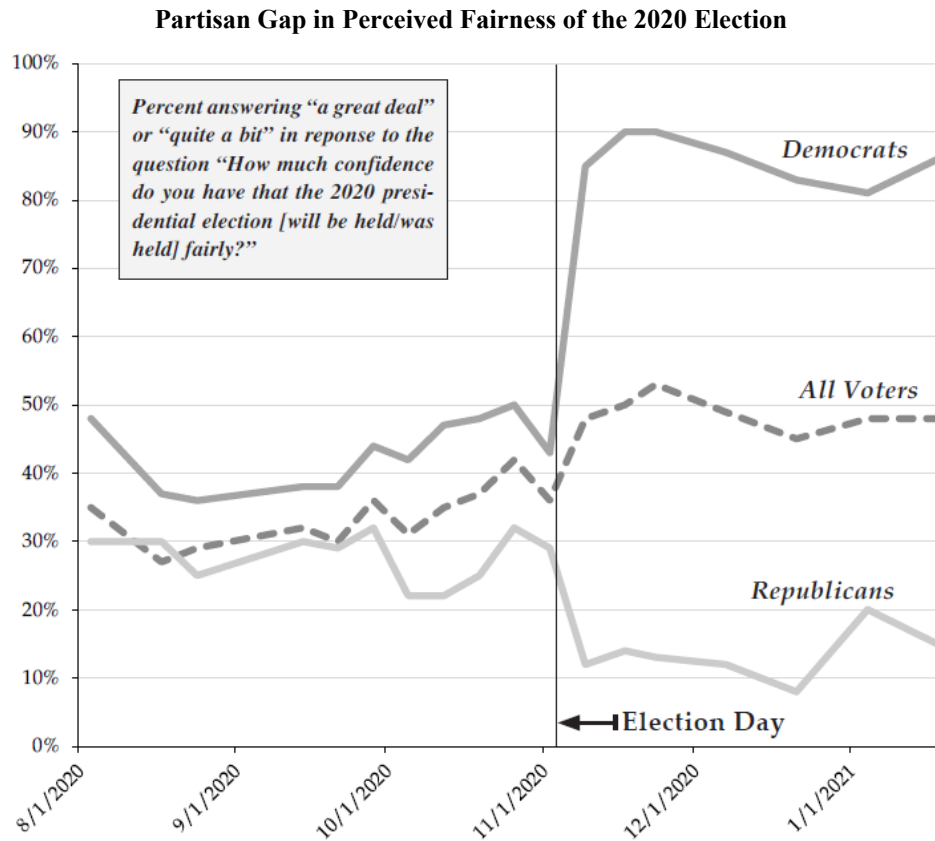
election, and thus provide clear rules. Now we again fail to provide clear rules for future elections. The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence. Our fellow citizens deserve better and expect more of us. I respectfully dissent.

NOTES AND QUESTIONS

1. Should the Court have decided the question regarding the Independent State Legislature Doctrine even though it would not have affected the outcome of the election? Is it better for the Court to decide the issue outside the heat of an election or when it might be outcome determinative? This dissent is one of the few opinions that cites *Bush v. Gore*. Does the history of the 2000 election controversy caution in favor or against the Court resolving these issues when the presidency might be on the line? Moreover, given the levels of polarization today, would a decision like *Bush v. Gore* be as broadly accepted as a final resolution to the case?

2. *Belief in Election Fraud and Loss of Confidence*. Justice Thomas warns of the danger of eroding confidence due either to suspicions of fraud or conflicting mandates issued from different branches of government. His opinion cites *Purcell* and *McCutcheon* concerning the risk that election dysfunction might lead to loss of confidence that might drive citizens away from participating in the democratic process. He implies that allegations of mail voting fraud, perhaps even in this election, could have that effect.

The claims of fraud in the 2020 election have, indeed, done lasting damage to public faith in the mechanics of American democracy. Supporters of the losing candidate in Presidential elections often feel “robbed” and express a loss of faith in the election afterward, whereas supporters of the winner often increase in their confidence (as was true of Joe Biden’s supporters in 2020). But the depth of the anger and distrust shared by many of Trump’s supporters exceeds anything seen in the era of modern polling, even including the disputed 2000 election. As depicted in the figure below, even before Election Day, Republicans had somewhat lower faith than Democrats in the fairness of the election. But after the election, the gap exploded to more than seventy percentage points, with only ten to twenty percent of Republicans saying they had “quite a bit” or “a great deal” of confidence in the results. Even eight months after the election, roughly a third of voters (mostly Republicans) continued to believe that the election was marred by fraud that affected the outcome.



Source: Economist/YouGov poll.

3. Attempts to “audit” the 2020 election. This continued lack of trust has produced tangible public policy consequences. In one extraordinary example that lasted into at least July 2021, ballots from Maricopa County have continued to be examined at the behest of Republicans in the Arizona State Senate. In an unprecedented process described by its proponents as a “forensic audit,” but which differs greatly from any audit ever conducted in Arizona or elsewhere, a consulting firm (“Cyber Ninjas”) with no election experience has been brought in to examine the ballots for fraud and tampering. The process, which ordinarily would take days or weeks, has taken several months. This exercise has now spread to other states, which, months after certification and other deadlines have passed, have begun to consider reexamining the 2020 ballots. See Elizabeth Howard & Gowri Ramachandran, *Partisan Election Review Efforts in Five States*, July 8, 2021, <https://www.brennancenter.org/our-work/research-reports/partisan-election-review-efforts-five-states> (noting similar efforts in Wisconsin, Pennsylvania, Michigan, and Georgia).

4. New Laws regulating voting in the wake of the 2020 election. Several states have passed new laws regulating the voting process. Some have made permanent the accommodations from the pandemic that, for example, made mail voting more easily accessible. Others have sought to roll back those accommodations, while at the same time going even further in an effort to respond to the charges the Trump campaign made in the wake of the 2020 election. According to the Brennan Center for Justice, in the first half of 2021, seventeen states

enacted 28 new laws that restrict the right to vote. See Brennan Center for Justice, Voting Laws Roundup: July 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>. PolitiFact, a major fact-checking organization, takes issue with the Brennan Center’s approach in a piece entitled “Are there 28 new, restrictive voting laws? Not exactly”. <https://www.politifact.com/article/2021/jul/21/are-there-28-new-restrictive-voting-laws-not-exact/>

As the Brennan Center reports:

At least 16 mail voting restrictions in 12 states will make it more difficult for voters to cast mail ballots that count. Six laws shorten the timeframe for voters to request a mail ballot, including a Georgia law that will reduce that window by more than one-half. Five laws make it more difficult for voters to automatically receive their ballot or ballot application — either by making it harder to stay on absentee voting lists or by prohibiting officials from sending applications or ballots without the voter’s affirmative request. Nine laws in eight states make it more difficult for voters to deliver their mail ballots, including a law in Arkansas that makes the in-person ballot delivery deadline earlier, six laws that restrict assistance to voters in returning their mail ballots, and four laws that limit the availability of mail ballot drop boxes. Three laws impose stricter signature requirements for mail voting, while three others impose stricter or new voter ID laws for mail voting.

Id. Other states have shortened periods for early voting, restricted the use of ballot drop boxes, or rolled back more permissive voter registration rules. A full summary appears below.

New Restrictive Laws

| EFFECT ON VOTING | BILL NUMBERS |
|--|---|
| Shorten window to apply for a mail ballot | AL HB 538, AR SB 643, GA SB 202, IA SF 413, KY HB 574, OK HB 2663 |
| Shorten deadline to deliver mail ballot | AR SB 643 |
| Make it harder to remain on absentee voting lists | AZ SB 1485, FL SB 90 |
| Eliminate or limit sending mail ballot applications to voters who do not specifically request them | GA SB 202, IA SF 413, KS HB 2332 |
| Eliminate or limit sending mail ballots to voters who do not specifically request them | FL SB 90 |
| Restrict assistance in returning a voter's mail ballot | AR HB 1715, FL SB 90, IA SF 413, KS HB 2183, KY HB 574, MT SB 530 |
| Limit the number, location, or availability of mail ballot drop boxes | FL SB 90, GA SB 202, IA SF 413, IN SB 398 |
| Impose stricter signature requirements for mail ballots | AZ SB 1003, ID HB 290, KS HB 2183 |
| Tighten or impose voter ID requirements for mail voting | FL SB 90, GA SB 202, MT SB 169 |
| Tighten or impose voter ID requirements for in-person voting | AR HB 1112, AR HB 1244, MT SB 169, WY HB 75 |
| Expand voter purges or risk faulty voter purges | IA SF 413, FL SB 90, KY HB 574, UT HB 12 |
| Ban snacks and water to voters waiting in line | FL SB 90, GA SB 202 |
| Eliminate Election Day registration | MT HB 176 |
| Reduce polling place availability (locations or hours) | IA SF 413, MT SB 196 |
| Limit early voting days or hours | GA SB 202, IA SF 413 |

Source: Brennan Center for Justice, Voting Laws Roundup: July 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

5. *Georgia as a test case.* The Georgia law, one of the first passed after the 2020 election, triggered major public controversy and was immediately challenged in court. The final version of the law was less restrictive than the one some legislators originally proposed. For example, instead of early versions' elimination of voting on the Sunday before the election (which would prevent so-called "Souls to the Polls" initiatives popular with Black churches), the final version mandates a minimum of 17 days of early voting statewide and requires at least two days of Saturday early voting (while permitting counties to have Sunday early voting as well if they choose). The law requires counties to hold early voting during weekday working hours (9 a.m. to 5 p.m.) and provides the option of running it from 7 a.m. to 7 p.m., but not later. If voters end up having to wait in a line longer than an hour, counties are required to surge additional voting equipment there. Although some legislators proposed eliminating no-excuse absentee voting, the law left no-excuse absentee voting in place.

The new law also includes a number of new restrictions on voting that have led the Department of Justice to file a lawsuit under Section 2 of the Voting Rights Act alleging that the law intentionally discriminates on grounds of race. *See United States v. Georgia*, 1:21-cv-02575-JPB, June 25, 2021, <https://www.justice.gov/opa/press-release/file/1406456/download> (complaint). Note that the DOJ complaint rests its case entirely on a theory of discriminatory purpose and does not invoke the "results" test under Section 2. Why might that be? The complaint targets several new provisions that might make voting more difficult:

- The law shortens the time period for requesting absentee ballots from six months in advance of an election to 78 days in advance.
- It replaces signature matching to validate absentee ballots with a requirement that voters instead include on their returned absentee ballot envelopes either their driver's license number; the last four digits of their social security number; or, if they have neither, a copy of another form of identification, such as a utility bill.
- It prohibits the mailing of unsolicited absentee ballot applications to all voters.
- The law requires provision of drop boxes but limits their number. Georgia had used drop boxes for the first time in fall 2020, pursuant to an emergency regulation during the pandemic. The new law now requires that every county have at least one drop box but caps additional drop boxes at one for every 100,000 registered voters in a county. Because several large counties had provided more than this number of drop boxes on 2020, the effect of the law is to reduce the number of drop boxes in these counties compared to 2020.
- It prohibits election offices from receiving third-party funding (something several jurisdictions did for the first time in the 2020 election).
- It prohibits third parties from offering food or water within 150 feet of a polling place to voters waiting in line, though election officials can hand out water and third parties can give water to these officials to hand out.
- The law also removes authority from the Secretary of State, who is now an ex officio non-voting member of the State Election Board. The majority of the members of the Board will be chosen by the state legislature. This board also has the power to suspend and replace local election officials.

6. Changes in authority and threats to election administrators. This last provision in the Georgia law regarding the reallocation of election oversight authority is representative of a trend seen in other states of attempting to remove authority from Secretaries of State and local election officials and place it in the hands of officials over which legislatures have more control. Georgia is the most notable example, but similar proposals to grant greater legislative control over elections are under consideration in Arkansas, Kansas, Montana, Iowa, Arizona, and Texas. Of course, Secretaries of State are themselves often elected on a partisan basis and have often been accused in recent years of using their powers to favor their copartisans. The Georgia law, however, was clearly meant as a rebuke of Secretary of State Brad Raffensperger, a Republican who resisted the Trump campaign's attempts to "find votes" to overturn the result of the presidential election in Georgia.

In addition, in the wake of the 2020 election, many election administrators at the state and local level, who were previously obscure actors, have come under significant attacks, including personal threats against themselves and their families. See Brennan Center for Justice & Bipartisan Policy Center, *Election Officials Under Attack: How to Protect Administrators and Safeguard Democracy*, June 16, 2021, https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials_v7.pdf. Many experienced election administrators have resigned. Moreover, more aggressively partisan actors appear to be determined to run to

fill these offices, now that election administration itself has come to be seen as a new front in battles over elections. The combination of these forces raises the risk that election administration could become more partisan in the coming years. This reflects the unusual fact that, in the United States, compared to nearly all other democracies, election officials are frequently elected to office, including in partisan elections, rather than having long-term, independent actors administer key parts of the election system.

7. Federal Election Reform Proposals. On March 3, 2021, the U.S. House of Representatives passed H.R. 1: the “For the People Act” on a party line vote. The 800 page bill had been originally proposed two years earlier. It represents an amalgamation of election-related reforms that many Democrats have supported for several election cycles. It includes reforms related to voting rights, redistricting, campaign finance, and government ethics.

Voting rights

- Creates new national automatic voter registration that asks voters to opt out rather than opt in, ensuring more people will be signed up to vote. Requires chief state election officials to automatically register eligible unregistered citizens.
- Requires each state to put online options for voter registration, correction, cancellation, or designating party affiliation.
- Requires at least 15 consecutive days of early voting for federal elections; early voting sites would be open for at least 10 hours per day. The bill also prohibits states from restricting a person’s ability to vote by mail, and requires states to prepay postage on return envelopes for mail-in voting.
- Establish independent redistricting commissions in states as a way to draw new congressional districts and end partisan gerrymandering in federal elections.
- Prohibits voter roll purging and bans the use of non-forwardable mail being used as a way to remove voters from rolls.
- Restores voting rights to people convicted of felonies who have completed their sentences; however, the bill doesn’t restore rights to felons currently serving sentences in a correctional facility.

Campaign finance

- Establishes public financing of campaigns, powered by small donations. ... The federal government would provide a voluntary 6-1 match for candidates for president and Congress, which means for every dollar a candidate raises from small donations, the federal government would match it six times over. The maximum small donation that could be matched would be capped at \$200. This program isn’t funded by taxpayer dollars; instead, the money would come from adding a 4.75 percent fee on criminal and civil fines, fees, penalties, or settlements with banks and corporations that commit corporate malfeasance...

- Supports a constitutional amendment to end *Citizens United*.
- Passes the **DISCLOSE Act**. . . This would require super PACs and “dark money” political organizations to make their donors public.
- Passes the **Honest Ads Act**, . . . which would require Facebook and Twitter to disclose the source of money for political ads on their platforms and share how much money was spent. . . .
- Discloses any political spending by government contractors and slows the flow of foreign money into the elections by targeting shell companies.
- Restructures the Federal Election Commission to have five commissioners instead of six, in order to break political gridlock at the organization.
- Prohibits any coordination between candidates and super PACs.

Ethics

- Requires the president and vice president to disclose 10 years of his or her tax returns. Candidates for president and vice president must also do the same.
- Stops members of Congress from using taxpayer money to settle sexual harassment or discrimination cases.
- Gives the Office of Government Ethics the power to do more oversight and enforcement and implement stricter lobbying registration requirements. These include more oversight of foreign agents by the Foreign Agents Registration Act.
- Creates a new ethics code for the US Supreme Court, ensuring all branches of government are impacted by the new law.

Ella Nilsen, House Democrats’ massive voting rights bill, explained: The bill still faces a steep climb in the US Senate, Vox, March 3, 2021, <https://www.vox.com/2021/3/3/22309123/house-democrats-pass-voting-rights-bill-hrl>.

On June 22, 2021, Republicans filibustered H.R. 1 (now S. 1) in the Senate. In addition to arguing against the bill on the merits, Republicans argue that it amounts to a Democratic “power grab” that is in many respects unconstitutional. In recent congressional testimony, Professor Tolson defended the constitutionality of H.R. 1 because its proponents relied on a number of provisions that confer broad federal authority over elections as authorization for the Act, including the Elections Clause of Article I, Section 4. The Elections Clause empowers Congress to implement a “complete code for federal elections” that can supplement or, alternatively, displace entirely the state regulatory regime. *See* Testimony of Franita Tolson, The Elections Clause: Constitutional Interpretation and Congressional Exercise: Hearing Before the H. Comm. on House Administration, 117th Cong. (2021) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Since H.R. 1 applies to federal (and not state) elections, Tolson argues that the bill is constitutional. Additionally, “[w]hen combined with [its enforcement authority under] the Fourteenth and Fifteenth

Amendments,” also invoked by Congress as authorization for the Act, “Congress’ authority to enact H.R. 1 pursuant to the Elections Clause is only strengthened...” *Id.*

Constitutional questions aside, H.R. 1 still faces an uphill battle. Given Republican opposition, enacting the bill would require all 50 Democratic Senators to support it, as well as ending the filibuster. The bill has failed to gain support thus far from all 50 Democratic Senators; in addition, at least two Democratic Senators have publicly announced their opposition to ending the filibuster. A key Democratic Senator who opposes H.R. 1/S. 1 in its current form, Senator Joe Manchin from West Virginia, has proposed a narrower version of national legislation that would include the following:

Voting Rights

1. Make election day a public holiday. (New)
2. Mandate at least 15 consecutive days of early voting for federal elections. (include 2 weekends)
3. Ban partisan gerrymandering and use computer models. (New)
4. Require voter ID with allowable alternatives (utility bill, etc.) to prove identity to vote. (New)
5. Automatic registration through DMV, with option to opt out.
6. Require states to promote access to voter registration and voting for persons with disabilities and older individuals.
7. Prohibit providing false information about elections to hinder or discourage voting and increases penalties for voter intimidation.
8. Require states to send absentee by mail ballots to eligible voters before an election if voter is not able to vote in person during early voting or election day due to eligible circumstance and allow civil penalty for failure. (New)
9. Require the Election Assistance Commission to develop model training programs and award grants for training.
10. Require states to notify an individual, not later than 7 seven days before election, if his/her polling place has changed.
 - Absentee ballots shall be carried expeditiously and free of postage.
 - Require the Attorney General to develop a state-based response system and hotline that provides information on voting.
11. Allow for maintenance of voter rolls by utilizing information derived from state and federal documents.
12. Establish standards for election vendors based on cybersecurity concerns.
13. Allow provisional ballots to count for all eligible races regardless of precinct.

Campaign Finance

1. Amend the Federal Election Campaign Act to create a reporting requirement for disclosing reportable foreign contacts.
2. DISCLOSE Act.

3. Honest Ads Act.
4. Create “coordinated spender” category to ensure single-candidate super PACs do not operate as arms of campaigns.

Ethics

1. Increase resources for FARA office, creates FARA investigation and enforcement unit in Department of Justice and provides authority to impose civil penalties.
2. Require all Presidential appointees to recuse themselves from any matter in which a party is the President, the President’s spouse or an entity in which the President or President’s spouse has a substantial interest.
3. Prevent lobbyists from working on behalf of foreign entities.
4. Require the President and the Vice President, within 30 days of taking office, to divest financial interests that pose a conflict of interest or disclose information about their business interests.

Executive Branch Reforms

1. Require the disclosure of individual tax returns and certain business tax returns by Presidents and Vice Presidents, as well as candidates for the President and Vice President.

Joe Manchin, Voting Legislation, <https://www.politico.com/f/?id=0000017a-15e9-d33b-a37f-1defe4c70000> .

In addition, Congress is likely to consider another proposed piece of voting legislation: The John Lewis Voting Rights Act. That bill, otherwise known as H.R. 4, was passed by the House on December 6, 2019, and would respond to the Supreme Court’s decision in *Shelby County v. Holder*, which struck down the coverage formula for the Voting Rights Act of 1965. See H.R. 4, <https://www.congress.gov/bill/116th-congress/house-bill/4/text>. The new coverage formula would include:

1. Any state that has had 15 or more voting rights violations within the last 25 years.
2. Any state that has had 10 or more voting rights violations and at least 1 of those violations were committed by the state itself (as opposed to a jurisdiction within the state) within the last 25 years.
3. Any subdivision in a state that has had 3 or more voting rights violations within the last 25 years.

According to one analysis, most of the South plus New York and California would be covered under the proposal. See Benjamin Barber, the states facing federal preclearance under proposed Voting Rights Act fix, Facing South, March 13, 2019. In addition, the Act would require “practice-based preclearance” for jurisdictions of the country, in which racial or language minorities comprise twenty percent of the voting age population (with some exceptions). The covered practices include: changes to the method of election, changes to jurisdiction

boundaries, changes through redistricting, changes in documentation or qualifications to vote, changes to multilingual voting materials, changes that reduce, consolidate, or relocate voting locations, and new list maintenance processes. For those practices, jurisdictions would need to go through the same preclearance requirements according to the same standard as set forth in the amended reauthorized Voting Rights Act of 2006.

Insert on page 155:

HUSTED V. A. PHILIP RANDOLPH INSTITUTE,

138 S. Ct. 1833 (2018)

JUSTICE ALITO delivered the opinion of the Court.

It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. Pew Center on the States, Election Initiatives Issue Brief (Feb. 2012). And about 2.75 million people are said to be registered to vote in more than one State. *Ibid.*

At issue in today’s case is an Ohio law that aims to keep the State’s voting lists up to date by removing the names of those who have moved out of the district where they are registered. Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls. We are asked to decide whether this program complies with federal law.

I

A

Like other States, Ohio requires voters to reside in the district in which they vote. Ohio Rev. Code Ann. § 3503.01(A); see National Conference of State Legislatures, Voting by Nonresidents and Noncitizens (Feb. 27, 2015). When voters move out of that district, they become ineligible to vote there. See § 3503.01(A). And since more than 10% of Americans move every year, deleting the names of those who have moved away is no small undertaking.

For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened. The NVRA “erect[s] a complex superstructure of federal regulation atop state voter-registration systems.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013). The Act has two main objectives: increasing voter registration and removing ineligible persons from the States’ voter registration rolls. See § 2, 107 Stat. 77, 52 U.S.C. § 20501(b).

To achieve the latter goal, the NVRA requires States to “conduct a general program that makes a reasonable effort to remove the names” of voters who are ineligible “by reason of” death or change in residence. § 20507(a)(4). The Act also prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds. §§ 20507(b), (c), (d).

The most important of these requirements is a prior notice obligation. Before the NVRA, some States removed registrants without giving any notice. See J. Harris, Nat. Munic. League, Model Voter Registration System 45 (rev. 4th ed. 1957). The NVRA changed that by providing in § 20507(d)(1) that a State may not remove a registrant’s name on change-of-residence grounds unless either (A) the registrant confirms in writing that he

or she has moved or (B) the registrant fails to return a preaddressed, postage prepaid “return card” containing statutorily prescribed content. This card must explain what a registrant who has not moved needs to do in order to stay on the rolls, *i.e.*, either return the card or vote during the period covering the next two general federal elections. § 20507(d)(2)(A). And for the benefit of those who have moved, the card must contain “information concerning how the registrant can continue to be eligible to vote.” § 20507(d)(2)(B). If the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds. See § 20507(d)(1).

While the NVRA is clear about the need to send a “return card” (or obtain written confirmation of a move) before pruning a registrant’s name, no provision of federal law specifies the circumstances under which a return card may be sent. Accordingly, States take a variety of approaches. See Nat. Assn. of Secretaries of State (NASS) Report: Maintenance of State Voter Registration Lists 5–6 (Dec. 2017). The NVRA itself sets out one option. A State may send these cards to those who have submitted “change-of-address information” to the United States Postal Service. § 20507(c)(1). Thirty-six States do at least that....

What if no return card is mailed back? Congress obviously anticipated that some voters who received cards would fail to return them for any number of reasons, and it addressed this contingency in § 20507(d), which, for convenience, we will simply call “subsection (d).” Subsection (d) treats the failure to return a card as *some evidence*—but by no means conclusive proof—that the voter has moved. Instead, the voter’s name is kept on the list for a period covering two general elections for federal office (usually about four years). Only if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district (*e.g.*, by updating address information online) may the registrant’s name be removed. § 20507(d)(2)(A); see §§ 20507(d)(1)(B), (3).

B

Since 1994, Ohio has used two procedures to identify and remove voters who have lost their residency qualification.

First, the State utilizes the Postal Service option set out in the NVRA. The State sends notices to registrants whom the Postal Service’s “national change of address service” identifies as having moved. Ohio Rev. Code Ann. § 3503.21(B)(1). This procedure is undisputedly lawful. See 52 U.S.C. § 20507(c)(1).

But because according to the Postal Service “[a]s many as 40 percent of people who move do not inform the Postal Service,”³ Ohio does not rely on this information alone. In its so-called Supplemental Process, Ohio “identif [ies] electors whose lack of voter activity indicates they may have moved.” Under this process, Ohio sends notices to registrants who have “not engage[d] in any voter activity for a period of two consecutive years.” “Voter activity” includes “casting a ballot” in any election—whether general, primary, or special and whether federal, state, or local. (And Ohio regularly holds elections on both even and odd years.) Moreover, the term “voter activity” is broader than simply voting. It also includes such things as “sign [ing] a petition,” “filing a voter registration form, and updating a voting address with a variety of [state] entities.”

After sending these notices, Ohio removes registrants from the rolls only if they “fai[l] to respond” and “continu[e] to be inactive for an additional period of four

consecutive years, including two federal general elections.” Federal law specifies that a registration may be canceled if the registrant does not vote “in an election during the period” covering two general federal elections after notice, § 20507(d)(1)(B)(ii), but Ohio rounds up to “four consecutive years” of nonvoting after notice. Thus, a person remains on the rolls if he or she votes in any election during that period—which in Ohio typically means voting in any of the at least four elections after notice. Combined with the two years of nonvoting before notice is sent, that makes a total of six years of nonvoting before removal.

II

B

Respondents argue (and the Sixth Circuit held) that, even if Ohio’s process complies with subsection (d), it nevertheless violates the Failure-to-Vote Clause—the clause that generally prohibits States from removing people from the rolls “by reason of [a] person’s failure to vote.” § 20507(b)(2); see also § 21083(a)(4)(A). Respondents point out that Ohio’s Supplemental Process uses a person’s failure to vote twice: once as the trigger for sending return cards and again as one of the requirements for removal. Respondents conclude that this use of nonvoting is illegal.

We reject this argument because the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. Instead, as permitted by subsection (d), Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice.

When Congress clarified the meaning of the NVRA’s Failure-to-Vote Clause in HAVA, here is what it said: “[C]onsistent with the [NVRA], ... no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A) (emphasis added). The meaning of these words is straightforward. “Solely” means “alone.” Webster’s Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And “by reason of” is a “quite formal” way of saying “[b]ecause of.” C. Ammer, *American Heritage Dictionary of Idioms* 67 (2d ed. 2013). Thus, a State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote.

This explanation of the meaning of the Failure-to-Vote Clause merely makes explicit what was implicit in the clause as originally enacted. At that time, the clause simply said that a state program “shall not result in the removal of the name of any person from the [rolls for federal elections] by reason of the person’s failure to vote.” 107 Stat. 83. But that prohibition had to be read together with subsection (d), which authorized removal if a registrant did not send back a return card and also failed to vote during a period covering two successive general elections for federal office. If possible, “[w]e must interpret the statute to give effect to both provisions,” *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009), and here, that is quite easy.

The phrase “by reason of” denotes some form of causation.... [W]e conclude that the Failure-to-Vote Clause, as originally enacted, referred to sole causation. And when

Congress enacted HAVA, it made this point explicit. It added to the Failure-to-Vote Clause itself an explanation of how it is to be read, *i.e.*, in a way that does not contradict subsection (d). And in language that cannot be misunderstood, it reiterated what the clause means: “[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A) (emphasis added). In this way, HAVA dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.

That is exactly what Ohio’s Supplemental Process does. It does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

For all these reasons, we hold that Ohio law does not violate the Failure-to-Vote Clause.

III

We similarly reject respondents’ argument that Ohio violates other provisions of the NVRA and HAVA.

A

Respondents contend that Ohio removes registered voters on a ground not permitted by the NVRA. They claim that the NVRA permits the removal of a name for only a few specified reasons—a person’s request, criminal conviction, mental incapacity, death, change of residence, and initial ineligibility. And they argue that Ohio removes registrants for other reasons, namely, for failing to respond to a notice and failing to vote.

This argument plainly fails. Ohio simply treats the failure to return a notice and the failure to vote as evidence that a registrant has moved, not as a ground for removal. And in doing this, Ohio simply follows federal law. Subsection (d), which governs removals “on the ground that the registrant has changed residence,” treats the failure to return a notice and the failure to vote as evidence that this ground is satisfied. § 20507(d)(1).

If respondents’ argument were correct, then it would also be illegal to remove a name under § 20507(c) because that would constitute removal for submitting change-of-address information to the Postal Service. Likewise, if a State removed a name after receiving a death certificate or a judgment of criminal conviction, that would be illegal because receipt of such documents is not listed as a permitted ground for removal under § 20507(a)(3) or § 20507(a)(4). About this argument no more need be said.

The dissents have a policy disagreement, not just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio’s Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before

us is whether it violates federal law. It does not.

The judgment of the Sixth Circuit is reversed.

THOMAS, J., concurring.

I join the Court’s opinion in full. I write separately to add that respondents’ proposed interpretation of the National Voter Registration Act (NVRA) should also be rejected because it would raise significant constitutional concerns.

Respondents would interpret the NVRA to prevent States from using failure to vote as evidence when deciding whether their voting qualifications have been satisfied. The Court’s opinion explains why that reading is inconsistent with the text of the NVRA. But even if the NVRA were “susceptible” to respondents’ reading, it could not prevail because it “raises serious constitutional doubts” that the Court’s interpretation avoids. *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018).

As I have previously explained, constitutional text and history both “confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 29 (2013) (THOMAS, J., dissenting). The Voter–Qualifications Clause provides that, in elections for the House of Representatives, “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, cl. 1. The Seventeenth Amendment imposes an identical requirement for elections of Senators. And the Constitution recognizes the authority of States to “appoint” Presidential electors “in such Manner as the Legislature thereof may direct.” Art. II, § 1, cl. 2; see *Inter Tribal Council of Ariz.*, 570 U.S., at 35, n. 2 (opinion of THOMAS, J.). States thus retain the authority to decide the qualifications to vote in federal elections, limited only by the requirement that they not “‘establish special requirements’” for congressional elections “‘that do not apply in elections for the state legislature.’” *Id.*, at 26 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 865 (1995) (THOMAS, J., dissenting)). And because the power to establish requirements would mean little without the ability to enforce them, the Voter Qualifications Clause also “gives States the authority ... to verify whether [their] qualifications are satisfied.” 570 U.S., at 28 .

Respondents’ reading of the NVRA would seriously interfere with the States’ constitutional authority to set and enforce voter qualifications. To vote in Ohio, electors must have been a state resident 30 days before the election, as well as a resident of the county and precinct where they vote. Ohio Rev. Code Ann. § 3503.01(A); see also Ohio Const., Art. V, § 1. Ohio uses a record of nonvoting as one piece of evidence that voters no longer satisfy the residence requirement. Reading the NVRA to bar Ohio from considering nonvoting would therefore interfere with the State’s “authority to verify” that its qualifications are met “in the way it deems necessary.” *Inter Tribal Council of Ariz.*, 133 S.Ct. 2247. Respondents’ reading thus renders the NVRA constitutionally suspect and should be disfavored. See *Jennings*, 138 S.Ct., at 836.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Section 8 of the National Voter Registration Act of 1993 requires States to

“conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant.” § 8(a)(4), 107 Stat. 82–83, 52 U.S.C. § 20507(a)(4). This case concerns the State of Ohio’s change-of-residence removal program (called the “Supplemental Process”), under which a registered voter’s failure to vote in a single federal election begins a process that may well result in the removal of that voter’s name from the federal voter rolls. See *infra*, at 1853 – 1854. The question is whether the Supplemental Process violates § 8, which prohibits a State from removing registrants from the federal voter roll “by reason of the person’s failure to vote.” § 20507(b)(2). In my view, Ohio’s program does just that. And I shall explain why and how that is so.

I

This case concerns the manner in which States maintain federal voter registration lists. In the late 19th and early 20th centuries, a number of “[r]estrictive registration laws and administrative procedures” came into use across the United States—from literacy tests to the poll tax and from strict residency requirements to “selective purges.” H.R. Rep. No. 103–9, p. 2 (1993). Each was designed “to keep certain groups of citizens from voting” and “discourage participation.” *Ibid.* By 1965, the Voting Rights Act abolished some of the “more obvious impediments to registration,” but still, in 1993, Congress concluded that it had “unfinished business” to attend to in this domain. *Id.*, at 3. That year, Congress enacted the National Voter Registration Act “to protect the integrity of the electoral process,” “increase the number of eligible citizens who register to vote in elections for Federal office,” and “ensure that accurate and current voter registration rolls are maintained.” § 20501(b). It did so mindful that “the purpose of our election process is not to test the fortitude and determination of the *1851 voter, but to discern the will of the majority.” S. Rep. No. 103–6, p. 3 (1993).

In accordance with these aims, § 8 of the Registration Act sets forth a series of requirements that States must satisfy in their “administration of voter registration for elections for Federal office.” § 20507. Ohio’s Supplemental Process fails to comport with these requirements; it erects needless hurdles to voting of the kind Congress sought to eliminate by enacting the Registration Act. ****

In sum, § 8 tells States the following:

- In general, establish a removal-from-registration program that “makes a reasonable effort” to remove voters who become ineligible because they change residences.
- Do not target registered voters for removal from the registration roll because they have failed to vote. However, “using the procedures described in subsections (c) and (d) to remove an individual” from the federal voter roll is permissible and does not violate the Failure-to-Vote prohibition.
- The procedures described in subsections (c) and (d) consist of a two-step removal process in which at step 1, the State uses change-of-address information (which the State may obtain, for instance, from the Postal Service) to identify registrants whose addresses may have changed; and then at step 2, the State must use the mandatory “last chance” notice procedure described in subsection (d) to confirm the change of address.

- The “last chance” confirmation notice must be sent by forwardable mail. It must also include a postage-prepaid, preaddressed “return card” that the registrant may send back to the State verifying his or her current address. And it must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

II

Section 8 requires that Ohio’s program “mak[e] a reasonable effort to remove” ineligible registrants from the rolls because of “a change in the residence of the registrant,” and it must do so “in accordance with subsections (b), (c), and (d).” § 20507(a)(4)(B). In my view, Ohio’s program is unlawful under § 8 in two respects. It first violates subsection (b)’s Failure-to-Vote prohibition because Ohio uses nonvoting in a manner that is expressly prohibited and not otherwise authorized under § 8. In addition, even if that were not so, the Supplemental Process also fails to satisfy subsection (a)’s Reasonable Program requirement, since using a registrant’s failure to vote is not a *1854 reasonable method for identifying voters whose registrations are likely invalid (because they have changed their addresses).

