**THE STATE OF SOUTH CAROLINA**
**IN THE SUPREME COURT**

IN THE ORIGINAL JURISDICTION

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Appellate Case No. 2024-001227

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**League of Women Voters of South Carolina**.....Petitioner,

v.

**Thomas Alexander**, in his official capacity as President of the South Carolina Senate; **Murrell Smith**, in his official capacity as Speaker of the South Carolina House of Representatives; **Howard Knapp**, in his official capacity as Director of the South Carolina Election Commission.....Respondents,

and

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

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# BRIEF FOR MURRELL SMITH, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES

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## INTRODUCTION AND STATEMENT OF THE CASE

Redistricting "is primarily the duty and responsibility of the State[s]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). "States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). In South Carolina, redistricting is assigned—by Constitution—to the General Assembly. S.C. Const. Art. III. Sec. 3. Petitioner League of Women Voters of South Carolina ("Petitioner" or "LWVSC") asks this Court to invade the General Assembly's constitutionally assigned legislative process, notwithstanding three facts: (1) redistricting and politics go hand-in-hand; (2) partisan considerations in redistricting are legitimate; and (3) judicial intervention would require this Court to establish policies to distinguish between nefarious and non-nefarious partisan considerations.

*The General Assembly and S. 865*

More than thirty years ago, in 1994, the General Assembly enacted a congressional districting plan that split Charleston County between two of the State's seven districts—Districts 1 and 6. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664-66 & n.29 (D.S.C. 2002). In 2002, after the Governor vetoed plans passed by the General Assembly, a three-judge panel of federal judges drew a new plan that maintained the Charleston County split. *Id*.

In 2011, following the 2010 census, the General Assembly adopted a new plan (the "Benchmark Plan"). *Backus*, 857 F. Supp. 2d at 557. The Benchmark Plan maintained the Charleston County split. The Department of Justice precleared the plan.[1] In all but one election over the next decade, the Benchmark Plan yielded a 6-1 Republican-Democrat congressional delegation, with District 1 consistently electing Republican candidates and District 6 consistently

[1] South Carolina redistricting legislation required preclearance by the Department of Justice until 2013, when the Supreme Court of the United States held that the coverage formula prescribed by the Voting Rights Act could no longer be used as a basis for subjecting jurisdictions, including South Carolina, to preclearance. *See Shelby County v. Holder*, 570 U.S. 529 (2013).

electing Democratic candidates. In the outlier election of 2018, District 1 elected Democrat Joe Cunningham to the United States House of Representatives in "a major political upset," resulting in a 5-2 Republican-Democrat congressional delegation. District 1 returned to form in 2020, narrowly electing Republican Representative Nancy Mace and favoring the Republican presidential candidate by a margin of 53.03% to 46.97%. Meanwhile, District 6 elected Democratic Representative James Clyburn and favored the Democratic candidate for President in 2020.

According to the 2020 Census results, five of the State's congressional districts (2, 3, 4, 5, and 7) had developed "relatively small" deviations from the ideal size of 731,203 persons,[2] while the remaining districts—Districts 1 and 6—had "significant" deviations due to population shifts toward coastal areas. District 1 was overpopulated by 87,689 persons (11.99%), and neighboring District 6 was underpopulated by 84,741 persons (11.59%).

In preparation for the redistricting cycle subsequent to the 2020 census, the South Carolina Senate (the "Senate") and House of Representatives (the "House") adopted similar, publicly accessible redistricting guidelines. These guidelines set out legal requirements and policy preferences concerning numerous traditional redistricting criteria, including contiguity, compactness, core preservation, communities of interest, and incumbency protection. The General Assembly established websites and email addresses for public input, made redistricting data and plans publicly available, and held numerous public hearings, thereby facilitating the participation of thousands of citizens.

[2] "One-person, one-vote" means different things when drawing district lines for state legislative offices versus lines for United States Congressional districts. While some deviation from perfectly equal population for state offices is constitutionally permissible, the only population deviation allowed between Congressional districts is one person. So, during the most recent redistricting cycle, a Congressional district had to have a population of 731,203, +/- 1.

At the request of various members of the General Assembly, the staffs of the House and Senate each drafted various congressional redistricting plans ("Staff Plans") for consideration. The Staff Plan that gained bicameral traction was the creation of Charleston Republican Senator George E. "Chip" Campsen, III ("Senator Campsen"). After redistricting subcommittee meetings and the receipt of additional public input, a Senate staff member drafted Senate Amendment 1 under Senator Campsen's sponsorship. Senate Amendment 1, which modified an earlier Senate Staff Plan, ultimately became Senate Bill 865 ("S. 865").

In 2021, Taiwan Scott, an individual from Beaufort County, and the South Carolina NAACP challenged S. 865 as an unconstitutional racial gerrymander in federal district court (*S.C. State Conf. of NAACP and Scott v. Alexander et al.*, 649 F. Supp. 3d 177 (D.S.C. 2023), hereinafter, the "*Scott* Case"). Many of the lawyers in this case also served as counsel in the *Scott* Case. And, as it did in the legislative process, the LWVSC participated in the *Scott* Case.[3] At trial, Senator Campsen testified that his districting decisions were "based on traditional districting principles." He explained that he employed a policy intended to create "a stronger Republican tilt to" District 1 while "honoring" other traditional criteria. Senator Campsen explained that Beaufort and Berkeley Counties—both majority-Republican counties that were each split between Districts 1 and 6 under the Benchmark Plan—would be wholly within District 1 under S. 865. Senator Campsen noted at trial the existence of a "very strong [local] sentiment" to unify Beaufort County, along with public support for unifying Berkeley County, in District 1.

[3] For example, the Vice President for Issues and Action for the League of Women Voters of South Carolina, Lynn Teague, was a witness for Plaintiffs in the *Scott* Case. In addition, Petitioner testified at numerous public hearings, retained a map drawer involved in litigation, and Petitioner submitted a proposed plan for consideration to the General Assembly, which was eventually sponsored by Sen. Richard Harpootlian.

S. 865 complies with traditional criteria and improves upon the Benchmark Plan's compliance with traditional criteria in several ways. First, S. 865 preserves 92.78% of District 1's core. Preserving district cores advanced the General Assembly's compliance with other traditional principles under South Carolina law. For one, preserving cores is "the clearest expression" possible of respect for "communities of interest." *Colleton Cnty.*, 201 F. Supp. 2d at 649. For another, preserving cores protects incumbents by "keeping incumbents' residences in districts with their core constituents." *Backus*, 857 F. Supp. 2d at 560.

Additionally, S. 865 unites the communities of interest of Beaufort County, Berkeley County, and the Sea Islands, as well as the Gullah-Geechee heritage corridor, in District 1. Statewide, S. 865 reduces the number of split counties from 12 to 10 and the number of split Voter Tabulation Districts[4] ("VTDs") from 65 to 13. In District 1 alone, S. 865 reduces the number of split counties from five to four and the number of split VTDs affecting population from ten to seven.

S. 865's compliance with traditional principles—and improvements on the Benchmark Plan—are further evident in Charleston County. There, the plan makes the Charleston Peninsula whole in District 1, reunites the coastal Charleston community of interest, and repairs all five split VTDs. S. 865 also follows the Charleston-Dorchester boundary to include Deer Park, Lincolnville, and Ladson in District 6, and conforms the district line to natural geographic features, including Wappo Creek and the Cooper, Stono, and Ashley Rivers.

Even though S. 865 improves the Districts 1 and 6 boundaries in Charleston County, the "one-person, one-vote" mandate and traditional criteria also supported preserving the split of Charleston County. First, unifying Beaufort, Berkeley, and Charleston Counties in District 1

[4] A VTD is a voting district as defined by the United States Bureau of the Census.

would have created an overpopulated district and violate the one-person, one-vote requirement. Second, unifying Charleston County in District 1 would yield a "majority Democratic district." Third, as Senator Campsen testified in the *Scott* trial, having both a Republican and a Democrat represent Charleston County in congress "benefit[s] the local community" on "bread-and-butter things" like port maintenance and "influence with the incumbent administration." He explained: "Jim Clyburn has more influence with the Biden Administration perhaps than anyone in the nation," and "I'm tickled to death that Jim Clyburn represents Charleston County."