Consider the following facts. First, Ohio tells us that a small number of Americans—about 4% of *all* Americans—move outside of their county each year. Record 376. (The majority suggests the relevant number is 10%, *ante*, at 1838 – 1839, but that includes people who move within their county.) At the same time, a large number of American voters fail to vote, and Ohio voters are no exception. In 2014, around 59% of Ohio’s registered voters failed to vote. See Brief for League of Women Voters et al. as *Amici Curiae* 16, and n. 12 (citing Ohio Secretary of State, 2014 Official Election Results).

Although many registrants fail to vote and only a small number move, under the Supplemental Process, Ohio uses a registrant’s failure to vote to identify that registrant as a person whose address has likely changed. The record shows that in 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Record 475. Ohio then sent those 1.5 million registered voters subsection (d) “last chance” confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, “You are right, Ohio. I have, in fact, moved.” *Ibid*. In addition, Ohio received back about 235,000 return cards which said, in effect, “You are *wrong*, Ohio, I have *not* moved.” In the end, however, there were *more than 1,000,000 notices*—the vast majority of notices sent—to which Ohio received back *no* return card at all. *Ibid*.

What about those registered voters—more than 1 million strong—who did not send back their return cards? Is there any reason at all (other than their failure to vote) to think they moved? The answer to this question must be no. There is no reason at all. First, those 1 million or so voters accounted for about 13% of Ohio’s voting population. So if those 1 million or so registered voters (or even half of them) had, in fact, moved, then vastly more people must move each year in Ohio than is generally true of the roughly 4% of *all* Americans who move to a different county nationwide (not all of whom are registered voters). See *Id.*, at 376. But there is no reason to think this. Ohio offers no such reason.

And the streets of Ohio’s cities are not filled with moving vans; nor has Cleveland become the Nation’s residential moving companies’ headquarters. Thus, I think it fair to assume (because of the human tendency not to send back cards received in the mail, confirmed strongly by the actual numbers in this record) the following: In respect to change of residence, the failure of more than 1 million Ohio voters to respond to *forwardable notices* (the vast majority of those sent) shows nothing at all that is statutorily significant.

To put the matter in the present statutory context: When a State relies upon a registrant’s failure to vote to initiate the Confirmation Procedure, it violates the Failure-to-Vote Clause, and a State’s subsequent use of the Confirmation Procedure cannot save the State’s program from that defect. Even if that were not so, a nonreturned confirmation notice adds nothing to the State’s understanding of whether the voter has moved or not. And that, I repeat, is because a nonreturned confirmation notice (as the numbers show) cannot reasonably indicate a change of address.

For these reasons, with respect, I dissent.

JUSTICE SOTOMAYOR, dissenting.

I join the principal dissent in full because I agree that the statutory text plainly supports respondents’ interpretation. I write separately to emphasize how that reading is bolstered by the essential purposes stated explicitly in the National Voter Registration Act of 1993 (NVRA) to increase the registration and enhance the participation of eligible voters in federal elections. 52 U.S.C. §§ 20501(b)(1)-(2). Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against.

Concerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an unfortunate feature of our country’s history. See *Schuette v. BAMN*, 572 U.S. 291, 337–338 (2014) (SOTOMAYOR, J., dissenting). As the principal dissent explains, “[i]n the late 19th and early 20th centuries, a number of ‘[r]estrictive registration laws and administrative procedures’ came to use across the United States.” States enforced “poll tax [es], literacy tests, residency requirements, selective purges, ... and annual registration requirements,” which were developed “to keep certain groups of citizens from voting.” H.R. Rep. No. 103–9, p. 2 (1993). Particularly relevant here, some States erected procedures requiring voters to renew registrations “whenever [they] moved or failed to vote in an election,” which “sharply depressed turnout, particularly among blacks and immigrants.” A. Keyssar, *The Right To Vote* 124 (2009). Even after the passage of the Voting Rights Act in 1965, many obstacles remained.

Congress was well aware of the “long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens” when it enacted the NVRA. S. Rep. No. 103–6, p. 18 (1993). Congress thus made clear in the statutory findings that “the right of citizens of the United States to vote is a fundamental right,” that “it is the duty of the Federal, State, and local governments to promote the exercise of that right,” and that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation ... and disproportionately harm voter participation by various

groups, including racial minorities.” 52 U.S.C. § 20501(a). In light of those findings, Congress enacted the NVRA with the express purposes of “increas[ing] the number of eligible citizens who register to vote” and “enhanc[ing] the participation of eligible citizens *1864 as voters.” §§ 20501(b)(1)-(2). These stated purposes serve at least in part to counteract the history of voter suppression, as evidenced by § 20507(b)(2), which forbids “the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.” *Ibid.*

Ohio’s Supplemental Process reflects precisely the type of purge system that the NVRA was designed to prevent. Under the Supplemental Process, Ohio will purge a registrant from the rolls after six years of not voting, *e.g.*, sitting out one Presidential election and two midterm elections, and after failing to send back one piece of mail, even though there is no reasonable basis to believe the individual actually moved. This purge program burdens the rights of eligible voters. At best, purged voters are forced to “needlessly reregister” if they decide to vote in a subsequent election; at worst, they are prevented from voting at all because they never receive information about when and where elections are taking place.

In concluding that the Supplemental Process does not violate the NVRA, the majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate. States, though, need not choose to be so unwise. Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote. The majority of States have found ways to maintain accurate voter rolls without initiating removal processes based solely on an individual’s failure to vote. See App. to Brief for League of Women Voters of the United States et al. as *Amici Curiae* 1a–9a; Brief for State of New York et al. as *Amici Curiae* 22–28. Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by. Today’s decision forces these communities and their allies to be even more proactive and vigilant in holding their States accountable and working to dismantle the obstacles they face in exercising the fundamental right to vote.

NOTES AND QUESTIONS

1. *Husted* exposes two fundamental divides in the Supreme Court regarding the administration of elections and the potential for creating barriers to voter participation. Although the divides are expressed in terms of statutory interpretation and broader policy or even constitutional considerations, ultimately both trace to the question of the degree of scrutiny that should be given to election administration. For the Court majority, both the National Voter Registration Act and the Help America Vote Act are primarily administrative mechanisms that seek to create a coordinated baseline for certain technical features of state election laws. Accordingly, the states are given wide berth to implement state practices consistent with the statutory language. Justice Alito’s opinion thus requires Ohio to ensure that no one is removed from the voter registration rolls without notice and that no one is removed “solely” on the basis of not having voted. Because Ohio satisfies both statutory requirements, the state law does not offend the federal statutory scheme.

For the dissenters, by contrast, the statutory scheme is not so much an administrative code that tests technical aspects of voting, but a more comprehensive federal protection of the franchise. Thus Justice Breyer would find the Ohio scheme to overreach dramatically in creating a presumption of ineligibility for some one million Ohio residents who are unlikely to have moved out of their county of eligibility. The majority finds the potential exclusion of such numbers of voters permissible so long as the express statutory commands are met. For the dissenting Justices, the Ohio voter registration practices offend the statutory objective of increasing voter protection.

Who gets the better of the statutory argument?

2. At a deeper level, the Court divides over the question whether Ohio is merely administering the election machinery or whether it is getting close enough to the heart of the right to vote to require greater judicial scrutiny. Justice Alito holds that the application of neutral rules in election administration withstands challenge so long as there is no conflict with federal statutory requirements. Justice Thomas goes considerably further in arguing that any federal attempt to impose additional requirements beyond not discriminating against state voters in federal elections would unconstitutionally go beyond federal power.

Justice Sotomayor's dissent reflects an increased willingness on her part to create a higher level of constitutional scrutiny for state regulation of the voting process, even in areas once thought to be administrative. Across a number of cases, Justice Sotomayor argues for greater scrutiny for any state conduct that reinforces past practices of exclusion, vote suppression, or outright vote denial.

As voter registration and election administration have become freighted with partisan accusations about vote suppression and vote fraud, courts have increasingly had to confront challenges to what are seemingly technical matters of running an election system. Older cases would have created a simple divide that matters of administration are subject to highly forgiving rational relations scrutiny, while matters that look like discrimination of exclusion trigger withering strict scrutiny. The difficulty is that the same conduct can look like either, and assigning the standard of review likely predetermines the outcome of the litigation.

The principal dissent of Justice Breyer comes closer to a hybrid approach that does not condemn any state conduct that affects the right to vote – the dissents all appreciate that voter registration lists do need to be purged and kept up to date. Instead, the dissents, like many lower courts that have heard repeated challenges to restrictive voter access rules, allow a form of burden shifting in which potential adverse effects on the ability to vote requires asking about the interest that the state seeks to advance and the cost-benefit rationality of the proposed state means to realize that objective. Ultimately, this is what separates Justice Breyer's focus on the overreach of the Ohio law from Justice Alito's narrower focus on the statutory language. For an assessment of such burden-shifting approaches, see Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind. L.J. 299 (2016).

CHAPTER THREE

Insert on page 201, after note 2.

2a. On March 26, 2018, Secretary of Commerce Wilbur Ross ordered that the 2020 Decennial Census would include a question asking all U.S. residents whether or not they were citizens. *See* Letter from Secretary Wilbur Ross to Karen Dunn Kelley, Under Secretary for Economic Affairs, March 26, 2018, *available at* https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf. In the letter, Secretary Ross wrote that he was responding to a December 12, 2017, request from the Department of Justice to collect data on the citizen voting age population (CVAP) in order to aid in enforcement of Section 2 of the Voting Rights Act in the next redistricting cycle. (Courts had routinely used CVAP estimates from the yearly American Community Survey (ACS) in Section 2 litigation in order to evaluate whether a minority group was large enough to constitute a CVAP majority in a potential single member district.) The Ross letter argued that the ACS CVAP estimates were insufficient for Section 2 purposes, because they could not provide reliable estimates of CVAP at the census block level.

Shortly after the issuance of this letter, several groups filed lawsuits in New York, California, and Maryland, to prevent the inclusion of the citizenship question on the 2020 Census form. *See* Brennan Center for Justice, *Litigation About the 2020 Census*, July 19, 2018, *available at* <http://www.brennancenter.org/analysis/2020-census-litigation> (assembling cases). The plaintiffs argued that the last-minute inclusion of an untested citizenship question would lead to administrative havoc with the census and cause a substantial differential undercount of minority communities afraid to identify themselves as non-citizens for fear of government retaliation. These plaintiffs argued that the inclusion of such a question violated the Constitution’s Census Clause and Equal Protection, as well as the Administrative Procedure Act. The citizenship question will introduce such a high level of inaccuracy into the 2020 headcount, the plaintiffs argued, that it will no longer constitute an “actual Enumeration” as required by Article I, section 2 of the Constitution. In addition, they argued that the alleged VRA-related rationale for changing the census form was not only pretextual, but masked discriminatory intent to diminish the political power and influence of communities of color by undercounting them. Indeed, they argued that it will inhibit enforcement of the VRA by leading to inaccurate counts of the very communities the VRA intends to protect. (In the course of the litigation, a May 2, 2017, email exchange with Secretary Ross emerged that revealed he had requested a change in the census form earlier in 2017, and that his advisor had then wrote, “We need to work with Justice to get them to request that citizenship be added back as a census question.” *See* <https://bit.ly/2LXjffHc>) They also argued that the precipitous decision to change the form was arbitrary, capricious, and contrary to law under the Administrative Procedure Act. Significant changes to census questions and procedures are often studied and tested many years before the census itself. The proposal to include a citizenship question was made after all the necessary preparations for the 2020 Census had been made.

Three different district courts found that the Secretary’s decision was “arbitrary and capricious” in violation of the APA, and two found that it violated the constitutional requirement to carry out an actual enumeration of the population. *See Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019); *State v. Ross*, 358 F. Supp. 3d 965 (N.D. Cal. 2019); *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019). The government obtained extraordinary expedited review before the Supreme Court.

On the last day of the term, the Supreme Court, in an opinion by Chief Justice Roberts, first held that the Constitution permitted the inclusion of a citizenship question on the decennial census (which it had for many years prior to 1970) and that inclusion of the question would not be substantively “arbitrary and capricious” under the APA. But he then concluded that inclusion of the question violated the APA’s requirement of reasoned decision-making because the Secretary’s stated reason for the decision, enforcing the Voting Rights Act, was “contrived” and seemed to be a pretext. The Court did not speculate about what other reasons might have led the Secretary to include the question, only that the VRA justification, given the extraordinary events leading up to the decision to add the question, did not appear to constitute the reason to add the citizenship question. However, the Court left open the possibility that the census could add the question if Secretary Ross could articulate a non-pretextual reason for the change in the form. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

Justices Thomas, Gorsuch, and Kavanaugh concurred in the holding that the decision satisfied the requirements of the APA and would not have considered the question of whether the decision was pretextual because the Secretary was entitled to a presumption of regularity. *See id.* at 2582-83 (Thomas, J., concurring in part and dissenting in part). Justice Alito would have held that the decision of what should be asked on the census was, under established administrative law doctrines, not subject to judicial review. *See id.* at 2598 (Alito, J., concurring in part and dissenting in part). And Justices Ginsburg, Breyer, Sotomayor, and Kagan, while agreeing that the decision was pretextual and therefore could not be upheld, would have also held that including the question would substantively violate the APA’s requirements that agency action not be arbitrary or capricious. *See id.* at 2595 (Breyer, J., concurring in part and dissenting in part).

Following the Supreme Court’s decision, attorneys from the Department of Justice initially indicated that the Census Bureau had begun to print census forms without a citizenship question, but following tweets by President Trump, there was some question whether the administration would instead try to find some alternative rationale. But after a week of uncertainty, the President instead announced an executive order to gather administrative data to obtain more detailed citizenship data because doing so would be more accurate. *See* Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019). The Census Bureau plans to merge those data on citizenship with the redistricting dataset generated from the census form in order to allow states to redistrict on the basis of eligible voters, along the lines sought by the plaintiffs in *Evenwel v. Abbott*.

CHAPTER FOUR

Insert on page 292, before subsection C.

Perhaps the closest textual role for political parties comes in the Twelfth Amendment’s recognition that Electors must vote separately for President and Vice President, thereby abandoning the practice that yielded John Adams, a Federalist, as President in 1796, and his rival Thomas Jefferson, a Republican, as Vice President. In light of the perceived fiasco of the 1800 election, the Constitution was amended to treat the votes for President and Vice President distinctly, recognizing that the candidates for these offices ran as a slate and that Electors would be expected to vote for the entire slate they were selected to support. As history progressed, and as the role of political parties solidified at the heart of the electoral system, States began to command Electors to follow faithfully the partisan obligations that resulted in their election. Article II of the Constitution, however, gives Electors the power to “vote” for president, raising the question whether what is termed a “faithless elector” is discharging her discretionary function or is acting in derogation of the political support of the voters in selecting the Elector from a party slate.

CHIAFALO V. WASHINGTON,
140 S. Ct. 2316 (2020)

JUSTICE KAGAN delivered the opinion of the Court.

Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few “electors” then choose the President.

The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State’s popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution “demands absolute freedom for the elector to vote his own choice.” *Ray v. Blair*, 343 U.S. 214, 228 (1952).

Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State’s popular vote. We hold that a State may do so.

I

Our Constitution’s method of picking Presidents emerged from an eleventh-hour compromise. The issue, one delegate to the Convention remarked, was “the most difficult of all [that] we have had to decide.” 2 Records of the Federal Convention of 1787, p. 501 (M. Farrand rev. 1966) (Farrand). Despite long debate and many votes, the delegates could not reach an agreement. See generally N. Peirce & L. Longley, *The People’s President 19–22* (rev. 1981). In the dying days of summer, they referred the matter to the so-called Committee of Eleven to devise a solution. The Committee returned with a proposal for the

Electoral College. Just two days later, the delegates accepted the recommendation with but a few tweaks. James Madison later wrote to a friend that the “difficulty of finding an unexceptionable [selection] process” was “deeply felt by the Convention.” Letter to G. Hay (Aug. 23, 1823), in 3 Farrand 458. Because “the final arrangement of it took place in the latter stage of the Session,” Madison continued, “it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho’ the degree was much less than usually prevails in them.” *Ibid.* Whether less or not, the delegates soon finished their work and departed for home.

The provision they approved about presidential electors is fairly slim. Article II, § 1, cl. 2 says:

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 next clause (but don’t get attached: it will soon be superseded) set out the procedures the electors were to follow in casting their votes. In brief, each member of the College would cast votes for two candidates in the presidential field. The candidate with the greatest number of votes, assuming he had a majority, would become President. The runner-up would become Vice President. If no one had a majority, the House of Representatives would take over and decide the winner.

That plan failed to anticipate the rise of political parties, and soon proved unworkable. The Nation’s first contested presidential election occurred in 1796, after George Washington’s retirement. John Adams came in first among the candidates, and Thomas Jefferson second. That meant the leaders of the era’s two warring political parties—the Federalists and the Republicans—became President and Vice President respectively. (One might think of this as fodder for a new season of *Veep*.) Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr ... did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College’s original voting rules.

The result was the Twelfth Amendment, whose main part provided that electors would vote separately for President and Vice President. The Amendment, ratified in 1804, says:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President ...; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to [Congress, where] the votes shall then be counted.

The Amendment thus brought the Electoral College's voting procedures into line with the Nation's new party system.

Within a few decades, the party system also became the means of translating popular preferences within each State into Electoral College ballots. In the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College. By 1832, though, all States but one had introduced popular presidential elections.

* * *

In the 20th century, many States enacted statutes meant to guarantee that outcome—that is, to prohibit so-called faithless voting. Rather than just assume that party-picked electors would vote for their party's winning nominee, those States insist that they do so. As of now, 32 States and the District of Columbia have such statutes on their books.... States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system. Almost all of them immediately remove a faithless elector from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge....

Washington is one of the 15 States with a sanctions-backed pledge law designed to keep the State's electors in line with its voting citizens.... This case involves three Washington electors who violated their pledges in the 2016 presidential election.... All three pledged to support Hillary Clinton in the Electoral College. But as that vote approached, they decided to cast their ballots for someone else. The three hoped they could encourage other electors—particularly those from States Donald Trump had carried—to follow their example. The idea was to deprive him of a majority of electoral votes and throw the election into the House of Representatives. So the three Electors voted for Colin Powell for President. But their effort failed. Only seven electors across the Nation cast faithless votes—the most in a century, but well short of the goal. Candidate Trump became President Trump. And, more to the point here, the State fined the Electors \$1,000 apiece for breaking their pledges to support the same candidate its voters had....

We uphold Washington's penalty-backed pledge law for reasons much like those given in *Ray*. The Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.

A

Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint.⁴ As noted earlier, each State may appoint electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2.... And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside

constraint, enables the enforcement of a pledge like Washington's.

And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and ... that is all.

The Framers could have done it differently; other constitutional drafters of their time did. In the founding era, two States—Maryland and Kentucky—used electoral bodies selected by voters to choose state senators (and in Kentucky's case, the Governor too). The Constitutions of both States, Maryland's drafted just before and Kentucky's just after the U. S. Constitution, incorporated language that would have made this case look quite different. Both state Constitutions required all electors to take an oath "to elect without favour, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." Md. Declaration of Rights, Art. XVIII (1776); see Ky. Const., Art. I, § 14 (1792) (using identical language except adding "[and] for Governor"). The emphasis on independent "judgment and conscience" called for the exercise of elector discretion. But although the Framers knew of Maryland's Constitution, no language of that kind made it into the document they drafted. See 1 Farrand 218, 289 (showing that Madison and Hamilton referred to the Maryland system at the Convention).

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, § 1 first names the members of the Electoral College: "electors." The Twelfth Amendment then says that electors shall "vote" and that they shall do so by "ballot." The "plain meaning" of those terms, the Electors say, requires electors to have "freedom of choice." ...

But even assuming other Framers shared that outlook, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people's decisions.

B

"Long settled and established practice" may have "great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689, (1929). As James Madison wrote, "a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate "terms & phrases." Letter to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908); see *The Federalist* No. 37, at 225. The Electors make an appeal to that kind of practice in asserting their right to independence. But "our whole experience as a Nation" points in the opposite direction. Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate,

almost all of them) rapidly settled into that non-discretionary role.

Begin at the beginning—with the Nation’s first contested election in 1796. Would-be electors declared themselves for one or the other party’s presidential candidate. (Recall that in this election Adams led the Federalists against Jefferson’s Republicans. In some States, legislatures chose the electors; in others, ordinary voters did. But in either case, the elector’s declaration of support for a candidate—essentially a pledge—was what mattered.... And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors’ choice of presidential candidate.

The Twelfth Amendment embraced this new reality—both acknowledging and facilitating the Electoral College’s emergence as a mechanism not for deliberation but for party-line voting. Remember that the Amendment grew out of a pair of fiascos—the election of two then-bitter rivals as President and Vice President, and the tie vote that threw the next election into the House. Both had occurred because the Constitution’s original voting procedures gave electors two votes for President, rather than one apiece for President and Vice President. Without the capacity to vote a party ticket for the two offices, the electors had foundered, and could do so again....

Courts and commentators throughout the 19th century recognized the electors as merely acting on other people’s preferences. Justice Story wrote that “the electors are now chosen wholly with reference to particular candidates,” having either “silently” or “publicly pledge[d]” how they will vote. 3 Commentaries on the Constitution of the United States § 1457, p. 321 (1833). “[N]othing is left to the electors,” he continued, “but to register [their] votes, which are already pledged.” *Id.*, at 321–322. Indeed, any “exercise of an independent judgment would be treated[] as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.” *Id.*, at 322....

State election laws evolved to reinforce that development, ensuring that a State’s electors would vote the same way as its citizens.... States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. Washington’s law, penalizing a pledge’s breach, is only another in the same vein. It reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State’s voters have chosen.

The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. And more than a third of the faithless votes come from 1872, when the Democratic Party’s nominee (Horace Greeley) died just after Election Day. Putting those aside, faithless votes represent just one-half of one percent of the total. Still, the Electors counter, Congress has counted all those votes. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years....

III

The Electors’ constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a

role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

The judgment of the Supreme Court of Washington is

Affirmed.

Justice THOMAS, with whom Justice GORSUCH joins as to Part II, concurring in the judgment.

The Court correctly determines that States have the power to require Presidential electors to vote for the candidate chosen by the people of the State. I disagree, however, with its attempt to base that power on Article II. In my view, the Constitution is silent on States' authority to bind electors in voting. I would resolve this case by simply recognizing that “[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.”

* * *

When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here.

* * *

NOTES AND QUESTIONS

1. The main effect of *Chaifalo* is to align the constitutional role of Electors with the popular understanding that citizens are voting for a candidate for president, not some unknown individuals beholden only to what their conscience tells them to do. In small ways, the opinion endorses a theory that attempts to align Electoral College outcomes more closely with the will of the electorate. The paucity of faithless electors in American history indicates that the effect will not temper the disparity between the popular vote and outcomes in the Electoral College, as occurred in 2016. One of the central driving factors in that disparity is the use of winner-take-all elections for the state Electoral College delegation in all states save Nebraska and Maine. As will be discussed in the context of minority vote dilution, winner-take-all systems reward plurality winners with 100 percent of the elected officials. Recently, there have been several attempts to challenge the winner-take-all feature of Electoral College selection, but all have failed in the courts. *See, e.g., League of United Latin American Citizens v. Abbott*, 951 F.3d 311 (5th Cir. 2020).

2. Justice Kagan invokes both text and history as supporting the right of States to condition the voting of the Electors. How persuasive is the textual argument based on the Twelfth Amendment? The Court's opinion aligns well with recent academic commentary that finds the Twelfth Amendment to be heavily influenced by the acceptance of political parties as central to democratic elections. *See* Edward B. Foley, *Presidential Elections and Majority Rule: The Rise, Demise and Potential Restoration of the Jeffersonian Electoral College*

(2020). But the text only requires Electors to “make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President...” Is this sufficient, as a textual matter, to support the Court’s conclusion that the “Amendment thus brought the Electoral College’s voting procedures into line with the Nation’s new party system”?

3. Alternatively, the opinion relies on two centuries of historical practice to cement a constitutional understanding of expectations about democratic governance. This is what Justice Frankfurter once referred to as the “historical gloss” that informs constitutional judgment. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). For the Court here, “long-settled and established practice” has an independent constitutional weight cautioning against disrupting institutional accommodations that have the virtue of being time-tested. For a defense of this form of constitutional interpretation, see Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 Cal. L. Rev. ____ (2020).

Insert on page 338, after note 10.1.

In 2020, Alaskan voters adopted the most significant reform to the structure of primary elections since Washington and California adopted the “Top-Two” model. These are the three states that used blanket primaries before the Court’s decision in *California Democratic Party v. Jones*.

The Alaskan system will use a non-partisan primary (as in the Top-Two system), but with the top four candidates moving on to the general election. Then, voters will use ranked-choice voting in the general election. The theory behind this system is that a Top-Four system makes it likely that at least one candidate from both major parties will make it to the general election, along with candidates who appeal either to the center or the wings of the political spectrum. The system makes the primary a much less consequential stage in the election process. Ranked-choice voting in the general election then seeks to ensure the candidate with the broadest appeal is the one who gets elected.

This structure responds to problems some see with the way the Top-Two model has worked out. In that approach, it has often been the case, particularly in California, that the two candidates in the general election are both from the same party. In addition, there is not strong evidence that the Top-Two system has led to the election of more centrist candidates. One assumption of the Top-Two model is that voters from the minority party will vote in the general election for the more moderate of the two candidates, if both are from the same, dominant party. But it appears many such voters simply do not show up to vote in the general election at all.

Fear of being “primaried” are one of the driving forces of extreme polarization, the inability of forge compromises, and hence the gridlock of Congress. As the authors of a recent book entitled *Rejecting Compromise: Legislators’ Fear of Primary Voters* (2020) find, based on interviews with those most directly involved in the election process: “Legislators believe that primary voters are much more likely to punish them for compromising than general election voters or donors.” The Alaska experiment, designed to make the primaries less relevant, will be an important one. Some of the important groups pursuing reform of the structure of primaries have shifted from supporting the Top-Two model to this Top-Four or a Top-Five model, with ranked-choice voting in the general election. For a report on primary election reform from one such group, Unite America, see

The Primary Problem (2020), available at <https://www.uniteamerica.org/reports/the-primary-problem>.

The most interesting recent case involving state regulation of political parties' methods of choosing their nominees comes from Utah, despite the fact that the Republican Party dominates state government there. The state Republican Party traditionally chose their candidates at a state party convention. If a single candidate received more than 60% of the votes there, that candidate moved directly to the general election as the party's nominee. If no candidate received 60% of the convention vote, the top two candidates moved to a state primary election, in which only party members could vote.

After "outside interests" began pressing for a pure primary system, the Utah legislature – with overwhelming Republican majorities in both chambers – enacted a "compromise measure" which created two paths to getting onto the general election ballot as a party nominee. The party can still hold a convention and choose a nominee it prefers, but, in addition, a candidate who does not compete in the state party convention or cannot get enough support there can still create a competitive party primary election by gathering a certain number of signatures by petition from eligible primary voters. In the primary election, such candidates then compete for the party's nomination against any nominee the state party convention chooses.

The consequences of this change in law were brought home dramatically in the recent Utah Republican party process for choosing its nominee for an open U.S. Senate seat. The party convention selected one candidate, but Mitt Romney went on to collect enough signatures to force a state primary, which he then won handily.

The Republican Party also sued to have this "two-party" law held unconstitutional, under the precedent of the *California Democratic Party v. Jones* case. In a sharply divided 2-1 decision, the 10th Circuit rejected this challenge. See *Utah Republican Party v. Cox*, 885 F.3d 1219 (10th Cir. 2013). The majority held that the law did not impose a severe burden on the party's associational rights:

First and foremost, this case is not, as the dissent would suggest, about who the candidates are, but rather who the deciders are. SB54 was not designed to change the substantive candidates who emerged from the parties, but rather only to ensure that all the party members have some voice in deciding who their party's representative will be in the general election. SB54's goal was to ensure only that the will of all the URP was not being truncated by an overly restrictive and potentially unrepresentative nominating process.

Balancing the State's interests against the interests of an association requires us to define the association with the requisite specificity. Here, where the argument is that SB54 may lead to a party nominating a candidate with whom it may not agree, the question before this Court is whether the burdens imposed on the URP by SB54 are minimal or severe. Put another way, our task today is to analyze SB54's burdens on the Utah Republican Party, or, put still differently, the group of like-minded individuals in Utah who have joined together under the banner of the Republican Party—rather than just the leadership of the party.

The URP, like all political parties, has "a right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences." That is why the district court declared the Unaffiliated Voter Provision, which forced the URP to allow nonmembers to help select its candidates, unconstitutional in the First Lawsuit.

But now that the Unaffiliated Voter Provision has been excised from SB54, the URP is no longer in danger of fielding a general election candidate who does not enjoy the support of at least a plurality of the voting members of the Utah Republican Party. It is true, as has happened since the passage of SB54, in fact, that the eventual nominee may not enjoy the support of a plurality of the roughly 3,500 party delegates that comprise the URP's caucus electorate. But that failure does not implicate the associational rights of the party, which consists of the roughly 600,000 registered Republicans in Utah, and which is not limited to the party-convention-delegates.

The party leaders and convention delegates are still free to communicate to the rest of their party which of the candidates on the primary ballot the leadership supports. But if the URP wants to open its doors to roughly 600,000 people across the state of Utah, the associational rights of the party are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership. To say otherwise is to erroneously conclude that the rights and interests of the association extend only to the rights and interests of the party leadership. . . .

Finally, the dissent relies on *Jones*, but *Jones* is not contrary to our holding. In that case, the Supreme Court held that states could not force parties to allow non-members—"those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival"—to participate in that party's primary election. Understandably, the Court held that such a "forced association" intruded on the party's First Amendment associational rights.

But no such burden exists in this case. When SB54 was initially passed, it did contain a significant associational burden in that it forced the party to associate with unaffiliated voters. However, that issue was fought in the first lawsuit, and the URP won. Now the URP's nominee is decided only by those individuals who have chosen to associate with the Party. Following the first lawsuit, SB54 is perfectly compliant with the holding in *Jones*.

For these reasons, we conclude that SB54 does not impose a severe burden on the URP by potentially allowing the nomination of a candidate with whom the URP leadership disagrees. Therefore, in recognition of the Supreme Court's repeated and un-recanted dicta, we hold that the Either or Both Provision is at most only a minimal burden on the URP's First Amendment associational rights.

In dissent, Judge Tymkovich saw the matter quite differently:

Senate Bill 54's effects are further confirmation of the truism that procedure can have enormous substantive repercussions. Not only does the law interfere with the Utah Republican Party's internal procedures, but it also changes the types of nominees the Party will produce and gives unwanted candidates a path to the Party's nomination. By doing so, Senate Bill 54 will inevitably cause divisiveness within the Party and reduce candidate loyalty to the Party's policies. Put together, these consequences severely burden the Party's ability to choose a loyal nominee and, ultimately, its right to define itself and its message. I explain each of these effects in turn.

To begin, Senate Bill 54 "substitute[s]" the Utah legislature's "judgment for that of the party as to the desirability of a particular internal party structure." The law is, in effect, a sort of state-created majority veto over the candidates a party selects through its carefully crafted convention process. And it gives aspiring candidates license to ignore a party's chosen convention procedures without ever having to convince other members to vote to change those procedures.

Such changes to a group's internal nominee selection process affect a group's ability to define itself. That is to say, they change the group's substance. . . .

Here, the possibility Senate Bill 54 will substantively alter the Utah Republican Party's character is not mere speculation. It is very real. The Utah Republican Party's -- neighborhood caucus meetings are a communitarian affair—with shared prayer, competition for delegate slots, and local electioneering in support or opposition to candidates and platform recommendations. Under Senate Bill 54, candidates can evade the scrutiny of delegates chosen at these meetings, ignoring the caucus system altogether. In effect, the new procedures transform the Party from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals who cast votes on a Tuesday in June.

Second, Senate Bill 54 will likely change the types of candidates the Party nominates. That was precisely the purpose of the law's promoter, Count My Vote. A nomination process filtered through a convention of party regulars will generate different candidates than one accomplished by polling the crowds, among whom are many persons who only nominally associate with the Party. Count My Vote understood that. So does the Party. Whether it makes candidates more moderate, as Count My Vote would have it, or allows for more extreme candidates divorced from the influence of party leadership, the signature-gathering path to nomination will produce "nominees and nominee positions other than those the part[y] would choose if left to [its] own devices."

Third, the law violates the Party's right not to associate with an unwanted candidate, a "corollary of [its] right to associate." . "In no area is the

political association's right to exclude more important than in the process of selecting its nominee." Yet under this regime, a person who collects signatures can be named the Party's nominee in spite of the fact that he or she has broken the Party's rules regarding how to seek the nomination.

What is more, this scheme allows nominal members or even members hostile to the Party's policies to hijack the Party's platform. So long as a person has means (by fame or fortune) to obtain the requisite number of signatures, he or she can challenge the Party's chosen convention candidate in a primary election. This is no small burden on the Party's right of dissociation, for the spoils of winning the primary are not just a place on the general election ballot (which can be obtained as an unaffiliated candidate). The spoils are a place as the Party's nominee. . .

Fourth, this law is likely to cause divisiveness within the Party's ranks. It does not require much foresight to predict that a face-off between a Party's chosen convention candidate and a signature-gathering insurgent will create rifts among the Party's members. Fueling intra-party strife endangers an association's very existence almost as much as the inability to exclude. Neither houses divided nor houses without walls can stand.

Fifth, Senate Bill 54 may undermine "the loyalty of candidates to party policies" by "putting candidates in a more independent position vis-à-vis the party and its leadership." *Id.* "[W]hen their nomination depends on the general electorate rather than on the party faithful," it is less likely that "party nominees will be equally observant of internal party procedures and equally respectful of party discipline." The same logic applies here.

While only party members can vote in the party's primary, not all members are the same. . . . Senate Bill 54 forces the Party to include people who only marginally identify with the party in its nomination decisions. This change will lessen candidates' loyalty to the Party relative to the Party's preferred convention process. A candidate may still formally have to certify agreement with the Party's policies, but faithful delegates are no longer able to hold rogue candidates accountable. And because more than two candidates may end up running in the primary election and split the vote, a person can gain the nomination without a majority of the vote—intensifying the risk that a nominee will be disloyal to the Party platform.