As explained above, Charleston County has been split between Districts 1 and 6 since the 1994 reapportionment plan. In 9 out of the last 10 general elections, Charleston County has sent both a Democrat (District 6) and a Republican (District 1) to Congress. Over that same span, Presidents Bill Clinton (D), George W. Bush (R), Barack Obama (D), Donald Trump (R), and Joe Biden (D) have occupied the White House.[5] The fact that the party affiliation of our President has rotated from Democrat to Republican repeatedly over the last thirty years is compelling evidence that, as Senator Campsen believes, Charleston County benefits from its split between two congressional districts typically electing members from different parties. At the very least, Senator Campsen's consideration of political party is a legitimate legislative policy judgment.

*Petitioner's Claim*

Petitioner claims the line dividing Districts 1 and 6 in S. 865 is an "extreme partisan gerrymander." This is not only hyperbolic, but also presents a non-justiciable political question. In the landmark case *Rucho v. Common Cause*, 588 U.S. 684, 691 (2019), the Supreme Court of the United States found that political gerrymandering claims were non-justiciable political

[5] Shortly after the filing of this brief, the party affiliation of the President will switch back to Republican.

questions. The *Rucho* Court primarily relied on the dearth of manageable standards for adjudicating such claims in reaching its conclusion. In effect, the Supreme Court reaffirmed that it is not in the business of legislating.

However, the *Rucho* Court did not foreclose the possibility that the various state courts could determine that partisan gerrymandering claims are justiciable under state law.[6] In the five years that have passed since *Rucho,* several state courts have faced this issue. Some courts determined that the laws of their states allow for adjudication of partisan gerrymander claims. But those state courts have interpreted their own constitutions that expressly restrict the use of partisan considerations in redistricting, thus establishing criteria and standards for the state courts to consider. *See* Fla. Const., Art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, § 804 (2017) (providing that no district shall "be created so as to unduly favor any person or political party").

The South Carolina Constitution does not contain any such provisions. The constitutions of North Carolina, New Hampshire, and Kansas are similarly bereft of partisan redistricting protections, and the highest courts those states have adopted the *Rucho* Court's reasoning—partisan gerrymandering claims are not justiciable where there exist no judicially manageable

[6] While finding that "[f]ederal 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," the Supreme Court left open the possibility that "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 588 U.S. at 718-19.

standards for adjudicating such claims. *See Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) ("It is not within the authority of this Court to amend the constitution to create such limitations on a responsibility that is textually assigned to another branch. Furthermore, were this Court to create such a limitation, there is no judicially discoverable or manageable standard for adjudicating such claims [and] creating partisan redistricting standards is rife with policy decisions," which belong to the legislative branch, not the judiciary… [W]e hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution."); *Brown v. Sec'y of State*, 176 N.H. 319, 313 A.3d 760 (2023) ("the issue before us raises a nonjusticiable political question"); *Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168 (2022) ("The use of partisan factors in district line drawing is not constitutionally prohibited.").

South Carolina law does not prohibit the consideration of political party in redistricting. And, as Senator Campsen articulated, not every partisan consideration is illegitimate. Petitioner asks this Court to do what the Supreme Courts of North Carolina, New Hampshire, and Kansas declined to do. That is, go beyond the text of the state constitution and establish policy to distinguish between legitimate and illegitimate consideration of political party in redistricting.

## STANDARD OF REVIEW

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). The Court is "reluctant to find a statute unconstitutional" and "[e]very presumption is made in favor of a statute's constitutionality." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 134, 568 S.E.2d 338, 344 (2002). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt."

*Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "The party challenging the statute bears [this] heavy burden." *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013). Moreover, a "possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis*, 345 S.C. at 569–70, 549 S.E.2d at 597.

## ARGUMENT

### I. S. 865 Does Not Violate South Carolina's Free and Open Elections Clause.

Contrary to the LWVSC's assertion, *see* Pet'r's Br. 23, S. 865 does not violate the Free and Open Elections Clause of the South Carolina Constitution. *See* Pet'r's Br. 23. Article I, Section 5 of the Constitution states: "All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office." S.C. Const. Art. I, § 5. According to this Court, the Free and Open Elections Clause means:

> [A]n election is free and equal within the meaning of the Constitution when it is public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

*Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95, 97 (1938).

#### A. *Gardner*, *Huntley*, and *Cothran* are clearly distinguishable.

Petitioner relies on a series of this Court's Great Depression-era election cases for the proposition that Article I, Section 5 is "irreconcilable with partisan gerrymandering." Pet'r's Br. 29. However, in each opinion cited, the Court was asked to review the constitutionality of a law that actually deprived a voter of the right to cast a ballot, which S. 865 clearly does not do. The

Court's analyses in each of these opinions, addressed in turn below, only confirms that Petitioner's reliance on these opinions is misplaced.

First, in *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338 (1932), the Court considered a challenge to a law requiring voters in a general election to choose between a Republican Party ballot and a Democratic Party ballot when casting their vote. This Court said, "any voter has the legal right in a general election to cast his ballot for any person for any particular office, even if the person desired to be voted for is not a candidate of any political party, or has not even announced on his own individual responsibility his candidacy for the office." *Id.* at 313, 166 S.E. 338, 342. Explaining the fundamental "right of the voter to vote for whom he pleases," this Court found it "inconceivable that [it] should enjoin any party to this proceeding or the managers of election from allowing a qualified voter to vote in the election a ballot other than the particular kind of ballot asked to be used by the petitioners." *Id*. The Court continued, "to do so would not only be violative of the statute law, but would deny citizens, who are not members of the Democratic or Republican Parties, such as [third-party] and independent voters, the free exercise of the right of suffrage in this State." *Id.* As made clear by this language, *Gardner* applies to laws in which a voter is deprived of his right to cast a ballot, not claims of partisan gerrymandering.

Second, in *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932), this Court considered the constitutionality of a law requiring that the rules for a primary election must govern the general election for a school board. Given the rules for primary elections at the time, application of this law absolutely deprived voters who were not affiliated with a political party of the right to cast a ballot. This Court found that the law "deprive[s] all those citizens of a school district of the right to vote in such election who do not have their names upon the club roll of some political party as required by the regulations applicable to the conducting of primary election, although they possess

the qualifications of suffrage required by the Constitution." *Id*. at 476, S.E. 639-640. Therefore, like *Gardner*, *Huntley* applies to laws in which a voter is deprived of the right to cast a ballot, not claims of partisan gerrymandering.

Finally, in *Cothran v. West Dunklin Public School District No. 1-C*, 189 S.C. 85, 200 S.E. 95, 96 (1938), the challenged act provided "that before one can vote in an election for school bonds in Greenville County, he must show that he returns for taxation real or personal property within the school district." This Court found that the Constitution does not require "that before one can vote at any election, general or special, he must be the owner of property, real or personal." *Id.* Like *Gardner* and *Huntley*, *Cothran* applies to laws in which a voter is deprived of the right to cast a ballot, not claims of partisan gerrymandering.

S. 865 does not deprive any voter of the right to cast a ballot. Accordingly, nothing about the boundary between Districts 1 and 6 violates the Free and Open Elections Clause. To hold otherwise would require this Court to ignore the plain text of the clause and the jurisprudence applying it.

**B. Historical Perspective of Article I, Section 5.**

In addition to the text of the Free and Open Elections Clause and the case law applying it, the history of Article I, Section 5 makes clear that it is not intended to level the partisan playing field in elections. As the LWVSC recognizes, "to interpret Article I, Section 5, the Court must look to its text and history, with special care to construe its meaning 'in the light of the history of the times in which it was framed, and with due regard to the evil it was intended to remedy.'" Pet'r's Br. p. 24, citing *Duncan v. Rec. Pub. Co*., 145 S.C. 196, 143 S.E. 31, 69 (1927) (quoting *Kirkland v. Allendale Cnty*., 128 S.C. 541, 123 S.E. 648, 650 (1924)). Speaker Smith agrees.