In sum, then, Senate Bill 54 interferes with the Party's internal procedures, changes the kinds of nominees the Party produces (is, in fact, meant to do so), allows unwanted candidates to obtain the Party nomination, causes divisiveness within the Party, and reduces the loyalty of candidates to the Party's policies. When an association grows large, the risk the association's central message will be lost amidst a sea of nominal members grows too—especially if the group must maintain an inclusive membership policy.

When the 10th Circuit denied rehearing en banc in Jun 2018, Judge Tymkovich issued this statement, designed to encourage Supreme Court review:

[...] I write separately to note the issues raised here deserve the Supreme Court’s attention. The panel majority pledges continued faith in an oft-repeated strand of Supreme Court dicta which, as my dissent argues, has outlived its reliability. At this point, the Supreme Court’s homage to State regulation of the primary election process is little more than a nod to received wisdom.

Yet circumstances are much changed. Recent Supreme Court cases like *California Democratic Party v. Jones* suggest this dicta does not provide the whole truth. So too, do facts on the ground. The behemoth, corrupt party machines we imagine to have caused the progressive era’s turn to primaries are now, in many respects, out of commission. In important ways, the party system is the weakest it has ever been—a sobering reality given parties’ importance to our republic’s stability. And given new evidence of the substantial associational burdens, even distortions, caused by forcibly expanding a party’s nomination process, a closer look seems in order. The time appears ripe for the Court to reconsider (or rather, as I see t, consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends.

Has Utah done any more here than mandate a primary election, and give the part the additional option of choosing one candidate in that primary through a party convention? If so, does Judge Tymkovich’s position amount to an attack on mandatory primary laws themselves?

Note on Primaries and the Presidential Nomination Process

Although the state mandated primary election for choosing a party’s nominee came into existence for most significant elections between 1910-1920, the method of choosing presidential nominees remained mostly immune from this change until the 1970s. Starting in the 1830s, the major parties nominated their candidates for President at national party conventions, which still take place today of course. But the delegates to these conventions were chosen through processes that the political parties controlled and consisted of national, state, and local party figures.

Between 1912-1920, a few states did introduce mandatory primaries, through which delegates were chosen pledged to support the nomination of a particular candidate, but the number of delegates chosen in this way never amounted to a significant level. Instead, the large majority of delegates, who thus controlled the nominations process, were still selected through the more traditional processes by which party figures from the national, state, and local level became delegates. Thus, from 1912 until the 1970s, the presidential nominations process involved what scholars call a “mixed system” of nominations. Some delegates were selected through the primary election, but most were selected through party-controlled processes. These conventions sometimes led to many rounds of balloting, and lots of political negotiations, before a nominee could garner enough delegate support to be chosen. The convention process has been called a system of “peer review,” in which party officeholders at the national, state, and local level selected the party’s presidential nominee.

This system was radically transformed in the 1970s and replaced with the system of primary elections (and caucuses) that is familiar today. Under this new system, nearly all the delegates to the convention are chosen through primary elections and committed to specific candidates. Well before the actual national party conventions, the nominees of the parties are therefore known, based on the outcome of these primaries. The conventions have ceased to play any political role other than as a coronation for the party's nominee. This transformation can be viewed as the replacement of a "peer review" method with a purely "populist" one in which the voters, through the primaries, directly choose the parties' nominees for President. The change came about as a result of the turbulence of the 1960s, particularly alienation in the Democratic Party with political elites in the aftermath of the 1968 Democratic Convention.

Was the elimination of any element of peer review and the move to a purely popular mode of selection an unalloyed positive? Did it make more likely the selection of nominees who were less experienced in government or who were less committed to the political policies of the party under whose brand they run? For discussion of these issues, see generally Stephen Gardbaum and Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 NYU L. Rev. 647 (2018). Note that the United States is an outlier among major democracies in using direct primaries to choose the nominees of the major parties. Most democracies continue to incorporate a significant element of peer review in their selection processes.

For general sources on the transformation of the presidential nominations process and the rise of the primaries, see Elaine C. Kamarck, *Primary Politics, How Presidential Candidates Have Shaped the Modern Nominating System* (2009); Marty Cohen and David Karol et. al., *The Party Decides: Presidential Nominations Before and After Reform* (2008); Nelson W. Polsby, *Consequences of Party Reform* (1983). For suggestions on changes to the presidential nominations process, see Symposium on the Presidential Nominations Process, 93 NYU Law Review (2018). See also *The Best Candidate* (E. Mazo ed. forthcoming 2020).

CHAPTER FIVE

Insert on page 396, at the end of note 4:

Burson v. Freeman, 504 U.S. 191 (1992), was one context in which the Supreme Court had recognized that special restrictions on speech could be applied in the electoral arena – in that case, to the polling place and immediately surrounding area. The Court upheld against First Amendment challenge a state law that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. Applying strict scrutiny, the Court nonetheless held that states had a compelling interest in protecting the right to cast a ballot free from “the taint of intimidation and fraud.”

The boundaries of that principle were tested recently in *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018), which involved a state law that barred voters from wearing inside a polling place on election day a “political badge, political button or other political insignia.” One of the plaintiffs had planned to wear a “Tea Party Patriots” shirt. Others planned to wear buttons to the polls with the words “Please I.D. Me.”

The Court reaffirmed the central holding of *Burson*. Nonetheless, the Court struck the Minnesota law down on First Amendment grounds, holding that the term “political” in the Minnesota law was too vague and potentially expansive to be used to prohibit expression, even in the polling place.

The Court offered some suggestions about what a more narrowly tailored concept of “political” might be that would enable a reformulated law to withstand First Amendment scrutiny. The Court pointed to California law as a kind of template; that law prohibits “the visible display . . . of information that advocates for or against any candidate or measure,” including the “display of a candidate’s name, likeness, or logo,” the “display of a ballot measure’s number, title, subject, or logo,” and “[b]uttons, hats,” or “shirts” containing such information).

Perhaps the most intriguing aspect of *Mansky* is that the boundary the Court draws here has a similar form (though not exactly the same precise lines) as the boundary in the campaign finance context the Court has drawn between “issue advocacy” and “election-related speech” or electioneering. The closer speech comes to direct electoral advocacy, the more it can be restricted within the polling place; the more such speech resembles issue advocacy, the more suspect such restrictions will be, even within the polling place. It is noteworthy that the need to draw a boundary along these general lines seems to keep emerging regarding how the First Amendment applies to the political process.

Insert at page 527, after note 6.

6a. *The Mueller Report and Russian Meddling in the 2016 Election.* On January 6, 2017, the U.S. Director of National Intelligence issued a report detailing Russian government intervention in the 2016 presidential election. The Report described Russian agents’ coordinated influence campaign, which included hacking the emails of the DNC and Clinton campaign, releasing those emails through WikiLeaks and other websites, and waging a sophisticated and wide-ranging campaign on social and traditional media. As the DNI Report concluded: “Russia’s goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential

presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump.” A later NSA Report also detailed Russian attempts to probe state voter registration systems and U.S. firms that provide voting technology and electronic pollbooks. A 2019 Report from the Senate Intelligence Committee later confirmed that Russians targeted election-related systems in all 50 states. Report of the U.S. Senate Select Committee on Intelligence on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. 1: Russian Actions Against Election Infrastructure and Additional Views, 116th Cong., 2019, at 12.

On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed former FBI Director Robert S. Mueller as a special counsel to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.” Throughout the course of his investigation, the special counsel issued indictments or received guilty pleas from five members of the Trump campaign, including former campaign chair, Paul Manafort, as well as 25 Russian nationals and three Russian businesses. He released his report on March 22, 2019. Those indictments and guilty pleas, however, have focused on criminal violations, such as money laundering, identity theft, wire fraud, cyber-crimes, obstructing justice, and other aspects of a conspiracy against the United States, rather than specific election law violations

Beyond the “hack and leak campaign” the Special Counsel’s Report provides even greater detail of the coordinated attempt to foster division in the American electorate and to affect the outcome of the 2016 election. Russian media organizations, such as Russia Today (RT) and Sputnik, promoted divisive campaign themes on their U.S. channels and websites, distributed Russian propaganda related to Clinton and Trump, and even hosted a debate for minor party presidential candidates in order to further fracture the electorate. Russia’s Internet Research Agency (IRA) ran multiple webpages, social media accounts, automated accounts (bots), and Facebook groups. At times, IRA trolls used social media to organize competing political rallies on divisive topics. The Mueller Report summarized the scope of the Russian social media campaign as follows:

Multiple IRA-controlled Facebook and Instagram Accounts had hundreds of thousands of U.S. participants. IRA-controlled Twitter accounts separately had tens of thousands of followers, including multiple U.S. political figures who retweeted IRA-created content. . . Facebook had identified 470 IRA-controlled Facebook accounts that collectively made 80,000 posts between January 2015 and August 2017. Facebook estimated the IRA reached as many as 126 million persons through its Facebook accounts. In January 2018, Twitter announced that it had identified 3,814 IRA-controlled Twitter accounts and notified approximately 1.4 million people Twitter believed may have been in contact with an IRA-controlled account.

Special Counsel Robert S. Mueller, III, Report on the Investigation on Russian Interference in the 2016 Election, March 2019, at 22-23.

The details of the Russian influence operation unearthed in the investigation raise several concerns from the perspective of campaign finance law. Federal law not only prevents foreign nationals from making contributions to campaigns, but it also prevents them from making any “independent expenditure, or disbursement in connection with any Federal, State or local election.” *See* 11 CFR 110.20; 52 U.S.C. § 30121; 36 U.S.C. § 510. It also prohibits the campaigns themselves from soliciting or accepting contributions

(which includes any “thing of value”) from foreigners and prohibits anyone from substantially assisting foreign nationals in the making of such expenditures or contributions. *Id.* The campaign finance questions with respect to the Russian intervention, then, concern whether the Russian operation constituted an illegal expenditure or contribution and whether the Trump campaign illegally coordinated with the Russians in their expenditures or contributions, accepted illegal contributions, or otherwise substantially assisted them in violating the prohibitions on foreigners’ participation in campaigns. Note that the term “collusion,” which has dominated public discussion of the affair, is not relevant for campaign law, which focuses on “coordination,” “solicitation,” or “substantial assistance.” Note further that these prohibitions apply to all foreign nationals, regardless of whether the person acts on behalf of a foreign government or not.

There can be little doubt that the Russians themselves violated the foreigner expenditure ban. Perhaps one might quibble as to whether any individual social media post, for example, might be captured by the prohibition, but the Russian operation (including the illegal hacking of the DNC and Clinton campaign, and the purchasing of ads on social media) was so resource intensive and intentionally directed at favoring one campaign that there can be little doubt that it would run afoul of the expenditure ban. The liability of the Trump campaign, itself, or officials within it depends on whether the facts demonstrate illegal coordination, solicitation or receipt of a “thing of value,” or “substantial assistance” in the making of illegal expenditures or contributions.

The Mueller report concluded that the government would not likely be able to obtain a criminal conviction regarding these issues for the following reasons:

The Office considered whether this evidence would establish a conspiracy to violate the foreign contributions ban, in violation of 18 U.S.C. § 371; the solicitation of an illegal foreign source contribution; or the acceptance or receipt of “an express or implied promise to make a [foreign-source] contribution,” both in violation of 52 U.S.C. § 30121(a)(1)(A), (a)(2). There are reasonable arguments that the offered information would constitute a “thing of value” within the meaning of these provisions, but the Office determined that the government would not be likely to obtain and sustain a conviction for two other reasons: first, the Office did not obtain admissible evidence likely to meet the government’s burden to prove beyond a reasonable doubt that these individuals acted “willfully,” *i.e.*, with general knowledge of the illegality of their conduct; and, second, the government would likely encounter difficulty in proving beyond a reasonable doubt that the value of the promised information exceeded the threshold for a criminal violation, *see* 52 U.S.C. § 30109(d)(1)(A)(i).

Before the Mueller report was released, there had been an intense debate about whether the campaign finance laws appeared to have been violated. Thus, in a series of blog posts on this subject, former White House Counsel and Obama Campaign Counsel, Robert Bauer, pointed to the public statements of Trump himself during the campaign encouraging the Russians to release Clinton’s emails, as well as the events leading up to the meeting between his son, son-in-law and campaign chair with a Russian national who had promised incriminating evidence on Hillary Clinton. These and many other actions could potentially amount to coordination between the campaign and the Russians, he argued:

This alliance of a campaign and a foreign government is

unprecedented in campaign finance law enforcement. It is also impossible to come to terms with the legal issues without paying attention to a central fact: the Russians and WikiLeaks could have proceeded without direct contacts with the Trump campaign, and yet chose to enter into direct campaign-related communications with it, and the campaign responded affirmatively. This was advantageous to both sides. The Russians and WikiLeaks could test for the campaign's approval, which would later presumably translate into gratitude, and the Trump campaign could urge their allies on, leaving them with no doubt that the intervention was welcome. This is the very heart of a coordination scheme. Given the breadth of the foreign national prohibition, it is hardly a stretch to find the makings of a major—and criminal—campaign finance violation on just what has emerged so far on the public record.

See Robert Bauer, *The Trump-Russia-WikiLeaks Alliance and Campaign Finance Laws*, November 20, 2017, available at <https://www.justsecurity.org/47248/trump-russia-wikileaks-alliance-campaign-finance-laws/>.

On the question whether providing information to a campaign could constitute a “thing of value” and thereby run afoul of the ban on foreign contributions, Eugene Volokh offered a different view:

Say that, in Summer 2016, a top Hillary Clinton staffer gets a message: “A Miss Universe contestant — Miss Slovakia — says that Donald Trump had sexually harassed her. Would you like to get her story?” The staffer says, “I’d love to,” and indeed gets the information, which he then uses in the campaign.

Did the staffer and the Miss Universe contestant just commit a crime?

Eugene Volokh, *Can It Be a Crime To Do Opposition Research by Asking Foreigners for Information*, WASH. POST, July 12, 2018. Volokh argues that a statute prohibiting the mere solicitation and delivery of information would be substantially overbroad, and therefore unconstitutional under the First Amendment.

Daniel Tokaji agrees. He points to *Bluman v. FEC*, especially the district court decision written by Judge Brett Kavanaugh, to suggest that the prohibition on foreign contributions should be limited to monetary contributions.

[T]here’s judicial precedent that appears to understand the foreign contributions ban as limited to monetary donations. In *Bluman v. FEC*, the federal district court in D.C. upheld the ban against a constitutional challenge, in a decision that was later affirmed by the U.S. Supreme Court. The district court emphasized the narrow scope of the statute, saying that it “does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues” but only prevents them from “providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.” At the end of its opinion, the court expressly reserved the question whether a broader restriction on foreign nationals’ speech would be permissible.

If it turns out that the Trump Jr. and Venelnitskay coordinated on express advocacy expenditures – for example, communications specifically advocating the election of his father – that would be one thing. But the emails don’t prove that. The big question is whether information-sharing should be considered a contribution. *Bluman* suggests that it shouldn’t.

Daniel Tokaji, *What Trump Jr. Did Was Bad, But It Probably Didn’t Violate Federal Campaign Finance Law*, July 14, 2017, available at <https://bit.ly/2LXm2Ap>.

How should campaign finance law deal with situations like the Russian intervention in the 2016 election? Should information be seen as a thing of value? Richard Hasen notes that polling data, election materials from previous campaigns, and contact lists of activists have all been considered things of value. See Richard Hasen, *In the Trump Jr. Case, Can “Dirt” on Hillary Clinton Be “Anything of Value”?*, Election Law Blog, July 11, 2017, available at <http://electionlawblog.org/?p=93733>. What does the special counsel’s decision not to focus on campaign finance violations suggest about the state of the law?

Insert on page 544, after note 5:

5a. The rise of multiple forms of independent expenditures has refocused attention on the jurisdiction of the Federal Elections Commission and whether it can order disclosure of donations to SuperPACs and other such entities. FECA provides that a district court “may declare that the dismissal of the complaint ... is contrary to law,” and, if the Commission fails to correct the illegality on remand, the “complainant may bring” an action in its own name against the alleged violator “to remedy the violation involved in the original [administrative] complaint.” 52 U.S.C. § 30109(a)(8)(C). In *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 892 F.3d 434 (D.C. Cir. 2018), the D.C. Circuit rejected the claim of a watchdog organization to prosecute the claim that an independent advocacy group was in fact a political committee under FECA and hence subject to disclosure and other regulatory limitations. Judge Randolph, writing for himself and Judge Kavanaugh, viewed the decision not to proceed with the charge as a matter of prosecutorial discretion that was not subject to either private-party challenge or judicial review. In dissent, Judge Pillard argued that the ability to challenge FEC failure to act was a necessary corrective because the “the Commission’s partisan-balanced composition and the political nature of the matters it regulates raise risks of inaction. Congress wanted to prevent the agency’s frequent deadlock from sweeping under the rug serious campaign finance violations—turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know. To that end, Congress provided for judicial review of Commission decisions not to enforce FECA.”

6. In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court in a 6-3 decision held unconstitutional on its face a California law that required charitable organizations to disclose their major donors to the state Attorney General’s Office. The Court held that compelled disclosure of donors inherently implicates freedom of association and applied the “exacting scrutiny” standard that *Buckley v. Valeo* had established for review of disclosure laws. The Court also held that this standard did not require states to adopt the least restrictive means of achieving their ends, but that the law be “narrowly tailored” to the state’s objectives.

AFP, an advocacy group devoted to promoting free markets, civil liberties,

immigration reform and limited government, introduced evidence that it and its supporters had been subject to bomb threats, protests, stalking, and physical violence. The major issue in the case was whether the Court should relegate AFP to bringing an as-applied challenge (as in *Washington Grange*), in which it would likely receive an exemption from having to comply with the disclosure requirement, due to the credible risk its donors would face reprisals, or whether the Court should strike the law down on its face (as in *California Democratic Party*) – meaning no charitable organization would have to disclose its donors.

The Court chose the latter course. The State asserted an interest in preventing charitable fraud and self-dealing; it claimed that requiring the filing of these forms, even in advance of concerns that any particular charity was engaging in such actions, facilitated these efforts. But the lower court had found, as the Court read the record, that there was not a single concrete instance in which pre-investigation collection of these forms had been used to advance the state’s investigative or regulatory efforts. The state’s interest was thus reduced to an efficiency one; once the state had other reasons to investigate a charity, having these forms already on file made it more convenient for the state to follow up. The Court also noted that the state had not even considered any alternative at all to its disclosure requirement. Concluding the law was not narrowly tailored to an important state interest, the Court struck it down on its face.

There is little doubt the Court’s decision was influenced by the existence of the internet and social media, combined with this era’s toxic political culture (“Such risks [of reprisals] are heightened in the 21st century and seem to grow with each passing year, as ‘anyone with access to a computer [can] compile a wealth of information about’ anyone else, including such sensitive details as a person’s home address or the school attended by his children.”). The dissenters would have permitted challenges to the law only on an as-applied basis: if a group could demonstrate a specific risk of reprisal to its members, it would be able to have the law invalidated as applied to it.

What bearing will *AFP* have on campaign-finance disclosure laws? The answer is unclear. In the election context, the Court has recognized that disclosure serves important governmental interests in the provision of information to voters about the sources of money to campaigns; in enforcing the campaign finance laws, such as the contribution limits; and in potentially exposing corruption. The *AFP* decision relied heavily on *Buckley*, and *Buckley* itself applied exacting scrutiny to the disclosure laws at issue, without the plaintiffs having to demonstrate any concrete risk of reprisal to them. But *AFP* pushes further to apply the narrow tailoring requirement to election-related disclosure requirements which introduces a new source of uncertainty in campaign finance law.

Insert after note 5 page 555.

6. A recent article, Richard H. Pildes and Mike Norton, *How Outside Money Makes Governing More Difficult*, 19 Election L.J. 486 (2020), empirically demonstrates that the rise of outside money in elections has made governing more difficult. When outside groups become bigger players, relative to the political parties and candidates, this foments greater tensions and conflicts within the legislative caucuses of both parties. In addition to this empirical analysis, the article includes interviews with top elected officials of both parties who describe the ways that increased outside money – starting with the McCain-Feingold law, followed by *Citizens United* – contributes to this fragmentation within the parties. Some sample comments include:

Former NRCC chair Tom Reynolds (2016): “*Citizens United* and other changes—McCain-Feingold—those guys that campaigned and wanted very badly to create McCain-Feingold have actually created a party that has less money, less resources, and have enabled outside groups to have enormous presence in campaigns.”

Former Democratic Congressional Campaign Committee (DCCC) Chair Martin Frost (2016): “McCain-Feingold’s worthless. Took money away from political parties and forced it to the fringes. I talked to campaign finance advocates at the time. I said, ‘Don’t you understand you’re going to be harming political parties.’ And some of them said, ‘Well, we don’t like political parties anyways.’ And then I said, ‘Well, don’t you understand if you take the soft money away from political parties, where it has to be disclosed’—we had to disclose every single dollar that I raised to the DCCC from corporations and unions and large contributors—‘you’re going to force it out to the wings, out to the extremes, some of whom don’t have to report.’”

Former DCCC and Democratic House Caucus Chair Vic Fazio (2016): “[Then president of the Heritage Foundation] Jim DeMint has got more power at Heritage Action [their PAC affiliate] than he did as a second-line Senator from South Carolina. Members run in fear of not having any ability to control the environment in which they are running.”

Former DCCC Chair Martin Frost (2016): “Members live in fear of a well-financed, well-organized minority in their own party taking them out. The way you avoid that is not to work with the other side.”

Republican Rep. Lynn Westmoreland (R-GA-03) (2016): “If you’re a candidate and you have a group that is supporting your candidacy, whether they’re supporting you or opposing your opponent, they can come out with any message they want to and you don’t have anything to say about it. You can deny. You can say you don’t agree with it, but after seeing it on TV for seven weeks—typically people don’t listen to a policy and so it makes it extremely hard.”

Rep. Tom Coleman (R-MO-06) (2016): Coleman characterized the interest groups as too shortsighted and focused on votes that were irrelevant because a majority had already been reached. “Then you have to go out and defend that vote because of how it’s been characterized. A lot of them are one-issue people, which you can’t please all the people all the time. You can’t please your best friend or your spouse with your votes. It’s impossible.”

Former NRCC and House Oversight chair Tom Davis (2016): Current or former moderate Republican members noted it has become harder to govern when the more ideological members in the party refuse to cooperate with leadership because they are bolstered by outside influences. Tom Davis saw it as an expectations problem. “When you get one-party government, there’s always that tendency to go overboard. When you don’t, you see what happens. Republicans control the Congress. They don’t control the president, and their base is so upset they turn to Trump, because these guys are doing nothing. You produce Ted Cruz and the Tea Party. All of a sudden, you cannot fit the rising expectations.”

Former NRCC staffer Bob Holste (2016): “If you’re a pissed off whatever—you know, a hedge fund guy and a member of Congress pisses you off, you can now shove a million dollars up their [] and never have it show up in a report anywhere, but people know exactly who pissed you off.”

7. *Campaign Finance in the Internet Age.* To what extent is the existing campaign finance regulatory regime predicated on television as the primary mode of political communication? What challenges does the rise of the Internet and various forms of digital communication pose to existing regulations and to applicable constitutional doctrine? Consider the changing dynamics of spending revealed in the 2016 Election:

Much of the elite commentary in the year since the 2016 election has focused on the effect of the internet on the presidential campaign and election. For some time, observers had noted the transformative power of online tools for campaign fundraising and political organizing. Even more recently, as in the 2008 and 2012 campaigns, the focus had turned to the marriage of big data and microtargeting with social media, enabling targeted messages even down to the individual level. With the 2016 campaign, however, the euphoria over the internet's capacity to enhance democracy gave way to a set of concerns about the potential for foreign intervention in U.S. elections, the power of a few platforms to affect political communications and voting behavior, and the ability of false stories to gain widespread traction online.

Online campaigning includes a broad array of activities beyond those typical of the offline world. In addition to TV-style 30-second ads, the range of online modes of paid political communication is potentially infinite. It extends to email and text messages, as well as social media posts, blogs, web pages, banner ads, search results, and even advertisements embedded in video games. The law requires disclaimers for campaign advertisements purchased on another entity's websites. However, scholars scouring FEC filings will search in vain for a complete accounting of a campaign's online spending. Often, online spending totals are pooled in official forms with other types of expenditures under generic categories such as "media" or "consultants." Thus, from official sources it becomes very difficult to disentangle online spending (let alone spending on particular platforms such as Google and Facebook) from other types of media spending. Moreover, industry associations analogous to those for the broadcasters that voluntarily provide data on ad buys do not exist among the main internet advertising platforms.

In many cases, we are left then with best guesses provided by industry observers or claims made by the campaigns themselves. For example, one media tracking firm, Borrell Associates, estimates total advertising spending for all races—federal, state, and local—in the 2016 election to be \$9.8 billion, a \$400 million increase over 2012. They also estimate that broadcast TV ad spending fell by 20 percent from 2012 to 2016, from \$5.45 billion to \$4.4 billion, whereas digital advertising grew almost eightfold from \$159 million dollars to \$1.4 billion, which is comparable to what was spent on cable television in 2016. Whereas in the 2012 election 57.9 percent of political advertising appeared on broadcast, 9.5 percent on cable, and 1.7 percent on digital, Borrell estimates that in 2016, broadcast dropped to 44.7 percent, cable

increased to 13.9 percent, and digital increased to 14.4 percent of total political advertising dollars. Roughly 40 percent of digital ad dollars were spent on social media sites (with Facebook being the most dominant), and roughly 20 percent of digital ad spending was directed to mobile devices.

Whatever the regulatory regime, the digital campaign universe is one that is conducive to undisclosed political spending and will be increasingly difficult to assess comprehensively as it overtakes television in importance. The web is worldwide, after all, and spending related to an American election can potentially occur anywhere in the world, by any entity, on communication platforms that reach American voters. Russian government agents' now-infamous purchase of \$100,000 worth of Facebook ads during the 2016 election campaign was apparently unknown to Facebook itself until after the election. Much of this spending appears to have violated the ban on foreign electioneering and perhaps also violated existing disclosure laws, although a great deal of such spending appears to have been on issue advocacy—that is, advertisements that did not mention a candidate but conveyed messages and images about certain divisive topics. In addition, spending on coordinated social media campaigns by trolls and bots are activities for which existing disclosure and regulatory schemes are completely unprepared.

Even apart from the issue of foreign spending, though, research on campaign spending patterns will be increasingly difficult in the coming years as campaign finance activity moves toward types of spending for which the disclosure regime (both that mandated by government and voluntarily entered into by media companies) is ill-suited. Although some platforms, such as Facebook, have recently volunteered to disclose future political advertising, it will be almost impossible to get a full picture of online spending comparable to what we have for television advertising. Many of these new technologies allow for targeted communication at the individual level, and potentially infinite variations on a single communication to perfect it for different audiences. Moreover, the line between “purchased” and “earned” media becomes increasingly blurred in the digital age, as campaigns and outsiders pay for armies of digital volunteers (let alone automated accounts or “bots”), who then surface content on social media that is functionally indistinguishable from other peer-to-peer communication.

In the campaign finance domain, the law lags far behind the technology, and legislative drafters concerned with these issues face considerable challenges in anticipating the character and variety of future online campaign communications. As a result, the platforms that dominate the field of digital advertising have enormous power to shape the rules of the campaign finance system. Their terms of service and community guidelines, let alone the less transparent algorithms that privilege certain types of communication over others, may soon prove as important as formal law in structuring how campaign-related money flows through the information ecosystem.

Nathaniel Persily, et al., *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 45-48 (2018), available at <https://bit.ly/2AhjLYN>.

Does the Internet disrupt campaign finance law in fundamental ways or can existing regulations be adapted to deal with on-line communication? Is the Internet a net positive or negative with respect to the interests the campaign finance regulatory system is supposed to further? Prior to 2016, most commentators celebrated the “liberation technology” of the Internet, which allowed even the poorest candidates and groups to have access to a worldwide audience. Since 2016, critics have focused on the difficulty of regulating on-line spending and the opportunities the Internet furnishes to foreign entities and non-disclosing groups to influence a country’s elections.

How should the law deal with the enormous power of certain Internet platforms, such as Facebook and Google, which dominate the market for online advertising spending? Are they becoming the de facto regulators of campaign finance? Widely criticized for its ad policies that allowed surreptitious Russian advertising in 2016, Facebook has implemented a spectrum of new policies for the United States aimed at transparency for “ads that include political content.” It now provides a searchable ad archive, for example, that includes the ads themselves, the amount spent by the buyer, and certain information as to who saw the ad. It also requires something like a “stand by your ad” disclaimer for political ads. However, the new ad rules apply to “issue advocacy” as well. Specifically, Facebook (and Instagram) apply these new rules to “ads that include political content,” which includes any ad that:

- Is made by, on behalf of, or about a current or former candidate for public office, a political party, a political action committee, or advocates for the outcome of an election to public office; or
- Relates to any election, referendum, or ballot initiative, including "get out the vote" or election information campaigns; or
- Relates to any national legislative issue of public importance in any place where the ad is being run; or
- Is regulated as political advertising.

See Facebook Business, Advertiser Help Center, About Ads That Include Political Content, available at <https://bit.ly/2mUAkXH>. Facebook further identifies twenty “issues of national importance” that range from “guns” and “abortion” to “economy,” “poverty,” and “values,” but also further explains that “this list may evolve over time.” See Facebook Business, Advertiser Help Center, National Issues of Public Importance, available at <https://bit.ly/2uWy86h>. Facebook identified those issues from a list prepared for academic research purposes by the Comparative Agendas Project, a joint project between several universities around the world that tracks policy issues and debates before different democratic governments. When it originally rolled out these transparency measures, they included media organizations’ posts. For example, if the New York Times or another publication paid to boost its election-related stories on Facebook so more viewers would see them, it needed to submit to the ad verification and transparency regime. Its spending on the ad, along with some exposure data, was then revealed in the publicly available ad

library. After objections from media organizations, Facebook has since exempted media organizations from these rules governing political advertising disclosure.

Google has taken a somewhat different approach from Facebook. Whereas Facebook requires advertiser verification and disclosure for federal, state, and local candidates, as well as issue advocacy, Google only requires it for “ads that feature a current officeholder or candidate for an elected federal office, such as that of the President or Vice President of the United States, or members of the United States House of Representatives or United States Senate.” *See* Google, Advertising Policies Help, Political Content, available at <https://bit.ly/2JfXIgh>. Google and Facebook also differ in what is contained in the data disclosed in their public libraries for covered advertising. Both contain data on the amount spent, the identity of the spender, and the number of impressions for each advertisement. Google chooses to disclose the advertiser’s targeting criteria according to age, gender, and region, whereas Facebook discloses exposure (that is, who actually saw the ad) along similar criteria.

8. The Honest Ads Act. The Facebook Ad Library is modeled on the requirements present in the Honest Ads Act, S. 1356, 116th Cong. (2017), a bill cosponsored by Senators Amy Klobuchar, Lindsey Graham and Mark Warner in the wake of disclosures of Russian meddling in the 2016 election campaign. In its “Findings,” the bill describes the Russian efforts to exploit different social media platforms to influence voters in 2016 and the lack of regulation of on-line campaigning that made it possible. The bill would require television or radio broadcast stations, providers of cable or satellite television, and online platforms to make “reasonable efforts” to ensure that foreign nationals are not purchasing political advertisements. Of greater significance, the bill would bring “qualified internet or digital communication[s]” into the ambit of the disclosure and disclaimer regime that applies to television and other satellite communications. To do so, the bill would directly regulate “any public-facing website, web application, or digital application (including a social network, ad network, or search engine) which (A) sells qualified political advertisements; and (B) has 50,000,000 or more unique monthly United States visitors or users for a majority of months during the preceding 12 months.” The bill requires these digital platforms to disclose all expenditures on “qualified political advertisements” above \$500, which includes not only candidate or campaign related ads, but also ads on “a national legislative issue of public importance.”

Should these types of decisions, such as whether to require disclosure for issue advocacy, be left to for-profit companies or is this an area where the government should shoulder the regulatory burden? Should firms, like Facebook and Google, implement the same rules as those the government should adopt? Should they adhere to existing First Amendment precedent, as it applies to government, along with the protections for unlimited spending by individuals and corporations? Are these firms in any better position to deal with the vexing issues of campaign finance law, such as the line between issue advocacy and express advocacy? Given the worldwide reach of these platforms, though, should they develop rules for individual countries or a one-size-fits-all approach to political advertising? Should these companies allow political advertising at all, given the risks made evident in the 2016 election and the relative insignificance of such advertising to the companies’ bottom line?

Before WILKINSON, MOTZ, and FLOYD, Circuit Judges.

WILKINSON, Circuit Judge:

A Maryland law requires newspapers, among other platforms, to publish on their websites, as well as retain for state inspection, certain information about the political ads they decide to carry. This case asks, at bottom, whether these terms can be squared with the First Amendment. For the reasons discussed below, we agree with the district court that they cannot. While Maryland’s law tries to serve important aims, the state has gone about this task in too circuitous and burdensome a manner to satisfy constitutional scrutiny.

I

[Prompted by revelations of Russian meddling in the 2016 election], Maryland decided to develop legislation that would bolster the state’s campaign finance regulations. . . . First, Maryland broadened its extant disclosure-and-recordkeeping regulations to include online advertisements. . . . Second, the Act extended Maryland’s campaign finance laws to include for the first time “online platforms.” An “online platform” under the Act is defined in terms of both its size and its speech, picking up essentially any public website in the state that reaches a certain circulation (100,000 unique monthly visitors) and receives money for “qualifying paid digital communications” (which are, in short, political ads). Md. Code Ann., Elec. Law § 1-101(dd-1). The distinctive feature of these sections is that their onus falls on the websites themselves, not the political speakers. These provisions are the subject of this lawsuit.

The Act imposes two sets of disclosure obligations on “online platforms” operating in Maryland. First, there is a “publication requirement.” Under this provision, online platforms must post certain information about the political ads on their websites. *Id.* § 13-405(b). In the main, within 48 hours of an ad being purchased, platforms must display somewhere on their site the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad. They must keep that information online for at least a year following the relevant election. Second, there is an “inspection requirement.” Under this part, platforms must collect records concerning their political ad purchasers and retain those records for at least a year after the election so that the Maryland Board of Elections can review them upon request. . . .

* * *

II

[T]he Act is a content-based law that targets political speech and compels newspapers, among other platforms, to carry certain messages on their websites. In other words, Maryland’s law is a compendium of traditional First Amendment infirmities.

First, the Act is a content-based regulation on speech. It singles out one particular topic of speech—campaign-related speech—for regulatory attention. . . . When the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft censorship. . . .

Second, the Act singles out political speech. While generic content-based

regulations strain our commitment to free speech, content-based regulations that target *political* speech are especially suspect. Because our democracy relies on free debate as the vehicle of dispute and the engine of electoral change, political speech occupies a distinctive place in First Amendment law. . . . The Act here aims directly at political speech. . . .