Article I, Section 5 came into being during Reconstruction with the passage of the Constitution of 1868. The evil it was intended to remedy was the limitation of suffrage to white males. Article I, Section 5 was not intended to protect political competitiveness or partisan fairness. This is made abundantly clear by the results of the first election held under the 1868 Constitution. The 1868 general election produced an 88% Republican majority in the House (109 of 124 members were Republican) and a 78% Republican majority in the Senate (25 of the 32 members were Republican). *See* Walter B. Edgar, South Carolina: A History (1999) at p. 387. Petitioner now invokes this provision to claim it protects partisan competitiveness. Clearly, it was not intended to do so when enacted and, therefore, it does not do so today.

**C. North Carolina provides a good example to follow.**

This Court should follow the North Carolina Supreme Court's application of its state constitution's Free Elections Clause[7] to a partisan gerrymander claim. That court held, "based on its plain language, historical context, and this Court's precedent," that the Free Elections Clause means "that voters are free to vote according to their consciences without interference or intimidation," but "partisan gerrymandering claims ***do not*** implicate this provision." *Harper v. Hall*, 384 N.C. at 363-4, 886 S.E.2d 393, 439 (emphasis added). In fact, the North Carolina Supreme Court held that "these state constitutional provisions [including the Free Elections Clause] do not expressly limit the General Assembly's redistricting authority or address partisan gerrymandering in any way." *Id.,* 384 N.C. 292, 351, 886 S.E.2d 393, 431. The Free Elections Clause, the Supreme Court of North Carolina found, was intended only to prevent deprivation of a "free" election where "(1) a law prevents a voter from voting according to one's judgment; or (2) the votes are not accurately counted." *Id.*

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

The North Carolina Supreme Court's reasoning is consistent with this Court's reasoning in *Gardner*, *Huntley*, and *Cothran*. *See Cothran*, 189 S.C. 85, 200 S.E. 95, 97 ("an election is free and equal … when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted…"); *Gardner*, 167 S.C. 313, 166 S.E. 338, 342 (the Constitution guarantees "the free exercise of the right of suffrage in this State"); *Huntley*, 167 S.C. 476, 166 S.E. 637, 639 ("All persons who are citizens of the state possessing these qualifications, as prescribed by the Constitution, are entitled to an equal vote…"). Therefore, this Court should continue to follow its interpretation of Article I, Section 5 and hold that it applies to the actual deprivation of a qualified elector's right to cast a ballot, but does not protect partisan competitiveness.

## II. S. 865 Does Not Violate South Carolina's Equal Protection Clause.

The LWVSC is likewise incorrect in arguing that S. 865 violates Article I, Section 3 of the South Carolina Constitution—the equal protection clause. Under the Equal Protection Clause, no "person shall be denied the equal protection of the laws." S.C. Const. Art. I, § 3. Nothing in its plain language, or in South Carolina jurisprudence, extends this clause to protect an individual's right to live in a certain electoral district because of their partisan affiliation. Unsurprisingly, then, in support of its argument on this point, Petitioner misconstrues two of this Court's opinions and relies heavily on an opinion of the New Mexico Supreme Court applying the New Mexico Constitution, addressed in turn below

### A. The LWVSC relies on inapplicable South Carolina opinions.

Petitioner relies on *Sojourner v. Town of St. George*, 383 S.C. 171, 679 S.E.2d 182 (2009), for the proposition that the right to vote is fundamental in nature and, when deprived, South Carolina courts must apply strict scrutiny when asked to review a statute denying the right to vote. But, like the opinions relied upon by Petitioner to support its Free and Open Elections clause