Third, the Act compels speech. And it does so in no small measure. Take, to start, the publication requirement. This provision requires online platforms that host political ads to post, in searchable format: (i) the ad purchaser’s name and contact information; (ii) the identity of the treasurer of the political committee or the individuals exercising control over the ad purchaser; and (iii) the total amount paid for the ad. . . . That is not all. The publication requirement also directs platforms to post all this information “in a clearly identifiable location on the online platform’s website” within 48 hours of purchase, and to maintain this information on their websites for at least one year after the relevant election. *Id.* § 13-405(b)(3).

Furthermore, the Act’s inspection requirement also compels speech. Under this provision, platforms must collect and retain records [related to the type and timing of the advertisement, the geography of its dissemination, and exposure data], to be disclosed to state regulators upon request. . . . Similar to the publication requirement, platforms must make these records available within 48 hours of the time an ad runs and retain them for at least one year after the relevant general election. *Id.* § 13-405(c)(2). . . .

Taken together, the Act’s publication and inspection requirements ultimately present compelled speech problems twice over. For one, they force elements of civil society to speak when they otherwise would have refrained. . . .

What’s more, the fact that the Act compels third parties to disclose certain identifying information regarding political speakers implicates protections for anonymous speech. Requiring the press itself to disclose the identity or characteristics of political speakers is a problematic step. . . . This country, moreover, has “a respected tradition of anonymity in the advocacy of political causes.” *McIntyre*. . . .

III

A

Maryland’s law is different in kind from customary campaign finance regulations because the Act burdens *platforms* rather than political actors. So when “People for Jennifer Smith” want to place an online campaign advertisement with the *Carroll County Times*, it is the *County Times* that has to shoulder the bulk of the disclosure and recordkeeping obligations created by the sections of the Act challenged here.

This platform-oriented structure poses First Amendment problems of its own. . . . [T]he Court’s disclosure-related campaign finance case law has also consistently relied on a key premise: While “disclosure requirements may burden the ability to speak, they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010) (internal quotation and citation omitted).

The internal logic for this assumption makes sense for *direct participants* in the political process. Political groups, by design, have an organic desire to succeed at the

ballot box. And this ambition generally offsets, at least in part, whatever burdens are posed by disclosure obligations. *See Buckley*. . . .

But this rationale falters when extended to neutral third-party platforms that view political ads no differently than any other. [A] core problem with Maryland’s law is that it makes certain political speech more expensive to host than other speech because compliance costs attach to the former and not to the latter. Accordingly, when election-related political speech brings in less cash or carries more obligations than all the other advertising options, there is much less reason for platforms to host such speech. . . .

In fact, the short history of Maryland’s law shows that these chilling effects are not theoretical. Google, for instance, has already stopped hosting political advertisements in the state. . . . And several Publishers here have avowed that they will have to do the same if the Act is enforced against them. . . . Additionally, a candidate for Maryland’s House of Delegates has alleged that Google’s drop-off from political advertising harmed his campaign, and that he and other candidates for local and state elections would find it even more difficult to communicate with voters if newspaper websites followed suit. All told, practice confirms what common sense would predict: While ordinary campaign finance disclosure requirements do not “necessarily reduce[] the quantity of expression,” *Buckley*, 424 U.S. at 19, the same cannot be said for platform-based laws.

[W]hen the onus is placed on platforms, we hazard giving government the ability to accomplish indirectly via market manipulation what it cannot do through direct regulation—control the available channels for political discussion. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

B

The First Amendment cautions that attend the Maryland Act are compounded by its application to the class of plaintiffs in this action. The Supreme Court has made clear that when the government tries to interfere with the content of a newspaper or the message of a news outlet, the constitutional difficulties mount. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). . . .

For one, Maryland’s law “intru[des] into the function of editors” and forces news publishers to speak in a way they would not otherwise. *Tornillo*, 418 U.S. at 258. The First Amendment does not just protect a news outlet’s editorial perspective or the way its beat reporters cover a given campaign or policy initiative. Rather, because the integrity of the newsroom does not readily permit mandated interaction with the government, the First Amendment applies in full force to all “news, comment, and advertising.” *Id.* . . .

Maryland tries to avoid these infirmities by analogizing the Act to the third-party disclosure obligations that have been upheld in the broadcasting context. But this is an inapt comparison. The broadcast industry has always held a distinctive place in First Amendment law on the ground that “[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (quoting *Columbia Broad. Sys., Inc., v. Democratic Nat’l Comm.*, 412 U.S. 94, 101 (1973)). That is, because broadcast licensees are given a federal grant to operate one of these limited channels, the Court has given the government wider latitude in regulating what is said on them. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399-400 (1969). This justification, however, is inapposite for the virtually limitless canvas of the internet. . . .

IV

[The Court declined to decide whether strict scrutiny or “exacting scrutiny” constituted the proper standard, because the law failed both.]

Under exacting scrutiny, there must be a “substantial relation” between an “important” government interest and “the information required to be disclosed.” *Buckley*. To start, there is no doubt that Maryland has asserted important government interests to sustain the Act. . . . First, Maryland has principally justified the Act on the ground that it will help deter foreign interference in its elections. . . . Second, Maryland has also claimed a set of secondary interests that are traditionally associated with disclosure-based laws: informing the electorate, deterring corruption, and enforcing the state’s campaign finance laws. . . .

But the fact that an interest is “important” in the abstract does not end the analysis. “In the First Amendment context, fit matters.” *McCutcheon*. Specifically, even under exacting scrutiny, a commitment to free speech requires governments to “employ[] not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). And on this front, the Maryland Act falls short.

For one, Maryland’s law does surprisingly little to further its chief objective of “combat[ing] foreign meddling in the state’s elections.” *Washington Post*, 355 F. Supp. 3d at 299. . . . First, even by Maryland’s own reckoning, foreign nationals rarely, if ever, relied on paid content to try to influence the electorate. Instead, as the state concedes, “Russian influence was achieved ‘primarily through unpaid posts’” on social media. . . . Second, the Act also fails to regulate even the narrow band of *paid* content used by foreign nationals. Of the small percentage of foreign-placed paid ads that reached Maryland voters, the vast majority did not urge people to choose a certain candidate or support a specific ballot initiative. Rather, their chief focus was to rouse passions on divisive questions such as those surrounding race or gun rights. . . .

What’s more, while the Act strikes too narrowly in some respects, it also strikes too broadly in others. Two features stand out: the decision to include the press and the choice to draw even quite-small platforms within the Act’s ambit.

First, . . . the state “has not been able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time.” *Washington Post*, 355 F. Supp. 3d at 301. Of course, states are owed a degree of deference in how they choose to pursue important governmental interests. But deference to ends does not obviate the need for concrete evidence showing the chosen means warrant the accompanying First Amendment burdens.

Maryland advances, however, a prophylactic rationale. On its view, the state “was not required to wait for foreign-sourced ads to appear *via a particular method* on plaintiffs’ websites before acting prophylactically to prevent such misconduct.” Appellant’s Reply Brief at 17. And in support of this view, Maryland points to evidence that Russian operatives infiltrated Google’s “DoubleClick” paid ad network during the 2016 election and that some newspaper websites, including those of some Publishers, use this network. As such, Maryland says there are sufficient grounds for it to regulate newspaper sites in anticipation of this possible new front in foreign interference.

This preventative justification fails to pass First Amendment muster. The Supreme Court has made clear that, when free speech values are at stake, states must supply rationales that are “far stronger than mere speculation about serious harms.” *Bartnicki v. Vopper*, 532 U.S. 514, 531 (2001) (quoting *United States v. Treasury Emps.*, 513 U.S. 454, 475 (1995)). . . . Without direct evidence (or anything close to it) of meddling on news sites, Maryland has failed to show that this purported threat is likely or imminent enough to justify the Act’s intrusive preventative measures.

Second, the Act is also too broad because it fails to distinguish between platforms large and small. The Maryland law sweeps the spectrum of websites, covering both *The Washington Post* and *Carroll County Times*, as well as their equivalents in every industry operating in the state. Specifically, the Act applies to each “public-facing website, web application, or digital application, including a social network, ad network, or search engine, that: has 100,000 or more unique monthly United States visitors or users” Md. Code Ann., Elec. Law § 1-101(dd-1). The law thus kicks in no matter how susceptible a website may be to foreign meddling or how influential it has been in a given election cycle.

As above, Maryland has failed to provide sufficient evidence to justify painting with such a broad brush. For instance, as the district court rightly observed, the clear bulk of foreign meddling took place on websites like Facebook, Instagram, or other social media platforms that each garner millions of visitors per month. *See Washington Post*, 355 F. Supp. 3d at 301. But the Act applies equally to *The Cecil Whig* and *The Cumberland Times- News* as it does to Facebook—notwithstanding the marked disparities between their respective reaches and past histories with foreign election interference. . . .

V

[W]hile we credit the aims of Maryland’s legislators, we can in no way approve the state’s chosen means. The most basic First Amendment principles compel as much.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

NOTES AND QUESTIONS

1. *Regulating platforms or advertisers.* The online advertising disclosure law at issue in *McManus* was novel, the Court noted, because it regulated the platforms directly rather than the purchasers of advertising. Doing so might chill both the platforms’ speech and that of prospective advertisers, the Court found. Does platform regulation raise unique First Amendment concerns? Does the First Amendment resign the government to regulating speech at the source, rather than at the platform where it might be done most efficiently? For a good discussion of *McManus* and other state attempts to regulate online political advertising, see Ashley Fox & Victoria Smith Ekstrand, *Regulating the Political Wild West: State Efforts to Address Online Political Advertising*, Notre Dame J. Legis. (forthcoming 2021).

2. *Are all platforms created equal?* *The Washington Post* was, in many ways, the perfect plaintiff for this case, as most would see a distinction between internet monopolies, like

Google and Facebook, and classic journalistic institutions. Does the *Washington Post* have a greater claim to First Amendment injury than other websites? More to the point, why should political advertising on the *Washington Post*'s website be treated differently than advertising on the major internet platforms? Given that Facebook and Google are responsible for most online advertising, let alone political advertising, can the law recognize that fact and regulate them uniquely? Which is more likely to be effective: regulating all the potential advertisers on those monopoly platforms or regulating the platforms themselves? As the Court notes, Google decided to suspend political advertising on its platform in Maryland as a result of this disclosure obligation. Does Google's response affect how we should think about the downstream chilling effects of disclosure laws? Given the dominance of Google and Facebook in the online advertising market, is the Court right to distinguish them from broadcast television, based on scarcity of the spectrum space and the public licensing requirement?

3. Platform regulation or government regulation. As noted above, the major internet platforms created their own disclosure regimes following the 2016 election controversy. Facebook's rules, in particular, emulated the proposed Honest Ads Act, which like the law in *McManus*, would have regulated the internet platforms directly, but unlike the Maryland law only applied to websites with over 50 million monthly users. Does *McManus* suggest the Honest Ads Act would violate the First Amendment? Or does the fact that it would only apply to the largest platforms make it more likely to be upheld? If even these disclosure regimes are seen as too burdensome, does the Constitution necessarily place power in the platforms to be the primary regulators of campaign spending going forward?

4. Organic posts versus paid content. The *McManus* Court minimized the significance of Russian-sponsored digital advertising in the 2020 election as a justification for the Maryland disclosure law. The Court rightly noted that Russian-sponsored organic content on social media dwarfed paid online content in the 2016 campaign. Does the fact that "free" speech by foreign actors was more prevalent undermine the justification for disclosure regulations for paid advertising? Moreover, the Court noted that most of the Russian ads were issue ads, not candidate ads. Does that distinction undermine the justification for disclosure rules for paid content advocating the election or defeat of candidates? If even candidate advertising disclosure obligations for platforms are constitutionally suspect, can the government do anything to regulate unpaid, issue-based content originating from foreign sources?

The Suspension of Donald Trump's Social Media Accounts

The swiftest response to the violence at the Capitol on January 6th did not come from government, but rather from the social media companies. Widely criticized for their inaction in the face of Russian meddling in the 2016 election, they were quick to act once violence erupted at the Capitol. By the day after the attempted insurrection, Facebook, Twitter, and YouTube suspended the accounts of President Trump. The different platforms provided different justifications for these actions, but all seemed to agree that his social media posts praised, sanctioned, or contributed to the violence at the Capitol. Several of President Trump's posts had been taken down or demoted by the platforms during the campaign, and some were subject to warning labels for constituting disinformation, hate speech, or unfounded rejection of the election result. But only with the events of January 6th, did the platforms exercise their most serious power and prevent President Trump from further posting through his accounts.

Twitter based its takedown on President Trump's violation of the platform's "Glorification of Violence" policy. Its explanation for the permanent takedown of the account, presented below, focused on the context for Trump's tweets and how they were being understood by potentially violent supporters.

On January 8, 2021, President Donald J. Trump Tweeted:

"The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!"

Shortly thereafter, the President Tweeted:

"To all of those who have asked, I will not be going to the Inauguration on January 20th."

Due to the ongoing tensions in the United States, and an uptick in the global conversation in regards to the people who violently stormed the Capitol on January 6, 2021, these two Tweets must be read in the context of broader events in the country and the ways in which the President's statements can be mobilized by different audiences, including to incite violence, as well as in the context of the pattern of behavior from this account in recent weeks. After assessing the language in these Tweets against our Glorification of Violence policy, we have determined that these Tweets are in violation of the Glorification of Violence Policy and the user @realDonaldTrump should be immediately permanently suspended from the service.

Assessment

We assessed the two Tweets referenced above under our Glorification of Violence policy, which aims to prevent the glorification of violence that could inspire others to replicate violent acts and determined that they were highly likely to encourage and inspire people to replicate the criminal acts that took place at the U.S. Capitol on January 6, 2021.

This determination is based on a number of factors, including:

President Trump's statement that he will not be attending the Inauguration is being received by a number of his supporters as further confirmation that the election was not legitimate and is seen as him disavowing his previous claim made via two Tweets (1, 2) by his Deputy Chief of Staff, Dan Scavino, that there would be an "orderly transition" on January 20th.

The second Tweet may also serve as encouragement to those potentially considering violent acts that the Inauguration would be a "safe" target, as he will not be attending.

The use of the words "American Patriots" to describe some of his supporters is also being interpreted as support for those committing violent acts at the US Capitol.

The mention of his supporters having a "GIANT VOICE long into the future" and that "They will not be disrespected or treated unfairly in any way, shape or form!!!" is being interpreted as further indication that President Trump does not plan to facilitate an "orderly transition" and instead that he plans to continue to support, empower, and shield those who believe he won the election.

Plans for future armed protests have already begun proliferating on and off-Twitter, including a proposed secondary attack on the US Capitol and state capitol buildings on January 17, 2021.

As such, our determination is that the two Tweets above are likely to inspire others to replicate the violent acts that took place on January 6, 2021, and that there are multiple indicators that they are being received and understood as encouragement to do so.

Twitter, Inc., Permanent suspension of @realDonaldTrump, January 8, 2021, https://blog.twitter.com/en_us/topics/company/2020/suspension.

Facebook also suspended President Trump's account, but under its Community Standard on "Dangerous Individuals and Organizations." That rule prohibits "content that praises, supports, or represents events that Facebook designates as terrorist attacks, hate events, mass murders or attempted mass murders, serial murders, hate crimes and violating events" or content that praises "terrorist, hate, and criminal organizations." Facebook had initially taken down content that President Trump had posted on January 6th while the insurrection was ongoing, then it said it was suspending his account until the inauguration, but it then later clarified that his account was suspended indefinitely. Although, like Twitter, Facebook had taken action against other pieces of content on Trump's account during the campaign, it was a one minute video posted at 4:21 PM Eastern time and one text post at 5:41 PM Eastern time on January 6th that ultimately led to the suspension.

In the video, Trump said:

I know your pain. I know you're hurt. We had an election that was stolen from us. It was a landslide election, and everyone knows it, especially

the other side, but you have to go home now. We have to have peace. We have to have law and order. We have to respect our great people in law and order. We don't want anybody hurt. It's a very tough period of time. There's never been a time like this where such a thing happened, where they could take it away from all of us, from me, from you, from our country. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel. But go home and go home in peace.

In a post eighty minutes later, as police were securing the Capitol, he wrote:

These are the things and events that happen when a sacred landslide election victory is so unceremoniously viciously stripped away from great patriots who have been badly unfairly treated for so long. Go home with love in peace. Remember this day forever!

In the summer of 2020, Facebook set up an outside "Oversight Board" composed of an international group of academics, representatives of various non-governmental organizations, journalists, and lawyers to adjudicate user appeals from decisions to take down content or accounts on the site. It decided several cases before the election, but none as prominent as its decision delivered on May 5, 2021, concerning the suspension of President Trump's Facebook and Instagram accounts. Facebook itself referred the suspension of Trump's account to the Oversight Board and also requested that the Board give recommendations regarding account suspensions for political leaders, in general. Basing its decision on international law and Facebook's values of voice, safety, and dignity, as articulated in its Community Standards, the Oversight Board upheld the suspension of Trump's account but overturned the indefinite duration of the suspension, giving Facebook six months to justify continued action against the account.

Case decision 2021-001-FB-FBR
Oversight Board (May 5, 2021)

<https://www.oversightboard.com/sr/decision/2021/001/pdf-english>

[T]he Board agrees with Facebook's decision that the two posts by Mr. Trump on January 6 violated Facebook's Community Standards and Instagram's Community Guidelines. ... Facebook designated the storming of the Capitol as a "violating event" and noted that it interprets violating events to include designated "violent" events.

At the time the posts were made, the violence at the Capitol was underway. Both posts praised or supported people who were engaged in violence. The words "We love you. You're very special" in the first post and "great patriots" and "remember this day forever" in the second post amounted to praise or support of the individuals involved in the violence and the events at the Capitol that day.

The Board notes that other Community Standards may have been violated in this case, including the Standard on Violence and Incitement. Because Facebook's decision was not based on this Standard and an additional finding of violation would not affect the outcome of this proceeding, a majority of the Board refrains from reaching any judgment

on this alternative ground. The decision upholding Facebook’s imposition of restrictions on Mr. Trump’s accounts is based on the violation of the Dangerous Individuals and Organizations Community Standard.

A minority of the Board would consider the additional ground and find that the Violence and Incitement Standard was violated. The minority would hold that, read in context, the posts stating the election was being “stolen from us” and “so unceremoniously viciously stripped,” coupled with praise of the rioters, qualifies as “calls for actions,” “advocating for violence” and “misinformation and unverifiable rumors that contribute[d] to the risk of imminent violence or physical harm” prohibited by the Violence and Incitement Community Standard.

The Board finds that the two posts severely violated Facebook policies and concludes that Facebook was justified in restricting the account and page on January 6 and 7. The user praised and supported people involved in a continuing riot where people died, lawmakers were put at serious risk of harm, and a key democratic process was disrupted. Moreover, at the time when these restrictions were extended on January 7, the situation was fluid and serious safety concerns remained. Given the circumstances, restricting Mr. Trump’s access to Facebook and Instagram past January 6 and 7 struck an appropriate balance in light of the continuing risk of violence and disruption. As discussed more fully below, however, Facebook’s decision to make those restrictions “indefinite” finds no support in the Community Standards and violates principles of freedom of expression.

* * *

8.3 Compliance with Facebook’s human rights responsibilities

The Board’s decisions do not concern the human rights obligations of states or application of national laws, but focus on Facebook’s content policies, its values and its human rights responsibilities as a business. The UN Guiding Principles on Business and Human Rights, which Facebook has endorsed (See Section 4), establish what businesses should do on a voluntary basis to meet these responsibilities. This includes avoiding causing or contributing to human rights harms, in part through identifying possible and actual harms and working to prevent or address them (UNGP Principles 11, 13, 15, 18). These responsibilities extend to harms caused by third parties (UNGP Principle 19). Facebook has become a virtually indispensable medium for political discourse, and especially so in election periods. It has a responsibility both to allow political expression and to avoid serious risks to other human rights. Facebook, like other digital platforms and media companies, has been heavily criticized for distributing misinformation and amplifying controversial and inflammatory material. Facebook’s human rights responsibilities must be understood in the light of those sometimes competing considerations.

The Board analyzes Facebook’s human rights responsibilities through international standards on freedom of expression and the rights to life, security, and political participation. Article 19 of the ICCPR sets out the right to freedom of expression. Article 19 states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” The Board does not apply the First Amendment of the U.S. Constitution, which does not govern the conduct of private companies. However, the Board notes that in many relevant respects the principles of freedom of expression reflected in the First Amendment are similar or analogous to the principles of freedom of expression in

ICCPR Article 19.

Political speech receives high protection under human rights law because of its importance to democratic debate. The UN Human Rights Committee provided authoritative guidance on Article 19 ICCPR in General Comment No. 34, in which it states that “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential” (para. 20).

Facebook’s decision to suspend Mr. Trump’s Facebook page and Instagram account has freedom of expression implications not only for Mr. Trump but also for the rights of people to hear from political leaders, whether they support them or not. Although political figures do not have a greater right to freedom of expression than other people, restricting their speech can harm the rights of other people to be informed and participate in political affairs. However, international human rights standards expect state actors to condemn violence (Rabat Plan of Action), and to provide accurate information to the public on matters of public interest, while also correcting misinformation (2020 Joint Statement of international freedom of expression monitors on COVID-19).

International law allows for expression to be limited when certain conditions are met. Any restrictions must meet three requirements – rules must be clear and accessible, they must be designed for a legitimate aim, and they must be necessary and proportionate to the risk of harm. The Board uses this three-part test to analyze Facebook’s actions when it restricts content or accounts. First Amendment principles under U.S. law also insist that restrictions on freedom of speech imposed through state action may not be vague, must be for important governmental reasons and must be narrowly tailored to the risk of harm.

I. Legality (clarity and accessibility of the rules)

In international law on freedom of expression, the principle of legality requires that any rule used to limit expression is clear and accessible. People must be able to understand what is allowed and what is not allowed. Equally important, rules must be sufficiently clear to provide guidance to those who make decisions on limiting expression, so that these rules do not confer unfettered discretion, which can result in selective application of the rules. In this case, these rules are Facebook’s Community Standards and Instagram’s Community Guidelines. . . .

The clarity of the Standard against praise and support of Dangerous Individuals and Organizations leaves much to be desired The UN Special Rapporteur on Freedom of Expression has also raised concerns about the vagueness of the Dangerous Individuals and Organizations Standard (A/HRC/38/35, para 26, footnote 67). . . . Any vagueness under the terms of the Standard does not render its application to the circumstances of this case doubtful. The January 6 riot at the Capitol fell squarely within the types of harmful events set out in Facebook’s policy, and Mr. Trump’s posts praised and supported those involved at the very time the violence was going on, and while Members of Congress were calling on him for help. In relation to these facts, Facebook’s policies gave adequate notice to the user and guidance to those enforcing the rule.

With regard to penalties for violations, the Community Standards and related information about account restrictions are published in various sources, including the Terms of Service, the introduction to the Community Standards, the Community Standard on Account Integrity and Authentic Identity, the Facebook Newsroom, and the Facebook Help Center. . . . [T]he Board reiterates that the patchwork of applicable rules makes it

difficult for users to understand why and when Facebook restricts accounts, and raises legality concerns.

While the Board is satisfied that the Dangerous Individuals and Organizations Standard is sufficiently clear under the circumstances of this case to satisfy clarity and vagueness norms of freedom of speech, Facebook's imposition of an "indefinite" restriction is vague and uncertain. "Indefinite" restrictions are not described in the Community Standards and it is unclear what standards would trigger this penalty or what standards will be employed to maintain or remove it. Facebook provided no information of any prior imposition of indefinite suspensions in any other cases. The Board recognizes the necessity of some discretion on Facebook's part to suspend accounts in urgent situations like that of January, but users cannot be left in a state of uncertainty for an indefinite time.

The Board rejects Facebook's request for it to endorse indefinite restrictions, imposed and lifted without clear criteria. Appropriate limits on discretionary powers are crucial to distinguish the legitimate use of discretion from possible scenarios around the world in which Facebook may unduly silence speech not linked to harm or delay action critical to protecting people.

II. Legitimate aim

The requirement of legitimate aim means that any measure restricting expression must be for a purpose listed in Article 19, para. 3 of the ICCPR, and this list of aims is exhaustive. Legitimate aims include the protection of public order, as well as respect for the rights of others, including the rights to life, security, and to participate in elections and to have the outcome respected and implemented. An aim would not be legitimate where used as a pretext for suppressing expression, for example, to cite the aims of protecting security or the rights of others to censor speech simply because it is disagreeable or offensive (General Comment No. 34, paras. 11, 30, 46, 48). Facebook's policy on praising and supporting individuals involved in "violating events," violence or criminal activity was in accordance with the aims above.

III. Necessity and proportionality

The requirement of necessity and proportionality means that any restriction on expression must, among other things, be the least intrusive way to achieve a legitimate aim (General Comment No. 34, para. 34).

The Board believes that, where possible, Facebook should use less restrictive measures to address potentially harmful speech and protect the rights of others before resorting to content removal and account restriction. At a minimum, this would mean developing effective mechanisms to avoid amplifying speech that poses risks of imminent violence, discrimination, or other lawless action, where possible and proportionate, rather than banning the speech outright.

Facebook stated to the Board that it considered Mr. Trump's "repeated use of Facebook and other platforms to undermine confidence in the integrity of the election (necessitating repeated application by Facebook of authoritative labels correcting the misinformation) represented an extraordinary abuse of the platform." The Board sought clarification from Facebook about the extent to which the platform's design decisions, including algorithms, policies, procedures and technical features, amplified Mr. Trump's posts after the election and whether Facebook had conducted any internal analysis of whether such design decisions may have contributed to the events of January 6. Facebook

declined to answer these questions. This makes it difficult for the Board to assess whether less severe measures, taken earlier, may have been sufficient to protect the rights of others.

The crucial question is whether Facebook’s decision to restrict access to Mr. Trump’s accounts on January 6 and 7 was necessary and proportionate to protect the rights of others. To understand the risk posed by the January 6 posts, the Board assessed Mr. Trump’s Facebook and Instagram posts and off-platform comments since the November election. In maintaining an unfounded narrative of electoral fraud and persistent calls to action, Mr. Trump created an environment where a serious risk of violence was possible.

...

As part of its analysis, the Board drew upon the six factors from the Rabat Plan of Action to assess the capacity of speech to create a serious risk of inciting discrimination, violence, or other lawless action:

Context: The posts were made during a time of high political tension centered on the unfounded claim that the November 2020 presidential election had been stolen. The Trump campaign had raised these claims in court, but with little or no evidence, and they were consistently rejected. Mr. Trump nonetheless continued to assert these claims on social media, including Facebook and Instagram, using his authoritative status as head of state to lend them credibility. He encouraged supporters to come to the nation’s capital on January 6 to “StoptheSteal,” suggesting that the events would be “wild.” On January 6, Mr. Trump urged supporters to march to the Capitol building to challenge the counting of the electoral votes. At the time of the posts, severe violence was continuing. When the restrictions were extended on January 7, the situation remained volatile. Among other indicators of the context, the District of Columbia took steps to warn of a heightened risk of violence surrounding the events at the Capitol.

Status of the speaker: Mr. Trump’s identity as president of the United States and a political leader gave his Facebook and Instagram posts a high degree of influence. The Board notes that as president, Mr. Trump had credibility and authority with members of the public, which contributed to the events of January 6. Mr. Trump’s status as head of state with a high position of trust not only imbued his words with greater force and credibility but also created risks that his followers would understand they could act with impunity.

Intent: The Board is not in a position to conclusively assess Mr. Trump’s intentions. The possibility of violence linked to Mr. Trump’s statements was clear, and the Board considered that he likely knew or should have known that these communications would pose a risk of legitimizing or encouraging violence.

Content and form: The two posts on January 6 praised and supported rioters, even though they called on them to go home peacefully. The posts also reiterated the unfounded claim that the election was stolen. Reports suggest that this claim was understood by some of the rioters as legitimizing their actions. The evidence here shows that Mr. Trump used the communicative authority of the presidency in support of attackers on the Capitol and an attempt to prevent the lawful counting of electoral votes.

Extent and reach: Mr. Trump had a large audience, with a following of at least 35 million accounts on Facebook and at least 24 million accounts on Instagram. Importantly, these social media posts are frequently picked up and shared more broadly through mass media channels as well as by high-profile supporters of Mr. Trump with large audiences, greatly increasing their reach.

Imminence of harm: The posts were made during a dynamic and fluid period of ongoing violence. There was a clear immediate risk of harm to life, electoral integrity, and political participation. The violence at the Capitol started within an hour of the rally organized through the use of Facebook and other social media. Indeed, even as Mr. Trump was posting, the rioters were rampaging through the halls of Congress and Members of Congress were expressing fear by calling on the White House and pleading for the president to calm the situation. The riot directly interfered with Congress's ability to discharge its constitutional responsibility of counting electoral votes, delaying this process by several hours.

Analyzing these factors, the Board concludes that the violation in this case was severe in terms of its human rights harms. Facebook's imposition of account-level restrictions on January 6 and the extension of those restrictions on January 7 was necessary and proportionate.

For the minority of the Board, while a suspension of an extended duration or permanent disablement could be justified on the basis of the January 6 events alone, the proportionality analysis should also be informed by Mr. Trump's use of Facebook's platforms prior to the November 2020 presidential election. In particular, the minority noted the May 28, 2020, post "when the looting starts, the shooting starts," made in the context of protests for racial justice, as well as multiple posts referencing the "China Virus." . . . The frequency, quantity and extent of harmful communications should inform the Rabat incitement analysis, in particular the factors on context and intent. For the minority, this broader analysis would be crucial to inform Facebook's assessment of a proportionate penalty on January 7, which should serve as both a deterrent to other political leaders and, where appropriate, an opportunity of rehabilitation. Further, if Facebook opted to impose a time-limited suspension, the risk-analysis required prior to reinstatement should also take into account these factors. Having dealt with this case on other grounds, the majority does not comment on these matters.

9. Oversight Board decision

[I]t was not appropriate for Facebook to impose an indefinite suspension.

Facebook did not follow a clear published procedure in this case. Facebook's normal account-level penalties for violations of its rules are to impose either a time-limited suspension or to permanently disable the user's account. The Board finds that it is not permissible for Facebook to keep a user off the platform for an undefined period, with no criteria for when or whether the account will be restored.

It is Facebook's role to create and communicate necessary and proportionate penalties that it applies in response to severe violations of its content policies. The Board's role is to ensure that Facebook's rules and processes are consistent with its content policies, its values, and its commitment to respect human rights. In applying an indeterminate and standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities. The Board declines Facebook's request and insists that Facebook apply and justify a defined penalty.

Facebook must, within six months of this decision, reexamine the arbitrary penalty it imposed on January 7 and decide the appropriate penalty. This penalty must be based on the gravity of the violation and the prospect of future harm. It must also be consistent with Facebook's rules for severe violations which must in turn be clear,

necessary, and proportionate.

1. *Facebook's Response to the Oversight Board's Decision.* The Board gave Facebook six months to reevaluate the indefinite term of the suspension of President Trump's account. On June 4, 2021, Facebook announced that the suspension would remain in effect for two years, at which time it would be reevaluated. "In establishing the two year sanction for severe violations, we considered the need for it to be long enough to allow a safe period of time after the acts of incitement, to be significant enough to be a deterrent to Mr. Trump and others from committing such severe violations in future, and to be proportionate to the gravity of the violation itself." Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, June 4, 2021, <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/>.

Does the two year suspension satisfy the Oversight Board's standard articulated in its decision? What is the appropriate term, if any, for such a suspension and how might Facebook assess whether conditions have sufficiently changed on the ground (and on the internet) such that the "clear and present danger" evident on January 6 has sufficiently abated and President Trump's account should be reinstated?

2. *Application of International Human Rights Law.* Pursuant to the Charter that created it, the Board grounded its decision in International Human Rights Law. In its brief submitted to the Board, the group representing President Trump argued that U.S. Constitutional principles should have determined the outcome in his case. They maintained that under the First Amendment, Trump's posts were protected speech. Could the U.S. government, consistent with the First Amendment, shut down or punish a speaker for saying what President Trump posted on Facebook, let alone under a standard prohibiting praise of violent organizations? Should national law, international law, or some other set of norms guide an American social media company (with global reach) taking down the speech of an American speaker, let alone an American President? Given that Facebook would need to apply its standards around the world, can it have different standards to govern similar situations in different countries?

How well suited are principles of international or national law to adjudicate takedowns by private companies like Facebook? Critics often describe Facebook as the new "public square," but should the same rules designed to limit government speech suppression apply to a social media company? Consider that most of Facebook's community standards on topics such as obscenity, hate speech, incitement, glorification of violence and the like, would be unconstitutional if legislated by a government. Indeed, how might a First Amendment decision, such as *Citizens United*, be applied to Facebook were it to voluntarily take on the U.S. Constitution as guidance for content moderation? Should it feel obligated to allow all corporations to place political advertisements on its site? See Nathaniel Persily, "Yes, Facebook's Oversight Board upheld Trump's suspension. But here's the bigger issue," *The Monkey Cage*, Washington Post, May 6, 2021, <https://www.washingtonpost.com/politics/2021/05/06/yes-facebooks-oversight-board-upheld-trumps-suspension-heres-bigger-issue/>.

Although it applies the Rabat plan of action applicable to government regulation of dangerous speech, the Board's decision admits that international law principles developed

to restrain governments have their shortcomings. The Board points, as well, to a separate set of international law norms concerning businesses' human rights obligations (to which Facebook ascribed). These principles are ones that apply to all kinds of corporations, for example, to protect against everything from discrimination to environmental pollution. They were not designed with social media companies in mind, but serve to highlight the significant role that private actors may play in violating and protecting human rights. What body of "law," if any, should a company turn to for guidance in adjudicating a case like the Trump takedown? Or is "law" the wrong guide here and instead a company should develop its own content moderation principles tailored to the features of its product and its function in the speech ecosystem? See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 *Harv. L. Rev.* 1598 (2018); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 *Yale L.J.* 2418 (2020); Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 *Colum. L. Rev.* 759 (2021)

3. Platform regulation of Candidates' Speech. Does the speech of political leaders deserve special protection from online platforms? In addition to referring the Trump takedown to the Board, Facebook asked the Board for an advisory opinion on how it should deal with the speech of political leaders. The Board declined to distinguish political leaders, elected or otherwise, from other types of influential speakers. For the Board, leaders of governments are just one among many categories of speakers who have extraordinary reach and influence. Is that the right approach? Given the considerable power that Facebook has over the information market, should it be especially wary about silencing duly elected government officials?

Consider the impact of such an approach internationally, when an American company shuts down the account of elected leaders attempting to communicate with the people they represent. What about during a campaign? Should Facebook have special rules for candidates or should they just be treated like other speakers? Recall the debate in *Austin* and *Citizens United*, which focused on whether corporations had "corrosive and distorting effects" on the political process. Could the same be said about entities like Facebook that play an increasingly important role in each election campaign?

4. State responses to perceived bias of social media companies. In response to the takedown of President Trump and other enforcement actions against conservative speakers, the state of Florida passed a [law](#) prohibiting social media companies from deplatforming candidates for office. The penalty in the law for deplatforming a statewide candidate is \$250,000 per day. The law also prohibited such companies from taking "any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." The law was swiftly [enjoined](#) by a federal court that found the law to constitute impermissible content-based discrimination (and perhaps intentional viewpoint-based discrimination) under the First Amendment. The law also discriminated amongst speakers, the Court held, because it exempted social media platforms with theme parks in Florida (e.g., Disney). Even if the Florida law may have been poorly drafted, what might states or Congress do to rein in the power of social media platforms, especially in campaigns? Can and should companies, like Facebook and Google, be treated like the broadcast networks once were under the "Fairness Doctrine," which at a time of much greater scarcity in communications channels (three broadcast networks, no cable television) allowed for regulations that gave speakers a right of equal access to network time to ensure viewers received evenhanded coverage of political issues? Especially given that these firms principally curate user-generated content, do the analogies to television, cable, or even newspapers hold up?

5. *Donald Trump's lawsuit against Facebook.* In response to the takedown of his account and following the Oversight Board's decision, Donald Trump filed a class action lawsuit against Facebook. He alleged that Facebook was a state actor bound by the First Amendment. As such, the deplatforming of his account constituted impermissible viewpoint based discrimination. He was joined in his complaint by others who allege that their accounts were suspended or otherwise punished for voicing different opinions on issues such as the virtues of hydroxychloroquine or the origins of COVID-19 in a Chinese lab. The complaint alleges that "Facebook's Community Standards guidelines regarding hate speech, incitement, or praise of violence are vague, broad, ill-defined, or not defined at all." The complaint tries to create a hook into state action in a number of ways. First, citing to the Supreme Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2016), it asserts that Facebook is essentially a "public square" and that regulations of its newsfeed are like regulations of sidewalks or parks. Second, it alleges that Democratic government officials coerced Facebook into removing Trump's account. Third, it argues that the Centers for Disease Control and White House routinely partner with Facebook to send messages, run public education campaigns, and to engage in censorship in the name of preventing vaccine and COVID misinformation. Fourth, it alleges that Section 230 of the Communications Decency Act, which accords legal immunity for content moderation decisions such as the deplatforming of Trump, is both unconstitutional and through its immunity provision, creates a nexus to state action such that the government acts through platforms by encouraging their speech suppression. As the complaint puts it: "Pursuant to Section 230, Defendants are encouraged and immunized by Congress to censor constitutionally protected speech on the Internet." *Donald J. Trump, et al., v. Facebook, Inc, and Mark Zuckerberg*, 1:21-cv-22440, (N.D. Fla. July 7, 2021), <https://tinyurl.com/trumpsocialmedialawsuit> (class action complaint for injunctive and declaratory relief).

Consider this complaint in light of the discussion of the White Primary cases from Chapter 4. Recall that, in the *White Primary Cases*, the Supreme Court determined that the Texas Democratic Party, even in its more informal incarnation as the Jaybirds, was bound by the 15th Amendment's prohibition on race discrimination in voting. However, later cases, such as *California Democratic Party v. Jones*, clarified that parties possess strong First Amendment rights akin to private associations with a right to determine their membership. Do these cases shed light on how we should think about Facebook and state action? What are the differences between Facebook and the Jaybirds? Is Facebook like Citizens United, a corporation with robust First Amendment rights, or more like a powerful political party running a primary, in which its speech rules are on a par with state action? Even if large internet platforms are not "the government," should they nevertheless abide by certain constitutional norms that constrain government?

6. *Should all platforms have the same content moderation rules?* Each of the major internet platforms banned Trump's account for some period of time, but they have articulated different standards for the future. Twitter and Snap have banned Trump indefinitely. Facebook, as noted above, will revisit the issue in two years, just as the 2024 campaign gets underway. YouTube has been the most opaque, banning Trump since January 6th, but saying that he might be reinstated once YouTube determines that the risk of incitement to violence has abated.

Should the same content moderation rules apply to all companies for speech like that of President Trump? Even if the government cannot mandate uniformity, would it nevertheless be desirable? Leaving aside the possible antitrust issues that might arise if the

platforms colluded to take down a speaker, should an industry organization develop those standards, for example? Or, perhaps, should different products (e.g., a social media platform, a video sharing service, and a direct messaging system) have different rules for content like that found violating the platforms' standards on January 6? See Evelyn Douek, *The Rise of Content Cartels*, Knight First Amendment Institute at Columbia University, Feb. 11, 2020, <https://knightcolumbia.org/content/the-rise-of-content-cartels>.

Insert at the top of page 583:

Small Donors, Political Polarization, and the Changing Dynamics of Campaign Finance

In just the last several years, the communications revolution has dramatically changed the ecosystem of financing campaigns. The internet and social media have dramatically reduced transactions costs of reaching out to potential donors, including small donors, as well as the transactions costs of contributing to campaigns. The term “small donors” is not always used consistently, but typically refers in federal elections to those who give less than \$200 (in total) to federal campaigns; campaigns are not required to disclose identifying individual information for donors who give less than \$200.

Before the 2018 mid-term elections, small donors had played a significant role only in presidential elections. Barack Obama was the first presidential candidate to seize the advantages internet fundraising presented, particularly for raising money from small donors (\$200 or less). In the 2008 general election, he raised about 24% of his funds from small donors; in the 2011-2012 cycle, he raised about 28% of his funds from small donors (by comparison, Mitt Romney raised 12% of his contributions, from small donors). Obama's ability to raise money from individual donors, large and small, was the main reason he was the first major-party candidate to abandon public financing for his 2008 general election campaign. In 2016, Donald Trump became the most successful candidate ever in raising money from small donors, whether measured in total dollars raised or in the percentage of his overall fundraising. Small-donation dollars made up 69% of the individual contributions to Trump's campaign and 58% of the Trump campaign's total receipts.

But outside presidential campaigns, small donations had played a minor role until 2018. In 2016, for example, small donors accounted for only about 6% of the money raised by House candidates. This changed dramatically just two years later, with the most dramatic changes taking place for Democratic candidates. Overall, Democratic Senate candidates raised 27% of their money from small donors; House Democratic candidates raised 16%. One of the major reasons for this quantum leap in the role of small donors was the creation and maturation of a Democratic-supporting website and entity called Act Blue. Act Blue enables donors to go to a single website, enter and store their personal information, and then donate to any Democratic candidate (or progressive organization) that uses Act Blue – and to return to the website to donate over and over again, to different candidates or causes. Most of these donations come via smartphones. In the 2018 election cycle, Act Blue raised more than \$1.6 *billion* dollars for Democratic candidates and causes overall – an astounding 80% increase from four years earlier, with the average donation being around \$34. By the summer of 2019, Act Blue donors had given 68% *more* money than they had by the same time in 2018 – with the average donation being \$32.

Partly as a result of Act Blue, Democratic Senate and House candidates outraced Republicans more than two to one in contributions from individuals in 2018. Republicans

are now trying to catch up in their capacity to raise small donations for House and Senate races by creating a website called WinRed.

Thus far, the recent revolution in small-donor financing has drawn almost universal enthusiasm from political “reform” groups and others troubled by the role of money in elections. Given the constraints *Buckley v. Valeo* and its progeny impose on spending caps, small-donor financing appears to be a way of reducing the role of large donors not by regulatory attempts to cap their donations, but by diluting the significance of such donations through raising the overall amount of money in elections and the percentage that comes from small donors. To reformers, small-donor contributions provide a constitutionally unproblematic path to a more egalitarian and broadly participatory system of financing, as well as a countervailing force against what critics see as the corrupting force of special interests or “big donors” in elections. Indeed, the sudden power of small-donor money is described as a way to “reclaim our republic,” which would not only “significantly enhance the quality of democracy in the United States,” but also “restore citizens to their rightful pre-eminent place in our democracy.”

The Democratic Party has seized upon the rise of small donors both as a means of determining the credibility of presidential candidates and as the new building block of campaign-finance reform. For the former, to get into the debates in the crowded presidential primaries, the Democratic Party has chosen metrics based on just two criteria: how well a candidate is doing in certain polls or whether they have received contributions from more than a certain number of unique donors (for the first two debates, it was 65,000 donors, with a minimum of 200 donors in at least 20 states; for the third debate, it will be 130,000 donors). As a result of the small-donor contribution requirement, some candidates started pleading with donors to give them just \$1 or \$5, so that they could bump on their numbers of unique donors.

On campaign-finance reform, the Democratic Party vision no longer centers on traditional public financing. Instead, the House Democrats first bill after reclaiming the House in 2016, H.R. 1, which was devoted to political reforms in general, proposed that candidates and Congress receive a 6:1 dollar match in public funds for contributions they receive up to \$200; thus, a \$200 contribution would generate \$1200 for a candidate (the match tops out at a certain level).

For all the current celebration of the rise of the small donor, one issue that has received too little attention thus far is whether small donors will fuel political polarization. As a general matter, individual donors to campaigns in general tend to be more ideologically extreme – and to give to more ideologically extreme candidates – than the average American. This fact follows from the general logic of political participation in the United States, which is that those who participate the most actively in politics tend to be more ideologically extreme than those who participate less. See Alan I. Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* (2010). Thus far, there is no basis for thinking that small donors are less polarizing than other donors, and indeed, there is some evidence that suggests that they are more polarizing. It is not hard to see intuitively why this might be so. Especially when we get away from the most highly visible races, such as presidential elections, if one asks what types of candidates are most likely to attract large flows of small donations from around the country, it is easy to understand why candidates who are the most visible or attract a devoted core of supporters would be most successful at raising small donations – and those candidates tend to come less from the center than the poles of the political spectrum.

Note that with traditional public financing, the funds come from the general treasury, and so the source of funds is politically agnostic. When public financing is built on the back of small donors, as in a 6:1 matching program, the public funding will be directed toward those candidates that small donors most favor.

The data and quotations in this Note come from Richard H. Pildes, *Small Donors, Campaign Finance, and Political Polarization*, 22 Penn. J. Const. Law 341 (2020), which addresses the issue of small donors and polarization.

CHAPTER SIX

Insert on top of page 704 after note 3:

4. In the 19th century, after Congress began requiring single-member districts in 1842, mid-decade redistricting was common. Ohio, for example, redistricted seven times between 1878 and 1892 – indeed, it conducted six consecutive congressional elections with six different plans during one point in this stretch. Mid-decade redistricting was most common when the party out of power at the time the prior maps had been drawn gained control of the state’s political process in a subsequent election. Yet in other states, districts went unchanged for decades, if the party in power continued to benefit.

In addition, when control of Congress was at stake, national party leaders pressed same-party state governments to gerrymander congressional districts aggressively. The effects on national policy were dramatic. In the aftermath of the Civil War and Reconstruction, Republicans had a near lock on control of the Senate and the Presidency, due in part to Republicans strategically admitted several new Western states that would clearly be controlled by Republicans. Thus, the House was the only place from which Democrats could fight off the Republican agenda – and the most intense period of partisan competition over control of the House before recent years was from 1872-1894. Throughout this period, the parties were virtually tied in House elections; the swing of a few seats thus had dramatic effects on national policy.

When Republicans appeared on the verge of recapturing the House in 1878, after the disputed 1876 Hayes-Tilden presidential election, the Speaker of the House, Democrat Samuel Randall, did so explicitly enough that the New York Times reported:

Dispatches have poured in upon them [Democratic state legislators] from all parts of the country, and especially from the Democratic leaders at Washington, who have declared that the passage of this bill [on redistricting] was the only way to save the next Congress from falling into Republican hands.

In response, redistricting controlled by Democrats in Ohio and Missouri enabled Democrats to capture nine swing seats, which preserved their slim majority control of the House. A further direct effect on voting rights followed: House Democrats eliminated federal supervision of polling places in the South, by eliminating funding for the army and federal marshalls to monitor voting.

Gerrymandering also enabled the Republicans to gain control of the House in 1888, also with major policy consequences: on a straight-party line vote regarding the most controversial economic policy of the late 19th century, Congress passed the protectionist “McKinley Tariff.”

In contrast to modern gerrymandering, which typically involves creating a lot of safe seats, in the 19th century gerrymandering involved creating many competitive districts that were marginally tilted toward the party in power. In this era, the political parties had far greater control over their candidates, and the parties used this power to maximize advantages to the party, without putting their incumbents in safe seats.

This discussion of 19th century gerrymandering is taken from the best book on the subject, Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy*

(2016).

RUCHO V. COMMON CAUSE

139 S.Ct. 2484 (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.

* * *

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. . . . 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. . . .

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. . . .

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.” 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.” *Davis [v. Bandemer]*, 478 U.S. 109, 145 (1986) (opinion of O’Connor, J.). . . . 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 v. Jubelirer*, [541 U.S. 267, 306 (2004)] (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.” [*League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006)] (*LULAC*) (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* (opinion of Kennedy, J.). If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, *Bandemer* (opinion of O’Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from “constitutional political gerrymandering.” [*Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)].

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* (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). . . .

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. . . .

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. . . .

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. . . .

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. . . . 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.... 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. . . .

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] (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 map drawers 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?

* * *

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.

* * *

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. . . . 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.

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

[Regarding the challenge to the North Carolina congressional plan, the] District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. . . . 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. . . . 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* (opinion of O’Connor, J.). . . . 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.” . . . 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 [*Bandemer* and *Vieth*] themselves, the predictions of durability proved to be dramatically wrong. . . .

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.

* * *

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. Both District Courts concluded that the districting plans at issue violated the plaintiffs’ First Amendment right to association. . . .

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*. 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?

* * *

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. . .

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. . . .

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* (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, . . . but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." . . . 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. . . . True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. . . . 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 experience 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.

* * *

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 v. Arizona Independent Redistricting Com’n*, 135 S. Ct. 2652 (2015)], 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* (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

* * *

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.

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. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. . . . 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. . . .

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. . . .

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).

* * *

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*. In this rare circumstance, that means our duty is to say “this is not law.”

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 partisanship 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. . . .

A

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.... 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. . . .

- 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.
- 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.” . . .
- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn.
- 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.”

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. . . .

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. . . . 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.”
- 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. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats.
- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents.
- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications....
- The General Assembly adopted the plan on a party-line vote.

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. . . .

At its most extreme—as in North Carolina and Maryland—the practice [of partisan gerrymandering] amounts to “rigging elections.” *Vieth v. Jubelirer* (Kennedy, J., concurring in judgment). 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. . . .

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.” (quoting *Arizona State Legislature*). 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. . . . The other is that political gerrymanders have always been with us. 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. . . . 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 dummylanders—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. . . .

[A]nd 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 ... 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*. 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.* 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.* 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.* . . .

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* (opinion of Kennedy, J.). . . . By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill* (Kagan, J., concurring) (“Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their policy objectives”). . . .

* * *

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. . . .

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). [citing cases from Michigan and Ohio] 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.

* * *

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.’ ” But in doing so, it fails to convey the decisions’ most significant—and common—features. Both courts focused on the harm of vote dilution, 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. . . . Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. . . .

. . . And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. . . . If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

* * *

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. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns.

[B]ut 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. . . . 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.

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. . . .

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 . . . 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. . . . 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.

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.

* * *

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." 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 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.” . . . 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.” 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.” . . . 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. . . . On top of that, the maps took the State’s legal landscape as a given. . . . 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 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. . . . How much is too much? At the least, any gerrymanders

as bad as these.

And if the majority thought that approach too case-specific, 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. 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. . . . 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. . . . 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. . . . The majority is wrong to think that these laws typically (let alone uniformly) further “confine[] and guide[]” judicial decisionmaking. They do not, either in themselves or through “statutory context.” 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.

* * *

III

[G]errymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, “all political power flows from the people.” *Arizona State Legislature*. 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.

NOTES AND QUESTIONS

1. To sharpen up understanding of the conflict between the majority and dissent, would Justice Kagan's dissent hold all partisan gerrymandering to be unconstitutional or only extreme partisan gerrymanders? Is the dissent clear about the answer to that question?

2. By the time of the *Rucho* decision, three-judge federal courts (the special courts used in challenges to statewide redistricting plans) had struck down, as unconstitutional partisan gerrymanders, congressional districting plans in Michigan and Ohio, in addition to the North Carolina and Maryland plans at issue before the Supreme Court; the Pennsylvania Supreme Court had struck the congressional map for that state down as well, on state constitutional grounds. In the federal cases, the lower courts had found plans to violate the

First Amendment, the Equal Protection Clause, and the Elections Clause (which would apply to plans for congressional districts, but not state districts).

3. To the extent the dissent (or others) argue that the federal courts should only hold extreme gerrymanders unconstitutional, how should extreme be defined? Should that be a function of only the intent behind a plan? If so, what would constitute “extreme” partisan intent? Should that be a function of how explicit the partisan intent is? Thus, would this apply only when the lawmakers expressly proclaimed their intent to partisan gerrymander, as in the *Rucho* case? Would it also require that this intent be written into the formal redistricting criteria that governed the process, as was also the case in *Rucho*? Should it require that the explicit intent be to maximize the partisan benefits, rather than just to engage in a partisan gerrymander?

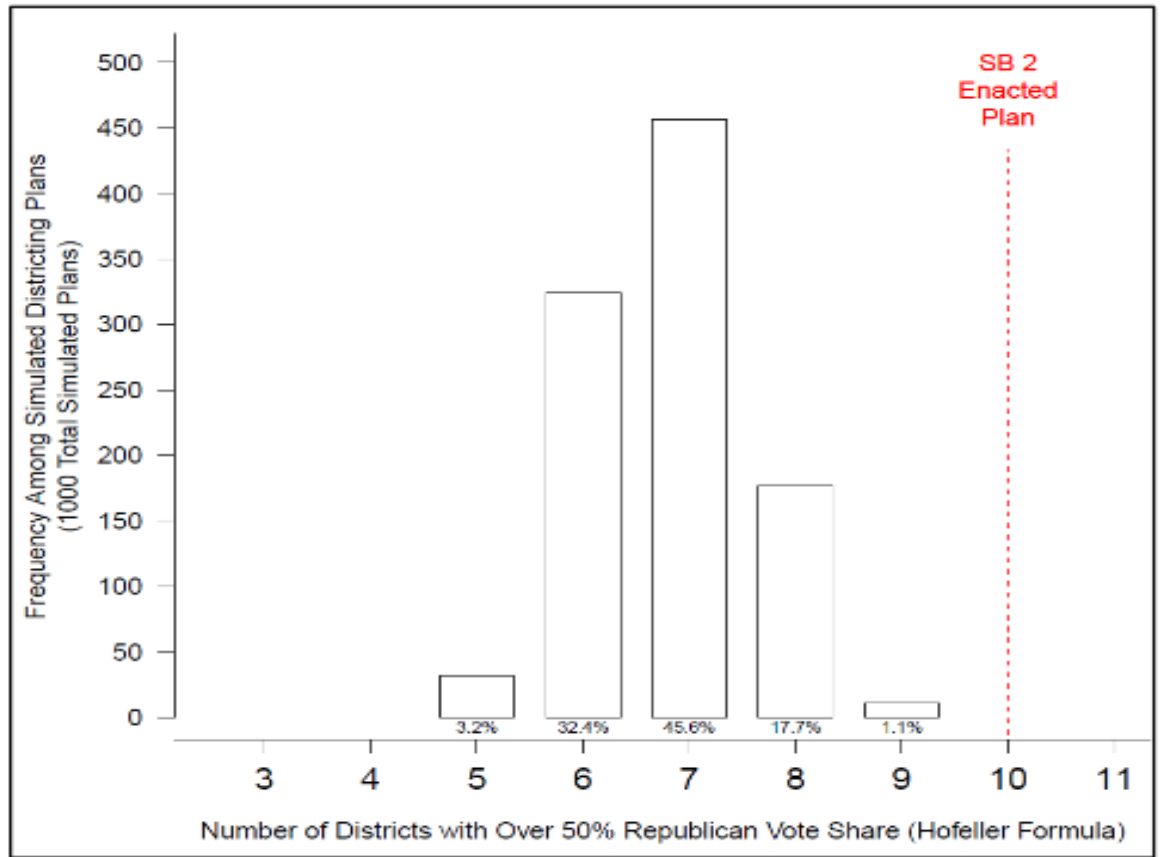
4. If “extreme partisan gerrymanders” are to be defined in terms of the *effects* of a plan, in addition to whatever intent requirement is imposed, how should courts measure or determine when the effects of a gerrymander become extreme? Should this be done on a district-by-district level, the level of the plan as a whole, or both? In the wake of *Gill*, the three-judge court in the North Carolina case had gone district-by-district, in a nearly 300 page opinion, identifying which specific districts had been cracked or packed and how, in the service of the State’s partisan gerrymander. That court then also looked to various statewide measures to examine the partisan effect of the plan as a whole.

5. Notice that neither the majority nor the dissenting opinion devote much space to discussing any of this district-specific evidence. Why is that?

6. In defining a statewide effects-based understanding of what constitutes an “extreme” partisan gerrymander – how much is too much – the plaintiffs in these cases had developed two dramatically different approaches. One approach relied on social-scientific metrics that are various versions of what are called “partisan symmetry” metrics. These are tests based on the principle that a plan should treat the two political parties symmetrically. By the time of *Rucho*, the most well-known of these measures was the “efficiency gap,” discussed in the notes after the *Gill* case.

The alternative approach was based on advances in computer power that now make it possible to draw thousands of redistricting maps relatively quickly. In *Rucho*, an expert drew more than 3,000 alternative maps based on the same redistricting criteria the State identified in its redistricting guidelines, but without taking partisanship into account. After these thousands of simulated plans are drawn, the same voting data that the redistricters used can be incorporated into each of the alternative, non-partisan maps. This then produces a distribution of the predicted partisan outcomes over this set of 3,000 alternative maps. The result can then be presented in a figure, like the one below, taken from the *Rucho* litigation. This figure shows that of the 13 congressional districts in North Carolina, 46% of neutral plans would produce a 7 R congressional delegation; 32% would produce a 6 R delegation; and 18% of the plans would produce an 8 R delegation.

The plan that was actually enacted can also be placed on this figure. As can be seen, the plan the NC legislature actually enacted (SB 2), produced a delegation that was 10-3 Republican. The figure shows just how much of an outlier the enacted plan was compared to the range of outcomes that would be generated by neutral, non-partisan plans:



7. The creation of a set of thousands of simulated plans can be used for two purposes. In cases where intent is disputed, this technique enables courts or others to see how plausible it is that the partisan outcomes could have been produced by neutral districting criteria, without any partisan intent. Second, this technique can also help identify just how extreme the partisan effects are of any plan. To cast this in more technical terms, we can look at the mean or median of the distribution and then ask this question: Taking account of that mean or median number of districts, how many standard deviations away are the number of districts in the enacted plan?

8. Note that the dissenting opinion in *Rucho* relies entirely on this second approach, using thousands of alternative maps, to define when the effects of a partisan map are extreme. The dissent does not rely at all on the use of social-scientific metrics concerning partisan asymmetry, such as the efficiency gap, to define an extreme gerrymander. What does that say about the future of efforts to limit partisan gerrymandering, both in state court litigation and also in determining what constitutes a “fair” redistricting map even when redistricting is done by independent commissions?

9. The majority asserts that any standard for unconstitutional partisan gerrymandering inevitably rests implicitly on a normative that assumes proportional representation (PR) is constitutionally required. The majority argues that the Constitution cannot be read to require PR, given that it is permissible for Congress to require the use of single-member districts for congressional elections. It is easy to explain why there is no reason to expect that a fair system of single-member districts will necessarily produce PR. Depending on how voters are geographically distributed throughout the State, a neutrally-drawn plan with 10 districts might result in Party A winning every seat with 53% of the vote. That would mean Party A would get all 10 seats, even though Party B won 47% of the statewide votes.

In a portion of the dissent not excerpted here, the dissent responded to the majority’s concerns about PR by arguing that the computer-generated alternative maps showed why PR was not the implicit normative baseline. Relying on an *amicus* brief filed on behalf of mathematicians and law professors, the dissent used Massachusetts as an example. In the 2000-2010 election cycle, Republicans received about 30-37% of the vote statewide for Congress. But Massachusetts had a 10-0 Democratic delegation in Congress. If PR were the baseline, Republicans would be “entitled” to at least three of those seats.

But when a vast array of neutral drawn maps was put together, it turns out that not a single plan based on traditional districting criteria would produce a single Republican-majority district. That is because Republican voters in Massachusetts are spread out so evenly across the State, there is nowhere a concentrated enough number of Republicans to form the majority in a district drawn to comply with traditional, neutral districting criteria. In other words, the correct baseline for Massachusetts, at least in the 2000 round of redistricting, is actually 10-0 Democratic. As the dissent argued, the use of alternative, non-partisan maps enables us to determine which partisan outcomes are produced by partisan manipulation and which are produced by using non-partisan criteria, combined with a State’s actual political geography.

10. In the November 2018 elections, voters in four states – Michigan, Missouri, Colorado, and Utah – approved ballot measures to create independent commissions or other non-partisan processes to draw congressional or state legislative districts. The success of these measures, and the *Rucho* decision, mean that redistricting reformers will likely focus even more on voter-initiated ballot measures, in states that permit such processes.

But even if the power to draw districts is taken out of the hands of legislators, commissions will still have to confront the underlying question of what makes a districting plan “fair.” Indeed, the four measures passed this fall offer quite different answers to these questions. Paying attention to the specific details of the differences between the provisions in these states is a good way to test the question of what fairness ought to mean in districting.

The most fundamental conceptual question is the choice between two fundamentally different approaches to define a “fair” plan. The first is more process-oriented and insists that districting comply with criteria that reflect appropriate democratic values for designing districts, but that do not include partisan political considerations. Thus, in “partisan-blind” redistricting, districts would be designed to meet standards like equal population; compliance with the Voting Rights Act; keeping pre-existing political units (like towns, cities, and counties) together, to the extent possible; respecting communities of interest; and keeping districts reasonable compact and contiguous.

The second approach is an outcome-oriented approach that seeks to ensure a map is “fair” in the sense that the likely outcome of elections under the plan would be that each political party would end up with roughly the same percentage of seats as the percentage of votes it received. The “process-oriented” and “outcome oriented” approaches define two poles of the spectrum; one can imagine approaches that try to combine these approaches in various ways.

Here is a description, with some analysis, of the differences between the recently-enacted measures in these four states. The excerpt is from Richard H. Pildes, *Redistricting Reform and the 2018 Elections*, Harv. L. Rev. blog (Oct. 26, 2018), at <https://blog.harvardlawreview.org/redistricting-reform-and-the-2018-elections/>:

The Missouri measure, for example, which affects only state (not congressional) legislative districts, endorses the most extreme outcome-oriented approach of any statute or ballot measure I’ve seen. This measure provides standards that a non-partisan demographer, who designs the maps in the first instance, is required to use. After specifying that maps should be based on equal population, comply with federal law, and meet certain racial fairness requirements, the initiative then states that the demographer is to do the following:

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. Competitiveness means that parties’ legislative representation shall be substantially and similarly responsive to shifts in the electorate’s preferences. . . .

In any plan of apportionment and map of the proposed districts submitted to the respective apportionment commission, the non-partisan state demographer shall ensure the difference between the two parties’ total wasted votes, divided by the total votes cast for the two parties, is as close to zero as practicable.

The initiative, which proceeds to enact a type of efficiency gap test, requires that these outcome-oriented objectives take priority over making sure that districts are contiguous, compact, or keep towns and other units together (I don’t actually believe a

demographer would in fact ignore contiguity for the purposes of ensuring fair partisan outcomes, but that's how the initiative reads.)

Meanwhile, the Utah initiative appears to take a process-oriented approach, or perhaps to try to merge process and outcome approaches, but in a way likely to foster confusion. Thus, the commission is told that it must meet, to the greatest extent practical and in a specific order of priority, seven process-oriented criteria, which include the usual factors, along with ones such as “following natural and geographic features, boundaries, and barriers.” But then, after this specific list of rank-ordered priorities that must be followed to the greatest extent practical, the next provision tells the commission not to “divide districts in a manner that purposefully or unduly favors or disfavors ... any political party.” Utah's commission would be only advisory. The legislature can reject the commission's map and enact its own plan. However, it would be bound by the same criteria as the commission and would have to issue a report explaining why its plan did better at satisfying these criteria.

To tell the commission to follow process-based criteria and not engage in purposeful partisan gerrymandering is one thing. Both of those objectives can be accomplished together. But what does it mean to tell it both to follow these criteria and also not to “*unduly favor or disfavor*” a political party? . . .

Michigan's initiative, which applies to both Congress and state districts, is similar to Utah's in trying to blend process and outcome criteria, but with a different set of priorities. Thus, Michigan's proposal first requires compliance with federal law, contiguity, and then respect for communities of interest. But the next requirement, in order of priority, is that the “districts shall not provide a disproportionate advantage to any political party,” using “accepted measures of partisan fairness.” Only after that requirement is met is the commission then required to reflect pre-existing boundaries of towns, cities, and counties and to be reasonably compact.

Because the commission's plans cannot provide a disproportionate advantage to a party, this requirement goes beyond ensuring that the commission not act with partisan intent. The effects of its plan must still not advantage any party. In addition, since this requirement is given priority over drawing compact districts or keeping towns and the like together, the Michigan initiative might be read to require that districters use bizarrely shaped districts and break up towns, cities, and counties whenever necessary to ensure that the map produces fair partisan outcomes, in the sense that a party's proportion of seats corresponds to its proportion of statewide votes.

Finally, Colorado's dual initiatives (one for Congress and one for state districts), take another approach altogether. They also try to blend process and outcome approaches, but the outcomes that the commission is required to pursue are competitive elections, not partisan fairness. By their terms, these initiatives start with the standard requirements of population equality and compliance with federal law, then require preservation of communities of interest and compact districts. After that, the initiatives require that map drawers, “to the extent possible, maximize the number of politically competitive districts.”

There can be a significant difference between maximizing competitiveness and maximizing “fair” partisan outcomes. A plan in which all districts are designed to be 53% Party A voters and 47% Party B voters (based on past voting patterns) would be one in which all districts are competitive. But it might be that Party A would then win all the seats. Depending on precisely how “competitiveness” is interpreted, then, the Colorado

commission might operate with a very different sense of “fair districts” than that in Missouri or Michigan or Utah.

CHAPTER SEVEN

On page 832, after note 5, insert the following:

6. In *Abbott v. Perez*, 138 S.Ct. 2305 (2018), the Supreme Court addressed, inter alia, the question whether the configuration of two Texas state legislative districts violated section 2.

Prior to 2011, Nueces County had been divided among three districts, two of which were Latino opportunity districts. But the county’s relatively low population growth meant that the county, which had a voting-age population that was 56% Latino, could now be contained entirely within two districts. The state legislature’s 2013 redistricting plan created one Latino opportunity district and one district that was not a Latino opportunity district.

Plaintiffs challenged the state’s decision to draw only one Latino opportunity district. The district court found that it was not possible to divide Nueces County into what the Supreme Court described as “more than one *performing* Latino district.” The district court refused to require breaking the county line to draw two Nueces County-centered Latino opportunity districts because “breaking the County Line Rule” in the Texas Constitution, see Art. III, § 26, to “remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires.” The Supreme Court accordingly held that “if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.”

Does this holding about “*performing*” districts add any new requirement to section 2 cases? Where should predictions about electoral outcomes, as opposed to population demographics, fit into the *Gingles* analysis?

Notice that the courts seem to assume that there is no obligation to create a VRA district where doing so would require overriding a state constitutional provision that requires protecting county-boundary lines. Is this tantamount to the courts holding that a Sec. 2 district is not compact if creating it would require overriding such state constitutional provisions?

On p. 871, after note 5, insert the following:

BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE
141 S.Ct. 2321 (2021)

Justice Alito delivered the opinion of the Court.

[The case concerned challenges to two provisions of Arizona law. The first involved the use of provisional ballots, which voters use when they show up to vote at a precinct but their name is not on the registration list. If the voter is in fact eligible to vote in that precinct, their vote is counted. If the voter is not eligible to vote in that precinct, it is not.

The second 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 collect and return that voter’s early-voting ballot. This constituted a ban on third-party ballot collection, or what critics of such collection call “ballot harvesting.”]

In these cases, we are called upon for the first time to apply §2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted. Arizona law generally makes it very easy to vote. All voters may vote by mail or in person for nearly a month before election day, but Arizona imposes two restrictions that are claimed to be unlawful. First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter’s family member, household member, or caregiver. After a trial, a District Court upheld these rules, as did a panel of the United States Court of Appeals for the Ninth Circuit. But an en banc court, by a divided vote, found them to be unlawful. . . . We now hold that the en banc court misunderstood and misapplied §2 . . .

I

A

. . . In the years since *Gingles*, we have heard a steady stream of §2 vote-dilution cases, but until today, we have not considered how §2 applies to generally applicable time, place, or manner voting rules. In recent years, however, such claims have proliferated in the lower courts. . . .

III

A

In *Gingles*, our seminal §2 vote-dilution case, the Court quoted the text of amended §2 and then jumped right to the Senate Judiciary Committee Report, which focused on the issue of vote dilution. Our many subsequent vote-dilution cases have largely followed the path that *Gingles* charted. But because this is our first §2 time, place, or manner case, a fresh look at the statutory text is appropriate. Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.

B

Section 2(a), as noted, omits the phrase “to deny or abridge the right . . . to vote on account of race or color,” which the *Bolden* plurality had interpreted to require proof of discriminatory intent. In place of that language, §2(a) substitutes the phrase “in a manner which *results in* a denial or abridgement of the right . . . to vote on account of race or color.” (Emphasis added.) We need not decide what this text would mean if it stood alone because §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation. Section 2(b) states that §2 is violated only where “the political processes leading to nomination or election” are not “*equally open* to participation” by members of the relevant protected group “*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.” (Emphasis added.)

The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be “equally open” to minority and non-minority groups alike, and the most relevant definition of the term “open,” as used in §2(b), is “without restrictions as to who may participate,” or “requiring no special status, identification, or permit for entry or participation.”

What §2(b) means by voting that is not “equally open” is further explained by this language: “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.” The phrase “in that” is “used to specify the respect in which a statement is true.” Thus, equal openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness. And the term “opportunity” means, among other things, “a combination of circumstances, time, and place suitable or favorable for a particular activity or action.” [Webster's Third New International Dictionary 1583 (1976)]; *see also* Random House Dictionary of the English Language, at 1010 (“an appropriate or favorable time or occasion,” “a situation or condition favorable for attainment of a goal”).