argument, *Sojourner* presents a situation where voters were actually deprived of the right to cast a ballot, making it clearly distinguishable from S. 865. In that case, the statute at issue was the Municipal Utility Act, S.C. Code Ann. §§ 5–31–620; 640. These statutes controlled how local municipalities were to handle elections related to certain aspects of its utilities. One such provision was that, [b]efore any election shall be held under the provisions of this article at least twenty-five per cent of the resident freeholders of the city or town… shall petition the city or town council that such election be ordered." S.C. Code Ann. § 5–31–640. The South Carolina Supreme Court found that this provision, which would prevent an election from ever being held if less than 25% of the residents petitioned, was not supported by a compelling state interest and, therefore, unconstitutional. *Sojourner*, 383 S.C. 171, 177, 679 S.E.2d 182, 186. Again, the statute at issue placed restrictions that could have actually prevented an election. That is certainly not the case with S. 865.

Petitioner also relies on *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 633 S.E.2d 482 (2006), for the proposition that the Equal Protection Clause applies to vote dilution claims. However, *Burris* is meaningfully distinguishable in three ways: (1) the *Burris* Court did not apply South Carolina's Equal Protection Clause; (2) contrary to Petitioner's argument that strict scrutiny applies here, the *Burris* Court determined that rational basis scrutiny applies to claims of vote dilution; and (3) the *Burris* Court relied primarily upon *Reynolds v. Sims*, 377 U.S. 533 (1964), which is a one-person, one-vote decision completely bereft of any allegations of partisan favoritism. Petitioner's reliance on *Sojourner* and *Burriss* is misplaced and unhelpful.

**B. The New Mexico Constitution makes no difference here.**

The LWVSC directs this Court's attention to *Grisham v. Van Soelen*, 539 P.3d 272 (2023), in which the New Mexico Supreme Court addressed partisan gerrymandering claims under New

Mexico law. Admittedly, the issue and facts in *Grisham* are meaningfully similar to the ones presented here. However, what persuaded the New Mexico court to recognize the justiciability of an equal protection claim premised on partisan gerrymandering was the general breadth of multiple provisions of the Bill of Rights in New Mexico's Constitution—provisions the South Carolina Constitution does not have. The New Mexico Supreme Court held:

> We recognize that other provisions in our state Bill of Rights—specifically Article II, Sections 2, 3, and 8—support that the right to vote is of paramount importance in New Mexico. Article II, Section 2 (Popular Sovereignty Clause) provides, "All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good." Article II, Section 3 (Right of Self-Government Clause) provides, "The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state." Article II, Section 8 (Freedom of Elections Clause) provides, "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." As we discuss herein, we determine that the right to vote is intrinsic to the guarantees embodied in these provisions of our state Bill of Rights.

*Grisham*, 539 P.3d at 282. It is clear that the text of the New Mexico Constitution is much further reaching than that of the South Carolina Constitution. For example, while both states have a "Free and Open" Elections clause, New Mexico's is arguably more expansive; expressly stating, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The comparison to New Mexico's Constitution does not lead to the inevitable conclusion that partisan vote dilution claims are justiciable under South Carolina' Equal Protection Clause. South Carolina has the constitutional provisions it has, and for the reasons stated herein, they do not give rise to Petitioner's claim here.

## III. S. 865 Does Not Violate South Carolina's Freedom of Speech Clause.

Though the LWVSC next argues that S. 865 violates Article I, Section 2 of the South Carolina Constitution—the clause protecting religious freedom, freedom of speech, and the right of assembly and petition—LWVSC is incorrect. Article I, Section 2, in pertinent part, provides:

> The General Assembly shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.

In support of its argument, the LWVSC directs this Court to its language in *Riley* establishing that, much like the New Mexico Supreme Court in *Grisham*, "a Constitution must be considered as a whole." *Riley*, 71 S.C. 457. Petitioner's argument on this issue reaches its crescendo when it claims:

> given the South Carolina Constitution's multiple commitments to "free and open" elections that are protected "from all undue influence" and where voters exercise "equal influence" over elections, it makes . . . sense to construe Article I, Section 2 to establish strong protections against viewpoint discrimination within the context of voting and electoral influence.

Pet. Br. Pp 38-39 (internal citation omitted). To put it politely, Petitioner's use of quotation marks in this sentence is misleading. The South Carolina Constitution does not say that it "protect[s]" voters "from all undue influence," nor does it include a provision establishing that each voter is entitled to exercise "equal influence" in partisan elections. Perhaps Petitioner would have a point if the South Carolina Constitution expressly established these rights. But it does not. So, without more, Petitioner's argument that S. 865 violates South Carolina Constitution Article I, Section 2 should fall on deaf ears. In this case, it does not matter if this Court considers only those provisions invoked by Petitioner or searches the entirety of the Constitution—the South Carolina Constitution does not protect a voter's right to live in a congressional district with a partisan makeup that pleases the LWVSC.

## IV. The South Carolina Constitution Does Not Require that Counties Remain Whole.

Finally, the LWVSC argues that S. 865 violates Article VII, Sections 9 and 13 of the South Carolina Constitution—provisions concerning Counties and County Government. Petitioner is incorrect.

Article VII, Section 9 provides, "Each County shall constitute one election district, and shall be a body politic and corporate." S.C. Const. Art. VII, § 9. Article VII, Section 13 provides, "The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, as it may deem wise and proper, and may establish or alter the location of voting precincts in any County." *Id.* § 13. Nothing in the language of these provisions ***require*** the General Assembly to keep counties whole during the redistricting process.[8]

As a threshold matter, it is imperative in the congressional redistricting process that the districts each contain a population as equal as is practicable. Article I, § 2 of the United States Constitution establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). The Supreme Court has further clarified that the one-person, one vote standard means that "[s]tates must draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). However, in practice, achieving precise mathematical equality is often impossible and almost certainly impossible to achieve without splitting counties. Therefore, the "equal representation" standard is enforced only to the

[8] Furthermore, the South Carolina District Court has made clear that while Section 13 provides that "[t]he General Assembly may at any time arrange the various Counties … into Congressional Districts," this "provision is permissive, not mandatory." *S.C. State Conf. of Branches of Nat. Ass'n for Advancement of Colored People, Inc. v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C.), *aff'd sub nom. Stevenson v. S.C. State Conf. of Branches of Nat'l Ass'n for Advancement for Colored People, Inc.*, 459 U.S. 1025 (1982).

extent of requiring that districts be apportioned to achieve population equality "as nearly as practicable." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).

According to the 2020 census, South Carolina's population is 5,118,425.[9] Therefore, the ideal population for each of South Carolina's seven congressional districts is 731,204. South Carolina has 46 counties ranging in population from less than 10,000 to more than half a million. It is impossible to draw seven congressional districts of equal population (+/- 1 person) without dividing some of the 46 counties. The best the General Assembly can do is limit such splits to the extent possible while also respecting traditional redistricting principles and grappling with the political concerns necessarily involved in the legislative process.

The legislative process is imperfect and the General Assembly did its best. S. 865 repaired three county splits (Berkeley, Beaufort, and Newberry counties) and contained two fewer county splits than the Benchmark Plan. *See Id.* at 61 ¶482 (noting the split of Jasper County to preserve a community of interest). This fact alone refutes Petitioner's claim that the General Assembly "discard[ed] constitutional reapportionment priorities." Pet'r's Br. 40.

## CONCLUSION

As demonstrated by the foregoing, Petitioner has failed to show the alleged constitutional violations beyond a reasonable doubt and failed to overcome the presumption of constitutionality afforded S. 865. Instead, Petitioner asks this Court to intervene in an inherently political, legislative process, despite the lack of guidance or direction from state law. The Court should reject Petitioner's expansive and unfounded view of the South Carolina Constitution and dismiss this case with prejudice because partisan gerrymandering claims present non-justiciable political questions.

[9] *See* United States Census Bureau, QuickFacts South Carolina, available at https://www.census.gov/quickfacts/fact/table/SC/POP010220.

Respectfully submitted,

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January 13, 2025
Columbia, South Carolina

## CERTIFICATE OF SERVICE

I certify that the foregoing Brief for Murrell Smith, in His Official Capacity as Speaker of the South Carolina House of Representatives, was served on counsel of record on January 13, 2025, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules.

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