Putting these terms together, it appears that the core of §2(b) is the requirement that voting be “equally open.” The statute’s reference to equal “opportunity” may stretch that concept to some degree to include consideration of a person’s ability to *use* the means that are equally open. But equal openness remains the touchstone.

C

One other important feature of §2(b) stands out. The provision requires consideration of “the totality of circumstances.” Thus, any circumstance that has a logical bearing on whether voting is “equally open” and affords equal “opportunity” may be considered. We will not attempt to compile an exhaustive list, but several important circumstances should be mentioned.

1. First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of “open[ness]” and “opportunity” connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. After all, every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is “equally open” and that furnishes an equal “opportunity” to cast a ballot must tolerate the “usual burdens of voting.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). Mere inconvenience cannot be enough to demonstrate a violation of §2.

2. For similar reasons, the degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration. Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared. The burdens associated with the rules in widespread use when §2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally “open” or furnishing an equal “opportunity” to vote in the sense meant by §2. Therefore, it is relevant that in 1982 States typically required nearly all voters to cast their ballots in

person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots. We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States. We have no need to decide whether adherence to, or a return to, a 1982 framework is necessarily lawful under §2, but the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.

3. The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.

4. Next, courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision. This follows from §2(b)'s reference to the collective concept of a State's "political processes" and its "political process" as a whole. Thus, 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.

5. Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account. As noted, every voting rule imposes a burden of some sort, and therefore, in determining "based on the totality of circumstances" whether a rule goes too far, it is important to consider the reason for the rule. Rules that are supported by strong state interests are less likely to violate §2.

One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.

Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. This interest helped to spur the adoption of what soon became standard practice in this country and in other democratic nations the world round: the use of private voting booths. ...

[W]e think it inappropriate to read §2 to impose a strict "necessity requirement" that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question. Demanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests. It would also transfer much of the authority to regulate election procedures from the States to the federal courts. ...

In light of the principles set out above, neither Arizona's out-of-precinct rule nor its ballot-collection law violates §2 of the VRA. Arizona's out-of-precinct rule enforces the requirement that voters who choose to vote in person on election day must do so in their assigned precincts. Having to identify one's own polling place and then travel there to vote does not exceed the "usual burdens of voting." *Crawford*, 553 U. S., at 198 (opinion of Stevens, J.) (noting the same about making a trip to the department of motor vehicles). On the contrary, these tasks are quintessential examples of the usual burdens of voting.

Not only are these unremarkable burdens, but the District Court's uncontested findings show that the State made extensive efforts to reduce their impact on the number of valid votes ultimately cast. The State makes accurate precinct information available to all voters. When precincts or polling places are altered between elections, each registered voter is sent a notice showing the voter's new polling place. ...

The burdens of identifying and traveling to one's assigned precinct are also modest when considering Arizona's "political processes" as a whole.... Any voter can request an early ballot without excuse. Any voter can ask to be placed on the permanent early voter list so that an early ballot will be mailed automatically. Voters may drop off their early ballots at any polling place, even one to which they are not assigned. And for nearly a month before election day, any voter can vote in person at an early voting location in his or her county. The availability of those options likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast—0.47% of all ballots in the 2012 general election and just 0.15% in 2016.

Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. The District Court accepted the plaintiffs' evidence that, of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot. For non-minority voters, the rate was around 0.5%. A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open....

The Court of Appeals' decision also failed to give appropriate weight to the state interests that the out-of-precinct rule serves. Not counting out-of-precinct votes induces compliance with the requirement that Arizonans who choose to vote in-person on election day do so at their assigned polling places. And as the District Court recognized, precinct-based voting furthers important state interests. It helps to distribute voters more evenly among polling places and thus reduces wait times. It can put polling places closer to voter residences than would a more centralized voting-center model. In addition, precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections. It is also significant that precinct-based voting has a long pedigree in the United States.

The Court of Appeals discounted the State's interests because, in its view, there was no evidence that a less restrictive alternative would threaten the integrity of precinct-based voting. ...Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives....

In light of the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, we conclude the rule does not violate §2 of the VRA.

B

HB 2023 likewise passes muster under the results test of §2. Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person. Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the “usual burdens of voting.” And voters can also ask a statutorily authorized proxy—a family member, a household member, or a caregiver—to mail a ballot or drop it off at any time within 27 days of an election. ...

The plaintiffs were unable to provide statistical evidence showing that HB 2023 had a disparate impact on minority voters. Instead, they called witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged. ...

Even if the plaintiffs had shown a disparate burden caused by HB 2023, the State's justifications would suffice to avoid §2 liability. Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. ...

The Commission warned that “[v]ote buying schemes are far more difficult to detect when citizens vote by mail,” and it recommended that “States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to “the voter, an acknowledged family member, the U. S. Postal Service or other legitimate shipper, or election officials.” *Id.*, at 47. HB 2023 is even more permissive in that it also authorizes ballot-handling by a voter's household member and caregiver.

The Court of Appeals thought that the State's justifications for HB 2023 were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. ...[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. Section 2's command that the political processes remain equally open surely does not demand that “a State's political system sustain some level of damage before the legislature [can] take corrective action.” Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. For example, the North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots. The Arizona Legislature was not obligated to wait for something similar to happen closer to home.

As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State’s justifications, leads us to the conclusion that the law does not violate §2 of the VRA.

* * *

Arizona’s out-of-precinct policy and HB 2023 do not violate §2 of the VRA... The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

[...] Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters. I could say—and will in the following pages—that this is not how the Court is supposed to interpret and apply statutes. But that ordinary critique woefully undersells the problem. What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about “the end of discrimination in voting.” I respectfully dissent...

II

...

A

Section 2, [referencing subsection (a) and (b)], has two interlocking parts. ...

Those provisions have a great many words, and I address them further below. But their essential import is plain: Courts are to strike down voting rules that contribute to a racial disparity in the opportunity to vote, taking all the relevant circumstances into account. ...

The “results in” language, connecting the covered voting rules to the prohibited voting abridgement, tells courts that they are to focus on the law’s effects. Rather than hinge liability on state officials’ motives, Congress made it ride on their actions’ consequences. ...But when to conclude—looking to effects, not purposes—that a denial or abridgment has occurred? Again, answering that question is subsection (b)’s function. It teaches that a violation is established when, “based on the totality of circumstances,” a State’s electoral system is “not equally open” to members of a racial group. And then the subsection tells us what that means. A system is not equally open if members of one race have “less opportunity” than others to cast votes, to participate in politics, or to elect representatives. The key demand, then, is for equal political opportunity across races.

That equal “opportunity” is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. ...In using that word, Congress

made clear that the Voting Rights Act does not demand equal outcomes. If members of different races have the same opportunity to vote, but go to the ballot box at different rates, then so be it—that is their preference, and Section 2 has nothing to say. But if a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageous) for one racial group than for others—then Section 2 kicks in. It applies, in short, whenever the law makes it harder for citizens of one race than of others to cast a vote....

[...] There is a Section 2 problem when an election rule, operating against the backdrop of historical, social, and economic conditions, makes it harder for minority citizens than for others to cast ballots. And strong state interests may save an otherwise discriminatory rule, but only if that rule is needed to achieve them—that is, only if a less discriminatory rule will not attain the State's goal. ...

B

The majority instead finds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a “totality of circumstances” analysis. ... That inquiry hardly gives a court the license to devise whatever limitations on Section 2’s reach it would have liked Congress to enact. But that is the license the majority takes. The “important circumstances” it invents all cut in one direction—toward limiting liability for race-based voting inequalities. ... The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens’ voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority’s non-test test makes it possible to save.

Start with the majority’s first idea: a “[m]ere inconvenience[]” exception to Section 2. Voting, the majority says, imposes a set of “usual burdens”: Some time, some travel, some rule compliance. And all of that is beneath the notice of Section 2—even if those burdens fall highly unequally on members of different races. But that categorical exclusion, for seemingly small (or “[un]usual” or “[un]serious”) burdens, is nowhere in the provision’s text. ... Congress, recall, was intent on eradicating the “subtle, as well as the obvious,” ways of suppressing minority voting. One of those more subtle ways is to impose “inconveniences,” especially a collection of them, differentially affecting members of one race. ... And what is a “mere inconvenience” or “usual burden” anyway? The drafters of the Voting Rights Act understood that “social and historical conditions,” including disparities in education, wealth, and employment, often affect opportunities to vote. ...

The majority’s “multiple ways to vote” factor is similarly flawed. True enough, a State with three ways to vote (say, on Election Day; early in person; or by mail) may be more “open” than a State with only one (on Election Day). And some other statute might care about that. But Section 2 does not. What it cares about is that a State’s “political processes” are “*equally* open” to voters of all races. And a State’s electoral process is not equally open if, for example, the State “only” makes Election Day voting by members of one race peculiarly difficult. ... Making one method of voting less available to minority citizens than to whites necessarily means giving the former “less opportunity than other members of the electorate to participate in the political process.”

The majority’s history-and-commonality factor also pushes the inquiry away from what the statute demands. The oddest part of the majority’s analysis is the idea that “what was standard practice when §2 was amended in 1982 is a relevant consideration.” The 1982 state of the world is no part of the Section 2 test. ...Even if those rules are unlikely to

violate Section 2 everywhere, they may easily do so somewhere. That is because the demographics and political geography of States vary widely and Section 2’s application depends on place-specific facts. ...

That leaves only the majority’s discussion of state interests, which is again skewed so as to limit Section 2 liability. No doubt that under our precedent, a state interest in an election rule “is a legitimate factor to be considered.” But the majority wrongly dismisses the need for the closest possible fit between means and end—that is, between the terms of the rule and the State’s asserted interest. ...

The majority’s approach, which would ask only whether a discriminatory law “*reasonably* pursue[s] important state interests,” gives election officials too easy an escape from Section 2. Of course preventing voter intimidation is an important state interest. And of course preventing election fraud is the same. But those interests are also easy to assert groundlessly or pretextually in voting discrimination cases....

III

Just look at Arizona. Two of that State’s policies disproportionately affect minority citizens’ opportunity to vote. ...

A

Arizona’s out-of-precinct policy requires discarding any Election Day ballot cast elsewhere than in a voter’s assigned precinct. Under the policy, officials throw out every choice in every race—including national or statewide races (*e.g.*, for President or Governor) that appear identically on every precinct’s ballot. The question is whether that policy unequally affects minority citizens’ opportunity to cast a vote.

Although the majority portrays Arizona’s use of the rule as “unremarkable,” the State is in fact a national aberration when it comes to discarding out-of-precinct ballots. In 2012, about 35,000 ballots across the country were thrown out because they were cast at the wrong precinct. Nearly one in three of those discarded votes—10,979—was cast in Arizona. ... [A]cross the five elections at issue in this litigation (2008–2016), Arizona threw away far more out-of-precinct votes—almost 40,000—than did any other State in the country.

Votes in such numbers can matter—enough for Section 2 to apply. The majority obliquely suggests not, comparing the smallish number of thrown-out votes (minority and non-minority alike) to the far larger number of votes cast and counted. But elections are often fought and won at the margins—certainly in Arizona. Consider the number of votes separating the two presidential candidates in the most recent election: 10,457. That is fewer votes than Arizona discarded under the out-of-precinct policy in two of the prior three presidential elections....

And the out-of-precinct policy operates unequally: Ballots cast by minorities are more likely to be discarded. In 2016, Hispanics, African Americans, and Native Americans were about twice as likely—or said another way, 100% more likely—to have their ballots discarded than whites. ...Assessing those disparities, the plaintiffs’ expert found, and the District Court accepted, that the discriminatory impact of the out-of-precinct policy was statistically significant—meaning, again, that it was highly unlikely to occur by chance. ...

And the case against Arizona’s policy grows only stronger the deeper one digs. . . . Much of the story has to do with the siting and shifting of polling places. Arizona moves polling places at a startling rate. . . . The odds of those changes leading to mistakes increased yet further because the affected areas are home to citizens with relatively low education and income levels. And even putting relocations aside, the siting of polling stations in minority areas caused significant out-of-precinct voting. Hispanic and Native American voters had to travel further than white voters did to their assigned polling places. And all minority voters were disproportionately likely to be assigned to polling places other than the ones closest to where they lived. . . .

Facts also undermine the State’s asserted interests, which the majority hangs its hat on. A government interest, as even the majority recognizes, is “merely one factor to be considered” in Section 2’s totality analysis. Here, the State contends that it needs the out-of-precinct policy to support a precinct-based voting system. But 20 other States combine precinct-based systems with mechanisms for partially counting out-of-precinct ballots (that is, counting the votes for offices like President or Governor). And the District Court found that it would be “administratively feasible” for Arizona to join that group. . . .

B

Arizona’s law mostly banning third-party ballot collection also results in a significant race-based disparity in voting opportunities. The problem with that law again lies in facts nearly unique to Arizona—here, the presence of rural Native American communities that lack ready access to mail service. . . . Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. And for many or most, there is no nearby post office. Native Americans in rural Arizona “often must travel 45 minutes to 2 hours just to get to a mailbox.” And between a quarter to a half of households in these Native communities do not have a car. So getting ballots by mail and sending them back poses a serious challenge for Arizona’s rural Native Americans.

For that reason, an unusually high rate of Native Americans used to “return their early ballots with the assistance of third parties.” . . . Put all of that together, and Arizona’s ballot-collection ban violates Section 2. The ban interacts with conditions on the ground—most crucially, disparate access to mail service—to create unequal voting opportunities for Native Americans. . . . What is an inconsequential burden for others is for these citizens a severe hardship. And the State has shown no need for the law to go so far. Arizona, as noted above, already has statutes in place to deter fraudulent collection practices. Those laws give every sign of working. Arizona has not offered any evidence of fraud in ballot collection, or even an account of a harm threatening to happen. . . .

NOTES AND QUESTIONS

1. The Trump administration filed a brief in support of Arizona. When the Biden administration took office in January 2020, the Solicitor General’s Office filed a letter with the Court. That letter stated that the Biden administration agreed that the Arizona law did not violate the VRA, but that it did not agree with the prior administration’s legal analysis of Section 2. But that letter did not provide an alternative analysis and the Biden administration did not file a brief in the case.
2. Justice Kagan argues that the racial disparity of the impact of precinct limitations on

voting is 2:1 from minorities to non-minorities. By contrast, Justice Alito finds that roughly 99 percent of minority voters properly navigate the in-precinct voting requirements, as do 99.5 percent of non-minority voters. There is no factual difference between these two statistical representations, but one seems to indicate a pronounced racial impact and one implies a trivial impact on anyone. How should courts navigate these statistical arguments? Do measures of statistical significance help? Does the statutory language concerning the totality of the circumstances help?

3. Justice Alito uses practices in existence in 1982 as a benchmark for assessing the legitimacy of challenged state practices. As the Court acknowledges, the 1982 amendments to Section 2 were framed as a response to the Court's ruling in *City of Mobile v. Bolden* that historic practices could not be challenged except through a showing of discriminatory purpose in the original adoption of such practices, as with the at-large elections in Mobile, Alabama. Has the majority flipped the import of Section 2 by reading into the statute a presumption of legitimacy for pre-1982 practices, including presumably the municipal election system in Mobile? Further, the use of past practice to define legitimate baselines is generally associated with the non-retrogression standard of Section 5 of the Act, the now-dismantled preclearance regime. Is this intra-statutory borrowing proper? Is this what Justice O'Connor anticipated in her attempt at a comprehensive synthesis of the Act in *Georgia v. Ashcroft*?

4. Note that the Court holds an important consideration that favors upholding a challenged rule is whether it "has a long pedigree or is in widespread use in the United States." Going forward, this more general consideration is likely to be more important than the narrower issue of what the state of voting laws might have been in 1982. Does this consideration suggest that only laws that are considerable outliers are likely to violate Section 2?

5. Justice Kagan contends that if there are several pathways to vote (e.g., in person, absentee, early), a proper Section 2 analysis should review each one separately. By contrast, Justice Alito would look at them together as part of the totality of circumstances to determine if minority voters have less opportunity. The question whether intermediate steps should be considered alone or whether all the steps should be assessed together has long been a difficult one for discrimination law. In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Supreme Court struck down as discriminatory an employment test that had a disparate impact on black applicants, despite other corrective measures that removed the disparity in actual hiring. *Teal* was a pure disparate impact case, something that Section 2 distinguished in its adoption of a "results" test based on the totality of the circumstances. Who gets the better of the statutory argument on this question?

6. Justice Kagan says that the Arizona ballot harvesting ban is a problem for Native Americans because it does not provide exceptions for clan members or others with Native kinship ties (i.e., the equivalent of family members). Does that mean this provision would be legal under Section 2 if it did so? Similarly, would her remedy be to invalidate this provision altogether? Or to hold that it violates Section 2 as applied to Native Americans? Finally, she says the problem with this law "lies in facts nearly unique to Arizona." Does that mean that bans on third-party ballot collection would not generally violate her understanding of Section 2?

7. In a part of the Court's opinion not reproduced above, the Court also reinstated the district court's conclusion that the ballot-collection provisions were not purposefully discriminatory. The district court had noted that the law had "followed increased use of ballot collection as a Democratic get-out-the-vote strategy and came 'on the heels of several prior efforts to restrict ballot collection, some of which were spearheaded by former

Arizona State Senator Don Shooter,” who had made “unfounded and often far-fetched allegations of ballot collection fraud,” and after others had made “racially tinged videos.” But the district court concluded that ultimately the bill was the product of sincere legislative debate over election integrity.

The Court affirmed that finding. It declared that “[t]he spark for the debate over mail-in voting may well have been provided by one Senator’s enflamed partisanship, but partisan motives are not the same as racial motives. . . . [T]he voting preferences of members of a racial group may make the former look like the latter, but [the district court] carefully distinguished between the two.” And even if some legislators or outsiders had racial motivations, the Court rejected the idea that those motivations could be attributed to the legislature as a whole: “The ‘cat’s paw’ theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill’s sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.”

Can racial and political motives generally be distinguished from one another, particularly if partisan voting patterns are highly correlated with race? Does the Court’s rejection of the cat’s paw theory represent a change in how legislative intent is determined?

On page 883, before the Notes and Questions, insert the following:

After a full trial, the district court rejected the plaintiffs’ section 2 claims, both with respect to their results claim and with respect to their intent claim. On appeal, the Fourth Circuit reversed, addressing only the intent claim.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP V. MCCRORY
831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)

DIANA GRIBBON MOTZ, Circuit Judge, writing for the court except as to Part V.B.:

These consolidated cases challenge provisions of a recently enacted North Carolina election law. . . .

Voting in many areas of North Carolina is racially polarized. That is, “the race of voters correlates with the selection of a certain candidate or candidates.” *Thornburg v. Gingles*, 478 U.S. 30, 62, (1986) (discussing North Carolina). In *Gingles* and other cases brought under the Voting Rights Act, the Supreme Court has explained that polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them. In North Carolina, restriction of voting mechanisms and procedures that most heavily affect African Americans will predictably redound to the benefit of one political party and to the disadvantage of the other. As the evidence in the record makes clear, that is what happened here.

After years of preclearance and expansion of voting access, by 2013 African American registration and turnout rates had finally reached near-parity with white registration and turnout rates. African Americans were poised to act as a major electoral

force. But, on the day after the Supreme Court issued *Shelby County v. Holder*, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an “omnibus” election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.

In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State’s true motivation. “In essence,” as in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 440, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006), “the State took away [minority voters’] opportunity because [they] were about to exercise it.” As in *LULAC*, “[t]his bears the mark of intentional discrimination.” . . .

I

* * *

During the period in which North Carolina jurisdictions were covered by § 5, African American electoral participation dramatically improved. In particular, between 2000 and 2012, when the law provided for the voting mechanisms at issue here and did not require photo ID, African American voter registration swelled by 51.1%. (compared to an increase of 15.8% for white voters). African American turnout similarly surged, from 41.9% in 2000 to 71.5% in 2008 and 68.5% in 2012. Not coincidentally, during this period North Carolina emerged as a swing state in national elections.

Then, in late June 2013, the Supreme Court issued its opinion in *Shelby County*. . . [T]he day after the Supreme Court issued *Shelby County*, the “Republican Chairman of the [Senate] Rules Committee[] publicly stated, ‘I think we’ll have an omnibus bill coming out’ and ... that the Senate would move ahead with the ‘full bill.’ ” The legislature then swiftly expanded an essentially single-issue bill into omnibus legislation, enacting it as Session Law (“SL”) 2013–381.

In this one statute, the North Carolina legislature imposed a number of voting restrictions. The law required in-person voters to show certain photo IDs, beginning in 2016, which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used. Moreover, as the district court found, prior to enactment of SL 2013–381, the legislature requested and received racial data as to usage of the practices changed by the proposed law.

This data showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV). The pre-*Shelby County* version of SL 2013–381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. After *Shelby County*, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the

bill retained only the kinds of IDs that white North Carolinians were more likely to possess.

The district court found that, prior to enactment of SL 2013–381, legislators also requested data as to the racial breakdown of early voting usage. Early voting allows any registered voter to complete an absentee application and ballot at the same time, in person, in advance of Election Day. Early voting thus increases opportunities to vote for those who have difficulty getting to their polling place on Election Day.

The racial data provided to the legislators revealed that African Americans disproportionately used early voting in both 2008 and 2012. In particular, African Americans disproportionately used the first seven days of early voting. After receipt of this racial data, the General Assembly amended the bill to eliminate the first week of early voting, shortening the total early voting period from seventeen to ten days. As a result, SL 2013–381 also eliminated one of two “souls-to-the-polls” Sundays in which African American churches provided transportation to voters.

The district court found that legislators similarly requested data as to the racial makeup of same-day registrants. Prior to SL 2013–381, same-day registration allowed eligible North Carolinians to register in person at an early voting site at the same time as casting their ballots. Same-day registration provided opportunities for those as yet unable to register, as well as those who had ended up in the “incomplete registration queue” after previously attempting to register. Same-day registration also provided an easy avenue to re-register for those who moved frequently, and allowed those with low literacy skills or other difficulty completing a registration form to receive personal assistance from poll workers.

The legislature’s racial data demonstrated that, as the district court found, “it is indisputable that African American voters disproportionately used [same-day registration] when it was available.” The district court further found that African American registration applications constituted a disproportionate percentage of the incomplete registration queue. And the court found that African Americans “are more likely to move between counties,” and thus “are more likely to need to re-register.” As evidenced by the types of errors that placed many African American applications in the incomplete queue, in-person assistance likely would disproportionately benefit African Americans. SL 2013–381 eliminated same-day registration.

Legislators additionally requested a racial breakdown of provisional voting, including out-of-precinct voting. Out-of-precinct voting required the Board of Elections in each county to count the provisional ballot of an Election Day voter who appeared at the wrong precinct, but in the correct county, for all of the ballot items for which the voter was eligible to vote. This provision assisted those who moved frequently, or who mistook a voting site as being in their correct precinct.

The district court found that the racial data revealed that African Americans disproportionately voted provisionally. In fact, the General Assembly that had originally enacted the out-of-precinct voting legislation had specifically found that “of those registered voters who happened to vote provisional ballots outside their resident precincts” in 2004, “a disproportionately high percentage were African American.” With SL 2013–381, the General Assembly altogether eliminated out-of-precinct voting.

African Americans also disproportionately used preregistration. Preregistration permitted 16- and 17-year-olds, when obtaining driver’s licenses or attending mandatory

high school registration drives, to identify themselves and indicate their intent to vote. This allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen. Although preregistration increased turnout among young adult voters, SL 2013–381 eliminated it.

The district court found that not only did SL 2013–381 eliminate or restrict these voting mechanisms used disproportionately by African Americans, and require IDs that African Americans disproportionately lacked, but also that African Americans were more likely to “experience socioeconomic factors that may hinder their political participation.” This is so, the district court explained, because in North Carolina, African Americans are “disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health.”

Nevertheless, over protest by many legislators and members of the public, the General Assembly quickly ratified SL 2013–381 by strict party-line votes. The Governor, who was of the same political party as the party that controlled the General Assembly, promptly signed the bill into law on August 12, 2013. . . .

[T]rial was scheduled to begin on July 13, 2015. However, on June 18, 2015, the General Assembly ratified House Bill 836, enacted as Session Law (“SL”) 2015–103. This new law amended the photo ID requirement by permitting a voter without acceptable ID to cast a provisional ballot if he completed a declaration stating that he had a reasonable impediment to acquiring acceptable photo ID (“the reasonable impediment exception”). Given this enactment, the district court bifurcated trial of the case. . . .

[Ultimately,] the district court entered judgment against the Plaintiffs on all of their claims as to all of the challenged provisions. . . .

II

A

* * *

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination....

When considering whether discriminatory intent motivates a facially neutral law, a court must undertake a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*. Challengers need not show that discriminatory purpose was the “sole[]” or even a “primary” motive for the legislation, just that it was “a motivating factor.” (emphasis added). Discriminatory purpose “may often 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.” [*Washington v. Davis*, 426 U.S. [229 (1976)]. But the ultimate question remains: did the legislature enact a law “because of,” and not “in spite of,” its discriminatory effect. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

In *Arlington Heights*, the Court set forth a nonexhaustive list of factors to consider in making this sensitive inquiry. These include: “[t]he historical background of the [challenged] decision”; “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from normal procedural sequence”; the legislative history of the decision; and of course, the disproportionate “impact of the official action—whether it bears more heavily on one race than another.”

In instructing courts to consider the broader context surrounding the passage of legislation, the Court has recognized that “[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for “[d]iscrimination today is more subtle than the visible methods used in 1965.” H.R. Rep. No. 109–478, at 6 (2006). Even “second-generation barriers” to voting, while facially race neutral, may nonetheless be motivated by impermissible racial discrimination. . . .

“Once racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” When determining if this burden has been met, courts must be mindful that “racial discrimination is not just another competing consideration.” *Arlington Heights*, 429 U.S. at 265–66. For this reason, the judicial deference accorded to legislators when “balancing numerous competing considerations” is “no longer justified.” Instead, courts must scrutinize the legislature’s *actual* non-racial motivations to determine whether they *alone* can justify the legislature’s choices. . . .

B

In the context of a § 2 discriminatory intent analysis, one of the critical background facts of which a court must take notice is whether voting is racially polarized. Indeed, to prevail in a case alleging discriminatory *dilution* of minority voting strength under § 2, a plaintiff must prove this fact as a threshold showing. *See Gingles*, 478 U.S. at 51....

While the Supreme Court has expressed hope that “racially polarized voting is waning,” it has at the same time recognized that “racial discrimination and racially polarized voting are not ancient history.” *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). In fact, recent scholarship suggests that, in the years following President Obama’s election in 2008, areas of the country formerly subject to § 5 preclearance have seen an *increase* in racially polarized voting. *See* Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. F. 205, 206 (2013). Further, “[t]his gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions.”

Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections....

[The Supreme Court’s recognition in *LULAC v. Perry*] that racially polarized voting may motivate politicians to entrench themselves through discriminatory election

laws applies with equal force in the vote denial context. Indeed, it applies perhaps even more powerfully in cases like that at hand, where the State has restricted access to the franchise. This is so because, unlike in redistricting, where states may consider race and partisanship to a certain extent, legislatures cannot restrict voting access on the basis of race. (Nor, we note, can legislatures restrict access to the franchise based on the desire to benefit a certain political party. *See Anderson v. Celebrezze*, 460 U.S. 780, 792–93 (1983).)

Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.

III

With these principles in mind, we turn to their application in the case at hand.

A

* * *

Unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular. Although we recognize its limited weight, *see Shelby Cty.*, 133 S.Ct. at 2628–29, North Carolina’s pre-1965 history of pernicious discrimination informs our inquiry. For “[i]t was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race.”

While it is of course true that “history did not end in 1965,” it is equally true that SL 2013–381 imposes the first meaningful restrictions on voting access since that date—and a comprehensive set of restrictions at that. Due to this fact, and because the legislation came into being literally within days of North Carolina’s release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise. Failure to so recognize would risk allowing that troubled history to “pick[] up where it left off in 1965” to the detriment of African American voters in North Carolina. . . .

The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans. In some of these instances, the Department of Justice or federal courts have determined that the North Carolina General Assembly acted with discriminatory intent, “reveal[ing] a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at 267. In others, the Department of Justice or courts have found that the General Assembly’s action produced discriminatory results. The latter evidence, of course, proves less about discriminatory intent than the former, but it is informative. A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose.

. . .

[T]he Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina—including several since 2000—because the State had failed to prove the proposed changes would have no discriminatory purpose or effect. . . .

During the same period, private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act. . . .

And only a few months ago (just weeks before the district court issued its opinion in the case at hand), a three-judge court addressed a redistricting plan adopted by the same General Assembly that enacted SL 2013–381. The court held that race was the predominant motive in drawing two congressional districts, in violation of the Equal Protection Clause. . . .

The district court failed to take into account these cases and their important takeaway: that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day. Only the robust protections of § 5 and suits by private plaintiffs under § 2 of the Voting Rights Act prevented those efforts from succeeding. These cases also highlight the manner in which race and party are inexorably linked in North Carolina. This fact constitutes a critical—perhaps the most critical—piece of historical evidence here. The district court failed to recognize this linkage, leading it to accept “politics as usual” as a justification for many of the changes in SL 2013–381. But that cannot be accepted where politics as usual translates into race-based discrimination. . . .

[The General Assembly] certainly knew that African American voters were highly likely, and that white voters were unlikely, to vote for Democrats. And it knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers. Indeed, much of the recent success of Democratic candidates in North Carolina resulted from African American voters overcoming historical barriers and making their voices heard to a degree unmatched in modern history.

Despite this, the district court took no issue with one of the legislature’s stated purposes in enacting SL 2013–381—to “mov[e] the law back to the way it was.” Rather, the court apparently regarded this as entirely appropriate. The court noted repeatedly that the voting mechanisms that SL 2013–381 restricts or eliminates were ratified “relatively recently,” “almost entirely along party lines,” when “Democrats controlled” the legislature; and that SL 2013–381 was similarly ratified “along party lines” after “Republicans gained . . . control of both houses.”

Thus, the district court apparently considered SL 2013–381 simply an appropriate means for one party to counter recent success by another party. We recognize that elections have consequences, but winning an election does not empower anyone in any party to engage in purposeful racial discrimination. When a legislature dominated by one party has dismantled barriers to African American access to the franchise, even if done to gain votes, “politics as usual” does not allow a legislature dominated by the other party to re-erect those barriers.

The record evidence is clear that this is exactly what was done here. For example, the State argued before the district court that the General Assembly enacted changes to early voting laws to avoid “political gamesmanship” with respect to the hours and locations of early voting centers. As “evidence of justifications” for the changes to early voting, the State offered purported inconsistencies in voting hours across counties, including the fact

that only some counties had decided to offer Sunday voting. The State then elaborated on its justification, explaining that “[c]ounties with Sunday voting in 2014 were disproportionately black” and “disproportionately Democratic.” In response, SL 2013–381 did away with one of the two days of Sunday voting. Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges *explicitly* on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise. . . .

B

Arlington Heights also instructs us to consider the “specific sequence of events leading up to the challenged decision.” In doing so, a court must consider “[d]epartures from the normal procedural sequence,” which may demonstrate “that improper purposes are playing a role.” The sequential facts found by the district court are undeniably accurate. Indeed, they are undisputed. And they are devastating. The record shows that, immediately after *Shelby County*, the General Assembly vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965. The district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent.

The district court found that prior to *Shelby County*, SL 2013–381 numbered only sixteen pages and contained none of the challenged provisions, with the exception of a much less restrictive photo ID requirement. As the court further found, this pre-*Shelby County* bill was afforded more than three weeks of debate in public hearings and almost three more weeks of debate in the House. For this version of the bill, there was some bipartisan support: “[f]ive House Democrats joined all present Republicans in voting for the voter-ID bill.”

Then, on June 25, 2013, the Supreme Court issued its opinion in *Shelby County*. The very next day, the Chairman of the Senate Rules Committee proclaimed that the legislature “would now move ahead with the full bill,” which he recognized would be “omnibus” legislation. After that announcement, no further public debate or action occurred for almost a month. As the district court explained, “[i]t was not until July 23 ... that an expanded bill, including the election changes challenged in this case, was released.”

The new bill—now fifty-seven pages in length—targeted four voting and registration mechanisms, which had previously expanded access to the franchise, and provided a much more stringent photo ID provision. Post-*Shelby County*, the change in accepted photo IDs is of particular note: the new ID provision retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans. The district court specifically found that “the removal of public assistance IDs” in particular was “suspect,” because “a reasonable legislator [would be] aware of the socioeconomic disparities endured by African Americans [and] could have surmised that African Americans would be more likely to possess this form of ID.”

Moreover, after the General Assembly finally revealed the expanded SL 2013–381 to the public, the legislature rushed it through the legislative process. The new SL 2013–381 moved through the General Assembly in three days: one day for a public hearing, two days in the Senate, and two *hours* in the House. . . . This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny. Indeed, neither this legislature—

nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise.

The district court erred in accepting the State’s efforts to cast this suspicious narrative in an innocuous light. . . .

[T]he district court dismissed the expanded law’s proximity to the *Shelby County* decision as above suspicion. The Court found that the General Assembly “would not have been unreasonable” to wait until after *Shelby County* to consider the “full bill” because it could have concluded that the provisions of the “full bill” were “simply not worth the administrative and financial cost” of preclearance. Although desire to avoid the hassle of the preclearance process could, in another case, justify a decision to await the outcome in *Shelby County*, that inference is not persuasive in this case. For here, the General Assembly did not simply wait to enact changes to its election laws that might require the administrative hassle of, but likely would pass, preclearance. Rather, after *Shelby County* it moved forward with what it acknowledged was an omnibus bill that restricted voting mechanisms it knew were used disproportionately by African Americans and so likely would not have passed preclearance. And, after *Shelby County*, the legislature substantially changed the one provision that it had fully debated before. . . . This fact alone undermines the possibility that the post-*Shelby County* timing was merely to avoid the administrative costs.

Instead, this sequence of events—the General Assembly’s eagerness to, at the historic moment of *Shelby County*’s issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow—bespeaks a certain purpose. Although this factor, as with the other *Arlington Heights* factors, is not dispositive on its own, it provides another compelling piece of the puzzle of the General Assembly’s motivation. . . .

D

Finally, *Arlington Heights* instructs that courts also consider the “impact of the official action”—that is, whether “it bears more heavily on one race than another.” The district court expressly found that “African Americans disproportionately used” the removed voting mechanisms and disproportionately lacked DMV-issued photo ID. Nevertheless, the court concluded that this “disproportionate[] use[]” did not “significantly favor a finding of discriminatory purpose.” In doing so, the court clearly erred. Apparently, the district court believed that the disproportionate impact of the new legislation “depends on the options remaining” after enactment of the legislation. *Arlington Heights* requires nothing of the kind. . . .

When plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not “the sole touchstone” of the claim. . . . Showing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent. . . .

Moreover, the district court also clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013–381 does not bear more heavily on African Americans. *See Clingman v. Beaver*, 544 U.S. 581, 607–08 (2005) (O’Connor, J., concurring) (“A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.”). For example, the photo ID requirement inevitably increases the steps

required to vote, and so slows the process. The early voting provision reduced the number of days in which citizens can vote, resulting in more voters voting on Election Day. Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually.

The district court discounted the claim that these provisions burden African Americans, citing the fact that similar election laws exist or have survived challenges in other states. But the sheer number of restrictive provisions in SL 2013–381 distinguishes this case from others. Moreover, *removing* voting tools that have been disproportionately used by African Americans meaningfully differs from not initially implementing such tools.

The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past. No law implicated here—neither the Fourteenth Amendment nor § 2—requires such an onerous showing. Emblematic of this error is the almost dispositive weight the court gave to the fact that African American aggregate turnout increased by 1.8% in the 2014 midterm election as compared to the 2010 midterm election. In addition to being beyond the scope of disproportionate impact analysis under *Arlington Heights*, several factors counsel against such an inference.

First, as the Supreme Court has explained, courts should not place much evidentiary weight on any one election. This is especially true for midterm elections. As the State's own expert testified, fewer citizens vote in midterm elections, and those that do are more likely to be better educated, repeat voters with greater economic resources.

Moreover, although aggregate African American turnout increased by 1.8% in 2014, many African American votes went uncounted. As the district court found, African Americans disproportionately cast provisional out-of-precinct ballots, which would have been counted absent SL 2013–381. And thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of SL 2013–381 could not then vote. Furthermore, the district court failed to acknowledge that a 1.8% increase in voting actually represents a significant *decrease* in the *rate* of change. For example, in the prior four-year period, African American midterm voting had increased by 12.2%.

In sum, while the district court recognized the undisputed facts as to the impact of the challenged provisions of SL 2013–381, it simply refused to acknowledge their import. The court concluded its analysis by remarking that these provisions simply eliminated a system “preferred” by African Americans as “more convenient.” But as the court itself found elsewhere in its opinion, “African Americans ... in North Carolina are disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health.”

These socioeconomic disparities establish that no mere “preference” led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration. Nor does preference lead African Americans to disproportionately lack acceptable photo ID. Yet the district court refused to make the inference that undeniably flows from the disparities it found many African Americans in

North Carolina experienced. Registration and voting tools may be a simple “preference” for many white North Carolinians, but for many African Americans, they are a necessity.

E

In sum, assessment of the *Arlington Heights* factors requires the conclusion that, at least in part, discriminatory racial intent motivated the enactment of the challenged provisions in SL 2013–381. The district court clearly erred in holding otherwise. In large part, this error resulted from the court’s consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*. Any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context.

Our conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group. But the totality of the circumstances—North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and unmistakably reveal that the General Assembly used SL 2013–381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.

IV

Because Plaintiffs have established race as a factor that motivated enactment of the challenged provisions of SL 2013–381, the burden now “shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” . . .

A court assesses whether a law would have been enacted without a racially discriminatory motive by considering the substantiality of the state’s proffered non-racial interest and how well the law furthers that interest.

Given a state’s interest in the fair administration of its elections, a rational justification can be imagined for many election laws, including some of the challenged provisions here. But a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law like SL 2013–381. Only then can a court determine whether a legislature would have enacted that law regardless of its impact on African American voters.

In this case, despite finding that race was not a motivating factor for enactment of the challenged provisions of SL 2013–381, the district court addressed the State’s justifications for each provision at length. The court did so, however, through a rational-basis-like lens. For example, the court found the General Assembly’s decision to eliminate same-day registration “not unreasonable,” and found “at least plausible” the reasons offered for excluding student IDs from the list of qualifying IDs. But, of course, a finding that legislative justifications are “plausible” and “not unreasonable” is a far cry from a finding that a particular law would have been enacted without considerations of race. As the Supreme Court has made clear, such deference in that inquiry is wholly inappropriate. *See Arlington Heights*, 429 U.S. at 265–66 (explaining that because “racial discrimination is not just another competing consideration,” a court must do much more than review for “arbitrariness or irrationality”). . . .

In enacting the photo ID requirement, the General Assembly stated that it sought to combat voter fraud and promote public confidence in the electoral system. See 2013 N.C. Sess. Laws 381. These interests echo those the *Crawford* Court held justified a photo ID requirement in Indiana. The State relies heavily on that holding. But that reliance is misplaced because of the fundamental differences between *Crawford* and this case.

The challengers in *Crawford* did not even allege intentional race discrimination. Rather, they mounted a facial attack on a photo ID requirement as unduly burdensome on the right to vote generally. The *Crawford* Court conducted an “*Anderson–Burdick*” analysis, balancing the burden of a law on voters against the state’s interests, and concluded that the photo ID requirement “impose[d] only a limited burden on voters’ rights.” *Crawford*, 553 U.S. at 202–03. Given that limited burden, the Court deferred to the Indiana legislature’s choice of how to best serve its legitimate interests.

That deference does not apply here because the evidence in this case establishes that, at least in part, race motivated the North Carolina legislature. Thus, we do not ask whether the State has an interest in preventing voter fraud—it does—or whether a photo ID requirement constitutes one way to serve that interest—it may—but whether the legislature would have enacted SL 2013–381’s photo ID requirement if it had no disproportionate impact on African American voters. The record evidence establishes that it would not have.

The photo ID requirement here is both too restrictive and not restrictive enough to effectively prevent voter fraud . . . First, the photo ID requirement, which applies only to in-person voting and not to absentee voting, is too narrow to combat fraud. On the one hand, the State has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina. On the other, the General Assembly *did* have evidence of alleged cases of mail-in absentee voter fraud. Notably, the legislature also had evidence that absentee voting was *not* disproportionately used by African Americans; indeed, whites disproportionately used absentee voting. The General Assembly then exempted absentee voting from the photo ID requirement. This was so even though members of the General Assembly had proposed amendments to require photo ID for absentee voting, and the bipartisan State Board of Elections¹¹ specifically requested that the General Assembly remedy the potential for mail-in absentee voter fraud and expressed no concern about in-person voter fraud.

The photo ID requirement is also too broad, enacting seemingly irrational restrictions unrelated to the goal of combating fraud. This overbreadth is most stark in the General Assembly’s decision to exclude as acceptable identification all forms of state-issued ID disproportionately held by African Americans. The State has offered little evidence justifying these exclusions. Review of the record further undermines the contention that the exclusions are tied to concerns of voter fraud. This is so because voters who lack qualifying ID under SL 2013–381 may apply for a free voter card using two of the *very same forms* of ID excluded by the law. Thus, forms of state-issued IDs the General Assembly deemed insufficient to prove a voter’s identity on Election Day are sufficient if shown during a separate process to a separate state official. In this way, SL 2013–381 elevates form over function, creating hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud.

The State’s proffered justifications regarding restrictions on early voting similarly fail. The State contends that one purpose of SL 2013–381’s reduction in early voting days was to correct inconsistencies among counties in the locations and hours of early voting

centers. . . .

[But] in its quest for “consistency” in the availability of early voting, the General Assembly again disregarded the recommendations of the State Board of Elections. The Board counseled that, although reducing the number of days of early voting might ease administrative burdens for lower turnout elections, doing so for high-turnout elections would mean that “North Carolina voters’ needs will not be accommodated.” The Board explained that reducing early voting days would mean that “traffic will be increased on Election Day, increasing demands for personnel, voting equipment and other supplies, and resulting in likely increases to the cost of elections.”

Concerning same-day registration, the State justifies its elimination as a means to avoid administrative burdens that arise when verifying the addresses of those who register at the very end of the early voting period. These concerns are real. Even so, the complete elimination of same-day registration hardly constitutes a remedy carefully drawn to accomplish the State’s objectives. The General Assembly had before it alternative proposals that would have remedied the problem without abolishing the popular program. . . .

In other circumstances we would defer to the prerogative of a legislature to choose among competing policy proposals. But, in the broader context of SL 2013–381’s multiple restrictions on voting mechanisms disproportionately used by African Americans, we conclude that the General Assembly would not have eliminated same-day registration entirely but-for its disproportionate impact on African Americans. . . .

In sum, the array of electoral “reforms” the General Assembly pursued in SL 2013–381 were not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions in SL 2013–381 constitute solutions in search of a problem. The only clear factor linking these various “reforms” is their impact on African American voters. The record thus makes obvious that the “problem” the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so. We therefore must conclude that race constituted a but-for cause of SL 2013–381, in violation of the Constitutional and statutory prohibitions on intentional discrimination.

V.

As relief in this case, Plaintiffs ask that we declare the challenged provisions in SL 2013–381 unconstitutional and violative of § 2 of the Voting Rights Act, and that we permanently enjoin each provision. They further ask that we exercise our authority pursuant to § 3 of the Voting Rights Act to authorize federal poll observers and place North Carolina under preclearance. These requests raise issues of severability and the proper scope of any equitable remedy. We address each in turn.

A

When discriminatory intent impermissibly motivates the passage of a law, a court may remedy the injury—the impact of the legislation—by invalidating the law. If a court finds only part of the law unconstitutional, it may sever the offending provision and leave the inoffensive portion of the law intact. . . .

As an omnibus bill, SL 2013–381 contains many other provisions not subject to challenge here. We sever the challenged provisions from the remainder of the law because it contains a severability clause, to which we defer under North Carolina law. . . . Therefore, we enjoin only the challenged provisions of SL 2013–381 regarding photo ID, early voting, same-day registration, out-of-precinct voting, and preregistration.

WYNN, Circuit Judge, with whom FLOYD, Circuit Judge, joins, writing for the court as to Part V.B.:

B

As to the appropriate remedy for the challenged provisions, “once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, ... court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs.” In other words, courts are tasked with shaping “[a] remedial decree ... to place persons” who have been harmed by an unconstitutional provision “in ‘the position they would have occupied in the absence of [discrimination].’”

The Supreme Court has established that official actions motivated by discriminatory intent “ha[ve] no legitimacy at all under our Constitution or under the [Voting Rights Act].” *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation. . . . Notably, the Supreme Court has invalidated a state constitutional provision enacted with discriminatory intent even when its “more blatantly discriminatory” portions had since been removed. . . .

Our dissenting colleague contends that even though we all agree that 1) the General Assembly unconstitutionally enacted the photo ID requirement with racially discriminatory intent, and 2) the remedy for an unconstitutional law must completely cure the harm wrought by the prior law, we should remand for the district court to consider whether the reasonable impediment exception has rendered our injunction of that provision unnecessary. But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case. That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters. We cannot discern any basis upon which this record reflects that the reasonable impediment exception amendment fully cures the harm from the photo ID provision. Thus, remand is not necessary. . . .

Here, the amendment creating the reasonable impediment exception does not invalidate or repeal the photo ID requirement. It therefore falls short of the remedy that the Supreme Court has consistently applied in cases of this nature.

Significantly, the burden rests on the State to prove that its proposed remedy completely cures the harm in this case. Here, nothing in this record shows that the reasonable impediment exception ensures that the photo ID law no longer imposes any lingering burden on African American voters. To the contrary, the record establishes that the reasonable impediment exception amendment does not so fundamentally alter the photo ID requirement as to eradicate its impact or otherwise “eliminate the taint from a law that was originally enacted with discriminatory intent.”

For example, the record shows that under the reasonable impediment exception, if an in-person voter cannot present a qualifying form of photo ID—which “African Americans are more likely to lack”—the voter must undertake a multi-step process. First, the voter must complete and sign a form declaring that a reasonable impediment prevented her from obtaining such a photo ID, and identifying that impediment. In addition, the voter must present one of several alternative types of identification required by the exception. Then, the voter may fill out a provisional ballot, which is subject to challenge by any registered voter in the county. On its face, this amendment does not fully eliminate the burden imposed by the photo ID requirement. Rather, it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional. . . .

In sum, the State did not carry its burden at trial to prove that the reasonable impediment exception amendment completely cures the harm in this case, nor could it given the requirements of the reasonable impediment exception as enacted by the General Assembly. Accordingly, to fully cure the harm imposed by the impermissible enactment of SL 2013–381, we permanently enjoin all of the challenged provisions, including the photo ID provision.

DIANA GRIBBON MOTZ, Circuit Judge, writing for the court:

C

As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements. *See* 52 U.S.C. § 10302(a), (c) (formerly 42 U.S.C. § 1973a). Such remedies “[are] rarely used” and are not necessary here in light of our injunction.

To be clear, our injunction does not freeze North Carolina election law in place as it is today. Neither the Fourteenth Amendment nor § 2 of the Voting Rights Act binds the State’s hands in such a way. The North Carolina legislature has authority under the Constitution to determine the “times, places, and manner” of its elections. U.S. Const. art. I § 4. In exercising that power, it cannot be that states must forever tip-toe around certain voting provisions disproportionately used by minorities. Our holding, and the injunction we issue pursuant to it, does not require that. If in the future the General Assembly finds that legitimate justifications counsel modification of its election laws, then the General Assembly can certainly so act. Of course, legitimate justifications do not include a desire to suppress African American voting strength. . . .

DIANA GRIBBON MOTZ, Circuit Judge, dissenting as to Part V.B.:

We have held that in 2013, the General Assembly, acting with discriminatory intent, enacted a photo ID requirement to become effective in 2016. But in 2015, before the requirement ever went into effect, the legislature significantly amended the law. North Carolina recently held two elections in which the photo ID requirement, as amended, was in effect. The record, however, contains no evidence as to how the amended voter ID requirement affected voting in North Carolina. In view of these facts and Supreme Court precedent as to the propriety of injunctive relief, I believe we should act cautiously. . . .

The majority maintains, however, that the reasonable impediment exception does not fully remedy the impact of the photo ID requirement. Perhaps not. But, by its terms,

the exception totally excuses the discriminatory photo ID requirement. Of course, in practice, it may not do so. But on this record, I believe we cannot assess whether, or to what extent, the reasonable impediment exception cures the unconstitutional 2013 photo ID requirement. . . .

[W]e are faced with a statute enacted with racially discriminatory intent, amended before ever implemented in a way that may remedy that harm, and a record incomplete in more than one respect. Given these facts, I would only temporarily enjoin the photo ID requirement and remand the case to the district court to determine if, in practice, the exception fully remedies the discriminatory requirement or if a permanent injunction is necessary. In my view, this approach is that most faithful to Supreme Court teaching as to injunctive relief.

Insert on page 888, after note 5.

6. In *League of Women Voters*, the court of appeals resolved the case on the basis of the plaintiffs’ discriminatory purpose claim, rather than reaching their section 2 “results” claim. Are there doctrinal or practical reasons why a court, or litigants, might prefer to have a case decided on intent grounds rather than results grounds? Are there cases where, contrary to the assumption behind the 1982 amendments to section 2, it might be easier to prove intent than results?

7. With respect to how courts should analyze discriminatory purpose claims, consider the Supreme Court’s recent decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

In 2011, the Texas Legislature redrew the state’s congressional and state legislative districts to respond to population changes revealed by the 2010 census. At the time, Texas was covered by section 5’s preclearance requirement. While Texas was seeking preclearance of its plans from the District Court for the District of Columbia, a number of plaintiff groups brought suit in federal district court in Texas under section 2 and the Fourteenth Amendment, claiming that some of the districts intentionally diluted the voting strength of black or Latino communities, some of the districts violated the results test, and some of the districts were racial gerrymanders that violated the *Shaw* principle (which is covered in Chapter 8.)

Because the Legislature’s 2011 plan had not yet been precleared, the Texas federal court enjoined use of the plan and, with elections approaching, issued its own interim remedial maps. In drawing those maps, the court gave no deference to the Legislature’s plans. “Instead, it based its plans on what it called ‘neutral principles that advance the interest of the collective public good.’” The Supreme Court rejected that plan in *Perry v. Perez*, 565 U.S. 388 (2012) (*per curiam*). So the district court then drew a new remedial map in 2013. This map made significant changes to 8 of Texas’s 36 congressional districts and 21 of the 150 districts in the Texas House where the court concluded that plaintiffs were either “likely” to prevail on their section 2 or constitutional claims or there were “not insubstantial” section 5 problems.

Shortly thereafter, the district court in the section 5 proceedings denied Texas’s request for preclearance of the 2011 plans. Texas initially appealed that decision to the Supreme Court. But while the appeal was pending, the Legislature repealed the 2011 plan and adopted the Texas district court’s 2013 interim remedy as its plan. And the Supreme Court decided *Shelby County*, which relieved Texas of the duty to seek preclearance.

After a series of trials, the Texas district court found that some of the districts the Legislature had drawn in 2011 that the court had permitted to go into effect in its 2013 interim remedy had in fact intentionally been drawn to dilute minority voting strength. It then held that the Legislature's decision to carry those districts forward unchanged into the 2013 legislative plan was tainted by that same discriminatory purpose: "'The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy.'"

On appeal, the Supreme Court reversed. Justice Alito's opinion for the Court framed the question as whether the district court had "required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011." Given the "presumption of legislative good faith" in the redistricting process, he rejected any idea "that past discrimination flips the evidentiary burden on its head."

The Supreme Court then rejected the district court's findings with respect to discriminatory purpose:

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature's intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another. . . . Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper.

The court below discounted this direct evidence, but its reasons for doing so are not sound. The court stated that the "strategy" of the 2013 Legislature was to "insulate [the plans] from further challenge, regardless of [the plans'] legal infirmities." But there is no evidence that the Legislature's aim was to gain acceptance of plans that it knew were unlawful. Indeed, there is no evidence that the Legislature thought that the plans were invalid—and as we will explain, the Legislature had sound reasons to believe just the opposite. . . .

It was reasonable for the Legislature to think that approving the court-approved plans might at least reduce objections and thus simplify and expedite the conclusion of the litigation. That MALDEF, counsel for one of the plaintiff groups, testified in favor of the plans is evidence that the Legislature's objective was reasonable.

Not only does the direct evidence suggest that the 2013 Legislature

lacked discriminatory intent, but the circumstantial evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and § 2 of the Voting Rights Act if those claims were merely likely to prevail. And the Texas court was told to accommodate any claim under § 5 of the VRA unless it was “insubstantial.” Fourth, the Texas court had made a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

Is there any evidence from which a contrary inference can reasonably be drawn? Appellees stress the preliminary nature of the Texas court’s approval of the interim plans, and as we have said, that fact is relevant. But in light of our instructions to the Texas court and the care with which the interim plans were developed, the court’s approval still gave the Legislature a sound basis for thinking that the interim plans satisfied all legal requirements.

JUSTICE THOMAS, in a concurrence joined by JUSTICE GORSUCH, reiterated the position that section 2 of the Voting Rights Act does not apply to redistricting at all.

JUSTICE SOTOMAYOR, joined by JUSTICES GINSBURG, BREYER, and KAGAN, dissented. She described the district court’s opinion as “follow[ing] the guidance in *Arlington Heights* virtually to a tee” in finding that the 2013 plan intentionally diluted minority voting strength. In particular, she pointed to “substantial evidence” that the 2013 Legislature used a “strategy [that] involved adopting the [2013 court-drawn] interim maps, however flawed,” to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps.”

Note that none of the opinions in *Abbott* discusses the connection between race and partisanship that played so significant a role in *League of Women Voters*. To what extent does that affect the Court’s analysis?

Note also the ironic role played by section 5. Had section 5 not been in effect when Texas drew its 2011 map, the Texas district court’s 2013 “interim plan” would not have included the unchanged districts; it would simply have denied the plaintiffs’ request for a preliminary injunction with respect to those districts. Thus, the 2011 Legislature’s discriminatory intentions with regard to those districts, which the Supreme Court majority did not dispute, would have been the relevant legislative purpose.

CHAPTER EIGHT

Insert on page 979:

BETHUNE-HILL V. VA. STATE BD. OF ELECTIONS,
137 S. Ct. 788 (2017)

JUSTICE KENNEDY delivered the opinion of the Court, in which the CHIEF JUSTICE and JUSTICES GINSBURG, BREYER, SOTOMAYOR, and KAGAN, joined.

This case addresses whether the Virginia state legislature’s consideration of race in drawing new lines for 12 state legislative districts violated the Equal Protection Clause of the Fourteenth Amendment. After the 2010 census, some redistricting was required to ensure proper numerical apportionment for the Virginia House of Delegates. It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%.

* * *

On appeal to this Court, the challengers contend that the District Court employed an incorrect legal standard for racial predominance and that the legislature lacked good reasons for its use of race in District 75. This Court now affirms as to District 75 and vacates and remands as to the remaining 11 districts.

I

[U]nder §5 as Congress amended it in 2005, “[a] plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a ‘benchmark plan’), the new plan diminishes the number of districts in which minority groups can ‘elect their preferred candidates of choice’ (often called ‘ability-to-elect’ districts).” *Arizona Independent Redistricting Comm’n*. The parties agree that the 12 districts at issue here, where minorities had constituted a majority of the voting-age population for many past elections, qualified as “ability-to-elect” districts. Most of the districts were underpopulated, however, so any new plan required moving significant numbers of new voters into these districts in order to comply with the principle of one person, one vote. Under the benchmark plan, the districts had BVAPs ranging from 62.7% down to 46.3%. Three districts had BVAPs below 55%.

Seeking to maintain minority voters’ ability to elect their preferred candidates in these districts while complying with the one-person, one-vote criterion, legislators concluded that each of the 12 districts “needed to contain a BVAP of at least 55%.” At trial, the parties disputed whether the 55% figure “was an aspiration or a target or a rule.” But they did not dispute “the most important question—whether [the 55%] figure was used in drawing the Challenged Districts.” The parties agreed, and the District Court found, “that the 55% BVAP figure was used in structuring the districts.” In the enacted plan all 12 districts contained a BVAP greater than 55%.

* * *

In April 2011, the General Assembly passed Delegate Jones’ plan with broad

support from both parties and members of the Black Caucus. One of only two dissenting members of the Black Caucus was Delegate Tyler of District 75, who objected solely on the ground that the 55.4% BVAP in her district was too low. In June 2011, the U. S. Department of Justice precleared the plan.

* * *

After a 4-day bench trial, a divided District Court ruled for the State [upholding the plan]. With respect to each challenged district, the court first assessed whether “racial considerations predominated over—or ‘subordinated’—traditional redistricting criteria.” An essential premise of the majority opinion was that race does not predominate unless there is an “*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former.” To implement that standard, moreover, the court limited its inquiry into racial motive to those portions of the district lines that appeared to deviate from traditional criteria. The court thus “examine[d] those aspects of the [district] that appear[ed] to constitute ‘deviations’ from neutral criteria” to ascertain whether the deviations were attributable to race or to other considerations, “such as protection of incumbents.” Only if the court found a deviation attributable to race did it proceed to “determine whether racial considerations qualitatively subordinated all other non-racial districting criteria.” *Ibid.* Under that analysis, the court found that race did not predominate in 11 of the 12 districts.

When it turned to District 75, the District Court found that race did predominate. The court reasoned that “[a]chieving a 55% BVAP floor required ‘drastic maneuvering’ that is reflected on the face of the district.” Applying strict scrutiny, the court held that compliance with §5 was a compelling state interest and that the legislature’s consideration of race in District 75 was narrowly tailored. As to narrow tailoring, the court explained that the State had “a strong basis in evidence” to believe that its actions were “reasonably necessary” to avoid retrogression. In particular, the court found that Delegate Jones had considered “precisely the kinds of evidence that legislators are encouraged to use” in achieving compliance with §5, including turnout rates, the district’s large disenfranchised prison population, and voting patterns in the contested 2005 primary and general elections.

II

* * *

A

The challengers first argue that the District Court misunderstood the relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles. The Court agrees with the challengers on this point.

A threshold requirement that the enacted plan must conflict with traditional principles might have been reconcilable with this Court’s case law at an earlier time. . . . Certain language in *Shaw I* can be read to support requiring a challenger who alleges racial gerrymandering to show an actual conflict with traditional principles. . . .

The Court’s opinion in *Miller*, however, clarified the racial predominance inquiry. In particular, it rejected the argument that, “regardless of the legislature’s purposes, a plaintiff must demonstrate that a district’s shape is so bizarre that it is unexplainable other than on the basis of race.” . . . Parties therefore “may rely on evidence other than bizarreness

to establish race-based districting,” and may show predominance “either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose.”

* * *

The State’s theory in this case is irreconcilable with *Miller* and *Shaw II*. The State insists, for example, that the harm from racial gerrymandering lies not in racial line-drawing *per se* but in grouping voters of the same race together when they otherwise lack shared interests. But “the constitutional violation” in racial gerrymandering cases stems from the “racial purpose of state action, not its stark manifestation.” *Miller*. The *Equal Protection Clause* does not prohibit misshapen districts. It prohibits unjustified racial classifications.

* * *

For these reasons, a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering. Of course, a conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predominance, but there is no rule requiring challengers to present this kind of evidence in every case.

* * *

III

The Court now turns to the arguments regarding District 75. The District Court here determined that the State’s predominant use of race in District 75 was narrowly tailored to achieve compliance with §5. The challengers contest the finding of narrow tailoring, but they do not dispute that compliance with §5 was a compelling interest at the relevant time. As in previous cases, therefore, the Court assumes, without deciding, that the State’s interest in complying with the Voting Rights Act was compelling.

* * *

The Court now finds no error in the District Court’s conclusion that the State had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating §5. As explained, §5 at the time barred Virginia from adopting any districting change that would “have the effect of diminishing the ability of [members of a minority group] to elect their preferred candidates of choice.” Determining what minority population percentage will satisfy that standard is a difficult task requiring, in the view of the Department of Justice, a “functional analysis of the electoral behavior within the particular . . . election district.”

Under the facts found by the District Court, the legislature performed that kind of functional analysis of District 75 when deciding upon the 55% BVAP target. Redrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus. . . . The challengers, moreover, do not dispute that District 75 was an ability-to-elect district, or that white and black voters in the area tend to vote as blocs. In light of Delegate Jones’ careful assessment of local conditions and structures, the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression.

* * *

IV

The Court’s holding in this case is controlled by precedent. The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama*. The District Court’s judgment as to District 75 is consistent with these principles. Applying these principles to the remaining 11 districts is entrusted to the District Court in the first instance.

The judgment of the District Court is affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

[JUSTICE ALITO’s opinion, concurring in part and concurring in the judgment, is omitted].

[JUSTICE THOMAS’s opinion, concurring in the judgment in part and dissenting in part, is omitted].

COOPER V. HARRIS
137 S. Ct. 1455 (2017)

JUSTICE KAGAN delivered the opinion of the Court, in which JUSTICES THOMAS, GINSBURG, BREYER and SOTOMAYOR joined. JUSTICE THOMAS filed a concurring opinion.

The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm.

I

* * *

B

This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State’s northern border. Both have quite the history before this Court.

* * *

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution’s one-person-one-vote principle, the State needed to place almost 100,000 new people within the district’s boundaries. [The representatives and expert who drew the map] chose to take most of those people from heavily black areas of

Durham, requiring a finger-like extension of the district’s western line. With that addition, District 1’s BVAP rose from 48.6% to 52.7%. . . . District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. Still, [the linedrawers] decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African-Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%.

* * *

III

[W]e turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district’s redesign. And it held that the State’s interest in complying with the VRA could not justify that consideration of race. We uphold both conclusions.

A

Uncontested evidence in the record shows that the State’s mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population. Senator Rucho and Representative Lewis [who supervised drawing of the plan] were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 “must include a sufficient number of African-Americans” to make it “a majority black district.” Similarly, Lewis informed the House and Senate redistricting committees that the district must have “a majority black voting age population.” *Id.*, at 610. And that objective was communicated in no uncertain terms to the legislators’ consultant. Dr. Hofeller testified multiple times at trial that Rucho and Lewis instructed him “to draw [District 1] with a [BVAP] in excess of 50 percent.”

* * *

[T]he result is a district with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts.

Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but.

B

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. And we have held that race-based districting is narrowly tailored to that objective if a State had “good reasons” for thinking that the Act demanded such steps. North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had “good reasons to believe it needed to draw [District 1] as a majority-minority district to avoid Section 2 liability” for vote

dilution. We now turn to that defense.

* * *

Here, electoral history provided no evidence that a §2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan’s adoption, African-Americans had made up less than a majority of District 1’s voters; the district’s BVAP usually hovered between 46% and 48%. Yet throughout those two decades, as the District Court noted, District 1 was “an extraordinarily safe district for African-American preferred candidates.” In the closest election during that period, African-Americans’ candidate of choice received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. Those victories (indeed, landslides) occurred because the district’s white population did not “vote[] sufficiently as a bloc” to thwart black voters’ preference, *Gingles*; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group’s favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a “crossover” district, in which members of the majority help a “large enough” minority to elect its candidate of choice. *Bartlett v. Strickland*. When voters act in that way, “[i]t is difficult to see how the majority-bloc-voting requirement could be met”—and hence how §2 liability could be established. So experience gave the State no reason to think that the VRA required it to ramp up District 1’s BVAP.

* * *

Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, §2 does not require crossover districts (for groups insufficiently large under *Gingles*), then §2 also cannot be satisfied by crossover districts (for groups in fact meeting *Gingles*’ size condition). In effect, they concluded, whenever a legislature can draw a majority-minority district, it must do so— even if a crossover district would also allow the minority group to elect its favored candidates.

That idea, though, is at war with our §2 jurisprudence— *Strickland* included. Under the State’s view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a §2 claim could succeed in a district (like the old District 1) with an under- 50% BVAP. But this Court has made clear that unless each of the three *Gingles* prerequisites is established, “there neither has been a wrong nor can be a remedy.” *Grove*. And *Strickland*, far from supporting North Carolina’s view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a §2 vote-dilution suit. . . . Thus, North Carolina’s belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a “strong basis in evidence,” but instead on a pure error of law.

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means “insist that a state legislature, when redistricting, determine precisely what percent minority population [§2 of the VRA] demands.” But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d’être* is a legal mistake. Accordingly, we uphold the District Court’s conclusion that North Carolina’s use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

IV

We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's §5. . . . [T]he State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller [the state's redistricting expert] moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. The mapmakers drew their lines, in other words, to "pack" District 12 with Democrats, not African Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.⁷

Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and respect for county lines. . . . But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a "political motivation" as well as a racial one. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." *Cromartie II*. As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I*.⁸

⁷ JUSTICE ALITO charges us with "ignor[ing]" the State's political-gerrymander defense, making our analysis "like Hamlet without the prince." But we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds). By contrast, the dissent consistently treats the State's version of events (what it calls "the Legislature's political strategy and the relationship between that strategy and [District 12's] racial composition," post, at 20) as if it were a simple "fact of the matter"—the premise of, rather than a contested claim in, this case. The dissent's narrative thus tracks, top-to-bottom and point-for-point, the testimony of Dr. Hofeller, the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble. Imagine (to update the dissent's theatrical reference) *Inherit the Wind* retold solely from the perspective of William Jennings Bryan, with nary a thought given to the competing viewpoint of Clarence Darrow.

⁸ As earlier noted, that inquiry is satisfied when legislators have "place[d] a significant number of voters within or without" a district predominantly because of their race, regardless of their ultimate objective in taking that step. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. In other words, the sorting of voters on the

[Under the clear-error standard of review], we uphold the District Court’s finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district’s reconfiguration.

A

Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African-Americans of voting age and 50,000 fewer whites of that age. . . . Those voter exchanges produced a sizable jump in the district’s BVAP, from 43.8% to 50.7%. The Assembly thus turned District 12 (as it did District 1) into a majority-minority district.

As the plaintiffs pointed out at trial, Rucho and Lewis had publicly stated that racial considerations lay behind District 12’s augmented BVAP. In a release issued along with their draft districting plan, the two legislators ascribed that change to the need to achieve preclearance of the plan under §5 of the VRA. . . . According to the two legislators, that race-based “measure w[ould] ensure preclearance of the plan.” Thus, the District Court found, Rucho’s and Lewis’s own account “evinced intentional” as to District 12’s racial composition: Because of the VRA, they increased the number of African-Americans.

Hofeller confirmed that intent in both deposition testimony and an expert report. [He explained], in language the District Court emphasized: “[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act.” . . . the legislature “determined that it was prudent to reunify [Guilford county’s] African-American community” into District 12. That change caused the district’s compactness to decrease (in expert-speak, it “lowered the Reock Score”), but that was a sacrifice well worth making: It would “avoid the possibility of a [VRA] charge” that would “inhibit[] preclearance.”

The State’s preclearance submission to the Justice Department indicated a similar determination to concentrate black voters in District 12....

And still there was more: Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district’s future make-up. According to Watt, Rucho said that “his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law.” And further, that it would then be Rucho’s “job to go and convince the African-American community” that such a racial target “made sense” under the Act.

* * *

grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design.

His report, as the District Court held, thus tended to confirm the plaintiffs' direct evidence of racial predominance. The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review.

B

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." . . . Because the plaintiffs here (as all agree) did not present such a counter-map, North Carolina concludes that they cannot prevail. The dissent echoes that argument.

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. . . .

But [alternative plans] are hardly the only means [for plaintiffs to prove their case]. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. . . . Similarly, it does not matter in this case, where the plaintiffs' introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.

A plaintiff's task, in other words, is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the "predominant consideration in or without a particular district." *Alabama*, 575 U. S., at ___, (internal quotation marks omitted); cf. *Bethune-Hill*, 580 U. S., at ___, ___, (rejecting a similar effort to elevate one form of "persuasive circumstantial evidence" in a dispute respecting racial predominance to a "mandatory precondition" or "threshold requirement" of proof). . . . But in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. Nor would it make sense to do so here. The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither

its presence nor its absence can itself resolve a racial gerrymandering claim.

North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Cromartie II* imposed a non-negotiable “alternative-map requirement.” . . . And as the State emphasizes, a part of our opinion faulted the *Cromartie* plaintiffs for failing to offer a convincing account of how the legislature could have accomplished its political goals other than through the map it chose. We there stated:

In a case such as this one where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

According to North Carolina, that passage alone settles this case, because it makes an alternative map “essential” to a finding that District 12 (a majority-minority district in which race and partisanship are correlated) was a racial gerrymander. Once again, the dissent says the same.

But the reasoning of *Cromartie II* belies that reading. The Court’s opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there. (Certainly the dissent’s current defense of that rule was nowhere in evidence.) And given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim—we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were “adequate” to show “the predominance of race in the legislature’s line-drawing process.” But that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail. Item by item, the Court discussed and dismantled the supposed proof, both direct and circumstantial, of race-based redistricting. All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim.

Rightly understood, the passage from *Cromartie II* had a different and narrower point, arising from and reflecting the evidence offered in that case. The direct evidence of a racial gerrymander, we thought, was extremely weak: We said of one piece that it “says little or nothing about whether race played a predominant role” in drawing district lines; we said of another that it “is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases.” Nor did the report of the plaintiffs’ expert impress us overmuch: In our view, it “offer[ed] little insight into the legislature’s true motive.” That left a set of arguments of the would-have-could-have variety. For example, the plaintiffs offered several maps purporting to “show how the legislature might have swapped” some mostly black and mostly white precincts to obtain greater racial balance “without harming [the legislature’s] political objective.” But the Court determined that none of those proposed exchanges would have worked as advertised—essentially, that the plaintiffs’ “you could have redistricted differently” arguments failed on their own terms. Hence emerged the demand quoted above, for maps that would actually show what the

plaintiffs had not. In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day.

But this case is most unlike *Cromartie II*, even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly’s intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs’ burden of debunking North Carolina’s “it was really politics” defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed.

* * *

V

Applying a clear error standard, we uphold the District Court’s conclusions that racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Carolina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court’s decision that §2 of the VRA gave North Carolina no good reason to reshuffle voters because of their race. We accordingly affirm the judgment of the District Court. It is so ordered.

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly applies our precedents under the Constitution and the Voting Rights Act of 1965 (VRA). I write briefly to explain the additional grounds on which I would affirm the three-judge District Court and to note my agreement, in particular, with the Court’s clear-error analysis.

As to District 1, I think North Carolina’s concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny. I also think that North Carolina cannot satisfy strict scrutiny based on its efforts to comply with §2 of the VRA. In my view, §2 does not apply to redistricting and therefore cannot justify a racial gerrymander. See *Holder v. Hall* (THOMAS, J., concurring in judgment).

As to District 12, I agree with the Court that the District Court did not clearly err when it determined that race was North Carolina’s predominant motive in drawing the district. This is the same conclusion I reached when we last reviewed District 12. The Court reached the contrary conclusion in *Cromartie II* only by misapplying our deferential standard for reviewing factual findings. Today’s decision does not repeat *Cromartie II*’s error, and indeed it confines that case to its particular facts. It thus represents a welcome course correction to this Court’s application of the clear-error standard.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring in the judgment in part and dissenting in part.

* * *

II

[Caution in imputing racial motive to a redistricting plan] “is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.” *Cromartie II*. We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context.

The problem arises from the confluence of two factors. The first is the status under the Constitution of partisan gerrymandering. As we have acknowledged, “[p]olitics and political considerations are inseparable from districting and apportionment,” *Gaffney v. Cummings*, and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. Partisan gerrymandering dates back to the founding, see *Vieth*, and while some might find it distasteful, “[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.” *Cromartie I; Vera*.

The second factor is that “racial identification is highly correlated with political affiliation” in many jurisdictions. *Cromartie II*. This phenomenon makes it difficult to distinguish between political and race-based decision-making. If around 90% of African-American voters cast their ballots for the Democratic candidate, as they have in recent elections, a plan that packs Democratic voters will look very much like a plans that packs African-American voters. “[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.” *Id.*

A

[I]n this case, as in *Cromartie II*, the plaintiffs allege a racial gerrymander, and the State’s defense is that political motives explain District 12’s boundaries. In such a case, *Cromartie II* instructed, plaintiffs must submit an alternative redistricting map demonstrating that the legislature could have achieved its political goals without the racial effects giving rise to the racial gerrymandering allegation. But in spite of this instruction, plaintiffs in this case failed to submit such a map. Based on what we said in *Cromartie II* about the same type of claim involving the same congressional district, reversal should be a foregone conclusion. It turns out, however, that the *Cromartie II* rule was good for one use only. Even in a case involving the very same district, it is tossed aside.

B

The alternative-map requirement deserves better. It is a logical response to the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate. This is a problem with serious institutional and federalism implications. When a federal court says that race was a legislature’s predominant purpose in drawing a district, it accuses the legislature of “offensive and demeaning” conduct.

* * *

There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts “exercise extraordinary caution” in distinguishing race-based redistricting from politics-based redistricting, *Miller*, they will invite the losers in the redistricting process to seek to

obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

III

Even if we set aside the challengers' failure to submit an alternative map, the District Court's finding that race predominated in the drawing of District 12 is clearly erroneous. The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high evidentiary standard that our cases require challengers to meet in order to prove racial predominance.

A

In order to understand the mapmaker's approach, the first element to be kept in mind is that the basic shape of District 12 was legitimately taken as a given. When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned.

* * *

B

* * *

The upshot is that, so long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately black.

* * *

Reviewing the evidence outlined above, two themes emerge. First, District 12's borders and racial composition are readily explained by political considerations and the effects of the legislature's political strategy on the demographics of District 12. Second, the majority largely ignores this explanation, as did the court below, and instead adopts the most damning interpretation of all available evidence. Both of these analytical maneuvers violate our clearly established precedent. Our cases say that we must "exercise extraordinary caution" "where the State has articulated a legitimate political explanation for its districting decision," *Cromartie II*; the majority ignores that political explanation. Our cases say that "the good faith of a state legislature must be presumed," *Miller*; the majority presumes the opposite. And *Cromartie II* held that plaintiffs in a case like this are obligated to produce a map showing that the legislature could have achieved its political objectives without the racial effect seen in the challenged plan; here, the majority junks that rule and says that the plaintiffs' failure to produce such a map simply "does not matter."

The judgment below regarding District 12 should be reversed, and I therefore

respectfully dissent.

NOTES AND QUESTIONS

1. *Bethune-Hill* is a highly significant further development of the new, *Alabama* line of racial gerrymandering cases because it clearly puts to rest any uncertainty about whether unconstitutional racial gerrymanders can occur when States move voters by race but do so without violating traditional districting principles. The Court's unanimous opinion is more forceful and clear than the Court's decisions have been previously that unconstitutional racial gerrymandering can occur even when a State draws districts that look regular and follow traditional districting principles. As the Court holds, "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." Similarly, "[r]ace may predominate even when a reapportionment plan respects traditional principles."

Litigants and advocates are going to differ in whether they like the clarity of this principle, but this clarification from the Court is extremely meaningful. Lower courts have been in confusion about this very important question, as evident in the Court's need to reserve the lower court in this case. This principle is going to make it significantly easier for plaintiffs to win racial gerrymandering claims. Conversely, States are not going to be able to move voters around by race without adequate justification, yet claim that they can do so because they nonetheless are following traditional districting principles.

2. *Bethune-Hill* also reveals considerable Court sophistication about the changing dynamics through which States engage in unconstitutional racial gerrymanders. As the Court points out, the leading prior cases all involved ones where legislatures had drawn contorted district boundaries for at least some of the district lines. Now, the Court is beginning to see cases in which legislatures are no longer doing that, yet still using unjustified racial classifications. As Justice Kennedy writes: "Yet the law responds to proper evidence and valid inferences in ever-changing circumstances, as it learns more about ways in which its commands are circumvented." This is a strong signal to lower courts not to apply prior cases formalistically or mechanically, but to ferret out unconstitutional racial gerrymanders that take ever-evolving forms.

3. Is there any potential relationship between *Bethune-Hill* and a central issue in the partisan gerrymandering case from Wisconsin, *Whitford v. Gill*? The case is presently on appeal to the Supreme Court. A crucial issue there is Wisconsin's position that, because it followed traditional districting principles in drawing its districts, it cannot have created an unconstitutional partisan gerrymander. Should the Court apply the same principle in the partisan case as in the race case and hold that what would otherwise be an unconstitutional partisan gerrymander cannot be immunized merely because the legislature drew districts that comply with traditional districting principles, even if the service of a plan whose intent and effect was an aggressive partisan gerrymander?

4. In the North Carolina case, *Cooper v. Harris*, the most important aspect is the Court's unanimous conclusion that Congressional District 1 (CD 1) is an unconstitutional racial gerrymander. It would be easy to miss that this part of the opinion is unanimous, because the Court divided 5-3 on the second district at stake, CD 12. With respect to CD 1, the critical point is that the Court rejected North Carolina's argument that the VRA required it to create a majority-black district to make sure black voters had equal political opportunity. More specifically, the Court concluded that voting in this area was not racially polarized enough to require the remedy of a majority-black district.

The Court held that voting cannot be considered racially polarized when enough white cross-over support exists that black candidates are being elected from districts that are less than 50% black. This conclusion is of great significance in avoiding unnecessary racial redistricting. It means that the mechanical creation of majority-minority districts will no longer be constitutionally tolerated. If a cohesive black community can get its preferred candidates elected in districts that are, perhaps, only 35-40% black, then pumping those districts up to more than 50% black – on the view that the VRA requires it – will be unconstitutional. This opens up more space for the creation of coalitional or cross-over districts in which minority and white political coalitions unite behind the same candidates.

5. Procedurally, *Cooper* also brings clarity to issues that have bedeviled the *Alabama* line of racial gerrymandering cases in the lower courts. The majority rejects the dissent's view that to prove racial predominance, plaintiffs in these cases must submit their own, alternative districting plan. The idea behind such a requirement – which, as the Court acknowledges, its prior opinion in *Cromartie II* might have been read to support – is that, if it is unclear whether race or some other, legitimate factors explain a district's design, plaintiffs should have to demonstrate – with alternative maps – how the legislature could have achieved its legitimate objectives without the use of race. If there is such a path, then the courts can conclude that race indeed predominated. But the Court held that plaintiffs can make out a case of racial predominance even without the need to present alternative maps. In reaching that conclusion, the Court also essentially relegated to irrelevance the earlier passage in *Cromartie II* that could have been taken to impose such a requirement.

CHAPTER TEN

Insert on page 1151:

The Presidential Election Day Act, the Electoral Count Act, and the 2020 Presidential Election

The two principal federal statutes that govern the presidential election are the Presidential Election Day Act and the Electoral Count Act (ECA). Both had remained largely in the background since their enactment in the 19th century. But the election controversies President Trump generated after the 2020 election exposed potential vulnerabilities in each statute, which suggest amendments might be necessary to clarify the proper meaning and role of these statutes.

A. *Of “Failed Elections” and the Presidential Election Day Act.* This statute specifies the Tuesday after the first Monday in November is the date of the presidential election. After specifying that date, the Act [goes on to provide](#): “Whenever any State has held an election for the purpose of choosing electors, and *has failed to make a choice* on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” After the election had taken place, President Trump urged certain statute legislatures to override the popular vote and appoint the electors themselves. Indeed, according to some news reports, the purpose of at least some of the post-election litigation on behalf of the Trump campaign was to generate enough uncertainty about the vote in these states in order to get sympathetic state legislatures to declare the election “failed” in their states and then invoke this provision.

The Act nowhere defines that it means for an election to have “failed.” Since this provision has never been invoked, there is also no judicial interpretation or past historical practice to draw on to give meaning to the word “failed.”

But the little-known [history](#) of the act reveals that one major purpose for it is now anachronistic, and the act needs to be updated to reflect the limited purposes for which it might remain relevant today. Part of the original purpose for this provision, adopted in 1845, is now anachronistic:

When Congress was creating the Presidential Election Day Act, the “failed election” provision was added at the insistence of representatives from New Hampshire and Virginia. At the time, New Hampshire required that a candidate had to receive a *majority* of all votes cast to be elected. A candidate who finished first but with only a plurality of the vote was not elected. The backup process in New Hampshire, as in other states that similarly required a “majority of votes” to win, was either that the legislature would appoint the office holder or that a second election would be held. Thus, these states would not be able to choose their presidential electors on Election Day, whenever no candidate received a “majority” of the votes — which would happen with third-party candidates on the ballot. When the bill was [next debated](#), the House responded by adding the “failed election” provision now found in current [law](#).

The history of why federal election law includes this “failed election” provision is part of the story of how democracy was understood early in American history. Many state constitutions [initially included](#) these “majority” vote provisions. This reflected the link between democracy and “majority rule” as that was understood early on. But as experience with democratic elections developed, states soon discovered that many elections involved a candidate winning a plurality, but not a majority, of the votes [no state now requires a candidate to receive a majority, rather than a plurality, of the vote to win the state’s electors].

See Richard H. Pildes, *There’s Still a Loaded Weapon Lying Around in Our Election System*, NY Times (Dec. 10, 2020).

The remaining justification for the provision is that if a state suffers a natural disaster or similar event on election day, which makes it nearly impossible to conduct the election, a state should not lose out entirely in sending electors to the electoral college. Should Congress update the Act and identify clearly the specific, limited circumstances in which state legislatures are empowered to step in after election day? Given the intense polarization of American politics, does this provision now constitute a loaded weapon, which state legislatures are more likely after 2020 to invoke to claim that some aspect of the voting process means the election in their state has “failed” and hence federal law authorizes them to appoint electors after the votes have been cast?

B. “*Counting*” the Vote in Congress and the ECA. The 12th Amendment to the Constitution provides that “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” The ECA implements this provision by setting forth the procedures for this counting process, and also provides for entertaining objections to the vote from any state, if one member of the House and the Senate jointly file an objection.

This procedure raises questions about the proper role of Congress in counting the vote. Does Congress have the power to go behind a state’s vote and object to that vote if Congress believes the election process in that state was illegal or involved large-scale fraud? Or is Congress limited to a more ministerial role, with the power only to make sure the certificates of the vote are authentic? Note that if an objection to a state’s vote were upheld, that state’s vote would be nullified, meaning the state’s electoral votes would be thrown out.

Before 2000, the only time a Senator and Representative jointly filed an objection, which concerned a “faithless elector” who cast a vote other than for the candidate who had won his state. Then in 2001, Democratic House members objected to the counting of Florida’s vote, in light of the *Bush v. Gore* decision, but no Senator joined. In 2005, a Democratic Senator and Democratic House members objected to counting Ohio’s votes, because of complaints about long lines that had purportedly led many voters not to vote; given the closeness of the election, Ohio’s votes determined the outcome. Those objections were voted down overwhelmingly. In 2017, Democratic House members, but no Senators, objected to the count because of allegations of Russian interference in the election.

But no objections rose to the level of those in 2021, when eight Republican Senators and 139 Republican House members objected to counting the vote from several states. The objections were voted down. But they have put much more squarely on the

agenda the question of the bases on which Congress can legitimately object, under the ECA, to counting a state's vote. The view of one expert on the arcane ECA, Professor Ned Foley, is the following:

This limited inquiry requires Congress simply to authenticate the documents. Remember, these rules were formulated in the 19th century, when there was a realistic risk of counterfeit papers pretending to be official. Thus, the 1887 act [requires](#) a state's governor to affix "the seal of the State" to the certificate confirming the appointment of electors.

Further, the 1887 act [obligates](#) Congress to consider "conclusive" a state's own "final determination" of litigation over a state's appointment of electors when two conditions are met. The "final determination" must occur by a certain date, Dec. 8 this year, and must be based on state laws existing before Election Day, Nov. 3. Congress [instructs](#) governors to provide verification of these two conditions in their certifications....

The Constitution [says only](#): "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

This provision, part of the 12th Amendment that reengineered the electoral college after the calamitous Jefferson-Burr tie in 1800, presumed that counting a state's electoral votes would be straightforward: The joint session would merely identify the state's electoral votes and add them up.

It would not be Congress's job to second-guess the state's appointment of its own electors. And it certainly would not be Congress's job to let a sitting vice president — as Adams had been in 1796 or Jefferson in 1800 — determine the election's outcome by deciding unilaterally whether or not to count a state's electoral votes. Note that, Vice President Pence.

While the Constitution makes each house of Congress the "judge" of elections to its own body, there's no comparable provision for presidential elections. In fact, it's the reverse. To prevent the electoral college from being subservient to Congress, the Constitution requires Congress to accept whatever the state decides regarding the appointment of its electors.

Ned Foley, *Sorry, President Trump. January 6 is not an Election Do-over*, Wash. Post (Dec. 29, 2020).

Given the number of objections since 2000, and the far more consequential controversies over the vote-counting process in 2021, should Congress revise the ECA to make clear the basis on which members of Congress can legitimately object to counting the vote from any state? Note that a revised ECA cannot give Congress powers over the count that contradict the role the 12th Amendment assigns to Congress.

C. There are other possible areas of reform if Congress considers updating the

ECA. Currently, a formal objection to counting a state's vote can be lodged if one Representative and one Senator agree to do so. Should those numbers be increased, so that only objections that generate more widespread support in Congress are to be recognized? Should 10% or more of each Chamber be required, for example?

In addition, the deadlines in the ECA set in the 19th century reflect the greater difficulty of communication and transportation in that era. In 2020, the Electoral College vote took place on Dec. 14th. But Congress does not meet until January 6th to receive this vote and count it. There is no need today for a gap as long as three weeks.

Yet there are only six weeks between Election Day and the date the electors must vote (and only five weeks before the "safe harbor" deadline). That is an extremely short period, particularly in the post-*Bush v. Gore* era in which recounts and litigation are virtually inevitable if the outcome is close. If major issues are still being contested as the process bumps up against either of those two dates in the Act, that could create considerable turmoil. Indeed, that is exactly what happened in *Bush v. Gore*, when the Supreme Court ordered the recount to stop mid-stream because the safe harbor date had arrived.

Congress could move these deadlines back by two to three weeks. That would give states more time to complete their processes, including any recounts or litigation. Would there be any downside to doing that? Before 2020, the date the electors voted was largely a formality. But in 2020, the Republican leadership in Congress was not willing publicly to declare Joe Biden the winner of the election until the day the electors voted. If that establishes a new norm, in which the losing side will not concede until the electors have voted, then perhaps it would be better not to push that date back any further than under current law.

Insert on page 1208:

The Presidential Election of 2020 and Election Challenges

A. Beginning even before Election Day, and continuing through the attack on the Capitol on January 6th, the charge of fraud became the organizing drive of the most sustained effort to repudiate a presidential election since at least 1876. While the claim of fraud proved politically galvanizing, it also proved without evidentiary foundation. For example, the Michigan State Senate, which is majority Republican, convened an Oversight Committee chaired by Senator Ed McBroom, a public and highly vocal Trump supporter. The Committee concluded there was no widespread vote fraud in the 2020 election in Michigan and McBroom attributes this to "the extent to which our elections officials go to facilitate our elections." The report ends by stating that:

[W]e commend the innumerable clerks, canvassers, staff, workers, and volunteers across Michigan that make the enormous complexity of elections operate so smoothly, so often. The complexity of the work and the dedication we discovered are astounding and worthy of our sincerest appreciation. . . . If all citizens remain vigilant and involved, we will emerge stronger after any challenging time.

See Michigan Senate Oversight Committee, Report On The November 2020 Election In Michigan 35 (2021); see also *id.* at 3,4 ("This Committee found no evidence of widespread or systematic fraud in Michigan's prosecution of the 2020 election.").

As the comprehensive Stanford-MIT study summarized: “The most basic measure of the success of an election is turnout. By this metric, the 2020 election was an unalloyed success by U.S. standards. Nearly 160 million votes were cast in 2020, up by more than 20 million from 2016. . . . Turnout as a percentage of the voting-eligible population increased in every state” Stanford-MIT Healthy Elections Project, *The Virus And The Vote: Administering The 2020 Election In A Pandemic* 10 (Persily, N., & Stewart III, C., eds., 2021).

Never before 2020 had a defeated presidential candidate launched such a litigation blizzard against the results of the election in numerous states, in state and federal court, and all turning on the question of fraud in the administration or tallying of the votes – all save the question of whether the Pennsylvania courts or legislature had exceeded their authority under the U.S. Constitution by adopting election changes to address the unique circumstances of the pandemic (discussed in Chapter ____). In total over 70 lawsuits were filed yielding at least 30 opinions, almost all seeking some emergency relief against the certification of elections results. The Trump campaign and its stand-ins prevailed on the merits in none of these actions, in state and federal court alike. In some cases, such as *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (Mem.), the question was standing and the Court denied the state of Texas the ability to sue to stop the certification of the Pennsylvania state presidential results.

In most cases, however, the election challenges were easily handled within existing legal doctrine. The repeated requests for injunctions against vote certification failed under traditional equitable considerations of the likelihood of prevailing on the merits under the facts presented, together with the prospect of irreparable injury. In *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 Fed.Appx. 377 (3d Cir. 2020), the court laid out the evidentiary grounds for rejecting the Trump camp’s claims:

The Campaign has not shown that denying relief will injure it. “Upon information and belief,” it suspects that many of the 1.5 million mail-in ballots in the challenged counties were improperly counted. But it challenges no specific ballots. The Campaign alleges only that at most three specific voters cast ballots that were not counted. And it never alleges that anyone except a lawful voter cast a vote. Of the seven counties whose notice-and-cure procedures are challenged, four (including the three most populous) represented that they gave notice to only about 6,500 voters who sent in defective ballot packages. The Campaign never disputed these numbers or alleged its own. Even if 10,000 voters got notice and cured their defective ballots, and every single one then voted for Biden, that is less than an eighth of the margin of victory.

Without more facts, we will not extrapolate from these modest numbers to postulate that the number of affected ballots comes close to the certified margin of victory of 80,555 votes. Denying relief will not move the needle.

The Third Circuit was no doubt mindful of the gulf between the limited pleadings in court and the extravagant claims in accompanying press conferences. The court’s irritation may be discernible in its rejection of injunctive relief:

Voters, not lawyers, choose the President. Ballots, not briefs, decide elections. The ballots here are governed by Pennsylvania election law. No federal law requires poll watchers or specifies where they must live or how close they may stand when votes are counted. Nor does federal law govern whether to count ballots with minor state-law defects or let voters cure those defects. Those are all issues of state law, not ones that we can hear. And earlier lawsuits have rejected those claims.

Seeking to turn those state-law claims into federal ones, the Campaign claims discrimination. But its alchemy cannot transmute lead into gold. The Campaign never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so. The Second Amended Complaint still suffers from these core defects, so granting leave to amend would have been futile.

And there is no basis to grant the unprecedented injunction sought here. First, for the reasons already given, the Campaign is unlikely to succeed on the merits. Second, it shows no irreparable harm, offering specific challenges to many fewer ballots than the roughly 81,000-vote margin of victory. Third, the Campaign is responsible for its delay and repetitive litigation. Finally, the public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of Pennsylvania voters who voted by mail. Plus, discarding those votes could disrupt every other election on the ballot.

We will thus affirm the District Court's denial of leave to amend, and we deny an injunction pending appeal. The Campaign asked for a very fast briefing schedule, and we have granted its request. Because the Campaign wants us to move as fast as possible, we also deny oral argument.

B. In *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920-21 (M.D. Pa. 2020), the court addressed the theory of relief more directly:

[C]rucially, Plaintiffs fail to understand the relationship between right and remedy. Though every injury must have its proper redress, a court may not prescribe a remedy unhinged from the underlying right being asserted. By seeking injunctive relief preventing certification of the Pennsylvania election results, Plaintiffs ask this Court to do exactly that. Even assuming that they can establish that their right to vote has been denied, which they cannot, Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others. Rather than requesting that their votes be counted, they seek to discredit scores of other votes, but only for one race. This is simply not how the Constitution works.

When remedying an equal-protection violation, a court may either “level up” or “level down.” This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing

that person on par with others who already enjoy the right, or a court may level down by withdrawing the benefit from those who currently possess it. Generally, “the preferred rule in a typical case is to extend favorable treatment” and to level up. In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution. Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

Here, leveling up to address the alleged cancellation of Plaintiffs' votes would be easy; the simple answer is that their votes would be counted. But Plaintiffs do not ask to level up. Rather, they seek to level down, and in doing so, they ask the Court to violate the rights of over 6.8 million Americans. It is not in the power of this Court to violate the Constitution....

Granting Plaintiffs' requested relief would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs' requested relief.

C. Pennsylvania also illustrated the problem of the proper timing for challenges to election procedures. Many courts turned to the doctrine of laches to find that challenges to specific voting practices that could have been lodged well before the election could not be raised as a post-election matter. In *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020), Trump supporters filed a petition for review in Commonwealth Court against the provisions of Act 77 of 2019 that established universal mail-in voting. Plaintiffs filed the petition on November 21, 2020, more than a year after the statute was enacted and several weeks after the general election. In their prayer for relief, plaintiffs sought (1) a declaration that the provisions of the statute establishing universal mail-in voting were unconstitutional and (2) injunctive relief invalidating all ballots by voters that utilized mail-in voting authorized by Act 77. In the alternative, plaintiffs requested that the court reject all ballots cast in the 2020 general election and “direct[] the General Assembly to choose Pennsylvania’s Electors.” *Id.* at 1256 (internal citation omitted). The Commonwealth Court preliminarily enjoined Pennsylvania from taking further action to certify the results of the general election. Defendants appealed the Commonwealth Court’s preliminary injunction to the Pennsylvania Supreme Court.

The majority dismissed the plaintiffs’ petition for review with prejudice and vacated the preliminary injunction on the ground that plaintiffs’ claims were barred by the doctrine of laches. The Court also held that all of plaintiffs’ other motions were moot. Justice Wecht’s concurrence further specified “the limited relief available when courts are faced with a wholesale challenge to the results of an election [A]ny request to invalidate its results must meet a high evidentiary threshold.” *Id.* at 1259. Specifically, to annul an election under Pennsylvania law “requires proof of fraud or other unlawful practices of such magnitude and so interwoven with the casting and counting of the votes as to obviously deprive the election returns of all validity.” *Id.*

But even so, Justice Wecht notes that the relief sought by plaintiffs—“ignor[ing] the results of an election and recommit[ting] the choice to the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania’s

voters”—is simply not within the court’s power. Pursuant to the Electors Clause, the General Assembly established in its Election Code the method of appointing Pennsylvania’s electors in 1937: by popular vote. The Election Code did not contain any “mechanisms by which to circumvent these procedures so as to permit the General Assembly to substitute its preferred slate of electors for that ‘elected by the qualified electors of the Commonwealth.’” *Id.* at 1260 (quoting 25 Pa. Stat. And Cons. Stat. Ann § 3191)). If the General Assembly wanted to replace the slate of electors, it would need to adopt a “new law in accordance with constitutional mandates, including presentment of the legislation to the governor to sign or veto.” *Id.* And even if the General Assembly passed such a law, it could only be prospective because “Congress has declared that each State’s method ‘for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State’ must have been established ‘by laws enacted prior to the day fixed for the appointment of the electors’—i.e., before November 3, 2020.” *Id.* at 1291 (citing 3 U.S.C. § 5).

D. The same result was reached in Wisconsin in *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), a suit filed by a Republican presidential elector the day after the Governor certified the presidential election results, which also followed a recount. The suit alleged that the Wisconsin Elections Commission and the Governor had (1) violated the Elections and Electors Clauses, (2) violated the Equal Protection Clause by counting unlawful or invalid ballots, which diluted his vote, (3) denied plaintiff his Fourteenth Amendment due process right to vote, and (4) committed “wide-spread ballot fraud.” *Id.* at 601. The requested remedy was that the court (1) order state officials to decertify the election results, (2) order the Governor not to transmit the results he had previously certified to the Electoral College, and (3) order the Governor to transmit results that declared President Trump the winner.

Rather than rely on laches, the court found that the plaintiff lacked standing to sue, both as an individual voter and as a nominee for elector because, among other things, the relief he sought would not redress the alleged injury-in-fact:

[Plaintiff] complains that his vote was diluted and that he wants his vote to count. But he asks the court to order the results of the election decertified and then to order defendant Evers to certify the election for Donald J. Trump. Even if this federal court had the authority to order the governor of the state of Wisconsin to certify the results of a national presidential election for any candidate—and the plaintiff has presented no case, statute or constitutional provision providing the court with that authority—doing so would further invalidate and nullify the plaintiff’s vote. The plaintiff wants Donald J. Trump to be certified as the winner of the Wisconsin election as a result of the plaintiff’s vote. But what he asks is for Donald J. Trump to be certified the winner as a result of judicial fiat. That remedy does not redress the plaintiff’s alleged injury. Even the plaintiff concedes in his brief in opposition to dismissal that “[d]efendant Evers can ... provide partial redress in terms of the requested injunctive relief, namely, by refusing to certify or transmit the election results, and providing access to voting machines, records and other ‘election materials.’” The plaintiff is wrong in that regard, as the court will explain when it discusses the related doctrine of mootness; the point is that even from the plaintiff’s perspective, the remedy he seeks will not fully redress the injury he claims.

Circling back to Article III's "case or controversy" requirement, the Supreme Court has held that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citing *Cuno*, 547 U.S. at 353). Even if the plaintiff had alleged a particularized, concrete injury and even if the relief he seeks would redress that injury, that relief is not tailored to the alleged injury. As the Michigan court explained in *King v. Whitmer*, 505 F.Supp.3d 720, 734–35 (E.D. Mich. Dec. 7, 2020), "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others their right to vote."

Id. at 609–10.

CHAPTER TWELVE

Insert on page 1247, after note 1:

1a. There has been a perceptible uptick in interest in Ranked Choice Voting (“RCV”) in recent years. These changes have nearly all come about through direct popular vote, rather than through legislation. In 2021, 23 cities in Utah, including Salt Lake City, voted to adopt RCV (going forward, they will vote each year on whether to retain it). The Virginia GOP used a convention in 2021 to nominate its candidates for state races, including governor; the delegates used RCV to make these choices. New York City will use RCV for the first time in its 2021 elections. With cities such as Santa Fe, Minneapolis, Oakland, and San Francisco also using RCV, around 53 jurisdictions now use RCV for at least some local elections. The Democratic Party used RCV for the 2020 presidential primary in four states. RCV is also now used for military and overseas voters in around 7 states.

The most significant uses of RCV will now be in Alaska and Maine. In 2020, Alaskan voters chose to adopt RCV for federal and state elections. As part of this change, Alaskan voters also adopted major changes to the way its primary elections will be conducted. Voters chose a “Top-4” structure, in which all candidates will run on a single ballot in the primary election; the top four will move on to the general election, in which RCV will be used to determine the winner. This is a shift from the Top-2 structure that voters in California and Washington adopted after the Supreme Court’s decision in the *California Democratic Party v. Jones* case eliminated the blanket primary. One way of understanding part of the purpose of the Top-4 structure is that it is designed to make the primary a less significant stage in the electoral process, and to eliminate party primaries altogether.

Voters in Maine also chose to adopt RCV for state and federal elections, starting in 2018, and became the first state to use RCV in presidential general elections in 2020. For an account of the current status of RCV by one of its most prominent supporting organizations, see <https://www.fairvote.org/>. Notice that RCV has been adopted in “red” and “purple” states and cities, as well as in liberal cities – indicating a higher degree of bipartisan interest than most voting reforms attract.

But RCV in Maine ran into a legal obstacle for state elections under the state constitution. The highest court in Maine concluded that RCV could not be constitutionally used in statewide general elections, but could be used in primaries and for federal elections. As a result, members of Congress, both House and Senate, are elected in Maine through RCV. The next section describes the state constitutional challenges to RCV.

1b. Maine’s constitution states that, for statewide offices, the winner is the candidate who receives “a plurality of” all votes cast. In an advisory opinion, the Maine Supreme Judicial Court advised that RCV’s multi-round tabulation process violates this type of provision because a candidate who receives the plurality of votes cast in the first round is not automatically elected.

If that interpretation is correct, it would imperil RCV nationwide. Nearly 40 state constitutions include provisions similar to that in Maine’s constitution. These provisions declare that candidates are to be elected to office if they receive “a plurality of the votes” or the “highest,” “largest,” or “greatest” number of votes. Even in states without such a constitutional provision, state statutes often include the same requirement. In short, if the

Maine decision is correct and adopted more broadly, it could prevent state and local governments throughout the country from adopting RCV.

For an analysis of why RCV does not violate these provisions and why the Maine decision is wrong, see Richard H. Pildes and Michael G. Parsons, *The Legality of Ranked-Choice Voting* (forthcoming, Cal. L. Rev. 2021):

[T]here is, simply put, no such thing as a “first plurality” under a ranked-choice system. The “first round” in an RCV election is only one part of a comprehensive and indivisible process, and the person with the largest number of first-preference rankings is nothing more than the person who holds the lead in those initial rankings. There is no inherent reason under an RCV statute to accord the first round any special constitutional significance. As other courts have recognized, “[t]he series of calculations required by the [ranked-choice voting tabulation process] to produce the winning candidate are simply *steps of a single tabulation, not separate rounds of voting.*”

1c. Another reform proposal idea that is gaining more traction in public and academic commentary, but not yet in practice, is to revive the use of multi-member election districts and combine them with RCV. The forces driving these proposals are concerns with the intense polarization of the political parties and the increasing geographic sorting of voters tied to their partisan voting patterns, with Democrats overwhelmingly dominant in the largest urban areas of the United States and Republicans in less-urbanized areas. The use of multi-member districts would also, perhaps, reduce the opportunities for partisan gerrymandering, since there would be fewer districts to be drawn.

Indeed, the opinion columnist, David Brooks of the New York Times, has staked out the position that a move to multi-member districts for Congress, combined with RCV, would be the single most consequential political reform. Here is part of Brooks’ description of how such a system would work and his argument for it:

In populous states, the congressional districts would be bigger, with around three to five members per district. Voters would rank the candidates on the ballot. If no candidate had a majority of first-place votes, then the candidate with the fewest first-place votes would be eliminated. Voters who preferred that candidate would have their second-choice vote counted instead. The process would be repeated until you get your winners. . . .

This system makes it much easier for third and fourth parties to form, because voting for a third party no longer means voting for one with no chance of winning. You get a much more supple representation of the different political tendencies that actually exist in the country.

The process also means that people with minority views in their region have a greater chance to be represented in Congress. A district in Southern California, for example, might elect a Bernie Sanders-type progressive, a centrist business Democrat and a conservative.

The current system — wherein a vast majority of seats are safely red or blue and noncompetitive, with only a handful of fiercely contested

districts — disappears. Every district becomes a swing district, each vote much more important. Congress begins to work differently because with multiple parties you no longer have stagnant trench warfare — you have shifting coalition-building.

See David Brooks, One Reform to Save America (May 31, 2018), at <https://www.nytimes.com/2018/05/31/opinion/voting-reform-partisanship-congress.html>. For more detailed advocacy of such a system, see Lee Drutman, 36 Nat. Affairs (Summer 2018), at <https://www.nationalaffairs.com/publications/detail/the-case-for-proportional-voting>.

Legislation implementing these ideas, called the Fair Representation Act (in various versions), has been introduced in recent sessions of Congress. The Act would free states from being required to use single-member districts to elect members of Congress (the system in use most of the time since 1842). Under the Act, states would be required to use RCV for congressional elections. The Act also permits states to combine RCV with multi-member districts for Congress (some versions would require states with more than six representatives to use multi-member districts). For example, a state entitled to twelve seats might divide itself into three regions, each electing four members of Congress. For the text of one version of the bill, as introduced in the 116th Congress, see <https://tinyurl.com/hr5j4w>.